MIGRATION MERITS REVIEW AND RIGHTS OF APPEAL IN AUSTRALIA

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The last 100 years

Migration law and practice is a rapid moving river. So much change has occurred in the last 100 years. Before World War I passports, identification cards, visas, and even driving licences were unknown. People moved from country to country at a more sedate pace yet with greater ease. As a boy in Scotland in the 1950s I can remember a red poster in the local country post office window saying '£10 to go to Australia'. I did not know until many years later it was a one way ticket! Now people are desperate to get a permanent visa to live in Australia whatever the cost.

With the introduction of border controls, after World War I, came increased administrative regulation and it was administrative regulation, rather than judicial determination, that decided grants of entry. Legal action to test the validity of adverse immigration decisions occurred even before Federation but statutory powers of government to exclude, detain and deport aliens were handled under a broad governmental statutory discretion.

As late as 1977 the High Court ruled in *R v Mackellar; Exparte Ratu*[1] that the Minister, in ordering deportation of a Tongan, who had overstayed a visitor's visa, was not required to observe the principles of natural justice. Then a new approach was signalled in 1985 with the decision of *Kioa v West* [2] which effectively reversed *Ratu's* case. One consequence is that in immigration decision-making generally there is a greater chance a decision may be ruled invalid.

In 1990 the High Court ruled that the Minister was obliged by the rules of natural justice to provide a hearing to Mr Haoucher [3] before rejecting a recommendation of the Administrative Appeals Tribunal ('AAT') that he not be deported.

Two years later parliament enacted a new scheme for review of immigration decision-making. Departmental decisions were reviewable on the merits by the Immigration Review Tribunal (later the Migration Review Tribunal ('MRT')); the Refugee Review Tribunal ('RRT') and the AAT. This framework heralded a much greater judicial involvement in the migration area.

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Increase in Federal Court case load

In 1987 - 1988 there were 84 migration cases filed in the Federal Court. By 2000/2001 it was 1,340. By 2002 over 50% of the decisions of the Federal Court and Full Bench were in migration matters [4].

The reaction of both Labor and Liberal governments to this increased role of judicial intervention is evident, particularly in the asylum area but also more widely. There was the introduction of temporary protection visas; then the excision or removal of certain territories and islands around Australia so as to prevent access to the courts; and then the introduction of a privative clause provision in s 474 of the Migration Act 1958 (Cth) ('the Act') intended to radically restrict rights of appeal to the Federal Court. This last measure was intended to extend to appeal rights open to unsuccessful visa applicants in general. The High Court still retained, through s 75(v)[5] of the Constitution, original jurisdiction to issue constitutional writs against Commonwealth officers, such as the Minister for Immigration. The inevitable consequence of cutting off rights of appeal to the Federal Court was to flood the High Court with applicants for protection visas -- although this course ultimately was frustrated, as we shall see, by the High Court's interpretation of the privative clause.

Merits and judicial review distinguished

Merits and judicial review point to dissimilar procedures and practices. In the case of merits review the Tribunals, whether they be the AAT, the RRT, or the MRT, conduct a complete rehearing of the applicant's case. The role of a Tribunal is not confined to reviewing the correctness of the delegate's decision. It is an opportunity for the applicant to canvass material which was not before the delegate. Conversely, any further appeal to the Federal Court is confined to a review of the material which had been lodged with the Department of Immigration ('DIMIA') and the Tribunal.

This difference of approach points to the critical importance of the applicant's advisors ensuring that all relevant material is before the Tribunal to satisfy it that the applicant qualifies for a visa.

This should not mean merely ensuring that there is some material to satisfy the Tribunal in respect of each necessary condition for a grant of a visa. It is vitally important to provide corroborative material, by which I mean material that independently supports the truth of matters which are asserted by the applicant. For example, in an application for a spousal visa, where there is a question whether, and at what stage, the de facto relationship became a genuine and continuing relationship to the exclusion of all others, an assertion that the happy couple spent a weekend together in Margaret River at a hotel at a specific time ought to be supported by a hotel receipt recording the event. Certainly in nearly all cases Tribunals have an understandable scepticism about unsupported assertions by applicants.

Where a Tribunal refuses an applicant a visa, the prospects of reversing the decision on appeal to the Federal Court are much less if there is a serious deficiency in the evidence lodged with DIMIA and the Tribunal, particularly where adverse findings had been made on the applicant's credibility. If the evidence is sufficient but the error is one of misapplying the law, then an appeal stands a much better prospect of success.

Conduct before the Tribunal

There are many good articles about how to conduct cases before the Tribunal[6]. I will not canvass that area. Recent case law has significantly limited the obligation placed upon a Tribunal, as an inquisitorial body, to explore for itself evidence to support claims not presented to the Tribunal on behalf of the applicant. Indeed, it has been held that where a

client is represented by a lawyer or migration agent at the primary merits review level this can result in the court presuming that all relevant matters were drawn to the attention of the decision-maker [7].

In particular, the High Court has taken a very restricted view of how far Tribunals have a duty to engage in inquiries of their own to verify the facts relevant to an applicant's claims. The Tribunal does have a duty to address the claims advanced before it, but this may mean no more than analysing the sufficiency of evidence led by the applicant to support the claim [8]. It cannot be taken for granted that a Tribunal will look beyond the evidence presented to it in arriving at its decision.

Tribunal members usually allow the adviser at the outset to inform the Tribunal of the witnesses available to be heard. It is desirable that full proofs of the evidence of these witnesses has been obtained and forwarded to the Tribunal in advance of the hearing. It is entirely in the Tribunal's discretion whether or not the Tribunal wishes to hear from a witness in person [9]. If the Tribunal declines to do so, and it can be shown that the Tribunal overlooked evidence supplied in the witness's statement, or rejected such evidence without regard to its availability, the applicant is then in a much stronger position to argue on appeal a jurisdictional error once an adverse finding is made to which some evidence would have been relevant. If there is no statement from the witness available to the Tribunal, the adviser may not get the opportunity during the hearing to explain adequately, or sometimes at all, the nature of the specific evidence that the witness would have been able to give if the Tribunal had chosen to call the witness.

Generally the Tribunal will want to hear from the applicant first. Again, it is important to appreciate that the Tribunal will be unaware of what evidence an applicant can give unless that material is available to the Tribunal from DIMIA documentation and departmental interviews conducted before the hearing takes place. Although some Tribunal members invite the adviser to suggest questions which may be asked additional to those from the Tribunal, many do not. Furthermore, usually questions are asked by the Tribunal of an applicant in a way which does not prompt the applicant or elicit from the applicant any more than what the applicant chooses to volunteer in answer to the questions. This being so, it is generally desirable to supply the Tribunal with a detailed statement before hand of what the applicant will say. This serves the purpose of enabling the Tribunal to appreciate the full scope of what it is that the applicant can say, and forms a record of evidence before the Tribunal which the applicant has furnished, whether or not this evidence is brought out during questioning by the Tribunal.

Although a signed statement from the applicant, forwarded to the Tribunal ensures the Tribunal knows what the applicant can say, it should be appreciated that the Tribunal will then compare the evidence elicited from the applicant at hearing with both the statement forwarded and with other previous statements made by the applicant to DIMIA. Usually what the applicant has said to the Departmental delegate is available to the Tribunal including any of the delegate's notes of the interview, and also what the applicant said in the initial application for the visa. On the other hand, a statement of evidence by the applicant will be a further account of relevant events available to the Tribunal in making an assessment of credibility based upon the consistency and reliability of the applicant's evidence. So if the applicant is someone with an unreliable memory, given to contradictory accounts, and inclined to volunteer information when not sure of its accuracy, then you may decide not to provide a statement prior to the hearing of the applicant's evidence before the Tribunal.

In deciding whether to forward statements in advance of the hearing, much will depend upon the nature of the visa sought, whether the applicant will be able to provide all necessary information without elaboration when asked by the Tribunal, whether previous statements supplied by the applicant to DIMIA cover all necessary evidential issues and so on. In any

event you should take a detailed proof of evidence. If time allows, proof the applicant more than once. It is remarkable how memory of events improves the more frequently a witness is questioned.

At the conclusion of the hearing the Tribunal member usually invites the adviser to make a closing statement. This should emphasise those aspects of the applicant's legal and factual case which your analysis of the Tribunal's examination of the witnesses suggests the Tribunal is most interested in addressing.

Since the recent Federal Full Court decision in *Zubair v MIMIA* [10] there has been a series of decisions holding that a delegate's invalid decision because of some defect in the hearing before the delegate may be 'cured' by proper procedures being followed by the Tribunal. Accordingly, the emphasis in addressing the Tribunal has inevitably shifted to convincing the Tribunal of the merits of the applicant's argument in the Tribunal itself, rather than exposing deficiencies in the delegate's approach. Of course, in preparing a case for a Tribunal hearing, particular regard should be had to the delegate's reasons for refusing the visa because those reasons may well influence the Tribunal in its consideration of the matter afresh. But it is quite open to the Tribunal to reject the reasoning of the delegate and still find that the visa was correctly refused or cancelled for reasons which differ from those of the delegate. In the *Zubair* case it was said that mere invalidity by the delegate in decision-making did not necessarily mean the Tribunal could not remedy the deficiency. In that case there had been before the delegate insufficient particulars of the grounds alleging breach of a student visa and insufficient opportunity for the student to answer the breach allegations. Nevertheless these deficiencies could be remedied by a proper approach before the Tribunal. Much will depend on the nature of the delegate's decision being impugned. *Zubair* may not be the final word upon this controversial area.

While oral submissions to the Tribunal may need to be confined to salient aspects which you think would exercise the attention of the Tribunal, it is always open to you to tell the Tribunal that you would appreciate a limited time to forward submissions (and any documentary material) which may canvass the law and the evidence in greater detail.

Rights of appeal

Both in Australia and England there have been increased efforts by the government to limit visa applicants' access to the courts. The large number of asylum seekers, the protracted nature of the judicial process, and the cost of superintending unauthorised arrivals, prompted strategies to be employed in Australia to limit court process. One strategy has been to excise various parts of Australia's territories from being treated as Australia for the purposes of judicial review. A second has been to restrict access to lawyers in the detention centres unless the detainee expressly asks for a lawyer under s 256 of the Migration Act.[11] A third was the introduction of a privative clause provisions (s 474 of the Migration Act) which was intended to severely limit access by applicants to the courts in all visa classes after administrative tribunal review had been completed. Under this provision, it was intended that the Federal Court would have no power to hear appeals from the RRT, MRT and AAT in relation to the grant, refusal or cancellation of visas. While the Federal Court had a limited power under s 39B of the Judiciary Act to review cases, the privative clause provision in s 474 was intended to remove the means to overturn visa cancellations and refusals. The privative clause provision replaced limited rights of appeal that previously existed under Part VIII of the Act.

In one of the High Court's most influential decisions, *Plaintiff S157 of 2002 v Commonwealth of Australia* [12], the Court found that the privative clause purporting to prevent appeals to the Federal Court would not apply where the decision of the Tribunal was made in excess of its jurisdiction. The court reasoned that where a jurisdictional error was made by the Tribunal in

the course of reaching a decision, the decision was nullified and for the purposes of s 474(2) of the Act it could not be construed as 'a decision … made under this Act'.

The High Court's opposition to the government's legislative approach, which sought to use a privative clause decision to prevent appeals, was based on constitutional principle. Administrative decision-makers cannot be left to determine the boundaries of their own jurisdiction. While the executive government may properly determine administratively the merits of applications, it is not open to it to also interpret and determine the permissible boundaries of the law that a statute requires them to administer.

It is for the primary decision-maker and the Review Tribunal to determine the merits of the particular case for that is the administrator's function. In determining the merits of an application for a visa, the decision-maker makes findings on credibility and, provided these are not illogical, irrational, or so unreasonable that no reasonable Tribunal could make them (known as *Wednesbury* unreasonableness) the appeal court will not disturb those findings. As we will see it, it is probably the law in Australia now that even *Wednesbury* unreasonableness is not available as a ground of appeal [13].

One consequence of the court's restricted review function is that it prevents an applicant from adducing additional evidence where this was not either before DIMIA or supplied to the Tribunal before it made its decision. Although the theoretical basis for admitting evidence in the Federal Court is very broad, in practice the Court will not generally allow deficiencies in the applicant's case to be remedied. After all, the appeal is a review of the Tribunal's decision based upon the material available to the Tribunal and not a review of the merits of the application. This is discussed in more detail later.

What happens when the Tribunal decides adversely to the applicant?

The first notification of an adverse decision is of course the delivery of the decision itself together with the reasons. With the delivery of the decision time for lodging an appeal commences and, if an appeal is not lodged within the prescribed time [14] to the Federal Court, then the Court has no jurisdiction to hear the matter. It is therefore important to have the reasons advanced for the decision appraised quickly.

In the first instance this involves an examination of the reasons for the decision, though very often the reasons do not disclose legal errors.

It is therefore very important to obtain the tape of the oral hearing before the Tribunal and, where possible, also any tape of the hearing before the delegate. These should then be transcribed. Sometimes a transcript of the oral hearing before the Tribunal will reveal that the Tribunal ignored or misstated evidence; failed to give the applicant an opportunity to comment upon information that forms part of the reason for an adverse finding; addressed itself to the wrong issues; or committed some other irregularity.

Another important step is to carry out a Freedom of Information search to ascertain what material it was that the delegate and the Tribunal had regard to in arriving at their adverse decisions. This can sometimes produce surprising results. On one occasion it was discovered that there was a draft letter prepared by the Tribunal member seeking additional information from the applicant which was then never sent. Sometimes one finds interesting inter-departmental correspondence. For example, where a student visa has been refused, following a report by an education provider to DIMIA about the applicant's poor academic performance, there is sometimes correspondence, emails, or notes of telephone conversations that throw important light on the reason why the education provider issued a notice under s 20 of the Education Services for Overseas Students Act 2000 (Cth) or the basis upon which DIMIA cancelled the student's visa.

So where an appeal is being seriously contemplated, it is strongly recommended to get: the reasons for decision, the transcript of the oral hearing, and the FOI material. Whilst the reasons are usually immediately available, the transcript may take some days to arrange if the tape is not available, and the FOI information usually takes longer to obtain than the prescribed appeal period. If an appeal is to proceed then this will usually have to be lodged before the FOI material is available. Copies of much of the material may be on the agent's file but other FOI material may not. Grounds of appeal can be amended once information comes to hand but if the notice of appeal is not itself lodged within the prescribed period then the applicant's claim is defeated. Notices of appeal can be discontinued if subsequent information reveals no basis for the appeal to proceed.

In the case of an application for constitutional writs under s 75(v) of the Constitution the legislation purports to place a time limit of 35 days upon such a review [15]. However, usually a constitutional writ in the High Court is not sought before an applicant has exhausted grounds of appeal to the Federal Court. Generally speaking the High Court will not permit a constitutional writ under s 75(v) to go unless and until satisfied that all other avenues of appeal have been exhausted so usually, though not always, proceedings have been completed in the Full Court of the Federal Court.

Drafting grounds of appeal

The grounds of appeal require very careful work because those grounds will ultimately determine the success or failure of the appeal. As time goes on and further FOI information comes to hand, grounds are frequently amended. My own preference is to provide significant detail in the grounds of appeal so that it reads almost like a skeleton outline of argument. This degree of detail can have its draw backs in that it commits the applicant to a precise position. However, by the time the matter goes on appeal the applicant's advisers have to pinpoint with some confidence those grounds which merit close examination.

First, detailed grounds have the advantage that the court is clear about what the appellant's argument is. Secondly, costs may be saved in that quite often the Minister will concede a meritorious appeal before the day of argument because her legal advisers do not have to wait until the eve of the hearing when the appellant makes written submissions to appreciate what the argument will be. Thirdly, if the primary judge fails to address a specific argument of the appellant, which is detailed in the grounds of appeal itself, the Full Court on further appeal can see for itself that the primary judge has ignored the appellant's argument. Just as judges are no doubt justified in reproaching counsel on occasion for grounds of appeal which may be insufficiently particularised, or too prolix or diffuse, counsel often feel aggrieved when judges do not address the arguments which are advanced before them. The remedy lies in the appellant's hands.

What constitutes jurisdictional error?

In the leading case of *Plaintiff S157 of 2002 v Commonwealth* (which frustrated the government's intentions to block judicial review by introducing 'privative clause decision(s)' under s 474(2) of the Act), five of the Judges said:

> Breaches of the requirements of natural justice found a complaint of jurisdictional error under s 75(v) of the Constitution.[16]

Their Honours also said that:

> This court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'. Thus if there has been jurisdictional error because for example of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the

> decision in question cannot properly be described in the terms used in s 474(2) as 'a decision … made under this Act'.[17].

Plaintiff S157 of 2002 reaffirmed that where it can be said that a Tribunal has breached the requirements of natural justice or in some other way failed to discharge 'imperative duties' or to observe 'inviolable limitations or restraints' then it commits jurisdictional error.

In the earlier case of *Minister for Immigration and Multicultural Affairs v Yusuf* ,[18] McHugh, Gummow and Hayne JJ said:

> It is necessary, however, to understand what is meant by 'jurisdictional error' under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia* [19] if an administrative tribunal (like the Tribunal) falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
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> 'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law. [20]

It may therefore be said that the scope of jurisdictional error matches, and very possibly exceeds, the width of the earlier statutory provisions allowing for judicial review in Part VIII. Further, the outer boundaries of jurisdictional error have probably not been fully explored. I set out here some of the main grounds.

Procedural fairness

The new rule established by the High Court in *Kioa v West* [21] was that in the ordinary case the validity of a deportation decision depends on whether there had been a proper observation of the rules of natural justice. In that case Mr Kioa was providing pastoral support to other illegal Tongan immigrants and an internal memorandum said:

> Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern.

The majority considered that the remarks were extremely prejudicial and, in failing to give Mr Kioa a chance to respond to them, gave rise to a breach of natural justice. Mason J thought that if the only reason for deporting a person was their status as a prohibited immigrant a hearing would not be required nor was there a general obligation to allow a person to respond to material on file. However, Deane J thought that a person should have a prior and adequate opportunity to answer reasons which appear to favour deportation [23]. Brennan J considered that a person should have an opportunity to respond to 'adverse information that is credible, relevant and significant' [24].

In 2000 an application for judicial review was brought under s 75(v) of the Constitution arguing that the applicant had been denied natural justice by the Tribunal. The Tribunal had indicated in general terms to Mr Aala that it had before it the earlier Tribunal and court

papers. Through an inadvertent oversight the Tribunal did not have four handwritten documents provided by Mr Aala to the Federal Court on a previous appeal that had led to his application being referred back to the Tribunal for reconsideration. In failing to have regard to the documents the decision-maker deprived the applicant of a chance to answer by evidence an argument as to adverse inferences relevant to credibility. Gaudron and Gummow JJ said:

> … if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (and validly) limited or extinguished any obligation to accord procedural fairness, the officer exceeds jurisdiction… [25].

Their Honours cited Lord Diplock in *Mahon v Air New Zealand Limited* [26] where His Lordship said:

> … any person represented at the inquiry who will be adversely affected by the decision to make the findings should not be left in the dark as to the risk of a finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result [27].

Since the decision in *Aala* the government has introduced amendments to the Act which purport to limit procedural fairness by stating that the respective divisions of the Act relating to the MRT and RRT are 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'. The 'natural justice hearing rule' is not defined and the further words 'in relation to the matters it deals with' imports a more specific limitation upon the scope of s 357B and s 422B than might have been achieved by a global reference to the conduct of reviews by the Tribunal. The 'matters' Division 4 deals with are therefore to be identified by reference to its particular provisions and not by reference to its general subject matter, that is the conduct of reviews by the Tribunal[29].

Section s 359A and s 424A are concerned with the respective obligations of the MRT and RRT to give to the applicant particulars of any information that the Tribunal considers would be a reason or part of the reason for an adverse determination. Likewise, s 360 and s 425 require the Tribunal to invite an applicant to appear before the Tribunal and present arguments. In *Minister for Immigration and Multicultural Affairs v SCAR* [30] a Full Court of the Federal Court held that s 425 was breached because the Tribunal failed to provide a 'real and meaningful invitation'. The Tribunal had found the applicant's evidence vague and made adverse credibility findings on that basis. The applicant had produced a psychological report stating that he was in no condition to handle an interview. Likewise, where the applicant was unable to attend a hearing because of ill-health the provision was breached [31].

It can be seen from these examples that procedural unfairness (and it is not of course all cases of procedural unfairness that found jurisdictional error but serious breaches of the rule) includes statutory breaches under the Act. In such circumstances they may also be regarded as jurisdictional error because they involve a failure to discharge 'imperative duties' or observe 'inviolable limitations or restraints'.

Sometimes these statutory contraventions are to be found in the failure of a Tribunal to meet a condition precedent to the Minister's satisfaction under s 65 of the Act. That is to say there is a misapplication of the law by the Tribunal or perhaps it failed to give consideration to some necessary legal component for the grant of a visa.

The *Craig* Grounds [32]

There are then those categories of cases where a court has found that a Tribunal may have identified the wrong issue and thereby have fallen into error of law which constitutes jurisdictional error. For example, a Tribunal is empowered to revoke a student visa cancellation if it finds that there have been 'exceptional circumstances beyond the applicant's control'. Where the Tribunal has equated 'exceptional circumstances' with 'emergency circumstances', error may be shown. The student may have attended a doctor, and therefore missed attendance at the required 80% of lectures. To find the applicant was 'so ill' as not to be able to attend was held to constitute a wrong identification of the relevant issue [33].

Another sometimes fertile source of appeal can be 'ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power'. The reference is to 'considerations' and 'factors' and this probably includes relevant or irrelevant 'evidence' as well as 'no evidence' [34]. An example would be if a Tribunal rejected an applicant's account that he is of adverse interest to the authorities in his country of origin and ignored a letter which he produced to the Tribunal which recorded that he is required to report at the local police station to answer charges of a political nature.

More usually the Tribunals scrutinise documents forwarded to them but there are many instances where they have held documents to be fabricated. Where this occurs there may be an issue that arises as to whether the applicant has had an opportunity to meet the criticism that the document was not authentic [35].

New Evidence on Appeal

Under s 27 of the Federal Court of Australia Act 1976 (Cth), a court may receive further evidence. Although the circumstances are limited in which a court will hear further evidence, given its review function, one circumstance where additional affidavit evidence is important is where it is alleged that the applicant was deprived of the opportunity of addressing information that formed part of the Tribunal's adverse conclusion. Another maybe where it is not so much 'information' under s 359A or s 424A which has not been put to the applicant, but that the applicant was not given the chance to comment upon some conclusion that the Tribunal arrived at, eg that a document produced by the applicant was not genuine. In these cases an affidavit from the applicant should explain what evidence the applicant would give had he or she been asked about the issue, eg 'had I been asked by the Tribunal, I would have said, etc…'.

It is important to appreciate that even where the appeal court finds that there has been a jurisdictional error, a prerogative writ pursuant to s 39B of the Judiciary Act will not be issued unless there is some utility in this course being followed. For example, if the appeal court considers that the Tribunal ignored relevant material in the form of diary notes, being a contemporaneous record of persecutory conduct suffered by an applicant, the court would need to be persuaded that these notes, if taken into account and accepted as genuine, could have brought about a different conclusion by the Tribunal.

As the High Court explained in *Applicant NAFF v MIMIA,* [36] there are circumstances where it would become essential for an applicant to explain why a Tribunal's error might have a decisive effect on the outcome of the application.

***Wednesbury* unreasonableness**

There remains still an area of uncertainty as to the scope of judicial review. It seems now accepted, since *Lam v Minister for Immigration and Multicultural and Indigenous Affairs* [37],

that while procedural unfairness may be jurisdictional error, substantive unfairness is not. Again this is explained because of the restrictions placed in the Constitution upon judicial intervention in matters which are essentially administrative decisions. Traditionally the rationale for judicial review was that it was an aspect of the rule of law and could be explained by the principle of ultra vires (that is, acting beyond statutory or common law power). More recently the English courts have expressed the basis for judicial review as being to prevent executive abuse but this has not thus far been accepted in Australia [38].

In *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [39] the English Court of Appeal held that the exercise of a discretion will be invalid if the result is 'so absurd that no sensible person could ever dream that it lay within the power'. In Australia, *Wednesbury* unreasonableness will only be entertained if it can be said that the Tribunal's unreasonableness results in the Tribunal exceeding its jurisdiction. Even then it is only so-called '*Wednesbury* unreasonableness' and not simply 'unreasonableness' that can be invoked.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S/20 of 2002* [40] the comments of McHugh and Gummow JJ can be viewed as accepting that where a Tribunal makes findings which are 'illogical, irrational, or lacking a basis in findings or inferences of facts supported on logical grounds' this may ground jurisdictional error though certainly it would not where there was some evidence, albeit insufficient evidence, for the Tribunal to arrive at its adverse conclusion.

It has been held that, where a conclusion reached by a Tribunal rests upon a misconception as to the applicant's explanation, it may be that the requirement that the Minister be 'satisfied' that the visa should be refused has not been attained. Likewise, to make adverse findings as to credit based on non existent facts may amount to a failure to act 'according to substantial justice' under s 420(2)(b) of the Act; and misapprehension or misstatement of the evidence might also ground review. But these are all areas of law where the application turns very much on how far the errors affected the determination of the Tribunal and the composition of the court hearing the matter.

Despite the already extensive jurisprudence, advisers will remain corks on this rapidly moving river and we should not be surprised if the river of legislation and expanding case law will be taking many more twists and turns in the years to come.

Endnotes

1 (1977) 137 CLR 461.
2 (1985) 159 CLR 550.
3 (1990) 169 CLR 648.
4 These statistics are taken from various sources including DIMIA fact sheets referred to in footnote 8 of John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Fed L Rev* 335 at 337 to which article I am indebted for some of the introductory information.
5 Section 75(v) of the Constitution states that the High Court has original jurisdiction 'in all matters in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.
6 One such article is by Regina Perton and Roz Germov , 20 February 2004, *Seminar & Workshop Course Materials: Migration Practice Essentials Pty Ltd 2004*.
7 *Emiantor v MIMA* (1997) 48 ALD 635 at 648-9, 653 per Merkel J.
8 *Muin v RRT* [2002] 190 ALR 601 [7], [97], [208], [263]; *MIMA v SGLB* (2004) 207 ALR 12 [43], though Gummow and Hayne JJ's comments there are directed and confined to the absence of a statutory power being placed on a Tribunal to obtain medical reports.
9 Section 361(3) for MRT and s 426(3) for RRT.
10 *Zubair v MIMIA* (2004) 211 ALR 261.
11 *Wu Yu Fang & 118 Ors v MIMA* (1996) 135 ALR 583.
12 (2003) 211 CLR 476.

13 *Eshetu v MIMIA* (1999) 197 CLR 611. Gleeson CJ and McHugh J appear to consider *Wednesbury* unreasonableness does not permit s 75(v) constitutional relief [45]; Gummow J contemplates it might do so [126], [133] but not necessarily [139]; Hayne J and Callinan J express no concluded view [159] and [187].
14 28 days to the Federal Court (s 477(1)) and 21 days to the Full Court of the Federal Court though leave may be granted for good cause in the case of an appeal to the Full Court outside the 21 days.
15 Section 486A(1).
16 (2003) 211 CLR 476 at [45].
17 (2003) 211 CLR 476 at [76].
18 (2001) 181 ALR 1.
19 (1995) 184 CLR 163.
20 (2001) 181 ALR 1 at [82].
21 (1985) 159 CLR 550
22 *Kioa*, Mason J at 588.
23 *Kioa,* Deane J at 633.
24 *Kioa*, Brennan J at 629.
25 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 [41].
26 [1984] AC 808.
27 *Ex parte Aala,* per Gaudron and Gummow JJ at [78] (original emphasis).
28 Section 357 of the Act for the MRT matters (covering Division 5 of Part 5) and s 422B for the RRT matters (covering Division 4 of Part 7).
29 *WAJR v MIMIA* (2004) 204 ALR 624 per French J [57].
30 (2003) 198 ALR 293.
31 *NAHF of 2002 v MIMIA* [2003] FCA 140.
32 (1995) 184 CLR 163 at 179.
33 *Lei Chen v MIMIA* [2005] FCA 229.
34 Sir Anthony Mason, 'The Scope of Judicial Review' (2001) 31 *AIAL Forum* 21 at 32-33.
35 *WAJR v MIMIA* (2004) 204 ALR 624 at [52].
36 *NAFF of 2002 v MIMIA* (2004) 211 ALR 660.
37 *Re MIMA ex parte Lam* (2003) 195 ALR 502.
38 Bradley Selway QC, 'The Principle behind Common Law Judicial Review of Administrative Action - the Search Continues' (2002) 30 *Fed L Rev* 217. This is an excellent article on the origins and development of judicial review to which I am indebted.
39 [1948] 1 KB 223 per Lord Greene MR.
40 (2003) 198 ALR 59 per McHugh and Gummow JJ at [34].