# FAIRNESS: WRIT LARGE OR SMALL?

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The traditional irony of denial of natural justice as a ground of judicial review of administrative action is that it may provide only a pyrrhic victory to the successful complainant. Once the court declares the administrator's decision is void for denial of natural justice and orders that the administrator decide again according to law, it is perfectly possible for the administrator, having afforded natural justice, to reach a decision no different from the original one.

Of course the cynical or well-advised complainant may expect no more of litigation than the satisfaction of nudging the complacent face of bureaucracy with the nuisance of a legal challenge, perhaps in the altruistic hope of forcing some improvement in decision-making procedures for the benefit of those who come after. But the court may ask itself why it bothered to force the administrator to perform the tiresome, time-wasting charade of hearing an applicant in whose case, whatever is said, the administrator finds no merit. The argument that it is futile to give a hearing surfaces occasionally in the substantive law, in relation to the original decision. There are *dicta* that where a hearing could have made no difference to the original decision reached, natural justice ought not to be implied, or, the court ought in its discretion to refuse a remedy.[1] But there is clear authority that if natural justice has been denied the decision is invalid whether or not a hearing would have made a difference.[2] A risk of prejudice is created if material adverse to a person is placed before the administrator making a decision, even if there is only a possibility that it could have affected him or her subconsciously.[3] The court is concerned with conformity to proper decision-making procedures, not with the substance of the decision which emerges from the procedures.

In any event, the development of a duty of administrators to act fairly, or a principle of "fair play in action", has made the victory of the individual who is denied a hearing increasingly less than a hollow one. At first the duty to act fairly appeared to amount to no more than a new way of describing the requirements of the rules of natural justice.[4] As

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[1] *E.G., Glynn* v. *Keele University* [1971] 1 W.L.R. 487 at 496; *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578 at 1582, 1595, 1600; *Cinnamond* v. *British Airports Authority* [1980] 1 W.L.R. 582 at 592, 593; *Cheall* v. *A.P.E.X.* [1983] 2 A.C. 180 at 190.

[2] *Ridge* v. *Baldwin* [1964] A.C. 40 at 68; *John* v. *Rees* [1970] Ch. 345 at 402; *Kioa* v. *Minister for Immigration and Ethnic Affairs* (1985) 62 A.L.R. 321 at 360-1, 380.

[3] *Kanda* v. *Government of Malaya* [1962] A.C. 322; *Kioa* v. *Minister for Immigration and Ethnic Affairs* (1985) 62 A.L.R. 321 *per* Mason, J. at 348-9, *per* Brennan, J. at 379-80, *per* Deane, J. at 383-4.

[4] *Wiseman* v. *Borneman* [1971] A.C. 297 at 308, 309, 320; *Bushell* v. *Secretary of State for the Environment* [1981] A.C. 75 at 117.

Lord Morris of Borth-y-Gest has said, "(n)atural justice is but fairness writ large and juridically."[5] But the concurrent development of the fairness principle and the concept of the legitimate expectation has had fundamental ramifications for administrative law in the United Kingdom.

Although the High Court of Australia had on previous occasions described natural justice in terms of fairness,[6] it was not until *Kioa* v. *Minister for Immigration and Ethnic Affairs*[7] that the arrival of the concept of procedural fairness was confirmed. This High Court decision is, if the trend in the United Kingdom is a good guide, a portent of the development in Australia of principles of judicial review which give greater recognition to the non-legal obligations and practices which emerge in the course of social interaction between citizen and administrator. Fairness will be writ somewhat larger than it was under the rubric "natural justice".

### *Fairness in the United Kingdom*

Since the decision in *In re H. K. (An Infant)*[8] in 1966, the English courts have, in decisions on natural justice, referred to a principle of "fair play in action" or a "duty to act fairly". The principle of fair play was confirmed by Lord Parker, C.J. in a later case,[9] taken up by Lord Denning, M.R. in a series of cases,[10] and approved by the House of Lords[11] and by the Privy Council.[12]

The concept of the legitimate expectation developed concurrently with the principle of fair play.[13] Until the advent of the legitimate expectation, cases in which denial of natural justice was raised could be easily sorted into two categories. First, forfeiture cases where the complaintant's legal right is affected, say by dismissal from employment or deprivation of membership of a professional or social body. Second, application cases where the complainant seeks and is refused a benefit or position to which he or she has no legal right or particular claim, as in the case of an unsuccessful application for a job or membership of an association. Whilst in the forfeiture cases there was often an allegation of misconduct against the complainant of which he or she had not been apprised, decisions in application cases could be made for many reasons,

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[5] *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660 at 679.

[6] *Mobil Oil Australia Pty Ltd.* v. *Federal Commissioner of Taxation* (1963) 113 C.L.R. 475 *per* Kitto, J. at 504; *R.* v. *Commonwealth Conciliation and Arbitration Commission; ex p. Angliss Group* (1969) 122 C.L.R. 546 at 552-3; *National Companies and Securities Commission* v. *News Corporation* (1984) 52 A.L.R. 417 *per* Gibbs, C.J. at 427-8.

[7] (1985) 62 A.L.R. 321.

[8] [1967] 2 Q.B. 617. Some would say the notion of fairness can be traced back further, to *Board of Education* v. *Rice* [1911] A.C. 179 at 182, where Lord Loreburn L.C. said there is "a duty lying upon every one who decides anything" to "fairly listen to both sides".

[9] *R.* v. *Birmingham City Justices; ex p. Chris Foreign Foods (Wholesalers) Ltd.* [1970] 1 W.L.R. 1428.

[10] *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149; *R.* v. *Gaming Board for Great Britain; ex p. Benaim and Khaida* [1971] 2 Q.B. 417; *Re Pergamon Press* [1971] Ch. 388; *Breen* v. *Amalgamated Engineering Union* [1971] 2 Q.B. 175; *R.* v. *Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299.

[11] *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534.

[12] *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660.

[13] The development beginning with *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149.

including policy relating to the desirable number of successful applications. Natural justice was usually implied in the forfeiture cases, but not in the application cases.

The concept of the legitimate expectation introduced a third, intermediate, category, the expectation cases, whose borders with the forfeiture and application categories were imprecisely drawn. A complainant who had a reasonable expectation from what had already happened that his or her legal right would not be revoked or that it would be renewed had a legitimate expectation which attracted the rules of natural justice.[14] For example, a person who has a licence upon which his or her livelihood depends has a legitimate expectation that it will not be arbitrarily revoked and a person elected to a position has a legitimate expectation that the appointment will be approved.[15] In expectation cases the question is raised as to what has happened to make the applicant unsuitable for the legal right for which he or she was previously thought suitable.

The accretion of a variety of types of administrative decisions to the category of expectation cases reflected a judicial concern to respect the reasonable mutual expectations which are generated in the course of interaction between citizens and administrative decision-makers. Though not articulated as such by judges, the concept of the legitimate expectation embodied a recognition that social interaction often involves not just one individual's influencing the decision-making of another, but their interdependence of expectation, decision and action.[16] Interaction between citizen and administrator is like a game of chess. The best action for the citizen depends upon what action the administrator (and possibly other decision-makers as well) takes and hence on the actions the citizen expects the administrator to take, which the citizen knows depend, in turn, on the administrator's expectations of his or her own.[17]

Judicial recognition of the need to give some legal force to these systems of mutual expectations is found in the doctrine of estoppel, at common law and in equity. It is therefore not surprising that decisions extending the ambit of the concept of the legitimate expectation and the fairness principle had a strong flavour of estoppel, demonstrated in *R.* v. *Liverpool Corporation; ex. p. Liverpool Taxi Operators' Association*;[18] *Attorney-General of Hong Kong* v. *Ng Yuen Shiu*;[19] *H.T.V. Ltd.* v. *Price Commission; Council of Civil Service Unions* v. *Minister for the Civil Service* ("the *GCHQ* Case")[20] and *R.* v. *Secretary of State for the Home Department; ex. p. Khan.*[21]

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[14] *McInnes* v. *Onslow-Fane* [1978] 1 W.L.R. 1520.

[15] See *R.* v. *Barnsley Metropolitan Borough Council; ex p. Hook* [1976] 1 W.L.R. 1052; *Breen* v. *Amalgamated Engineering Union* [1971] 2 Q.B. 175.

[16] See R. K. Merton, *Social Theory and Social Structure* (rev. ed., 1968) 338-342; D. Truman, *The Governmental Process* (1965) 23-6.

[17] On game theoretical analysis of social interaction, see, *e.g.*, E. Ullman-Margalit, *The Emergence of Norms* (1977).

[18] [1972] 2 Q.B. 299.

[19] [1983] 2 A.C. 629.

[20] [1985] A.C. 374.

[21] [1985] 1 All E.R. 40.

The net result of these cases is that a legitimate expectation may be generated by some statement or undertaking made by an administrator having the duty of making the decision, if the administrator acts in a way that would make it unfair or inconsistent with good administration to deny the individual affected a hearing. Further, the legitimate expectation may arise from the administrator's having followed a regular practice which the individual affected can reasonably expect to continue.

The concurrent development of the fairness principle and the concept of the legitimate expectation had three effects. The question of the presence of a legitimate expectation loomed so large in some cases that it overshadowed other factors bearing upon the implication of natural justice, or fairness. Once a legitimate expectation was identified as having been affected, then the duty to act fairly was established. Considerations such as the nature of the administrator's power tended to be seen as affecting the flexible content of fairness. An extreme example of the nature of the power indicating that fairness did not demand a hearing, occurred in *GCHQ*, where considerations of national security outweighed those of fairness.

Second, the fairness principle spilled over into grounds of review other than denial of natural justice. Unfairness may amount to an abuse of power.[22] In *In re Preston*[23] the House of Lords indicated that fairness could require the Inland Revenue Commissioners to honour a bargain struck with a taxpayer which was not contractually binding.[24]

Further, denial of natural justice and the principle that an administrator must not apply a policy inflexibly are often coupled as grounds of review in one case. Fairness is the umbrella principle spanning both grounds of review.[25] Administrators are of course free to alter their policies.[26] But a regular administrative practice may generate a legitimate expectation which supports a legal right to a hearing, before the practice is altered, whether by virtue of natural justice or under the no-fettering principle.[27]

In the United Kingdom then, the fluidity of the fairness principle has provided an opportunity for judges to recognise that in some circumstances practices followed and obligations incurred by administrators have a normative force with legal consequences.

The third effect of the development of the fairness principle and the legitimate expectation is the circumvention of the fundamental rule in public law that estoppel cannot be raised to prevent the performance of

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[22] *H.T.V. Ltd.* v. *Price Commission* (1976) I.C.R. 170; *Laker Airways Ltd.* v. *Department of Trade* [1977] 2 W.L.R. 234; *In re Preston* [1985] 2 W.L.R. 836.

[23] [1985] 2 W.L.R. 836.

[24] On the facts, however, the Inland Revenue had not promised not to investigate the taxpayer's liability further if it discovered new information, and in any event the taxpayer had not honoured his obligation under the bargain to make full disclosure.

[25] *R.* v. *Secretary of State for the Environment; ex p. Brent London Borough Council* [1982] 1 Q.B. 593; *R.* v. *Secretary of State for the Home Department; ex p. Khan* [1985] 1 All E.R. 40.

[26] *British Oxygen Co.* v. *Minister of Technology* [1971] A.C. 610.

[27] *E.g., R.* v. *Secretary of State for the Home Office; ex p. Khan* [1985] 1 All E.R. 40. *In re Findlay* [1985] A.C. 318 is not inconsistent with this proposition.

a statutory duty or to hinder the exercise of a statutory discretion.[28] Honouring an undertaking may be compatible with the administrator's performance of its statutory duty in the public interest.[29] However, unfairness in failing to honour an undertaking or conform to a practice may amount to an abuse of power.[30] In such a case the rule that estoppel cannot be raised to prevent the performance of a statutory duty is inapplicable. Fairness has provided a point for a stealthy re-emergence of estoppel.

*Fairness in Australia*

Australian judicial and academic perception of natural justice has been stifled by faithfulness to the test, enunciated by the Privy Council in *Durayappah* v. *Fernando*,[31] for the implication of natural justice. The threefold test requires consideration of the nature of the property of the complainant affected by the decision, the circumstances in which the administrator is entitled to intervene and the sanctions the latter is entitled to impose. Any one or more of the factors may point to the implication of the rules of natural justice.

Whilst the fairness principle blossomed in the United Kingdom it made a poor start in Australia. The High Court decisions in *Salemi* v. *Mackellar (No. 2)*[32] and *R.* v. *MacKellar; ex. p. Ratu*[33] failed to appreciate the full impact of the principle or the accompanying wasting away of the *Durayappah* v. *Fernando* implication principle.

In *Salemi (No. 2)* the High Court by a statutory majority[34] held that the rules of natural justice did not apply to the exercise of discretion of the Minister for Immigration and Ethnic Affairs to order the deportation of a person who was a prohibited immigrant under s. 18 of the Migration Act 1958 (Cth). Again in *Ratu* a majority of the High Court held that natural justice was not implied in relation to s. 18.

In *Salemi (No. 2)* Barwick, C.J. was prepared to use the expression fairness to describe the flexible content of natural justice once it was established that natural justice was implied.[35] Gibbs, J., endorsing the Privy Council conception, in *Furnell* v. *Whangarei High Schools Board*,[36] of natural justice as fair play in action, thought that the duty to act fairly simply flowed from the duty to observe natural justice. However, he then applied the implication test in the earlier Privy Council decision of *Durayappah* v. *Fernando*.[37]

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[28] *Southend-on-Sea Corporation* v. *Hodgson (Wickford) Ltd.* [1962] 1 Q.B. 416; *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* [1937] A.C. 610.

[29] *R.* v. *Liverpool Corporation; ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299.

[30] *Laker Airways Ltd.* v. *Department of Trade* [1977] 2 W.L.R. 234; *In re Preston* [1985] 2 W.L.R. 836.

[31] [1967] 2 A.C. 337.

[32] (1977) 137 C.L.R. 396.

[33] (1977) 137 C.L.R. 461.

[34] Judiciary Act 1903 (Cth.) s. 23(2)(b).

[35] (1977) 137 C.L.R. 396 at 400.

[36] [1973] A.C. 660 at 679.

[37] See also *per* Brennan, J., *FAI Insurances Ltd.* v. *Winneke* (1982) 151 C.L.R. 342 at 410f.

Barwick, C.J.'s deprecation in *Salemi (No. 2)* of the expression "legitimate expectation" as adding little if anything to the meaning of a legal right, was ignored by Murphy, and Aickin, JJ. in *Heatley* v. *Tasmanian Racing and Gaming Commission*,[38] handed down a few months after *Salemi (No. 2)*. In *Attorney-General of Hong Kong* v. *Ng Yuen Shiu*[39] Barwick, C.J.'s view was also disapproved by the Privy Council, which held that the word "legitimate" in the expression "legitimate expectation" means "reasonable". In *Kioa* Gibbs, C.J. preferred the view of the Privy Council whilst Brennan, J. recognised and went beyond that view of the legitimate expectation.[40] Nevertheless the combined effect of Barwick, C.J.'s restrictive interpretation of the legitimate expectation and Gibbs, J.'s adherence to the *Durayappah* implication test was a limping start to the principle of fairness in Australia.

By contrast, in the United Kingdom the duty to act fairly signalled the courts' preparedness to require a broad spectrum of administrators to observe natural justice, whatever the depth of its content in particular circumstances. The concept of the legitimate expectation had to develop in tandem with that of fairness to permit this extension of natural justice to new fields of administrative decision-making. And the identification of a legitimate expectation began to overshadow the traditional implication test.

Apart from the minority judgments in *Salemi (No. 2)* and a bold and foresightful decision of the Federal Court in *Cole* v. *Cunningham*[41] the fairness principle in Australia failed to make the quantum leap represented by the United Kingdom decisions in *Liverpool Taxi* and *Ng Yuen Shiu*, extending the ambit of the principle to require a hearing where an administrator had made an undertaking or followed a regular practice which the complainant could reasonably expect to be honoured. This stultification in the development of the principle can be traced to the judgment of Barwick, C.J. in *Salemi (No. 2)* in which *Liverpool Taxi* was described as a case turning upon the express undertaking made by the council rather than upon the implication of natural justice. That does not explain why each of the judges in *Liverpool Taxi* held that the administrator, in failing to give the association a hearing, was in breach of its duty to act fairly.[42]

In 1985 in *Kioa* v. *Minister for Immigration and Ethnic Affairs*[43] the High Court at last animated the duty to act fairly, or procedural fairness, as it tends to be described in Australia, possibly infusing it with more vigorous potential than it has realised so far in the United Kingdom.

Nine years after *Salemi (No. 2)* and *Ratu*, the High Court, Gibbs,

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[38] (1977) 137 C.L.R. 487. See also Mason, J. in *Ratu*, n. 33 at 476.
[39] [1983] 2 A.C. 629 at 636.
[40] (1985) 62 A.L.R. 321 at 345 and 371. See *infra*, text accompanying notes 80-86.
[41] (1983) 49 A.L.R. 123.
[42] [1972] 2 Q.B. 299 at 307, 310, 313.
[43] (1985) 62 A.L.R. 321.

C.J. dissenting,[44] held that natural justice was implied where the Minister for Immigration and Ethnic Affairs exercised power to refuse to renew a temporary entry permit or to grant a permanent entry permit, and deported the immigrant.[45]

Mr. and Mrs. Kioa were Tongan citizens who had outstayed their temporary entry permits to Australia although they had requested extensions and received no reply from the Department of Immigration. They had stayed on in order to work and send money back to Tonga to support their family which had suffered as a result of the cyclone in Tonga in 1982. The Kioas had a child whilst in Australia and by birth she was an Australian citizen.

The Minister's delegate, exercising discretionary power under s. 18 of the Migration Act, ordered that the Kioas be deported. He took into account a departmental report which set out departmental policy but also contained allegations that the Kioas had changed their address without informing the Department and that Mr. Kioa's active involvement with other persons seeking to circumvent Australia's immigration laws must be a source of concern.

It was clear from the statement of reasons given by the Minister's delegate for his decision, under s. 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth.), that given the current immigration policy, the delegate would have decided to deport the Kioas whether or not Mr. Kioa had been involved with persons seeking to circumvent Australia's immigration laws.

Since *Salemi (No. 2)* had been decided, legislative changes had been made of such significance that it was now open to the Court to imply natural justice in relation to the power. In particular, under the Administrative Decisions (Judicial Review) Act 1977 (Cth.) there was now a comprehensive system of judicial review of Commonwealth administrative decisions, including deportation orders, and a right of the applicant to a statement of the reasons for such decisions. Amendments to the Migration Act 1958 (Cth.) structured the discretion of the Minister relating to the grant of entry permits and strengthened the sanctions against prohibited non-citizens. By not providing the Kioas with an opportunity to respond to the material prejudicial to them in the departmental report, the Minister's delegate had acted unfairly.

Important English decisions in which fairness required an administrator to honour an undertaking or conform to a regular practice which the applicant reasonably expected to be followed, were endorsed by some of the judges.[46] But in their honest acceptance of the implications of procedural fairness, Mason, Brennan, and Deane, JJ. in

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[44] Gibbs, C.J. dissented because he took the view that the amendments made to the Migration Act were not such as to lead to any result different from that which was arrived at in *Salemi (No. 2)*. In *Salemi (No. 2)* Gibbs, J., as he then was, was in the majority.

[45] Migration Act 1958 (Cth.), ss. 6A, 7, 18.

[46] *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 A.C. 337: *per* Gibbs, C.J. and Mason, J., (1985) 62 A.L.R. 321 at 333, 345; *GCHQ* [1985] A.C. 374: *per* Mason and Brennan, JJ., *id.* 345, 372.

one sense unfolded the principle more dramatically than any English decision has done so far. English courts still carefully consider whether a legal right or legitimate expectation is affected by the administrative decision, in order to determine whether fairness is implied. It was the expressed view of Mason, and Brennan, JJ. and the implicit view of Deane, J. that the critical question now will not be whether the rules of natural justice are implied.[47] Procedural fairness will be a requirement borne by every administrator whose decision affects rights, interests and legitimate expectations, unless of course there is a strong manifestation of contrary statutory intention. The critical question is what does fairness require in the circumstances of the particular case. It is in answering this question, the question of the content of fairness, that the court will consider circumstances such as the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting. Procedural fairness emphasises, more than the expression natural justice did, the flexibility in the content of the principle.

The High Court recognised that acceptance of the principle of procedural fairness imports a relaxation of the test for the implication of natural justice. Unlike the English courts, the High Court accepts the practical result of that relaxation: the concept of the legitimate expectation will no longer be necessary as a means for extending the range of administrative decision-making in relation to which natural justice is implied.

The Kioas did not appear to have a legitimate expectation, in terms of the doctrine developed in the English cases.[48] Whilst their temporary entry permits were current the Kioas had a legal right to stay in Australia for the period specified. They also had a legitimate expectation that the permit would not be revoked before the period had expired. But Mr. and Mrs. Kioa's permits had expired on 8 December 1981 and 31 March 1982 respectively, more than a year before Mr. Kioa was arrested.

In normal circumstances, once a permit has expired the situation is akin to the application cases—the immigrant is applying for a legal right to which he or she has no particular claim. There is no direct support in the English cases for the view that the grant of a temporary entry permit generates a legitimate expectation of a renewal of the permit.[49] For a legitimate expectation to arise otherwise the expectation would have to be based on special facts such as some statement or undertaking by the administrator or a regular practice of granting renewals, which the applicant could reasonably expect to continue. But this was not such a case. No amnesty had been announced by the government as it had been

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[47] (1985) 62 A.L.R. 321 at 347, 367.

[48] See *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149.

[49] Indirect support is found only in cases concerning different subject matter: Scarman, L.J.'s *obiter* comment in *R.* v. *Barnsley Metropolitan Borough Council; ex p. Hook* [1976] 1 W.L.R. 1052 that the non-renewal of a licence would attract natural justice unless the licensee had been given to understand that renewal was not to be expected; Lord Denning, M.R. *in arguendo* in *R.* v. *Liverpool Corporation; ex p. Liverpool Taxi Fleet Operators' Association* [1972] Q.B. 299 at 304. See also *infra* text accompanying notes 66-71.

in *Salemi (No. 2)*, the factor accounting for Stephen, J.'s powerful dissent in that case.[50]

However, there is English and Australian authority that a licensee seeking a renewal has a legitimate expectation of renewal. Commentators often approach analysis of expectation cases by grouping together licence cases, entry permit cases and so on, in the hope of introducing some order into the law. But it was to the licence cases and types of cases other than the entry permit ones that the High Court had to turn in *Kioa.*

In *R.* v. *Gaming Board of Great Britain; ex. p. Benaim and Khaida*,[51] Lord Denning, M.R. held that holders of a gaming licence had a legitimate expectation of gaining a licence under a new statutory scheme.[52] The Australian authority is *FAI Insurances Ltd.* v. *Winneke.*[53] An insurance company was held to have a legitimate expectation of having its licence to insure for workers compensation renewed or not refused without an opportunity for a hearing.

But do the *Gaming Board* Case and *FAI Insurances* leave open the argument for a legitimate expectation in a wider class of case? The cases concerned subject matter very different from that in *Kioa.* They were cases where a licence permitted a licensee to carry on a business. The licences came up for renewal to provide the licensor with an opportunity to check whether the licensee was complying with the terms of the licence. If not disqualified, the licensee could expect a renewal. Barwick, C.J. acknowledged in *Salemi (No. 2)* that in such cases the grant of the licence may import a term that the interests of the licensee would be considered before a renewal was refused.[54] Where it is clear from the circumstances that the licensee has not been given to understand that there is a possibility of non-renewal, non-renewal might cause the licensee a seriously upset in plans, economic loss and perhaps cast a slur on reputation.[55]

But a temporary entry permit is not granted in circumstances which carry such an implication.[56] The stay in the country is understood to be temporary and the permit fixes the period. Such circumstances are not comparable with those in the *Gaming Board* Case or *FAI Insurances.*

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[50] If it had been, the High Court could have simply applied *Ng Yuen Shiu*, as did the Federal Court in the case of an application for re-appointment to the Public Service, *Cole* v. *Cunningham* (1983) 49 A.L.R. 123. Compare *Minister of Immigration and Ethnic Affairs* v. *Haj-Ismail* (1982) 40 A.L.R. 341 and *Minister of State for Immigration and Ethnic Affairs* v. *Arslan* (1984) 55 A.L.R. 361, where in any event, on the facts the representation made by the administrator did not give rise to a legitimate expectation. Note however, that the Federal Court was prepared to apply *Ng Yuen Shiu* to the entry permit renewal cases.

[51] [1970] 2 Q.B. 417.

[52] Similarly, in *R.* v. *Barnsley Metropolitan Borough Council; ex p. Hook* [1976] 1 W.L.R. 1052 at 1058, *per* Scarman, L.J. and *McInnes* v. *Onslow-Fane* [1978] 1 W.L.R. 1520 at 1529, *per* Megarry, V.C., it was recognised *in obiter* that licence renewal cases fell within the expectation category.

[53] (1982) 151 C.L.R. 342.

[54] (1977) 137 C.L.R. 396 at 405. See also *per* Mason and Aickin, JJ., *FAI Insurances Ltd.* v. *Winneke* (1982) 151 C.L.R. 342.

[55] See *per* Scarman, L. J. in *R.* v. *Barnsley Metropolitan Borough Council; Ex p. Hook* [1976] 1 W.L.R. 1052 at 1058, quoting from *De Smith's Judicial Review of Administrative Action* (4th ed., 1980) 223, 224; repeated by Mason, J. in *FAI Insurances* (1982) 151 C.L.R. 342 at 361.

[56] Mason, J. in *Ratu* (1977) 137 C.L.R. 461 at 480-1; see the contrary view expressed in relation to the temporary entry permit of a student who had not yet completed studies, *per* Ellicott, J., *Haj-Ismail* v. *Minister for Immigration and Ethnic Affairs* (1981) 36 A.L.R. 516 at 536; see, on appeal, *per* Davies, J., *contra*, (1982) 40 A.L.R. 341 at 361-2.

But why should a renewal of a licence to carry on a business or livelihood be categorised as an expectation case, but a renewal of a temporary entry permit be categorised as an application case? Some judges and commentators have taken the view that not only the nineteenth century concept of property, but also new forms of property (such as status),[57] ought to enjoy the protection of natural justice.[58] The courts had, after all, already forced reputation in with traditional proprietary and financial rights as an interest which ought to be protected by natural justice.[59] The view is sensible and indeed irresistible and was heartily accepted by Mason, Deane, and Brennan, JJ. in *Kioa.*

However, once applications for renewals of licences, temporary entry permits and all administrative decision-making concerning status are accepted as affecting legitimate expectations and attracting procedural fairness, the distinction between the expectation and application categories breaks down.[60] The extension of the duty to act fairly to decision-making affecting the new property has the logical implication that there is no longer any point in talk of legitimate expectations. It is sensible to stop searching for a legitimate expectation and to talk in terms of interests affected.

In *Kioa* the judges in the majority either paid lip service to the search for a legitimate expectation or abandoned it. According to Mason, J., in order for procedural fairness to apply, the administrative decision must affect rights, interests and expectations of the individual citizen in a direct and immediate way. A right or interest may relate to personal liberty, status, preservation of livelihood and reputation as well as proprietary rights and interests.[61] A decision which only affects a person as a member of the public or a class of the public is not such a decision attracting fairness. Here we travel over the borderline into decisions described as policy or political decisions.[62]

In finding there was a legitimate expectation, Mason, J. referred to *In re H.K. (An Infant), FAI Insurances*, the *Gaming Board* Case, *Cole* v. *Cunningham* and *Daganayasi* v. *Minister of Immigration*[63] without discussing the fact that the circumstances attending the grant of a temporary entry permit are very different from those in the licence cases. Turning to the critical question of the content of procedural fairness in the circumstances of the case, the Kioas ought to have been given a

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[57] C. Reich, "The New Property" (1964) 73 *Yale L.J.* 733.

[58] Murphy, J. in *Ratu* (1977) 137 C.L.R. 461 at 483-4; Cooke, J. in *Daganayasi* v. *Minister of Immigration* [1980] 2 N.Z.L.R. 130 at 144; P. P. Craig, *Administrative Law* (1983) 260-1.

[59] *Fisher* v. *Keane* (1878) 11 Ch. D. 353 at 359, 363; *Heatley* v. *Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487 at 495, 512.

[60] See also the beginning of the breakdown of the distinction in the employment area in promotion appeal cases at Commonwealth level: *Hamblin* v. *Duffy (No. 2)* (1981) 55 F.L.R. 228 at 237-9.

[61] (1985) 62 A.L.R. 321 at 345, 346. Note that Mason, J. may have expressed himself in this way because he would describe a licence, such as that in *Banks* v. *Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222, as an "interest". See *FAI Insurances* (1982) 151 C.L.R. 342 at 360. But *Banks* was a forfeiture case and the licence is best seen as property carrying legal rights whilst current and a legitimate expectation that it will not be revoked before its natural expiration date.

[62] *Ibid.* See also *Salemi (No. 2)* n. 32 at 452, *per* Jacobs, J. and *FAI Insurances* (1982) 151 C.L.R. 342 at 361.

[63] [1980] 2 N.Z.L.R. 130.

hearing because of the presence of two factors. First, the application had been made in circumstances which were relevantly similar to those in which the earlier permit was granted. Second the decision-maker intended to reject the application on the ground of a consideration personal to the applicant on the basis of information obtained from another source with which the applicant had not been given an opportunity to deal.

Like Mason, J., Deane, J. also predicated the application of procedural fairness upon an administrative decision affecting a wider range of interests. He rounded them all up under the description

> rights, interests, status or legitimate expectations of another in his individual capacity (as distinct from as a member of the general public or of a class of the general public).[64]

Mason, and Deane, JJ.'s tentative steps away from the accepted requirement of finding a legal right or legitimate expectation was in need of further refinement. Restricting procedural fairness to administrative decisions affecting an individual in an individual capacity, rather than as a member of the public, would exclude the race-goer whom the High Court had held in 1977 to have a legitimate expectation as a member of the public of being admitted to a racecourse on payment of the required fee.[65] Brennan, J. took up the challenge of devising a test for filtering out those administrative decisions which ought to remain firmly in the category of application cases, where procedural fairness is not implied.

His Honour clearly doubted whether on the facts of this case the administrative decision had affected a legitimate expectation as that notion is generally understood. There is, however, said Brennan, J., an infinite variety of social interests, which do not amount to legal rights but which are affected by the exercise of administrative discretion and which should be protected by natural justice. The expression "legitimate expectation" is simply an epithet for all these interests and is not a sure criterion for determining whether natural justice is implied.

With respect, apart from the confusing suggestion that a legitimate expectation is a state of mind, Brennan, J.'s approach is a logical one, supporting the breakdown of the distinction between application cases and expectation cases. What of Mason, and Deane, JJ.'s limitation of the interest protected to those held not just as a member of the public or a class of the public?[66] The limitation harks back to the approach of Jacobs, J., who, as a member of the minority in *Salemi (No. 2)*, in discussing legitimate expectations said

> Though the principles of natural justice extend to executive or administrative acts, it is necessary to bear in mind that the kind of act here referred to is the act which directly affects the person (or corporation) individually and not simply as a member of the public

[64] (1985) 62 A.L.R. 321 at 383.
[65] *Heatley* v. *Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487.
[66] (1985) 62 A.L.R. 321 at 346.

> or a class of the public. An executive or administrative decision of the latter kind is truly a "policy" or "political" decision and is not subject to judicial review.[67]

Brennan, J. said that there is a presumption that procedural fairness applies to a statutory power if its exercise affects the interests of an individual alone, or is apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public.[68] This test, intended to filter out policy decisions, made in the public interest, conjures up some of the tests for standing to seek remedies in public law. It was to this sphere that Brennan, J. turned.[69]

At first blush this seems a logical move. In public law as in private law a complainant whose legal right is affected by a decision has standing to sue. But the courts have had to grapple with the issue of the grounds upon which a person whose legal rights are not affected should be permitted to bring an action to right a public wrong. The issue of criteria for establishing standing to seek remedies in public law is parallel to the issue of criteria for the implication of procedural fairness. In both contexts the court has a task of filtering out those numbers of the public whose interests are not appropriately or sufficiently affected by the administrative decision. It was his consideration of standing in an earlier case which inspired Jacobs, J.'s approach.[70]

After mentioning the common law tests for standing to seek the remedies of *certiorari* and injunction, Brennan, J. applied the test for standing to seek an injunction,[71] concluding that the Kioas did have a special interest in the subject matter of the application. On this test, the applicants would not only have standing to seek an injunction to restrain their deportation, but also be entitled to procedural fairness. Once standing at common law is established, then procedural fairness applies.

However, in his careful consideration of whether the legislature intended to exclude natural justice Brennan, J. displayed a reluctance to forget altogether the traditional test for the implication of natural justice.[72] His Honour appears to be torn between two devices for screening out cases where procedural fairness ought not to be implied. Statutory construction could be maintained as a filter, a more searching process, requiring the drawing of inferences, than simply ascertaining legislative intention from the presence or absence of "express words of plain intendment"[73] in the empowering legislation.[74] The unfettered

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[67] (1977) 137 C.L.R. 396 at 452.

[68] (1985) 62 A.L.R. 321 at 373.

[69] *Id.* 374-5.

[70] *Mutton* v. *Ku-ring-gai Municipal Council* [1973] 1 N.S.W.L.R. 233 at 241-3: *Salemi (No. 2)* (1977) 137 C.L.R. 396 at 452.

[71] *Australian Conservation Foundation* v. *Commonwealth* (1980) 146 C.L.R. 493.

[72] *(1985) 62 A.L.R. 321 at 376-377.*

[73] *Commissioner of Police* v. *Tanos* (1958) 98 C.L.R. 383 at 396.

[74] It was by emphasising this element in Brennan, J.'s judgment that Everett, J. reached the conclusion in *Idonz Pty. Ltd.* v. *National Capital Development Commission* (1986) 67 A.L.R. 46 that procedural fairness was not implied.

nature of the power and the sanction the decision-maker may impose are taken into account. The alternative is the filter to which abandonment of the expression "legitimate expectation" would impel Brennan, J.: the dissolution of the test for implication of natural justice into the test for standing at common law to seek a public law remedy.

The second filtering mechanism is a viable approach in the United Kingdom, where Order 53 of the Supreme Court Rules has introduced a simple procedure in public law, the application for judicial review, and a uniform standing test of a "sufficient interest". A legitimate expectation has been held to amount to a sufficient interest.[75]

But public law in Australia is still dogged by a multiplicity of remedies. If the test for the application of procedural fairness is merged with the test for standing is it to differ according to the remedy sought by the applicant? Also to be taken into consideration are the statutory standing rules under the Administrative Decisions (Judicial Review) Act 1977 (Cth.), which has introduced a simple procedure of an application for an order of review of Commonwealth administrative action. The test for standing is that the applicant be a "person aggrieved".[76] But the common law rules as to standing still apply to some public law disputes concerning Commonwealth administrative action, and the majority of disputes concerning State administrative action.[77]

Perhaps Brennan, J. intended that one test be uniformly applied: whether the applicant has a special interest in the subject matter of the action. But then a court may have to apply different tests in one case.[78] In *Kioa* itself standing was determined by application of the test under the Administrative Decisions (Judicial Review) Act. Should the implication of procedural justice then be determined by the common law rule for standing to seek an injunction?

A solution to these difficulties of consistency in the application of Brennan, J.'s proposal may be sought in implementation of the Law Reform Commission's recommendation for a uniform standing rule to replace in general the common law rules.[79] The test is markedly more liberal than the stricture of Mason, and Deane, JJ. that for procedural fairness to apply the administrative decision must not solely affect a person

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[75] See *O'Reilly* v. *Mackman* [1982] 3 W.L.R. 1096. Order 53 rule 1 (2) of the Supreme Court Rules is now incorporated within section 31(2) of the Supreme Court Act 1981 (U.K.).

[76] Ss. 3(4), 5, 6, 7.

[77] At the Commonwealth level, proceedings in the original jurisdiction of the High Court (Commonwealth of Australia Constitution Act 1900 (Cth.), s. 75) and the "extended jurisdiction" of the Federal Court (Judiciary Act 1939 (Cth.), s. 39B, 44). With regard to remedies on review of State administrative action, see Administrative Decisions (Judicial Review) Act 1977 (Cth.), s. 9; Supreme Court Act 1970, (N.S.W.) ss. 65, 69, 75; Administrative Law Act 1978, (Vic.).

[78] It was for this reason, and because Brennan, J.'s approach does not yet have the support of the other judges of the High Court, that Woodward, J. refused to follow it in *Idonz Pty. Ltd.* v. *National Capital Development Commission* (1986) 67 A.L.R. 46.

[79] Law Reform Commission *Standing in Public Interest Litigation* (Report No. 27, 1985). The Commission's test is however, not to displace the existing test for standing to require a statement of reasons to be given under the Administrative Decisions (Judicial Review) Act 1977 (Cth.) s. 13 and the Trade Practices Act 1974 (Cth.), s. 80(1)(c).

as a member of the public or a class of the public. Any person is presumed to have standing to initiate public interest litigation unless the court finds he or she is thereby "merely meddling". A personal stake in the litigation is sufficient to give standing and is usually shown merely by the individual's having commenced the proceedings. A plaintiff who has no personal stake will only be excluded if his or her manner of presenting the issues in the litigation betrays a clear incapacity or unwillingness to represent the public interest adequately in conducting the case.

That the Commission's test was not designed as a screening device for the application of procedural fairness is demonstrated by the last element of the test. The Commission's objective, in formulating the standing test, was to ensure that legal issues of public significance may be brought before a court by a public-spirited citizen for resolution. That is an objective far removed from the purpose which standing rules traditionally served—to distinguish whether, amidst the class of individuals in the public affected by the administrative decision, the prospective litigant was affected in a special or peculiar way. Whilst that objective, of identifying some interest less than a private legal right which is affected by the administrative decision, is rapidly being discarded as standing rules are liberalised, it is the objective which Brennan, J. hopes to achieve by utilising standing rules in the context of procedural fairness.

It may be assumed that the public interest is involved in all disputes concerning administrative decision-making. But in some public law disputes, particularly those where denial of natural justice is alleged, the interests of the individual loom larger than the issue of the public interest. As Brennan, J. admitted, in adverting to the danger of the courts trespassing into the area of policy, which is to be decided upon by the administrator,

> It is hard to place the unseen suffering of a large and innominate group against the evident suffering of a present litigant and the difficulty is enhanced by the court's lack of familiarity with the considerations which the policy reflects.[80]

A uniform criterion for extracting from the mass of public law disputes those in which the courts ought *prima facie* to interfere upon the ground of lack of procedural fairness is not found in the Commission's recommended test for standing to initiate public interest litigation.

If standing rules do not provide an acceptable criterion for screening out cases to which procedural fairness ought not to apply, consider two further possible criteria. One is found in a distinction drawn by Lord Reid in *Ridge* v. *Baldwin*[81] between a Minister's decision relating solely to treatment of an individual and policy-making on a larger scale by the Minister, where the public interest is at stake even though the interests of individuals are also affected.

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[80] (1985) 62 A.L.R. 321 at 375-6.
[81] [1964] A.C. 40.

In the distinction there can be sensed the traditional objective of standing rules—to distinguish whether the litigant was affected in a special or peculiar way. After *Ridge* v. *Baldwin* it was no longer necessary to point to a case as being of the individual treatment type, or adjudicative, in order to show an administrator had a duty to act judicially and hence was bound by the rules of natural justice. However, given the flexible content of natural justice, adjudicative decision-making would demand a more exacting hearing procedure. Thus, what a Minister ought to do in considering objections to a motorway scheme may be very different from what a watch committee ought to do in considering whether to dismiss a chief constable.[82]

Lord Reid's distinction deserves consideration as a means of marking the borderline between expectation cases and application cases. The problem is that there is often an element of policy-making even in an adjudicative decision. Organisation theorists say that much administrative decision-making is incremental. Rather than policy being made on a large scale, as a rational choice between alternative values with their alternative consequences, policy is made in a piecemeal fashion in the course of case-by-case adjudication.[83] Determining whether a case is characterised by "strong and compassionate or humanitarian grounds"[84] requires the exercise of discretion. Departmental policy guidelines structuring and confining the administrator's discretion cannot be applied mechanically. Departmental guidelines themselves contain vague and open-textured terms whose application requires an exercise of discretion, a discretion which may well be swept along by the media attention and political currents which surround many immigration cases and supply overwhelming policy considerations.

Finally, consideration might be given to the presence of a duty on the party of the administrator to give reasons for its decisions as a crucial criterion for the implication of procedural fairness. In *Kioa* Mason, and Wilson, JJ. and *semble*, Brennan, and Deane, JJ. found that the enactment, since *Salemi (No. 2)* and *Ratu* were decided, of s. 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth.), was an important new factor which indicated a legislative intention not to exclude procedural fairness.[85] S. 13 requires certain administrators exercising power under Commonwealth enactments (including the Minister for Immigration and Ethnic Affairs exercising power under s. 18 of the Migration Act (Cth.)) to give reasons upon request for their decisions.

The applicability of s. 13 to an administrative decision is clearly not an acceptable criterion for defining the line between application cases and cases where procedural fairness applies. Administrators do not at common

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[82] It is along these lines that Mason, J. in *Kioa* (1985) 62 A.L.R. 321 at 346 appears to understand the statement by Jacobs, J. in *Salemi (No. 2)* (1977) 137 C.L.R. 396 at 452. See also the discussion of Cooke, J. in *Dagayanasi* v. *Minister of Immigration* [1980] 2 N.Z.L.R. 130.

[83] D. Braybrooke and C. E. Lindblom, *A Strategy of Decision* (1963, 1970).

[84] Migration Act 1958 (Cth.), s. 6A(8).

[85] (1985) 62 A.L.R. 321 at 342, 355-7, 377-8, 383.

law have a duty to give reasons for their decisions, nor is such a duty an aspect of the rules of natural justice.[86] Only one of the States has made statutory provision for a duty to give reasons.[87] Even at the Commonwealth level s. 13 applies to only a sub-class of the decisions to which the new procedures of the Act apply.[88]

S. 13 cannot provide a uniform criterion for the implication of procedural fairness and its applicability may not even be a reliable guide in a particular case.

*Conclusion*

In one sense the High Court in *Kioa* has demonstrated a vision beyond that of its English counterparts. The implication test for fairness has been relaxed and the continuing usefulness of the concept of the legitimate expectation questioned. Certainly some members of the High Court, in closely examining the legislative changes subsequent to *Salemi (No. 2)* and *Ratu*, still placed emphasis upon the nature of the administrative power, demonstrating a lingering attachment to the traditional approach to natural justice—to fairness writ small. But the judges were anxious to justify the departure from the view the Court had taken in the earlier cases. The thrust of the judgments of Mason, Brennan, and Deane, JJ. is that henceforth in Australia procedural fairness is demanded of a much wider spectrum of administrative decision-makers, extending beyond those whose decisions affect legal rights and legitimate expectations.

Those three of the four judges in the majority in *Kioa*, having clearly moved away from the implication test in *Durayappah* v. *Fernando*, were fundamentally concerned with the sorts of interests which ought to be protected by procedural fairness. Recourse to standing rules proposed by Brennan, J. does not promise a consistent criterion tailored to what might be expected to be the objective of an implication test. The implication test stated by Mason and Deane, JJ. cannot be founded upon Lord Reid's distinction, which fails to cut through the vast blur of administrative decision-making in which policy-making and adjudication of individual cases are intertwined. Nor does the statutory duty to give reasons for decisions provide an acceptable test.

There is no obvious answer to the question how the implication test may be relaxed without blotting out completely the diminished category of application cases, where procedural fairness is not implied. What is required is a minimal test as to the justiciability of an issue. The application cases have provided the paradigm of the non-justiciable issue in natural justice. Yet even apart from the breaking down of the distinction between

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[86] *Public Service Board of New South Wales* v. *Osmond* (1986) 63 A.L.R. 559.

[87] Administrative Law Act 1978, (Vic.), s. 8.

[88] Administrative Decisions (Judicial Review) Act 1977 (Cth.), ss. 5, 13(1), (8)-(11), 13A, 14, Schedule 2. See D. C. Pearce, *Commonwealth Administrative Law* (1986), paras. 357, 361-3. Note the limitations upon the class of Commonwealth decisions to which the Act itself applies: *id.*, s. 3(1), (2), (3), Schedule 1.

this category of cases and the expectation cases, this sphere of administrative decision-making is being eroded by checking by tribunals and courts of certain adjudicative decisions in order that policy objectives of government may be pursued.[89] Still untouched, however, are decisions made at a high level of the executive, usually in the exercise of prerogative power, such as the dissolution of Parliament, the making of treaties, the grant of the Attorney-General's fiat to a relator action, the grant of honours, the Attorney-General's entry of a *nolle prosequi*.[90]

Nevertheless it is arguable that no public law dispute is inherently non-justiciable. Justiciability substitutes for the discarded expectation/application distinction a test which provides no more guidance than does Lord Reid's distinction. At best justiciability is a cluster concept.[91] The justiciable public law dispute is distinguished from the non-justiciable one on the ground that it has the necessary and sufficient features to fall within the cloudy parameters of the concept. In the end justiciability is determined in the exercise of judicial discretion as the issue arises in hard cases.

Pushing the threshold for the implication of procedural fairness to the edges of the concept of justiciability is not however a useless exercise. It is worth arguing that the implication test has, with the development of procedural fairness, dissolved to such an extent. Fairness is then fairness writ large. The test will not often need to be applied. Usually we know a justiciable public law dispute when we see it. *Kioa* is one example. Indeed it is to be hoped that the High Court has now left behind it the need to dwell upon the formulation of an implication test. It will, if it is true that the critical question now is what is the content of fairness.

The advocated attrition of the implication test is, for a further reason, likely to occur naturally. If the High Court fully embraces fairness as it has developed in the English decisions the screening device of an implication test will in many cases be unnecessary. In the United Kingdom fairness has spanned more than one ground of review and has provided a vehicle for judicial reliance upon reasons drawn from the doctrine of estoppel. Whilst the courts formally reject estoppel as a ground of review in public law where it would prevent the performance of a statutory duty or hinder the exercise of a statutory discretion, "estoppel-type" considerations often incline the courts to conclude that the administrator has acted unfairly.[92]

In such cases the importance of the implication test is much reduced, either because unfairness amounts to an abuse of power (for which no

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[89] *E.g.*, Racial Discrimination Act 1975 (Cth.), Sex Discrimination Act 1984 (Cth.) and anti-discrimination legislation of the States.

[90] *GCHQ* [1985] A.C. 374 at 418; *Coutts* v. *Commonwealth* (1985) 59 A.L.R. 699.

[91] H. Putnam, "The Analytic and the Synthetic" in Feigl and Maxwell (eds.) 3 *Minnesota Studies in the Philosophy of Science* 378 (1962); Wittgenstein, *Philosophical Investigations* (trans. E. M. Anscombe, 2nd ed., 1958) Part I, para 66.

[92] *E.g.*, *H.T.V. Ltd.* v. *Price Commission* (1976) I.C.R. 170; *R.* v. *Liverpool Corporation; ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299; *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 A.C. 629; *In re Preston* [1985] 2 W.L.R. 836; *R.* v. *Secretary of State for the Home Department; ex p. Khan* [1985] 1 All E.R. 40.

screening device is appropriate) or because the important factor is that it is to the applicant that the administrator has made an express or implied representation. In its ramifications for the administrator this is fairness writ large. The administrator will have blundered not just by deciding according to the wrong procedure but by deciding in excess of power. Or, the administrator will be required to honour an undertaking it has made provided that is consistent with its statutory duty. Fairness writ large may radically limit the administrator's discretion, allowing the court to give recognition to the mutual expectations generated in the course of the administrator's interaction with a citizen.

In immigration cases not unlike *Kioa* the administrator may act unfairly by failing to take into account relevant considerations or by taking into account irrelevant considerations, or by inflexibly applying a policy.[93] Such unfairness may amount to an abuse of power.[94] Writ larger, like this, fairness requires a hearing without the need for an implication test.

There is a remaining problem. It is all very well for procedural fairness to be implied. But that is of little use to the litigant if the content of fairness is minimal, perhaps already having been complied with by the administrator. There were suggestions in the judgments of Mason and Brennan, JJ. in *Kioa* that in cases where the reason for deportation is that the person is a prohibited immigrant the content of fairness is nothing. The person is not even entitled to notice that a decision adversely affecting him or her is about to be made.[95] In such circumstances, although the legal reasoning leading to the result is now different, the deportee is no better off than under the regime of *Salemi (No. 2)* and *Ratu*. As in *GCHQ*, policy considerations outweigh those of fairness: the object of the Migration Act ought not to be frustrated by requiring notice to be given which would facilitate the prohibited immigrant's evading the authorities.

But would a Minister ever make a deportation decision solely on the ground that the person was a prohibited immigrant? Most prohibited immigrants enter Australia legally. Many will have requested a further temporary or a permanent entry permit prior to the deportation decision. Decision-making on either application in a typical case requires consideration of personal circumstances other than the immigrant's status under the Migration Act.[96]

Wilson, J., in considering the changes in the statutory scheme since *Salemi (No. 2)* and *Ratu*, conceded, somewhat reluctantly, that in view of certain of the provisions for grant of temporary and thence permanent entry permits, it was possible to discern a "relevance, albeit attentuated",

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[93] Deane, J. appears to have been open to such an argument, (1985) 62 A.L.R. 321 at 383-4.

[94] The Minister for Immigration and Ethnic Affairs was held by the Federal Court to have acted in abuse of power by failing to take into account relevant considerations in *Minister for Immigration and Ethnic Affairs* v. *Tagle* (1983) 48 A.L.R. 566. On *unfairness* in taking into account irrelevant considerations, see *per* Dunne, L.J., *R.* v. *Secretary of State for the Home Department; ex p. Khan* [1985] 1 All E.R. 40 at 52.

[95] (1985) 62 A.L.R. 321 *per* Mason, J. at 348, *per* Brennan, J. at 378.

[96] Migration Act 1958 (Cth.), ss. 6(2), (2A), 6A, 7(2).

of strong compassionate or humanitarian grounds to the exercise of the Minister's discretion to order deportation under s. 18.[97] Mason, J. qualified his assessment of the content of fairness where a person is deported by reason of being prohibited immigrant. His Honour said that where the decision is proposed to be based upon some consideration beyond the mere fact of the person's being a prohibited immigrant, and the further consideration is one which is personal to the applicant and with which he has not dealt in his application, the applicant is entitled to a hearing.[98] Wilson, J. said that any submission or factor which contributes to or supports the delegate's recommendation for deportation and which could prejudice the applicant's case and which the applicant has not addressed in any submission he or she has made, will raise a requirement that it be put to the applicant.[99]

Personal considerations of the applicant will often have been drawn to the attention of the Minister by the applicant in attempting to satisfy the Minister that he or she should be granted a temporary or permanent entry permit. The relevance or weight of such considerations will enter into the decision-making process of the delegate. The delegate may also make some inquiries independently of the information provided by the applicant. *Kioa* is certainly authority that any adverse information from other sources regarding personal considerations has to be put to the applicant so that he or she may comment upon or contravert it. If independent sources were always relied upon, there might then be no instances of the class of case where the Minister deports for the sole reason that the applicant is a prohibited immigrant. Fairness would require a hearing in every case.

But suppose no other source of information regarding personal considerations is placed before the Minister than what has been provided by the immigrant? Here it seems, the content of fairness is limited to the provision of the very occasion upon which that information was furnished by the applicant.[100] If the applicant, not knowing the rules of the game he or she is playing with the administrator, presents his or her case in a poor light, the position is irretrievable.[101] No further opportunity for a hearing need be offered and no further submission accepted.

But it is grossly paradoxical that the content of fairness is reduced by the administrator's decision whether or not to investigate beyond the poor picture presented by an applicant. The content of fairness does hang

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[97] (1985) 62 A.L.R. 321 at 359. In particular, Migration Act 1958 (Cth.), s. 6A(8)(e).

[98] *Id.* 348.

[99] *Id.* 360-1.

[100] In *Koh* v. *Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, 30 April 1986) Beaumont, J. held that procedural fairness was afforded by the initial interview. The Minister's delegate did not rely upon personal considerations derived from any other source and the intimation by the immigrant's solicitor that he would make further submissions did not raise a duty to give further notice before the deportation decision was made.

[101] *E.g., Sinnathamby* v. *Minister for Immigration and Ethnic Affairs* (1986) 66 A.L.R. 502. But see *Videto* v. *Minister for Immigration and Ethnic Affairs (No. 2)* (1985) 2 A.L.N. 238, where abuse of power for failure to take into account relevant considerations was made out.

upon the circumstances of the case, but is it contingent in this arbitrary sense?

Although some judges of the Federal Court would answer in the affirmative,[102] I doubt whether Deane, J. would join them. In *Kioa* Deane, J. said that apart from cases of necessity where it is impracticable to extend to a prohibited immigrant an opportunity of being heard (say because he or she has gone into hiding) it is difficult to envisage a case in which the particular circumstances would indicate that fairness did not require a hearing to be afforded.[103] Indeed his Honour took the view that even where the sole reason for deportation is that the person is a prohibited immigrant, that person should have the opportunity to raise particular matters, even just to challenge current government policy.[104]

With respect, Deane, J.'s approach is to be preferred. The approach is sensitive to the principle of administrative law that an administrator who applies a policy inflexibly acts *ultra vires.* Whilst a Minister is entitled to adopt a policy of deporting simply for the reason that the person is a prohibited immigrant, the Minister must still consider each case on its merits. This means always being willing to listen to the applicant who has something new to say.[105] Procedural fairness must, in its application in particular cases, mesh in with other principles of administrative law, as English decisions are now beginning to demonstrate.[106]

The extension by the courts of procedural fairness to further fields of administrative decision-making, a process illustrated by *Kioa,* will not then be an empty gesture in many contexts, a right with no content. The cases where procedural fairness is outweighed by considerations of national security or the efficient operation of legislation regulating the composition of the Australian community, will be exceptional.[107]

If, absent a clear legislative intention excluding natural justice, the critical question now is what is its content, then fairness will be writ large by the High Court. Litigation will not be futile, having an outcome which is, as it may have been in the case of the Kioas, "a very slender technical victory", but will be of real utility to the complainant.[108]

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[102] See Fox, and Neaves, JJ., Burchett, J. dissenting, *Sinnathamby* v. *Minister for Immigration and Ethnic Affairs, ibid.*, where the applicant condemned herself out of her own mouth.

[103] (1985) 62 A.L.R. 321 at 383-4.

[104] *Ibid.*

[105] *British Oxygen Co. Ltd.* v. *Minister of Technology* [1971] A.C. 610.

[106] For an Australian decision based upon the ground of inflexible application of policy rather than natural justice, but in the context of refusal of an entry permit, see *Chumbairux* v. *Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, 17 September 1986). See also *Turner* v. *Minister for Immigration and Ethnic Affairs* (1981) 35 A.L.R. 388; *Tang* v. *Minister for Immigration and Ethnic Affairs* (1986) 67 A.L.R. 177, which turned upon statutory construction rather than the common law principle.

[107] *E.g., GCHQ* [1985] 1 A.C. 374 *per* Lord Roskill at 418, *per* Lord Scarman at 407; *Coutts* v. *Commonwealth* (1985) 59 A.L.R. 699; *Builders Registration Board of Queensland* v. *Rauber* (1983) 47 A.L.R. 55.

[108] *Per* Wilson, J. (1985) 62 A.L.R. 321 at 360-1. See also *per* Brennan, J. *id.* 380, *per* Deane, J., *id.* 383-4.