JUDICIAL REVIEW RIGHTS

*Justice R S French**

Introduction

Judicial review is concerned with the supervision by courts of decision-making by public officials. It is about administrative justice. More people encounter that kind of justice than the curial variety. There is a myriad of decisions that governments and public authorities make which affect the lives and wellbeing, the freedoms and opportunities of many. For those claiming Australia's protection under the *Refugee Convention*, the quality of administrative justice may mean the difference between life and death or liberty and imprisonment.

In a society governed by the rule of law it should not be hard to reach agreement on some basic propositions about the content of administrative justice. It will, of course, be justice according to law. Official decision-making must be lawful. Officials, like all of us, must obey the law and no more so than when they exercise the high public trust of making decisions that affect the interests of others. As Justice Gaudron said recently:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less. [1]

The way in which administrative decisions are made should be fair. Ordinarily that will mean that the person affected will have a right to put his or her case either orally or in writing before a final decision is made. That right extends to the right to answer adverse material that might be taken into account by the decision-maker. The person affected should also be able to have confidence that the official making the decision does so impartially. That confidence requires both the appearance and the reality of neutrality. Official decisions should be made so that, when explained, the logic behind them is understandable, even if there are differing views about the outcome. And they should be explained. These considerations reflect what might be called core requirements of just decision-making in a society governed by the rule of law. In summary they are:

- Lawfulness
- Fairness
- Rationality
- Intelligibility

These elements find their place to a greater or lesser extent in basic and well-established grounds of judicial review. The first two, lawfulness and fairness, are covered generally by the grounds of error of law and breach of procedural fairness. The requirement of rationality is reflected in the obligation that the decision-maker take into account relevant factors which must be considered and not take into account irrelevant factors. In an extreme case, a decision will be reviewable on the ground that it is so unreasonable that no reasonable decision-maker could have made it. Although not yet a requirement of the common law, statutory requirements to provide reasons for decisions support the element of intelligibility.

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* *Justice, Federal Court of Australia.*

1 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

It is a feature of migration law, however, that statutory changes have compromised the maintenance of standards of fairness and rationality applicable to administrative decisions in other areas. There is a tension between the standards of administrative justice imposed by judicial review and other attributes which, from the point of view of the subject and also of the general community, are desirable. These are the attributes of:

- Accessibility.
- Affordability for the individual and for the community.
- Timeliness in processing and disposition.

None of these attributes of administrative justice derives significant support from the common law although sometimes they will be reflected in statutory directions to the decision-maker. So under s 420 of the *Migration Act 1958* (Cth) the Refugee Review Tribunal in carrying out its functions under the Act is required to pursue the objective "…of providing a mechanism of review that is fair, just, economical, informal and quick"

The pressure on officials to deal expeditiously with high volumes of decision-making must be immense and has been recognised by the courts in relation to the application of rules of procedural fairness. There is a balancing process involved. In connection with applications for protection under the Refugees Convention, the question whether procedural fairness requires an oral hearing by the decision-maker in every case was canvassed in *Zhang de Yong v Minister for Immigration Local Government and Ethnic Affairs*[2]. In concluding that there was no universal mandate for an oral hearing by the delegate, The court had regard to the practical implications of the prescription of particular procedures:

> The court has no direct knowledge of the resource implications of particular procedures, nor of the resources available to the department to implement them. Oral hearings by the ultimate decision-makers could be provided for all applicants using the simple artifice of increasing the number of persons with appropriate delegations. However it may be, … such a solution would also put the final decision-making responsibility in the hands of more junior and less experienced officers than those who currently hold delegations. In my opinion, courts should be reluctant to impose in the name of procedural fairness detailed rules of practice, particularly in the area of high volume decision-making involving significant use of public resources.[3]

Judicial review can and must, in a principled way, engage with the practical realities of administrative decision-making. There is a tolerance of non-critical error on review. The courts are warned against scrutinising administrative reasoning with an eye keenly attuned to the perception of error.[4] They are enjoined in effect against judicialising the reasoning processes of administrative decision-makers. Lord Shaw said many years ago in *Local Government Board v Arlidge*:[5]

> …that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded.[6]

2 (1993) 118 ALR 165.

3 Ibid, 190-191.

4 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287 approved by the High Court in *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1996) 185 CLR 259.

5 [1915] AC 120.

6 [1915]AC 120, 138.

A special aspect of administrative decision-making, including decision-making at the level of administrative tribunals, not found in judicial decision-making, is the application of administrative policy. Thus like cases are treated similarly which is an essential element of fairness. But there is a tension between the application of policy and the consideration of individual cases where a statutory discretion has to be exercised. The application of policy guidelines has nevertheless been accepted by courts subject to appropriate consideration being given to the individual case where a statutory discretion is to be exercised.

Mechanisms for Achieving Administrative Justice

Judicial review must be put in perspective as one of a menu of mechanisms for ensuring administrative justice. Of fundamental importance to establishing and maintaining proper standards is the education of decision-makers. At lower levels in government departments and authorities there is a turnover of staff, a need to ensure that officers are educated in the basic principles of administrative justice and a need to ensure that that education is up to date.

Administrative justice may be supported by systems of internal review by superior officers and external administrative review by bodies such as the Refugee Review Tribunal, the Administrative Appeals Tribunal and the like. Official mechanisms of external scrutiny are also available through the Ombudsman, the parliamentary member whose constituent is affected by a decision and the Minister who may be the subject of direct representations. Unofficial mechanisms of great importance, not least because of the impact they may have on the political process which affects statutory change, are non-government organisations and the media. Scrutiny of decisions is brought about by access to official documents under freedom of information legislation or statutory requirements for the provision of documents and reasons. Systemic issues may also be addressed by Commonwealth and State Auditors-General. And at the end of the line of official review, is judicial review.

It should not be assumed that judicial review is regarded as the best method of achieving administrative justice. It occupies only a limited territory for the implementation of appropriate standards of administrative justice. Professor Cranston has said:

> … the attention lawyers lavish on judicial review diverts their gaze from more fundamental, if less glamorous, mechanisms to redress citizens' grievances and call government to account.

Professor Mark Aronson has suggested that there is observable a shift from traditional values of administrative justice to an economic paradigm emphasising regulatory flexibility and negotiation, regulation by performance outcome and through economic incentives. This, he says, is linked to an increasing disenchantment with judicial review.[7]

In the 5th edition of de Smith's *Judicial Review of Administrative Action*, the role of judicial review is described as "inevitably sporadic and peripheral". It must be kept in perspective and regarded, particularly by the judges, with that harsh modesty which should follow from a realistic appraisal of the actual outcomes that it generates. Consistently with those limitations however, judicial review plays an important part, in a high public way, of declaring, reasserting and supporting important standards necessary to the rule of law expressed in the delivery of administrative justice as well as redressing departures from those standards in individual cases.

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7 Aronson, A Public Lawyer's Response to Privatisation and Outsourcing in Taggart (ed), The Province of Administrative Law, Hart (1997), 43.

The Limits of Judicial Review

Judicial review permits consideration by courts of questions of lawfulness and fairness and in extreme cases the rationality of the decision under challenge. It does not provide a forum for substituting one administrative decision for another. "Merits review" is a term which is used in a rather imprecise way to describe territory forbidden to judicial review. I say imprecise because a decision which is unlawful or unfair or so unreasonable as to be beyond power might well be thought bad on its merits. Nevertheless, the term has the imprimatur of the High Court which in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[8] approved the observation of Brennan J in *Attorney-General (NSW) v Quin*:

> 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 legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[9]

It follows that there is no general power in a court to rectify administrative injustice. The support which judicial review processes can give to administrative justice is to that extent circumscribed.

Judicial Review of Migration Decisions in the Federal Court

The general jurisdiction of the Federal Court to review administrative decisions derives from the *Administrative Decisions (Judicial Review) Act 1977*(the AD(JR) Act) as well as s 39B of the *Judiciary Act 1903*. That general jurisdiction, applicable to migration decisions, was removed in 1992 with the introduction of Part 8 of the Migration Act ('the Act'). Part 8 was introduced by the *Migration Reform Act 1992* to limit the volume of applications for review in the Federal Court. It reflected the concerns of the government of the day about the growth in the number of applications for judicial review, the time taken to address appeals, and the costs of the administrative process dealing with review.

The approach of Part 8 of the Act was to replace the generally applicable judicial review scheme with a judicial review scheme specific to that Act and from which was removed grounds of review such as natural justice and unreasonableness.[10]

Part 8 begins in s.475 with a definition of "judicially-reviewable decisions". These are decisions of the Migration Review Tribunal, the Refugee Review Tribunal and other decisions made under the Act or the Regulations relating to visas (s 475(1)). A number of decisions are classified as not judicially reviewable decisions (475(2)). By way of example a decision which itself is subject to review by the Migration Review Tribunal or the Refugee Review Tribunal is not reviewable in the Federal Court. So the decision of a delegate of the Minister refusing a protection visa is not itself reviewable in the Federal Court. That, of course, does not prevent it being reviewable by the High Court under s 75(v) of the Constitution, which is discussed later.

It may be noted in passing that it has been held that a decision of the Administrative Appeals Tribunal setting aside a decision under the Act, is a decision made under the *Administrative Appeals Tribunal Act 1975* (AAT Act). It is not therefore caught by the provisions of Part 8

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8 (1996) 185 CLR 259, 272.

9 (1990) 170 CLR 1, 35-36.

10 Ruddock, "Narrowing the Judicial Review in the Migration Context", (1997) 15 *AIAL Forum*, 15.

and thus is subject to an application for review on grounds of error of law under the provisions of the AAT Act and, alternatively, review under the AD(JR) Act.[11] Section 476 sets out the grounds upon which application may be made for review by the Federal Court of a judicially reviewable decision. These grounds, as set out in s.476(1), are:

> (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.

Subsection 476(2) expressly excludes as grounds for review breach of the rules of natural justice and that the decision involved an exercise of a power that was so unreasonable that no reasonable person could have so exercised the power. Subsection 476(3), the ground relating to improper exercise of power, is confined to the pursuit of improper purposes, acting under dictation and acting in accordance with a rule or policy without regard to the merits of the particular case. Taking irrelevant considerations into account or failing to take relevant considerations into account or exercising the power in bad faith or otherwise abusing the power, are not included as grounds for review. The no evidence ground in par (g) is elaborated in s 475(4) thus:

> 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.

Applications are also able to be made in respect of failures to make decisions, such applications being on the ground of unreasonable delay.

Section 478 establishes a time limit of 28 days from the date of notification of the decision within which an application under s 476 or 477 must be made. Subsection 478(2) enjoins the Court thus:

> The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period specified in paragraph (1)(b).

The time limit set down in s.478 recently survived a constitutional challenge.[12] Notwithstanding that, on its face, s.478(2) might have appeared to breach the separation of legislative and judicial power, it was held to be of no legal effect and therefore no question of its constitutionality arose.

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11 *Powell v Administrative Appeals Tribunal* (1998) 89 FCR 1.

12 *Hocine v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 269.

The powers of the Court in the exercise of its jurisdiction under Part 8 are set out in s 481. They are the usual powers in respect of judicial review.

The jurisdiction of the Federal Court with respect to judicially reviewable decisions is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under s 75 of the Constitution.[13] The confinement of the Federal Court's jurisdiction is set out in s 485 in the following terms:

> 485(1) In spite of any other law, including section 39B of the Judiciary Act 1903, the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions or decisions covered by subsection 475(2) or (3), other than the jurisdiction provided by this Part or by section 44 of the Judiciary Act 1903.
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> (2) Subsection (1) does not affect the jurisdiction of the Federal Court in relation to appeals under section 44 of the Administrative Appeals Tribunal Act 1975.
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> (3) If a matter relating to a judicially reviewable decision is remitted to the Federal Court under section 44 of the Judiciary Act 1903, the Federal 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 this Part.

It was argued before the High Court in *Abebe v Commonwealth*[14] that various of the provisions, including ss 476(1), (2) and (3) and 485 of the Act were invalid. This was on the basis that conferral on the Federal Court of original jurisdiction under s 77(i) of the Constitution can only be in respect of "matters" as set out in ss 75 and 76 and that a "matter" goes beyond the controversy of which the claim forms part. It was said that when Parliament invests the Court with jurisdiction to determine a "matter" it cannot limit the grounds on which the matter may be dealt with. A matter, it was said, is a single justiciable controversy. The Federal Court must be clothed with full authority essential for the complete adjudication of the matter.

This argument, however, was rejected by a 4:3 majority. The majority comprised Gleeson CJ and McHugh, Kirby and Callinan JJ. Justices Gaudron, Gummow and Hayne dissented. The majority held that nothing in Chapter III of the Constitution requires the Parliament to give a federal court authority to decide every legal right, duty, liability or obligation inherent in a controversy merely because it has jurisdiction over some aspect of that controversy. So long as a law "defines" the jurisdiction of a Federal Court "with respect" to a "matter" within Parliament's authority, it is constitutionally valid.

The scope of the various grounds of review has been agitated in the Federal Court and in the High Court. This is particularly so with respect to paragraph (a) of s.476(1). There was a line of authority in the Federal Court which linked that paragraph to the duty imposed on the Tribunal under s.420 to act according to substantial justice and the merits of the case. Failure to do this reflected, for example, in failure to observe the rules of natural justice, was characterised as a breach of procedures required by the Act. This view was rejected by the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu*[15]. The Court held that s 420(1) did not prescribe a procedure to be observed by the Tribunal in the making of a decision so as to found a right to review under s 476(1)(a). The clear language and purpose of s 476(2)(b) could not be avoided by treating s 420 as conferring rights not limited by that paragraph.

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13 S.486, Migration Act.

14 (1999) 197 CLR 510.

15 (1999) 197 CLR 611.

Another potentially contentious application of s 476(1)(a) arises in cases in which it is asserted that the Tribunal has failed to make findings on material questions of fact. Section 430 of the Act requires that where the Tribunal makes its decision on a review it must prepare a written statement that:

- sets out the decision of the Tribunal on the review;
- sets out the reasons for the decision;
- sets out the findings on any material questions of fact; and
- refers to the evidence or any other material on which the findings of fact were based.

It has been held that a failure to comply with this requirement is a failure to observe procedures required by the Act and therefore is a ground for review under s.476[16]. This is a ground which is being resorted to with increasing frequency as it allows, in effect, a review of the rationality and intelligibility of the Tribunal's decision-making processes.

The scope of judicial review is still substantial notwithstanding its limitations by Part 8. The disconformity between the grounds of review in the Federal Court and the grounds upon which review are available under s 75(v) of the Constitution is, as will be seen, productive of an increasing misdirection of High Court resources to deal with a growing migration list in its original jurisdiction. There is absolutely no justification for continuing that disconformity. This is not to reflect upon the ways in which Australia purports to comply with its obligations under the Refugees Convention. Having recently reviewed the practice of various countries in relation to the so-called safe third country doctrine, it seems to me that, in that area at least, Australia stands up quite well against other countries trying to cope with the growing problem of the international movement of people fleeing persecution and war.

The Irreducible Core of Judicial Review – The Constitutional Jurisdiction of the High Court

In addition to its function as Australia's ultimate appeal court, the High Court has a supervisory role in connection with executive action under Commonwealth law which derives directly from the Constitution. Section 75 of the Constitution provides:

> In all matters:
> .
> .
> .
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
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> the High Court shall have original jurisdiction."

The insertion of s 75(v) was inspired by the decision of Marshall CJ of the United States Supreme Court in *Marbury v Madison*.[17] While the decision is famous for its assertion of the jurisdiction of the court to declare invalid laws contrary to the Constitution, it also held that the court lacked any original jurisdiction to issue writs of mandamus to non-judicial officers of the United States. Andrew Inglis-Clark, who was the Tasmanian Attorney-General in 1891, and had read the case, produced a draft Constitution Bill which included a clause 63 to overcome the effect of *Marbury* and to provide for the original jurisdiction in the Constitution. At the January 1898 Convention Debates in Melbourne Barton moved successfully for the deletion of the clause. In the debate Isaacs thought the power was not expressly given in the United States Constitution but that undoubtedly the court exercised it. Clark became aware

16 *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469.

17 5 US 1 (Cranch) 137 (1803).

of the deletion and sent a telegram referring to *Marbury*. Barton replied thanking him and remarking "None of us here had read the case mentioned by you of Mabury and Madison or if seen it had been forgotten."

In March 1898, par (v) of s.75 in its present form was reinserted in the draft Constitution on Barton's motion. In so moving he referred to *Marbury* and observed that the words of the provision could do no harm and might "protect us from a great evil".[18] No privative clause has yet been devised which can defeat that constitutional jurisdiction in head-on conflict. However, such provisions have been effective when characterised not as restricting judicial review but rather as defining the true reach of the decision-maker's power.[19]

The High Court is generally empowered under s 44 of the *Judiciary Act 1903* to remit to the Federal Court or any State or Territory court with jurisdiction, matters which are commenced in its original jurisdiction. That is subject, in the case of the Federal Court, to the limitation imposed, in the case of judicial review of migration decisions, by s 485(3) of the *Migration Act*.

The original jurisdiction conferred on the High Court by s 75(v) of the Constitution is also conferred on the Federal Court and the Supreme Courts of the States by s.39B of the *Judiciary Act*. However, the effect of that jurisdiction is also confined by operation of s.485 of the *Migration Act*. It may be an open question whether it is possible for the High Court to remit a matter commenced there under s.75(v) of the Constitution to a State Supreme Court in reliance upon the jurisdiction of the State Supreme Court under s 39 of the *Judiciary Act.* Indeed since this paper was delivered, Lee J has essayed a substantial discussion of the distribution of federal jurisdiction and the remitter question in *Ayub v Minister for Immigration and Multicultural Affairs*,[20] a judgment given on 14 December 2000. His Honour there upheld an objection as to competency as the application for review was made outside the time limited by s 478(1) of the Act. He observed, however, that a Supreme Court has a like jurisdiction "with respect to judicially-reviewable decisions" that is not so confined, including as it does, a concurrent original jurisdiction to provide judicial review by the remedies of injunction or declaratory order.

Whatever flows from the *Ayub* case, the limitations imposed upon the jurisdiction of the Federal Court by Part 8 of the Act, in the meantime, have resulted in an increasing resort to the original jurisdiction of the High Court under s 75(v). For the grounds upon which the constitutional writs may issue include want of natural justice and improper exercise of power by a failure to take into account relevant considerations or taking into account irrelevant considerations as well as so called Wednesbury unreasonableness.

The High Court has recently delivered judgment in *Re Refugee Review Tribunal; Ex parte Aala*[21] in which consideration has been given to the operation of s 75(v). Mr Aala was an Iranian national who claimed to have been employed in the secret police of the former Shah of Iran and subsequently to have been involved in the illegal sale of property owned by the Shah and some of his supporters. He also claimed to have made substantial donations to Mujahideen, an underground counter revolutionary organisation. Between 1990 and his departure from Iran he claimed that members of the Komiteh, the morals police of the new regime, had visited his premises on three occasions apparently looking for documents that

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18 JA La Nauze, *The Making of the Australian Constitution* (1974) pp 233-234; J Thomson, *"Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution"* in G Craven (ed) *the Convention Debates 1891-1898 Commentaries Indices and Guide.*

19 *R v Hickman*; *Ex parte Fox and Clinton* (1945) 70 CLR 598.

20 [2000] FCA 1844.

21 (2000) 176 ALR 219, delivered on 16 November 2000.

might disclose his involvement in the sale of the properties. In September 1991 he married an Australian citizen of Afghan ethnic origin. In August 1992 he and his wife separated. In February 1993, a spouse visa was refused. Mr Aala was charged and convicted of the malicious wounding of his wife and sentenced to thirty four months in prison on 16 August 1995. On 20 August 1996 he made an application for a protection visa. That was refused and the refusal was affirmed by the Refugee Review Tribunal. He made application to the Federal Court for an order of review of the Tribunal's decision. His application was dismissed by Beaumont J, but an appeal to the Full Court was successful on the basis that the Tribunal had misdirected itself as to the legal test to be applied in assessing Mr Aala's assertions. The decision of the Full Court preceded that of the High Court in *Eshetu*.

The matter went back to the Refugee Review Tribunal differently constituted. In the course of the hearing the member who constituted the second Tribunal told Mr Aala that she had the "Department of Immigration file and your old Refugee Tribunal file and your new Refugee Tribunal plus all of the Federal Court papers". However, four written statements which had been placed by Mr Aala before Beaumont J in the Federal Court at first instance were not before the Tribunal. The second Tribunal affirmed the decision not to grant Mr Aala a protection visa. Mr Aala sought judicial review of that decision before the Federal Court. His application before Branson J was dismissed. He then appealed to the Full Federal Court. By this time the High Court had handed down its decision in *Eshetu*. In accordance with that decision, the Full Court accepted that it had no jurisdiction "to set aside the decision of the Tribunal on the ground that it denied to the applicant natural justice". It therefore dismissed the appeal.

Mr Aala's next step was to seek relief in the original jurisdiction of the High Court by way of constitutional writs under s 75(v). In December 1999 McHugh J made orders nisi requiring the respondents to show cause why writs of prohibition, certiorari and mandamus should not issue. In the event Mr Aala was successful, certiorari issued to quash the decision of the Tribunal and prohibition issued to prevent the Minister from taking action on the decision of the Tribunal. Mandamus issued requiring the Tribunal to consider and determine the application according to law. In substance, Mr Aala succeeded before the High Court on grounds of breach of the rules of natural justice arising out of the mis-statement by the second Tribunal concerning the papers which it had before it. As Gaudron and Gummow JJ observed, no relief was sought from the High Court which would quash the order of the Full Federal Court dismissing the appeal from Branson J. As they said:

> …the effect of the relief sought in this court would be to outflank and collaterally impeach the respective rights and liabilities under the Act of the prosecutor [Mr Aala] and the Minister by quashing the administrative decision which the order of the Federal Court affirmed.[22]

The pursuit of that course was open to Mr Aala as a consequence of the holding in *Abebe v Commonwealth* that Part 8 of the Act is valid. The Federal Court was specifically precluded from considering, as a ground of review, that a breach of the rules of natural justice occurred in connection with the making of the decision. That ground was precluded by the operation of s 476(2) of the *Migration Act*. But it was a ground which could be considered by the High Court in its original jurisdiction.

Kirby J in his judgment observed:

> In this matter, this Court has been involved, not in the elucidation of some important question of constitutional, statutory or other legal significance. The applicable principles are clear. This Court has been engaged in nothing more than the elucidation of the facts

22 At para 11.

> and the application to them of settled rules of law. In the event that the Parliament was of the opinion that consideration of arguments of procedural fairness (and administrative unreasonableness) was consuming too much time and cost in migration matters, both in the Tribunal and before the Federal Court, there must surely have been a better way of reducing those burdens than by heaping them upon this Court.[23]

In that case, the Minister submitted to the High Court that because the Constitution was silent about the grounds on which mandamus or prohibition could issue, those grounds were fixed according to the practices prevailing at the time the Constitution came into force, that is 1901. It was said to follow as a consequence that prohibition would not lie to prevent a breach of rules of procedural fairness. That contention was rejected by the Court.

It will be recalled that the jurisdiction of the Federal Court under Part 8 of the Act is limited in respect of breach of the rules of natural justice to the ground of actual bias. This has led predictably to a number of cases in which actual bias, as distinct from the appearance or reasonable apprehension of bias, has been raised as a ground of review. One such case was that of *Jia v Minister for Immigration and Multicultural Affairs*.[24] A non-citizen on a student visa was convicted of offences including sexual assault for which he was sentenced to a number of years imprisonment. He was, upon his release, to be the subject of deportation under the criminal deportation policy on the basis that he was not of good character. However, the Administrative Appeals Tribunal decided that, notwithstanding the convictions, it was not satisfied that he was not of good character. The Minister nevertheless cancelled Mr Jia's visa under s.501 (as it was) and declared him to be an excluded person under s.502. The Minister, before making those decisions, had made public statements critical of the Administrative Appeals Tribunal decision. Indeed he had written a letter to the President of the AAT about it and similar decisions. His decisions under s 501 and 502 were challenged in the Federal Court on the grounds of actual bias. At first instance, the application was dismissed on the basis that actual bias had not been established. That decision was reversed by majority in the Full Court. The High Court subsequently granted special leave to appeal and heard the appeal at the Perth sittings recently. In addition, however, to his appeal, Jia sought the issue of constitutional writs in the original jurisdiction of the High Court under s 75(v). The issue of the constitutional writs was based upon grounds of breach of the rules of natural justice which require only the appearance or reasonable apprehension of bias.[25]

The community can no doubt expect to be the beneficiary of a good deal of new learning about the application of s 75(v) and the principles of judicial review from the High Court in its new role as a trial court exercising original jurisdiction in an area in which it now has a rapidly growing case list. The serious misapplication of judicial resources apparent in this distortion of jurisdiction in relation to migration matters should be of serious concern to all who value the rule of law and rational approaches to the way in which court resources are to be applied.

Conclusion

This paper has sought to outline the essentials of the present judicial review process in respect of migration decisions and its connection to general principles of administrative justice. There are undoubtedly problems in the process due to the large and growing number of applications for judicial review. These are exacerbated by the present disconformity between the original jurisdiction of the High Court and the confined jurisdiction of the Federal

23 At para 133.

24 (1999) 93 FCR 556.

25 Editorial Note: the High Court on 29 March 2001 upheld the Minister's appeal holding that there had been no breach of the bias rule: [2001] HCA17.

Court. The problems are unlikely to be solved by the enactment of more draconian privative clauses. That will merely heighten the disconformity. Real issues of fairness exist in the way the present system operates at a practical level in terms of notification of Tribunal decisions, the extent to which asylum seekers comprehend the decision that has been made in relation to them and, a fortiori, the extent to which they comprehend the limited nature of the judicial review process. Though it may be said that at a theoretical level, notwithstanding the practical problems referred to, Australia has a process for judicial review which complies with the requirements of the Convention, at a practical level that process sometimes approaches the farcical, as the Court is dealing with unrepresented litigants who do not speak English and have no idea of the nature of the process which they have invoked by signing a photocopied application in a detention centre. For the most part, legal aid is not available. It is only through the good offices of lawyers providing their services on a voluntary basis to represent applicants and thereby to assist the Court, that the situation is not a lot more difficult than it is at present. Our ability to deliver administrative justice to those who are acutely in need of it is being tested to the limits in connection with the judicial review of decisions relating to applications for protection visas.