PROBING THE FRONTIERS OF ADMINISTRATIVE LAW

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In its decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Plaintiff M70*')[1] the High Court ruled unlawful the Gillard Government's 'Malaysian solution' to dealing with refugee arrivals by boat. It rather spectacularly brought the Court and its important role in national affairs into the public arena and even caught many Court-watchers by surprise. Yet the majority decision was quite consistent with recent trends in the Court's approach to administrative law issues. It is perhaps best understood in the context of other important cases decided in the last couple of years that indicate the High Court under Chief Justice French has been engaged in a fresh exploration of the outer boundaries of administrative law. The other cases are *Saeed v Minister for Immigration and Citizenship* ('*Saeed*'),[2] *Kirk v Industrial Relations Commission* (*NSW*) ('*Kirk*'),[3] *Minister for Immigration and Citizenship v SZMDS* ('*SZMDS*'),[4] and *Plaintiff M61/2010E v Commonwealth* ('*M61*').[5] There are parallels and commonalities here that present important 'frontier' issues where the French Court appears to be seeking a more rational, consistent and coherent basis for public law jurisprudence in Australia.

This article seeks to discern trends emerging in these decisions in which the Court is arguably developing and clarifying its approach to judicial review in Australia. This is at a time when Australian administrative law is apparently diverging from other common law jurisdictions, such as the United Kingdom, New Zealand and Canada.[6] In these recent cases the Court may be seen as working towards a rationale that justifies its development of a distinctively Australian jurisprudence. We seek to identify these emerging themes with a view to establishing whether they may be of some predictive value for future public law litigation. We first consider the themes becoming evident in *Saeed*, *Kirk*, *SZMD*S and *M61* and then assess how *Plaintiff M70* fits into the frame.

***Saeed v Minister for Immigration*: stricter scrutiny of immigration laws**

Background

Saeed comes out of that prolific field renowned for breeding administrative law principles, namely, immigration cases. Over the 35 years since *Kioa v West*[7] rejuvenated the concept of natural justice, the High Court has inched its way forward in developing that concept, alternatively known as procedural fairness. As is now notorious both the High and the Federal Courts have engaged in a strange contrapuntal dance with successive Federal governments of both political persuasions where the parliament and the judiciary have each followed the law of Newtonian physics in so far as each action has produced an equal and opposite reaction. As Commonwealth governments have enacted packages of amendments to the *Migration Act 1958* (Cth) ('*Migration Act*') designed increasingly to restrict access by persons claiming refugee status in Australia, we have seen the High Court and the Federal Court respond with narrow interpretations of those restrictive procedures. These decisions,

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to a significant extent, have often preserved the right of asylum seekers to judicial review. Inevitably, the contrary forces at play between the courts and government have given rise to much political tension.[8]

Two important pillars supporting the various governments' legislative program limiting judicial review have been, first, the restriction of the *grounds* on which migration decisions could be reviewed and secondly, the institution of geographically defined, offshore *exclusion zones* in which the rights of review were further restricted or even in some instances totally excluded. Both these elements were present in *Saeed*.[9]

By way of a countervailing force, the courts have engaged in an ongoing analysis of the extent to which judicial review of migration decisions, including asylum cases, can be constitutionally curtailed in the light of s 75(v) of the Commonwealth Constitution. It confers on the High Court jurisdiction to grant injunctions and writs of prohibition and mandamus against officers of the Commonwealth, including Ministers and their delegates.

A notable example of this tug of war *is Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* ('*Miah*').[10] Upon the High Court holding in that case that the Minister was obliged to afford a visa applicant an opportunity to comment on undisclosed information held by the Department, the Act was amended to restrict the matters that the Minister was required to disclose to applicants. This reduction in the content of the rules of natural justice was accompanied by amendments to the Act purporting to assert that the procedural requirements then incorporated into the Act were intended to constitute an *exhaustive code*. The extent to which that legislative response to *Miah* effectively reduced recourse to general principles of procedural fairness remained in contention until in *Saeed* the High Court held that the relevant provisions in the Act *did not exclude* the general common law obligation to provide visa applicants located outside Australia with an adequate opportunity to be heard.

The significance of the High Court's decision in Saeed

At first sight *Saeed* might appear to be just one more of the many migration cases involving intricate and detailed issues of statutory construction that largely turn on their own special terms and facts. However, upon closer analysis, the case has significant implications regarding:

- the way the High Court is currently approaching *issues of construction* involving the Act;
- in particular, the operation of the *principle of legality* in promoting interpretations directed to maintain the liberties of persons subject to executive detention or exclusion from Australia;
- recourse to *extrinsic materials* and the *mischief rule* in resolving textual ambiguity;
- the *interrelationship of common law principles of natural justice and the statutory foundation* on which procedural fairness is either engaged or is to be implied under particular provisions of the Act;
- the *content* of the natural justice hearing rule in the specific circumstances;
- the extent to which *accessible information*, capable of affecting the decision with respect to persons claiming asylum, *needs to be pursued* in departmental investigations; and
- the link with *constitutional issues* associated with s 75(v) of the Commonwealth Constitution, particularly in terms of possibly imposing implied obligations on executive decision-making where the executive could otherwise frustrate access to judicial review.[11]

The material facts

Ms Saeed was a Pakistani citizen who applied for a skilled occupation employment visa from outside Australia. She gave details of her employment as a cook at a restaurant in Pakistan. Departmental enquiries suggested that women were not employed as cooks at the business. The Minister's delegate therefore concluded that she was dishonest and without making further enquiry refused her application. She then instituted proceedings for judicial review under s 39B of the *Judiciary Act 1903* (Cth) claiming the delegate's decision was unlawful because she had not been advised about the adverse view taken about her honesty and given a chance to provide countervailing information.

The principal legislative issue

The Minister claimed that, by virtue of s 51A the Act constituted an exhaustive procedural code for applications of her kind and that the delegate was therefore not obliged to acquaint her with the details of the departmental enquiry, nor to afford her an opportunity to respond.

Textually, the crucial expression in 51A was that the provisions of the relevant part of the Act should be taken to be 'an exhaustive statement of the requirements of the natural justice hearing rule *in relation to matters it deals with*.' The High Court accepted that the phrase '*in relation to matters it deals with*' was ambiguous. The issue then became: was Ms Saeed's application made from outside Australia, a matter that the relevant Part of the Act 'dealt with'? If her application fell within the relevant Part of the Act she was not entitled to have the adverse view disclosed to her unless the Minister's delegate had chosen to reveal it.

The irony here is that the High Court, faced with a lack of clarity regarding the precise ambit of s 51A, construed it as only modifying the natural justice hearing rule in relation to applications made *onshore* in Australia. Since Ms Saeed's application had been made from outside Australia the common law rules of procedural fairness continued to apply. As they had not been complied with in terms of alerting her to the adverse information, the delegate's decision had not been lawfully made.[12]

The Court's approach to construction

The majority judgment (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) first held that if a statute authorises decisions to be made that are capable of affecting a person's liberties, the statute must be construed against a background of common law notions of fairness.[13] The corollary is that the rules of natural justice are only to be taken as excluded to the extent that the statute itself prescribes and only then if it does so with unequivocal and irresistible clarity. Modification should not be based on uncertain inferences.

The principle of legality

Such a methodology was seen to be consistent with *the principle of legality* encompassing the presumption that legislation should be interpreted as far as possible so as not to interfere with established rights and freedoms, an approach which is becoming a regular feature of High Court interpretation.[14] This principle asserts that a court should not impute to a legislature an intention to interfere with fundamental rights unless the intention is manifested by unmistakable and unambiguous language. This was not the case with the expression 'in relation to the matters which it deals with' because it was not clear what was the extent of the relevant matters.

The respondent argued that the ambiguity should be resolved in favour of all applications, both offshore and onshore, because the relevant amendments were made in general response to the High Court's decision in *Miah.* This would ensure that there was an

exhaustive procedural code for all kinds of applications. This turned out to be a circular, 'catch 22' proposition. The principal judgment, in rejecting it, noted that *Miah* specifically involved an onshore visa application and the legislative response should be taken as confined to similar circumstances.[15] The respondent also contended that if this were the case, there would be two standards of natural justice applicable according to where the application originated. Justice Heydon described this as an appeal to anomaly.[16] Why should one standard of procedural fairness operate offshore and a different and more limited form be applicable onshore? However, the Court noted that in other respects the Act differentiated between onshore and offshore applications. Relevantly, an onshore applicant was entitled to a statement of reasons whereas no such concession was made to offshore applicants.[17]

Use of extrinsic materials

The Minister sought to persuade the Court that when Parliament amended Part 2 of the Act and included the 'exhaustive code' declaration in s 51A, it was attempting to reverse the High Court's decision in *Miah* by excluding certain elements of the fair hearing rule in respect of all applications under the Act. The Minister relied on extrinsic materials including the Minister's *Second Reading Speech* and the *Explanatory Memorandum* accompanying the Bill. The majority responded that first, courts should try to resolve statutory ambiguity primarily by reference to the provisions of the Act rather than extrinsic materials (that is, priority should be accorded to textual interpretation so far as reasonably possible).[18] Secondly, regarding the actual materials presented to the Court, they were taken to be only relevant to the amendments that were designed to reverse *Miah* itself. Since *Miah* was only concerned with onshore applications s 51A should be read as confined to the specific 'mischief' that was thought to flow from that case and no wider.[19] It is evident that since such extrinsic materials are rarely directed to explaining specific provisions in detail they will usually be 'unhelpful' in resolving more general issues of ambiguity.[20]

Application of general common law fair hearing rule

Having concluded that the common law rules of natural justice were not supplanted by the restrictive procedural provisions of Part 2 of the Act, the Court then had to determine just what the rules of natural justice were with respect to the application by the plaintiff. This is because the rules of natural justice are not absolute; they are flexible and vary according to the kind of interest likely to be affected in the context in which the rules apply. Here again the statutory text, read in the light of the circumstances to which the legislation is directed, is likely to be the key determinant of the extent to which common law procedural fairness is modified. According to French CJ: 'Courts approaching the question whether and how they [the common law rules] apply to a particular case will have regard to the practical exigencies of the kind of decision-making involved as well as the particular circumstances of the case.'[21]

Given the seriously adverse result of a decision refusing her a visa to work in Australia, the Court held she was entitled to have the departmental information revealed to her and an opportunity to present relevant information in response. Since that had not been the case, she was entitled to a writ of certiorari quashing the delegate's decision and an order of mandamus requiring the respondent to consider and determine her application according to law**.**[22]

Whether the Minister's delegate had an obligation to disclose reasons for refusal

Saeed also concerned the extent to which inferences adverse to an administrative decision-maker can be drawn when the discretion to grant or refuse a permit, such as a visa, is conditional on an officer's 'satisfaction' as to certain jurisdictional facts. Longstanding High Court authority holds that although a power may depend on an officer's opinion the decision

is not necessarily shielded from judicial review.[23] The majority judgment noted that this could have presented difficulties regarding a court's ability to review the delegate's decision. The Court did not find it necessary, however, to determine this aspect of the case as there had been a fundamental failure to provide procedural fairness.

In *Saeed* the reviewing courts, when determining whether the decision of the Minister's delegate was tainted by jurisdictional error, had the advantage of written reasons provided by the delegate. The tension between maintaining the reviewability of executive decisions to avoid unlawful action and allowing the decision-maker a margin of discretion is much more difficult when reasons are not provided. Possible miscarriage of discretion in that event depends on judicial inference.[24] Where the decision is ostensibly based on facts and matters about which the administrator *could have been* reasonably satisfied, a court will be reluctant to identify jurisdictional error. The need to reconcile holding the executive legally accountable in the absence of reasons and permitting the executive some leeway in decision-making so as to avoid entering on merits review is an issue that is likely to receive further High Court consideration in the next year or two.

Constitutional implications

Lurking in the background of that issue were constitutional objections. These were broadly founded on the proposition that exclusion of procedural fairness in a way that significantly shields a Commonwealth administrative decision from judicial review is incompatible with Chapter III of the Commonwealth Constitution, and specifically, s 75(v).[25] The role of s 75(v) in ensuring that Commonwealth officers act within the boundaries of legality is one of the primary aspects of the rule of law said to underlie the Constitution.[26]

In the event it was again not necessary to determine these constitutional objections. The question remains: will the Court recognize an implied fairness limitation on the Commonwealth's legislative power, derived from s 75(v), preventing Parliament dispensing with any requirement to give reasons or explain and justify the decision? The implications could be far-reaching. For example, the current orthodoxy is that unless compelled to do so by statute, Commonwealth decision-makers do not have to give a statement of their reasons for decision. Certainly, there is no common law right to reasons although in special circumstances such an obligation might be statutorily implied.[27] The question must inevitably arise whether Commonwealth decision-makers can shield themselves from effective review by refusing to provide an adequate explanation of the basis of their decisions. The High Court, however, arguably stepped closer to recognizing a constitutional requirement for a Commonwealth decision-maker to *justify* significant decisions in *Wainohu v New South Wales*.[28]

Conclusion on Saeed

Saeed represents a notably stricter approach, consistent with the principle of legality, to construing Commonwealth migration laws. Legislative attempts to exclude considerations of natural justice will be strictly scrutinised and only upheld if expressed in terms of irresistible clarity. Even then, there is the possibility that the High Court might invoke constitutional implications to strike down egregious exclusions of fair process that alter the fundamental nature of the judicial process. *Saeed* also emphasised the primacy of the legislative text where it was possible for courts to discern meaning over executive expressions of legislative intent in extrinsic materials.

Kirk v Industrial Relations Commission (NSW): the constitutional advance

Background

The most highly publicised of the recent High Court decisions under consideration emerged from a controversy concerning the administration of New South Wales occupational health and safety laws. Even in that narrow context the decision in *Kirk*[29] has had a significant impact – unpicking well-established prosecutorial practice in New South Wales,[30] prompting doubt over the status of completed and pending proceedings there and elsewhere,[31] and feeding concerns over the capabilities of the specialist adjudicative bodies operating in such fields.[32] This all came in the midst of a heated national debate over the proposed creation of uniform occupational health and safety laws.

Yet there is a deeper significance in the *Kirk* decision, in its important contribution to the advance of Australian constitutional and administrative law and to the strengthening collaboration between the two. Through a deft re-fit of *Kable*[33] style thinking, the High Court has replicated for state Supreme Courts the constitutional protection afforded to the Court's own s 75(v) judicial review jurisdiction (which was itself prominently underlined in the 2003 migration decision of *Plaintiff S157*).[34] *Kirk* could have been decided on the basis of a traditional textual confinement of the State privative clause at issue, however the Court instead crafted a general constitutional protection for Supreme Court supervision of jurisdictional error. This carries, in its wake, some important implications for the operation of privative clauses and the very notion of jurisdictional error in Australia.

Subsequent lower court decisions have explored various aspects of the *Kirk* decision – including its directions on appropriate prosecutorial practice, evidentiary matters, and of course the inability of State legislatures to immunize jurisdictional error from Supreme Court supervision.[35] The purpose of this examination is to draw out the primary implications of the case for ongoing Australian public law development.

The material facts

The 'Kirk Company' (Kirk Group Holdings) owned a farm in NSW. Kirk himself was a non-active director who left the day to day operations to an experienced employee farm manager named Palmer. In 2001 an ATV vehicle purchased by the Kirk Company overturned and caused Palmer's death, while he was delivering steel to fencing contractors on the property. The Kirk Company and Kirk himself (via directors' liability provisions) were charged with offences under the *Occupational Health and Safety Act 1983* (NSW) ('*OHS Act*').

Section 15(1) of that *OHS Act* relevantly imposed an obligation to 'ensure the health, safety and welfare of…employees' (s 15(2) gave examples of possible failures); and s 16(1) imposed an obligation to 'ensure' that non-employees were not exposed to risks to health or safety while on site (which was relevant to the contractors). Notable here is the high standard of liability imposed. Equivalent legislation in other states generally only requires the taking of practicable health and safety measures. Section 53 of the New South Wales Act provided defences, essentially where compliance with the Act or regulations was 'not reasonably practicable' (s 53(a)), or where there were causes outside the defendant's control and for which it was impracticable to make provision (s 53(b)).

The charges against Kirk and the Kirk Company were dealt with by the New South Wales Industrial Court (as subsequently re-named) and money penalties were imposed. Those proceedings were protected by the broadly worded privative clause found in s 179(1) of the *Industrial Relations Act 1996* (NSW) – a long-standing and prominent feature of the New South Wales industrial law landscape.[36] However, ultimately the High Court identified serious error, held the privative clause to be ineffective in those circumstances, and set

aside the New South Wales Court of Appeal's refusal of certiorari against the Industrial Court and quashed the original prosecution orders.

Errors in the proceedings

According to the High Court joint majority,[37] the proceedings were flawed by reason that the particular acts or omissions said to give rise to the contravention had to be identified in the statement of any offence charged under ss 15 or 16.[38] This flowed, it was said, from the terms of both the offence and defence provisions (and indeed common law principle). Their Honours pointed particularly in their reasoning to the awkward implications of the more general approach for the operation of the defence provisions, and indeed the fact that such an approach tended to place the Industrial Court in the position of acting as an administrative commission of inquiry.[39]

The joint majority also identified another error in the proceedings below. By agreement between the parties the prosecution had called Kirk as a witness, however *Evidence Act* provisions (expressly applied here via the *Industrial Relations Act*) stated that a defendant in such circumstances was not competent to give evidence for the prosecution. This was considered to be a restriction that could not be waived, and the breach was a substantial departure from the rules of evidence.[40]

Jurisdictional errors?

The High Court majority concluded that both the identified errors were 'jurisdictional errors'.[41] Ultimately for the Court this characterisation was quite straight forward, however the discussion en route was illuminating. Their Honours traversed the tangled history of relevant administrative law principle, pausing at various points to observe disjunctions and deconstructive commentary. They noted the odd remedial pairing of jurisdictional error and error on the face of the record, and indeed the historical interplay between the two. They also traced the development of the notion of jurisdictional error, emphasising its context-specific and very functional nature. This latter discussion, with its implicit admission of uncertainty, has traditionally been the staging point for troubled commentators rather than the High Court itself.

The High Court majority discussed the important decision of *Craig*,[42] with its generic formulas for the identification of jurisdictional error, in some detail.[43] However they emphasised that there is no 'bright line test', and declined to attempt to 'mark the metes and bounds' of jurisdictional error here – noting that *Craig* should not be read as providing a rigid taxonomy and that its examples were indeed just examples.

Yet ultimately the Court did not stray far from the formulas of *Craig* – explaining the nature of the 'jurisdictional errors' present here in the terms of those formulas.[44] The Industrial Court's error relating to requisite detail in the statement of charges, considered to have arisen essentially from a misconstruction of s 15 of the *OHS Act*, was said to involve both a misapprehension of its functions and powers and indeed the making of orders it had no power to make. The error as to evidentiary process (namely permitting the prosecution to call Kirk as a witness) was also said to involve misapprehension and breach of a limit on power. It was additionally noted that both of these errors appeared 'on the face of the record' as that expression must be understood in light of ss 69(3)–(4) of the *Supreme Court Act 1970* (NSW).[45] This extra conclusion ultimately had little practical bearing on the case. However, the High Court majority did take the opportunity to flag an impending reassessment of the common law's confined understanding of the scope of the 'record' (as perpetuated in *Craig*).

A new constitutional protection

The comments of the High Court on the nature of jurisdictional error are interesting, and perhaps will reinvigorate debate in this awkward and elusive sub-branch of administrative law. However, the most significant contribution of the *Kirk* decision came next; in the High Court's determination that state Supreme Courts' supervisory jurisdiction over jurisdictional error was constitutionally protected.

The Court confirmed[46] that Chapter III of the Constitution requires that there be a body fitting the description 'Supreme Court of a State'. It is beyond the power of a State, it was said, to alter the constitution or character of its Supreme Court so that it ceases to meet the constitutional description.[47] Most importantly, and more controversially,[48] it was said that a defining characteristic of state Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority via the grant of relief on grounds of jurisdictional error (which is of course ultimately subject to High Court supervision via s 73 appeals).[49] Particular reference was made in this context to 'accepted doctrine' at the time of federation, the importance of this Supreme Court review function as the mechanism for determination and enforcement of the limits on state executive and judicial power, and the fact that the dismantling of this function would create 'islands of power' immune from supervision and restraint.

Accordingly, it was declared that a privative clause in state legislation that purports to strip the Supreme Court of this function of correcting jurisdictional error is beyond state legislative power.[50] This, it was noted, reaffirms the continuing utility of the distinction between jurisdictional and non-jurisdictional error in Australia – the distinction marks the relevant limit on state legislative power as legislation which denies relief for non-jurisdictional error (including that appearing on the face of the record) is <u>not</u> beyond power.[51]

Armed with this new constitutional premise, as well as traditional interpretive tools for the confinement of privative clause protection to non-jurisdictional error, the High Court majority ultimately concluded that the privative clause (s 179 of the *Industrial Relations Act 1996* (NSW)) should be read down accordingly.[52] Section 179, it was said, does not (and could not validly) exclude the jurisdiction of the Supreme Court to grant relief via certiorari, prohibition or mandamus to enforce the limits of the Industrial Court's statutory authority. For the purposes of this case then, it did not on its proper construction exclude certiorari for jurisdictional error.

Implications and conundrums

Many interesting issues emerge from the *Kirk* decision,[53] beyond its immediate ramifications for the administration of occupational health and safety laws in New South Wales. In terms of constitutional law development, *Kirk* is of course an interesting new twist on the much vaunted but for some time under-performing *Kable* principle. Now, with this very practical turn, the constitutional personality of state Supreme Courts is likely to be much explored and debated in the coming years.[54] However the key notion of 'defining characteristics' does not make for easy predictions on what might come next.

In administrative law terms, the implications of *Kirk* are perhaps more slow-burning. First, there are some important questions yet to be fully answered as regards the Federal Court. Given the entrenchment of judicial review in the High Court[55] and Supreme Courts, what exactly is the position of the Federal Court – arguably the major player in the field of judicial review? Can we find in its far more limited constitutional connections some similar protection of its judicial review function? Secondly, what now is the appropriate methodology for dealing with a privative clause at state level – do the old *Hickman* provisos regarding 'manifest errors' continue to have a role? It seems there can be little room for *Hickman* at

state level[56] given that the conventional understanding of the *Hickman* formula is that it simply marks out a serious 'core' of jurisdictional error to which a strong presumption of reviewability has attached.[57] The role of *Hickman* largely dissolves by reason that the full range of jurisdictional error now necessarily remains reviewable under constitutional principles.

Faced with the apparent immovability of the *Kirk* guarantee, some commentators have been keen to remind us that in certain contexts the need for specialist expertise and/or finality does justify the removal of some decisions from the reach of judicial review.[58] There has been some discussion of exactly how state parliaments might still successfully achieve this.[59] The possible drafting options – such as non-invalidity clauses, procedural obstacles to review, artificially broad discretions, or the exclusion of grounds – appear now to be slim ones. The greatest promise perhaps lies in some new refinement of the ungainly concept of 'jurisdictional error' itself, but the tenor of the High Court's discussion in *Kirk* indicates that this is not likely in the near future.

Where exactly does *Kirk* take us on the notion of 'jurisdictional error', a concept which has of course haunted administrative lawyers in Australia for many years? The High Court's candour certainly suggests that it is ready for renewed debate. And there is a mounting urgency to this debate given that the creeping constitutionalisation of courts' supervisory jurisdiction over jurisdictional error places greater weight upon this long-troubled concept.

In the years between *Plaintiff S157* and *Kirk* the High Court had been largely spared difficult argument on the intricacies and boundaries of jurisdictional error, as the cases coming to it accumulated around established precedent on basic procedural error, 'jurisdictional facts' and natural justice.[60] Yet the *Kirk* facts stood on less steady ground, as revealed by the discrepancy between the conclusions of the High Court and the New South Wales Court of Appeal.[61]. This more difficult context seems to have revived some of the conceptual difficulty last seen clearly in *Plaintiff S157.* It will be recalled that owing to some conflation of the tasks at hand in *S157*,[62] there was arguably some circularity in the joint majority reasoning: was an error in such a case not protected by a privative clause because it was 'jurisdictional', or was it 'jurisdictional' because it was not protected by the privative clause (as 'reconciled')? More broadly, is the notion of jurisdictional error to some extent an externally-defined one or does it necessarily emerge internally from the specific legislative intention on what is essential to a particular decision? If both, then why?

The joint majority reasoning on jurisdictional error in *Kirk*, albeit somewhat peripheral to the larger constitutional target, ended up as a variation on the same theme. As noted above, the majority at various points acknowledged the uncertain nature of jurisdictional error and emphasised the non-rigid, purely illustrative role of the *Craig* classifications. Yet ultimately their Honours readily employed *Craig* categories without closer analysis. In the end therefore, we are left with an awkward combination of predictive formulas and admitted uncertainty which is unsettling in much the same way as the conceptual circularity in *Plaintiff S157*. This is an interesting methodological conundrum that perhaps lies somewhere quite close to the heart of the difficulty in this field.

Minister for Immigration and Citizenship v SZMDS: welcome clarification or further obfuscation?

Background

The potential to challenge administrative decision-making on the basis of 'illogicality' or 'irrationality' has, particularly in contemporary practice within federal jurisdiction, held something of a fascination for public law litigators. Lawyers acting for applicants in judicial review challenges frequently search for novel or imaginative grounds, whilst remaining ever

mindful of the critical distinctions between judicial review and merits review, and in turn jurisdictional error and non-jurisdictional error. A challenge to the 'logic' of a decision may, on its face, carry much promise of obtaining a successful outcome. Conversely, lawyers defending the legality of administrative decision-making may be wary about a ground of review which challenges the decision's 'logic' or 'rationality'. In particular, does it run the risk of skating dangerously close to review of non-jurisdictional error, or even review on the merits?

The continuing preponderance of applications in federal jurisdiction for judicial review of decisions of the Refugee Review Tribunal ('RRT') to deny protection visas to asylum seekers brings this tension into sharp focus[63]. Legal representatives of asylum seekers are obliged to analyse RRT decisions rigorously and carefully, ever alert for the detection of a basis to argue (and, importantly, *reasonably* to argue)[64] that the statutory criteria in ss 36 and 65 of the *Migration Act* have not been applied according to law. Frequently, RRT decisions will be expressed in a manner that is at best less than optimal, at worst in a manner downright confusing and difficult to interpret sensibly. But when does poor expression of written reasons, possibly borne out of an erroneous approach to fact-finding in determining whether there has been a well-founded fear of persecution on Convention grounds, amount to jurisdictional error sufficient to justify relief on judicial review?

For several years, some hope had been generated (for lawyers representing applicants on judicial review), or apprehensions created (for lawyers representing government decision-makers) that an absence of logic or rationality in arriving at findings of fact in administrative decision-making would ground judicial review. For example, Gummow J, in his important and influential judgment in *Minister for Immigration and Multicultural Affairs v Eshetu*[65] implied that, in the context of the arrival at a level of 'satisfaction' as a condition precedent to the grant or refusal of a protection visa, decision-making may involve 'findings or inferences of fact which were not supported by some probative material or logical grounds' and thus be open to judicial review. Moreover, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[66] Gleeson CJ referred, without apparent disapproval, to a ground of judicial review that the RRT's decision under challenge in that case was 'illogical, irrational, or was not based on findings or inferences of facts supported by logical grounds'.

Apparently more conclusive was a passage from the judgment of Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[67] where their Honours identified the condition precedent of 'satisfaction' as being a 'jurisdictional fact' upon which the exercise of administrative authority to grant a protection visa is premised, as necessitating a determination that did not suffer from any defect of being 'irrational, illogical (or) not based on findings or inferences of fact supported by logical grounds'.

Subsequent to those important statements, a substantial body of authority had developed in the Federal Court, in either its exercise of original jurisdiction to review the legality of decision-making concerning the grant or refusal of visas or its appellate jurisdiction determining appeals from the Federal Magistrates Court, which illustrated a range of different views as to whether illogicality or irrationality was capable of amounting to jurisdictional error.[68] The issue had truly become one of genuine complexity at the frontiers of contemporary Australian administrative law. *SZMDS* was a case which proceeded on appeal to the High Court from a judgment of Moore J of the Federal Court, who had allowed an appeal from the decision of the Federal Magistrates Court. Its circumstances appeared to provide genuine hope to practitioners that a real measure of certainty for the operation of this important area of administrative law in Australia would be achieved. By granting special leave to the Minister for Immigration and Citizenship, the High Court implicitly accepted that the case involved questions of law of general importance, particularly in light of the variance of views that had emerged in recent years in the Federal Court.[69]

The Respondent to the appeal in the High Court (SZMDS) was a citizen of Pakistan who had applied for a protection visa on the ground that he feared persecution because of his homosexuality if forced to return to Pakistan. Prior to coming to Australia, he had resided in the United Arab Emirates (UAE) for several years and claimed to have engaged in homosexual activity. Whilst residing in that country, he had returned to Pakistan on a number of occasions, including, most recently, three weeks before arriving in Australia. He had also visited the United Kingdom. The Minister asserted on judicial review, and in due course on appeal, that those circumstances reflected adversely on SZMDS's credibility. How could he assert that his claimed fear of persecution was 'well-founded' if he had returned to the very country where the persecution was said to be feared, and if he declined to avail himself of an opportunity to obtain protection in the United Kingdom? On SZMDS's account, he returned to Pakistan on the final occasion so as to finalise his relations with his wife and children, whereas he elected not to seek asylum in the United Kingdom because he had a good relationship and good life in the UAE.

A delegate of the Minister refused to grant SZMDS a protection visa and the RRT, on merits review, affirmed the decision of the delegate. Whilst the RRT accepted that male homosexuals in Pakistan comprised a particular social group for the purposes of the *1951 Convention on the Status of Refugees* (*Refugees' Convention*),[70] it nonetheless found that the applicant was not a member of that group and that, accordingly, his asserted fear of persecution was not 'well-founded'.[71] Specifically, the RRT found that SZMDS's return to Pakistan, and his failure to seek asylum in the United Kingdom, sat inconsistently with his asserted fear of persecution. It reasoned that a person's asserted fear that serious harm would result from activities becoming known in his or her country of origin, if asserted *genuinely*, would cause him or her to not return to that country and, further, to apply for protection at the first opportunity. Underpinning that reasoning was an assumption that SZMDS's homosexuality would become known, or carry the risk of becoming known, even on a short visit to Pakistan.

The application for judicial review by SZMDS in the Federal Magistrates Court was dismissed. However, Moore J, exercising the appellate jurisdiction of the Federal Court under s 25(1AA)(a) of the *Federal Court of Australia Act* 1976 (Cth), allowed the appeal on a ground that had not been raised before the Federal Magistrates Court, namely, that the RRT's conclusion that *SZMDS* was not a homosexual was based on an illogical or irrational process of reasoning, causing the RRT to fall into jurisdictional error.[72] His Honour expressed that finding in trenchant terms, noting that:

> I ***simply fail to see*** how the fact that the applicant briefly returned to Pakistan undermined his claim that he had become an active homosexual in the UAE in the preceding two years. There was *simply no basis*, in my opinion, for the Tribunal to have concluded that the fact that the applicant returned briefly to Pakistan was inconsistent with him having a fear of harm based, on his case, on his family and others in Pakistan coming to know he was a homosexual.[73]

and further:

> Similarly, the applicant's explanation as to why he did not claim asylum in the UK was perfectly plausible. Putting it slightly differently, the Tribunal's conclusion about the consequences of not claiming asylum in the UK is, in my opinion, ***completely unsustainable as a piece of logical analysis***.[74]

Did Moore J's criticism of the RRT's reasoning process properly establish a legitimate ground of judicial review? Or was his Honour *merely* expressing 'emphatic disagreement' with the correctness of the *conclusion* of the Tribunal on merits review in the manner alluded to in *Eshetu*[75] and *S20/2002*[76]. Three judges of the High Court (Heydon, Crennan and Bell JJ) concluded essentially the latter and thus that the Tribunal's reasons were not irrational or illogical and that the appeal ought to be allowed. Two judges of the High Court (Gummow

ACJ and Kiefel J) would have sustained the reasoning of Moore J as supporting the quashing of the decision and ordering a redetermination by the RRT. For their Honours, to decide by reasoning from the circumstances of the visits to the United Kingdom and Pakistan, that SZMDS was to be disbelieved in his account of his life that he had led while residing in the UAE was to make a critical finding by inference not supported on logical grounds.

Yet, by a differently constituted majority (Gummow ACJ, Kiefel, Crennan and Bell JJ; with Heydon J finding it unnecessary to decide the point), the High Court concluded that irrationality in the finding of the jurisdictional fact which is a precondition to the exercise of power enacted by ss 36 and 65 of the *Migration Act* is capable of amounting to a jurisdictional error. This proposition perhaps best represents the case's *ratio decidendi*. Beyond that, however, it is no easy task to derive further doctrinal certainty from the decision.

Salient features of the joint judgments

Gummow ACJ and Kiefel J, and at somewhat greater length Crennan and Bell JJ, examined a number of aspects of the development in Australian administrative law of the principles of jurisdictional error in the finding of jurisdictional facts. Heydon J, by contrast, saw it as unnecessary to determine any of the questions of law in issue, in light of his conclusion (forming part of the majority as to the outcome of the appeal) that the RRT's decision was not illogical. His Honour accordingly did not canvass any of the authorities or principles on illogicality, irrationality, or jurisdictional fact more generally.

The joint judgment of Gummow ACJ and Kiefel J emphasised a number of critical aspects of constitutional principle which mark the metes and bounds of recently enunciated doctrine of the High Court concerning judicial review. With reference to extra judicial writings of the late Justice Selway of the Federal Court[77] and the joint judgment in *Plaintiff S/157 of 2002 v Commonwealth*[78] their Honours reaffirmed the critical distinction, in the Australian constitutional setting, between jurisdictional and non-jurisdictional error of law. That led to their Honours referring to the now time-honoured statement of general principle by Brennan J in *Attorney General (NSW) v Quin*[79] regarding the duty and jurisdiction of a court on judicial review to go no further than declaring and enforcing the law in a way which determines the limits and governs the exercise of the repository's power. That duty may, in certain cases of judicial review, involve identifying the nature of a precondition to the exercise of statutory power.

Against that background their Honours observed that the power to grant a protection visa under ss 36 and 65 of the *Migration Act* fixes upon a criterion of 'satisfaction' as to the existence of a certain state of affairs. It was noted that Lord Wilberforce in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[80] had remarked upon the necessity for a court, in undertaking judicial review as to the formation of a judgment of 'satisfaction', to enquire whether such a judgment has been made upon a proper self-direction as to those facts, among other essential features. This in turn led their Honours to refer approvingly to the line of authority traced back to the judgment of Latham CJ in *R v Connell; ex parte Hetton Bellbird Collieries Ltd*.[81] The principle guiding judicial review of judicial facts of that character is that the legislation conferring power upon such a pre-condition is to be taken to import a requirement that the opinion is one that could be formed by a reasonable person, thus:

> If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.[82]

Another important earlier judgment is that of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation ('Avon Downs')*,[83] in which his Honour, likewise speaking of a decision-maker empowered to act upon 'satisfaction' of a state of affairs, commented to similar effect to Latham CJ in *Hetton Bellbird*. Dixon J noted *inter alia* that:

> If the result appears to be unreasonable on the supposition that (the decision-maker) addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, that it may be a proper inference that it is a false supposition.[84]

In expanding upon the significance, for this type of administrative decision-making, of *Wednesbury* unreasonableness, their Honours drew on the judgment of Gummow J in *Eshetu*[85] and noted that the case was concerned with unreasonableness in the sense of abuse of power in the exercise of discretion, on the assumption that the occasion for the exercise of that discretion had arisen upon the existence of any necessary jurisdictional facts.

Gummow ACJ and Kiefel J regarded that background as important to a consideration of the import of observations of Gummow and Hayne JJ in *SGLB* where the 'critical question' for the validity of the necessary 'satisfaction' was whether the determination was 'irrational, illogical and not based on findings or inferences of fact supported by logical grounds'.[86] That 'critical question', their Honours held in *SZMDS*, should not receive an affirmative answer that is lightly given.[87] To do so would risk falling foul of the warning expressed in *Minister for Immigration v Wu Shan Ling*[88] that the reasons for decision of a tribunal such as the RRT ought not be scrutinised over-zealously or 'with an eye keenly attuned to the perception of error'. Thus, whilst their Honours appeared to be enunciating a strict standard for the demonstration of jurisdictional error on the basis of irrational or illogical reasoning in arriving at a state of 'satisfaction', such a category of jurisdictional error was nonetheless explicitly recognised. To hold otherwise, in their Honours' view, 'would give insufficient weight to the importance of s 75(v) of the Commonwealth Constitution in ensuring that the legislative expression of jurisdictional facts in terms of satisfaction or opinion of a decision-maker does not rise higher than its source'[89].

The joint judgment of Crennan and Bell JJ, similarly, drew on the earlier key statements of principle from *Hetton Bellbird*, *Avon Downs*, and *SGLB*. Their Honours specifically addressed four reasons that had been advanced by the Commonwealth Solicitor General on behalf of the appellant Minister. The appellant had contended for a principle that jurisdictional error would not be established by 'mere' illogicality or irrationality in fact finding or, alternatively, if 'mere' illogicality 'were enough', that such illogicality or irrationality must be so extreme as to show that the opinion formed could not possibly be formed by a tribunal acting in good faith. Crennan and Bell JJ concluded, in countering those bases relied upon by the appellant, that if it be shown that illogicality or irrationality occurs at the point of 'satisfaction' for the purposes of s 65 of the Act, then jurisdictional error is established. To hold otherwise would fail to give proper regard to the distinction between errors of law and errors of fact, or between jurisdictional error and error in the exercise of jurisdiction. As *Kirk* had itself reinforced among other critical conclusions, entertaining a matter in the absence of jurisdictional fact will constitute jurisdictional error.

For Crennan and Bell JJ, three considerations complicated the acceptance of rationality as a 'free standing common law requirement in decision-making' with the consequence that what the appellant had described as 'mere' illogicality or irrationality may attract judicial review. First, as observed by Gleeson CJ in *S20/2002* and by Gleeson CJ and McHugh J in *Eshetu*, describing reasoning as 'illogical or unreasonable, or irrational' may merely be an emphatic way of expressing disagreement with it. Secondly, the overlap between irrationality,

illogicality and unreasonableness is supported not only by the linguistic sense of the terms themselves, but also by high level authority. In the United Kingdom, it has been observed that 'although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness'.[90] Thirdly, more recent developments in England have included reference to the principle of proportionality in administrative decision-making as part of a wider component of administrative law doctrine in a number of European countries. The principles of reasonableness (as derived from *Wednesbury*) and proportionality are now said by the authors of a frequently cited British textbook on administrative law to 'cover a great deal of common ground'.[91]

Having identified those complicating factors in marking out the parameters of illogicality or irrationality as a basis for judicial review, Crennan and Bell JJ appeared content to confine their decision to jurisdictional error as it occurs in the statutory setting of the application of ss 36 and 65 of the *Migration Act*. Their Honours emphasised that not every lapse in logic will give rise to jurisdictional error and that a court should be slow, although not unwilling, to interfere in an appropriate case.[92] Because, here, there was an issue of jurisdictional fact on which different minds might reach different conclusions, it followed that a logical or rational decision-maker could have come to the same conclusion as the RRT. There was thus no sense in which the decision that the first respondent did not fear persecution, or the findings of fact upon which that ultimate conclusion by the RRT was based could be said to fall into any of the distinct but related categories of being 'irrational' or 'illogical', nor 'clearly unjust', 'arbitrary', 'capricious', 'not bona fide', or '*Wednesbury* unreasonable'.

Subsequent consideration of SZMDS

SZMDS has already been cited in numerous administrative law cases before Australian superior courts. In the majority of cases, a submission that jurisdictional error has been established by 'illogical' or 'irrational' reasoning, or some variant on the theme within the scope of the analysis in either of the joint judgments, has been rejected, demonstrating the strictness of the standard that *SZMDS*[93] enunciates as applying to judicial review on this ground.

However, an example to the contrary lies in the judgment of Kenny J as a member of a Full Court of the Federal Court in *Minister for Immigration and Citizenship v SZLSP ('SZLSP')*.[94] Her Honour was part of a 2–1 majority that dismissed an appeal from the Federal Magistrates Court on an application for judicial review of a decision of the RRT. Her Honour, applying *SZMDS,* held that the material relied on by the RRT as rejecting the credibility of the asylum seeker did not disclose any material by reference to which a rational decision-maker could have evaluated the asylum seeker's answers and, moreover, no other logical basis justified the RRT's finding. Kenny J thus regarded it as 'appropriate to infer' that the RRT's decision-making was arbitrary and irrational, such as to constitute jurisdictional error.[95] The other member of the majority, Rares J, dismissed the appeal on a different basis – namely that the RRT had failed properly to comply with s 430(1) of the *Migration Act*. Drawing on observations of the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf ('Yusuf')*,[96] his Honour found that the limited scope of the written reasons of the RRT caused it to constructively fail to exercise its function of undertaking a review pursuant to s 414 of the *Migration Act*.[97]

The dissenting member of the Full Court in *SZLSP*, Buchanan J, considered that the RRT had committed no jurisdictional error and would have upheld the Minister's appeal accordingly. His Honour was unpersuaded that the reasoning of the RRT lacked any foundation in logic or rationality and regarded the obligation in s 430(1)(d) of the *Migration Act* as being merely a 'procedural one'. On those bases Buchanan J rejected the conclusions of Kenny J and Rares J respectively[98].

In another recent Full Court decision Buchanan J was again involved in a 2–1 majority outcome, this time in the majority which upheld an appeal on behalf of the Minister, setting aside orders of the Federal Magistrates Court which had itself upheld an application for judicial review of an RRT decision. The case was *Minister for Immigration and Citizenship v SZOCT ('SZOCT')*,[99] where Buchanan J, together with Nicholas J, applied *SZMDS*, specifically adverting to an important passage of the joint judgment of Crennan and Bell JJ.[100] Their Honours concluded in *SZOCT*, not without reservation, that the conclusion of the Federal Magistrates Court on judicial review, intervening so as to overturn the assessment made by the RRT of the asylum seeker's credit, was not a course which was open to that Court on the material before it. Despite expressing a concern about the nature and focus of the RRT's questioning of the asylum seeker, Buchanan J concluded that there was no 'clear case' of jurisdictional error which 'emerged from the record' so as to justify intervention on judicial review[101].

Jacobsen J dissented in *SZOCT*. His Honour applied the same statement of principle as had Buchanan J and also observed that a court should be slow to interfere and that a clear case of jurisdictional error must be made out. Jacobson J, as with Buchanan J, found the question in *SZOCT* to be a difficult one. Ultimately his Honour came to the view that the answer was not one on which reasonable minds may differ and that there was an absence of probative material put forward by the RRT to justify its finding of a well-founded fear of persecution on the basis of the applicable Convention ground, namely religion[102].

A third recent decision of a Full Court of the Federal Court of which Buchanan J was a member illustrates the practical reality that, even where a ground of review of illogicality or irrationality in the limited sense endorsed in *SZMDS* has been invoked, judicial review may be undertaken on distinct, albeit related, grounds. In *Tisdall v Webber*[103] Greenwood, Tracey and Buchanan JJ allowed an appeal on the basis that the primary judge determining a judicial review application had committed appealable error in failing to find that the *findings* of the committee making the administrative decision were not reasonably open on the material before the committee and that there was no reasonable basis for the committee's *conclusions.*[104]

Concluding comments – how much clearer at the frontier?

It is a grave mistake for public law practitioners to over-read *SZMDS* and construe it as establishing some kind of broad-based ground of jurisdictional error by reason of illogicality or irrationality in the course of administrative decision-making. The *ratio decidendi* at the case itself extends no further than the scope of judicial review of decisions of the RRT in reaching, or not reaching, a level of 'satisfaction' for the purposes of ss 36 and 65 of the *Migration Act*. It does not provide any support for a broader proposition that, in cases where an exercise of statutory power is grounded on the *actual existence or non-existence* of a particular fact, a challenge on the basis of illogicality or irrationality will be open.

The point directs attention to the process of statutory construction by which the nature of a jurisdictional fact is to be discerned. Public law litigators understand, or certainly should understand, the recurring importance of principles of statutory interpretation in numerous facets of their practices. An oft-cited authority on the point is *Timbarra Protection Coalition v Ross Mining NL ('Timbarra Protection')*.[105] In that case Spigelman CJ, speaking for the New South Wales Court of Appeal, canvassed and applied to the legislation before the court the range of indicators that ought to be taken into account in reaching a conclusion as to which form of jurisdictional fact was intended by the enacting legislature. As the contemporary approach to interpretation in Australian law recognises generally, purpose and context are primary indicators of statutory meaning, to be applied in the first instance, not merely when an ambiguity has been shown to arise. In the particular circumstances of the characterisation of a precondition to the exercise of jurisdiction, additional indicators include:

- whether the precondition is perceived to be truly 'essential' to the exercise of jurisdiction;
- the extent of the experience and expertise the primary decision maker has, or has access to; and
- the consequences,[106] particularly any potential inconvenience, of classifying the precondition as a 'true' jurisdictional fact, not one premised on a state of satisfaction or belief.

Timbarra Protection is consistent with the subsequent High Court authority of *Corporation of the City of Enfield v Development Assessment Commission*[107] and now *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Plaintiff M70*').[108] As the High Court emphasised in *City of Enfield*,[109] where a jurisdictional fact *properly so called* is to be established, it is open to a reviewing court to determine for itself, on the evidence led before it, whether the factual precondition is present or not. By contrast, where a decision-maker's jurisdiction is premised on a 'satisfaction' or similar formulation, the line of authority marked by *Hetton Bellbird* and its progeny becomes applicable. *SZMDS* is now an important component of that line of authority.

The differing analyses of on the one hand French CJ and, on the other hand, Gummow, Hayne, Crennan and Bell JJ in the very recent decision of *Plaintiff M70* (further discussed below) illustrate the subtleties of construction of relatively complex statutes such as the *Migration Act* that can be presented where true 'jurisdictional facts', in that former sense, are claimed to have been enacted. The Applicant in *Plaintiff M70* asserted that the statutory criteria enacted in s 198A(3)(i)–(iv) were such jurisdictional facts.[110] The competing contention of the Respondent Minister was that the requisite power was constrained only by requirements that it be exercised *bona fide* and within the scope and for the purpose of the statute.

As will be seen below, Gummow, Hayne, Crennan and Bell JJ accepted the Applicant's characterisation, holding that to accord the Minister the flexibility for which he contended would pay insufficient regard to the text, context and purpose of the provision, particularly the need to identify the relevant criteria with particularity.[111] By contrast French CJ rejected the Applicant's characterisation, holding that clearer language than that enacted in s 198A was required to construe the relevant criteria as needing to be objectively found to exist for the executive function so conferred to be enlivened.[112]

Ultimately, *SZMDS* went barely any further than it needed to so as to resolve the controversy that had justified a grant of special leave to appeal. There are other types of public law litigation where the High Court has adopted a similarly minimalist approach. It has, for example, in certain cases applied a "settled practice" of declining to determine constitutional questions "unless necessary for the decision of the case".[113] A related principle is the strong canon of statutory construction that the Commonwealth and State Parliaments do not intend their statutes to exceed constitutional limits and that, accordingly, Australian legislation should be interpreted, as far its words allow, to keep within constitutional limits[114].

Questions accordingly remain, notwithstanding *SZMDS*, about the nature and limits of the overlap between 'illogicality' and 'irrationality' on the one hand, and *Wednesbury* unreasonableness on the other. Administrative lawyers have tended to plead the latter ground of jurisdictional error sparingly, in recognition of the relatively few cases where it has successfully been established in its own right. But as noted, the line of cases evolving through *Eshetu, S20/2002* and now *SZMDS*, consistently with parallel trends in British administrative law, manifests a blurring of the division between the grounds.

Interestingly, then, and perhaps somewhat paradoxically, the High Court's insistence on the meeting of a strict standard in demonstrating illogicality by administrative decision-makers in

finding jurisdictional facts appears to be tempered by a slightly greater inclination to entertain an associated ground of *Wednesbury* unreasonableness. Whether this turns out to be of any real consequence in practical terms is another matter. As in other areas of judicial review, the fundamental principles that lie at the heart of jurisdictional error will continue to be of crucial practical importance.

***Plaintiff M61 v Commonwealth of Australia*: restoring judicial oversight to offshore processing**

Background

The two plaintiffs in this case, both citizens of Sri Lanka, arrived by boat on the Territory of Christmas Island without visas. The *Migration Act* defines Christmas Island as an 'excised offshore place'.[115] As a result, the plaintiffs were 'unlawful non-citizens'[116] and 'offshore entry persons'[117] for the purposes of the Act, and were detained under s 189 of the Act.

Section 46A of the Act precludes unlawful offshore entrants from making a valid application for any visa, including a protection visa, whilst in Australia. As a result, in the absence of the capacity to make a valid application, the plaintiffs could not rely upon the provisions of the Act which would otherwise have required the Minister to consider such an application and, if the criteria were met, grant a visa.[118] However, s 46A also provides that the Minister has the power to allow a visa application from an unlawful offshore entry person if the Minister thinks it is in the public interest. This power is known as 'lifting the bar'. Section 195A then provides the Minister with a power to grant a visa, notwithstanding that no application has been made, if the Minister thinks it is in the public interest. Both sections expressly state that the powers conferred must be exercised by the Minister personally,[119] but that the Minister has no duty, in any circumstances, to *consider* whether to exercise the powers.[120]

However, under the *Refugees' Convention*[121] and its *Protocol,*[122] Australia has basic obligations not to expel or return refugees to the frontiers of territories where 'life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion'.[123] At first sight, s 46A and s 195A would not appear to guarantee compliance with these obligations, given that consideration need not ever be given to whether an illegal offshore entrant should be allowed to apply for a visa to enter Australia, or to whether such a visa should nevertheless be granted in the absence of an application. Instead, to ensure compliance with these international obligations, the Department of Immigration and Citizenship (the Department) undertook a 'Refugee Status Assessment' (RSA) regarding each plaintiff to determine whether either was a person to whom Australia owed protection obligations. This assessment was described in departmental material prepared for those executing the process as being 'non-statutory' and that, as a result, 'the *Migration Act*, the *Migration Regulations 1994*...and Australian case law on the interpretations of the definition of a refugee and 'protection obligations' do not apply'.[124] Instead these materials said that those bodies of law should only guide those carrying out the process as a matter of policy.

The RSA process resulted in a conclusion that neither plaintiff was owed any protection obligations.[125] However, the plaintiffs sought an 'Independent Merits Review' (IMR) of this conclusion. This process, similarly described in departmental materials as 'non-statutory' and outside the force of Australian migration law, was not undertaken by officers of the Department. Instead, a private company, Wizard People, was engaged by the Department to conduct these reviews. The result of the IMR was to confirm that neither plaintiff was owed protection obligations.[126]

The plaintiffs then commenced proceedings in the High Court's original jurisdiction seeking relief against the Commonwealth, the Minister, and those who conducted the IMR and the

RSA. They alleged that they had been denied natural justice in the RSA and IMR process and that errors of law had been committed because those who undertook those processes considered that they were not bound by the provisions of the *Migration Act* and relevant case law, but that, rather, those bodies of law were mere guides. Relief by way of mandamus, certiorari, and injunction was sought.

The second plaintiff, M 69, also sought a declaration that s 46A and related provisions of the Act, were constitutionally invalid. It is convenient to summarise the court's brief disposition of this issue first.

Constitutional invalidity?

Plaintiff M69 said that s 46A was invalid because the provision exempting the Minister from the duty to consider the exercise of the power to lift the bar gives 'an effectively unfettered and unreviewable statutory power to decide whether or not to exercise the power' to lift the bar.[127] It was argued, broadly, that this provision was invalid because Chapter III of the Commonwealth Constitution precludes the Commonwealth Parliament from conferring arbitrary powers, without enforceable limits, upon decision makers.[128]

This constitutional argument began, at its most abstract, with two premises. First, that it is an essential characteristic of the system of courts set up by Chapter III that those courts have the capacity to declare and enforce the statutory limits upon the powers of the decision makers[129] and, second, that s 75(v) of the Commonwealth Constitution entrenches this core review jurisdiction. The implication said to arise from these premises was that there must be some limit on all powers rendering them capable of being checked under s 75(v). The specific result argued to flow from that implication was that a power could not be granted by the Commonwealth Parliament without any obligation on the decision maker to consider the exercise of that power in any circumstances.[130] This conclusion was also said to be supported by rule of law considerations, the specific holding in *Kirk* as regards avoiding 'islands of power immune from supervision and restraint', and the proposition that administrative decision makers cannot determine the limits of their own power.

However, the court swiftly rejected the contention that a power could not be granted without some duty on a decision maker to consider its exercise on the basis that '[m]aintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise'.[131] Put another way, the absence of a duty to consider the exercise of a power may preclude a decision maker from being judicially compelled to do so, but that is not to say that the power itself is without enforceable limits.

Because the court's reasoning exposed the fallacy in the final conclusion of the argument, it was not necessary for the court to examine the frontiers of the broader proposition that all powers must have some form of reviewable limit. As a result, the court avoided the invitation to add to the propositions established so recently in *Kirk.*

The legality of the plaintiffs' detention

As mentioned, upon entering Christmas Island, the plaintiffs were detained under s 189 of the Act. The legality of their detention was not disputed by the plaintiffs, although the basis for that legality was at odds with that asserted by the Commonwealth. The plaintiffs claimed that the detention was lawful because steps were being taken under the *Migration Act* to determine their refugee claims. The Commonwealth argued that it was lawful because, although steps were *not* being taken under the *Migration Act*, those steps could potentially lead to the exercise of power under the Act.[132]

Section 196 provides that persons detained under s 189 must be kept in detention until they are granted a visa or removed or deported from Australia. However, the Act also provides that a person who 'has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone' must be removed from Australia 'as soon as is reasonably practical'. It appeared then that the obligation to remove the plaintiffs as soon as practical arose the moment they entered Christmas Island.[133]

However, the court rejected that suggestion, holding that the provisions authorised the detention of illegal offshore entrants whilst the RSA and IMR processes were completed.[134] This conclusion was reached having regard to the text of the provisions and that context. Regarding the first, the court held that the provisions contemplate the possibility of an illegal offshore entrant making a valid application for a protection visa. The foremost reason of context was that the Act, read as a whole and having regard to its legislative history, is directed at compliance with Australia's international obligations regarding refugees.[135] Consistency with that purpose meant that the Act should be read so as to provide the power to grant a protection visa in an appropriate case and so as not to require the removal of a person where they satisfy the protection requirements of the Convention. These considerations led to the conclusion that detention was necessarily authorised whilst steps were taken to determine whether the Minister should 'lift the bar'.

What was the source of the power being exercised to conduct the IMR whilst the plaintiffs were detained?

A further preliminary issue which required resolution was the precise nature of the power being exercised by those undertaking the IMR process. As noted above, the process was essentially the result of a Ministerial statement made in July 2008, and the manuals which were subsequently issued to those executing the process stated that it was 'non-statutory'. The Commonwealth therefore submitted that the process involved the exercise of a 'non-statutory executive power under s 61 of the Constitution'.[136] On the other hand, the plaintiffs said the process occurred as 'either part of the Minister's exercise of powers in ss 46A and 195A or as informing their exercise because of the centrality of a refugee status determination to the execution of the Act'.[137]

Before resolving this issue the court addressed what it saw as an apparently irreducible tension between the conclusions it had previously drawn regarding the legality of the plaintiff's continued detention and the manner in which the Commonwealth characterised the RSA and IMR processes. Namely, on the one hand, the ongoing detention of the plaintiffs had been found to be legal only because inquiries were being made in accordance with the *Migration Act* as to whether the power to lift the bar should be exercised and, on the other hand, the Commonwealth argued that those inquiries had no statutory foundation.[138] The court observed that the Commonwealth's characterisation of the RSA and IMR process would effectively put the period of the plaintiffs' detention entirely within the unconstrained discretion of the executive (aside from the possibility of review on the very uncertain basis of whether the possibility of the exercise of the power to lift the bar actually existed).[139] This potentially unpalatable result laid bare the problematic nature of the proposition that the process was non-statutory.

In resolving the issue, the court again noted that the RSA and IMR processes were the result of a Ministerial announcement in July 2008. It went on to hold that these processes should be conceptualised not simply as a request by the Minister to be provided with advice on whether the bar should be lifted, but rather as a decision by the Minister, under the Act, to *consider* whether to exercise the power in respect of every offshore entry person making a claim that he or she is owed protection obligations.[140] This conclusion was consistent with, and confirmed, the court's finding as to the legal basis for the plaintiffs' detention. The

detention was lawful because a decision had been made to consider whether to lift the bar under the Act.[141]

The court then explained that such a conceptualisation was consistent with the requirement that the powers may only be exercised personally on the basis of a distinction between a decision to *consider* whether to lift the bar and a decision to actually do so or not do so.[142] Although the latter can only be done personally by the Minister, the statute did not require the former to be.

The court also touched upon the intersection between these conclusions and the so called '*Carltona* principle'.[143] That principle contemplates a relationship of agency without a formal delegation of power. This was relevant because, consistent with its argument on the legal basis of the plaintiffs' detention, the Commonwealth had argued that the *Carltona* principle should not be invoked to find that the RSA and IMR process were an exercise of the Minister's powers under s 46A or 195A, as the Act required the Minister to act personally. However, the court held that it was unnecessary to consider whether this principle could operate to link the RSA and IMR processes back to the *Migration Act* because it had already been found that the Minister had made a decision under the Act, and the RSA and IMR processes were the result of that decision.[144]

Application of natural justice?

These conclusions allowed the court to engage in a conventional analysis on the question of whether natural justice applied to the Minister's decision to consider the exercise of the powers. The court seemed to tread particularly carefully in this portion of its reasons to avoid a number of the ongoing controversies in this area.

Although the court seemed to side-step the much debated question of whether natural justice applies by virtue of the common law or by statutory implication, a close reading of the reasons might provide evidence to some that this particular controversy has run its course. The court observed that it was 'unnecessary to consider whether identifying the root of the obligation remains an open question'[145] and cited *Saeed* for that proposition. In that case six justices seemed to favour Brennan J's view on that point in *Kioa v West.*[146] Reading between the lines, it seems that the court may have been of the view that a consideration of whether the question even remained open was unnecessary because it had been answered elsewhere.

In the result, the court held that natural justice applied to the decision by the Minister to consider whether to lift the bar because that decision, along with the consequential necessity to make inquiries, affected the liberty of the plaintiffs by prolonging their detention, and so affected their rights and interests.[147] The Commonwealth had argued that, if the power exercised was found to be statutory, natural justice should not apply to it because it was simply a discretionary power to confer a right, being the right of entry to Australia. It was not a power to defeat or prejudice a right already held.[148] The court explained that this proposition ignored the fact that under *Annetts v McCann*[149] natural justice would apply where rights, interests and legitimate expectations were defeated or prejudiced. However, it went on explicitly to state that it saw no need to comment on the continuing relevance of legitimate expectations[150] because rights and interests were sufficiently affected to enliven procedural fairness. This (strictly unnecessary) reference to legitimate expectations combined with an express refusal to consider its ongoing validity is intriguingly ambiguous and perhaps a result of the compromises necessary to secure unanimity.

Next, the court turned to the question of whether any breach of natural justice had occurred. The court's focus was the errors said to have been committed in the IMR process, on the basis that any assessment during the RSA had now been overtaken.[151] This is interesting,

as it seems to involve some running together of the decision of the Minister to undertake a consideration of the plaintiff's claims, and the process that resulted from that decision. Although the court previously disclaimed any reliance upon the *Carltona* principle to link the review process to the Act, it seems to be implicitly operating in the background here to link the RSA and IMR process to the Minister's decision.

In considering the IMR process the court swiftly determined that natural justice breaches had occurred in the case of each plaintiff.[152] It also found, as a result of the conclusion that the RSA and IMR processes were essentially the consideration of whether to exercise a statutory power, that error had been committed by the reviewers in failing to consider themselves bound by the *Migration Act* and associated case law.[153]

Jurisdiction to review public law functions outsourced to private corporations

The court left to another day the question of whether the officers of a company like Wizard People Pty Ltd could be said to be 'officers of the Commonwealth' for the purposes of founding the court's jurisdiction under s 75(v), on the basis that jurisdiction was found under s 75(iii) due to the Commonwealth being a party and, possibly, under s 75(i) relating to matters arising under a treaty (in this instance the *Refugees' Convention*).

Superficially, it could be thought that this case raised similar issues to those raised in *NEAT Domestic Trading Pty Ltd v AWB Pty Ltd ('NEAT')*[154] where a private company was conferred with apparently public law type functions. Interestingly, however, that case was not mentioned in the reasons. It seems that the court avoided commenting upon the difficult issues which arose in *NEAT* by treating the actions of the corporation conducting the IMR as those of the Minister, as was noted above. In any case, both the source and nature of the power exercised in the RSA and IMR process were arguably public. Those facts may have been sufficient to distinguish *NEAT*, given that in that case the court found that the apparently public power in issue derived from a private source, being the *Corporations Law* of Victoria.

Remedy

The court refused the grant of mandamus because the statute expressly provided that the Minister was not under a duty to consider whether to lift the bar.[155] This in turn entailed that certiorari be refused as a matter of discretion on the ground that its issue would be futile if mandamus could not then issue.[156] This conclusion meant that the court eschewed consideration of whether the writ should lie to quash an interim decision, where that interim decision is not a mandatory relevant consideration to the final decision it precedes.[157] Instead, declaratory relief was awarded.

A legacy?

By elegantly linking the 'non-statutory' process which applied to unlawful offshore entrants back to the *Migration Act* the court was easily able to conclude that the obligations of natural justice were enlivened. In so doing, it confirmed that the full protections of Australian administrative law applied to supervise the decision makers involved, and exploded the Departmental directions to the contrary. This result is particularly significant given that arguably the underlying intent of those directions was to circumvent curial oversight of the processing of asylum seekers offshore.[158] The court's unanimous reasons to this effect therefore again send a strong and heartening signal regarding the court's commitment to dismantle any attempt to remove fundamental administrative safeguards in the absence of unmistakable and unambiguous parliamentary language to the contrary.

***Plaintiff M70/2011 v Minister for Immigration and Citizenship*: the final demise of offshore processing?**

Background

Each of the plaintiffs in this matter were Afghani citizens who travelled by boat from Indonesia to Christmas Island. M70 was an adult. M106 was a minor and was unaccompanied by any parent or guardian. Both lacked visas to enter Australia. On arrival each became 'unlawful offshore entrants' and were subsequently detained and, pursuant to s 41A, precluded from applying for visas. Both plaintiffs claimed that they were persons to whom Australia owed protection obligations.

M70 and M106 were subject to a new set of administrative arrangements applicable specifically to offshore entry persons. The first part of those arrangements was a direction from the Minister to the Department that all consideration of whether to exercise the power to lift the bar in respect of such entrants was to stop until further notice. This essentially suspended the scheme considered in the *M61* decision (discussed above). The second part was an agreement with the government of Malaysia to transfer up to 800 offshore entrants, claiming protection obligations, to that country for the assessment of their claims. That agreement contained a number of assurances relating to the transferred persons, including an assurance that the transferred persons would be treated 'with dignity and respect and in accordance with human rights standards'. However, the agreement expressly provided that its terms were not legally binding upon the two countries.

The second part of this arrangement was said to be carried out pursuant to s 198(2) and s 198A(1) of the *Migration Act*. Section 198(2) provides that an officer must remove as soon as practicable an unlawful non-citizen who, relevantly, is detained as an offshore entry person, has not been immigration cleared and has either not made a valid application for a visa that can be granted to them, or has made such an application and that application has been determined.[159] Section 198A(1) specifically confers power on an officer to take an offshore entry person to a 'declared' country. Section 198A(3) then provides that the Minister may ‘declare’ that a country provides access to effective procedures to assess protection claims, provides protection pending and after determination of these claims, and meets relevant human rights standards in providing this protection.[160]

The Minister had made a declaration in respect of Malaysia following the execution of the agreement with Malaysia. That declaration was made after the Minister considered a submission from the Department which contended that Malaysia fulfilled the criteria in s 198A(3), primarily on the basis of the political commitments made by it under the arrangement; a submission from the Department of Foreign Affairs and Trade that, relevantly, advised that Malaysia was not a party to the Refugee Convention and did not recognise, or have domestic legal protections in place for, asylum seekers; and some materials from the United Nations High Commissioner for Refugees (UNHCR).

The plaintiffs commenced proceedings in the High Court's original jurisdiction challenging their proposed transfer to Malaysia and claiming an order prohibiting that action. Both claimed that the declaration made by the Minister under s 198A was invalid and that s 198(2) did not confer a power to remove them to Malaysia.

In addition, M106 also claimed that consent was required to transfer him to Malaysia and that this consent had not been validly given. This argument rested primarily upon s 6 and s 6A of the *Immigration (Guardianship of Children) Act 1946* (Cth) which together provide that the Minister is the guardian of all non-citizen children who arrive in Australia and that such children shall not leave Australia without the consent of the Minister. It was an agreed fact that no written consent had been given by the Minister in respect of the plaintiff.

The much-anticipated High Court decision: declaration criteria satisfied? A second source of power?

The case of *Plaintiff M70* has been the most politically charged High Court matter in some years, and the judgments were keenly awaited and prepared quickly. The Court was acutely aware of the ramifications of its conclusions, and the potential controversy that would follow. The Chief Justice declared, at the opening of his separate judgment:[161]

> [it] is the function of a court when asked to decide a matter which is within its jurisdiction to decide that matter according to law. The jurisdiction to determine the two applications presently before this Court authorizes no more and requires no less.

The central concern of the High Court was of course the lawfulness of the proposed removal of the plaintiffs from Christmas Island to Malaysia. Arguments around this question proceeded principally on three issues:[162]

1. whether a valid declaration relating to Malaysia had been made under s 198A(3) of the *Migration Act*, such that s 198A provided power to remove the plaintiffs to Malaysia;
2. whether the general provisions relating to the removal of 'unlawful non-citizens' found in s 198(2) of the *Migration Act* provided power to remove the plaintiffs to Malaysia; and
3. whether the consent of the Minister, as guardian of the second plaintiff, was necessary before that person could be lawfully taken from Australia.

Dealing with the second point first, the joint majority of Gummow, Hayne, Crennan and Bell JJ[163] held that s 198A was the only relevant legislative source of power. Their Honours emphasised that the ambit of s 198(2)'s operation, read in light of s 198A, must be understood with reference to the fact that the *Migration Act* responds to Australia's international obligations, including the obligation of not returning a person (directly or indirectly) to a country where he or she has a relevant fear of persecution.[164] It was also said that the ambit of a removal power must be understood in the context of international law principles concerning the movement of persons from state to state.[165] Importantly, it was felt that to remove a person to their country of nationality or any third country willing to receive them, without first having assessed whether they had a relevant fear of persecution, may put Australia in breach of its international law obligations.[166] Given that s 198A is directed to taking persons to a country that provides the access and protections identified in s 198A(3), s 198(2) should not be read as requiring or permitting removal prior to a determination of their refugee status. The Act, it was said, confers only one power to take that action – the power given in s 198A, and the generality of the s 198(2) power must be confined by reference to the s 198A restrictions.[167] It was noted that the legislative history reinforced this conclusion, and indeed that the alternative reading would leave s198A no separate work to do.[168] French CJ in his separate judgment arrived at a similar conclusion regarding the interaction of s 198(2) and s 198A.[169]

Proceeding then to the larger questions concerning s 198A, the joint majority reviewed the history of the Malaysian Arrangement and noted that on its own terms it was no more than a statement of the intentions of the participants and political commitments – creating no obligations for the purposes of international law.[170] Their Honours then considered the terms of the declaration-making power in s 198A, pointing out the unusual wording (the Minister 'may: (a) declare…that a specified country' has the four characteristics identified).[171] The plaintiffs submitted that the listed criteria were jurisdictional facts, either in the 'objective' sense (such that they must actually be satisfied for valid exercise of the power) or in the

sense that the Minister must be satisfied that the criteria were met.[172] The Commonwealth submitted that it was the existence of the declaration itself, not the truth of its content, that enlivened a power – and that the power was constrained only by requirements of good faith and consistency with legislative scope and purpose. The joint majority accepted the Commonwealth's admitted constraints, but felt that to accept only those minimal constraints and reject the view that the criteria were jurisdictional facts would pay insufficient regard to the provision's text, context and evident purpose – which required identification of the criteria with particularity.[173]

For the joint majority the central question then became whether the 'complex of elements' in each criteria were wholly factual (as submitted by the Commonwealth) or included elements of legal obligation (as contended by the plaintiffs). Their Honours noted that in each of the criteria there appeared to be elements of fact involved (as to what actually happens in the relevant county). However, they quickly distanced themselves from that point (with its attendant difficulties over the temporal ambit of the inquiry) and any need actually to express a view on whether Malaysia in fact meets appropriate standards in handling asylum seekers. Whilst they may have backed themselves into the possibility of such a factual analysis in the future (see below), the critical issue in this instance, as they saw it, was that the references in the criteria to 'provides access' and 'provides protection' did not refer *only* to a state of facts (or conclusions about them), but rather to something that must be legally assured. In so concluding, their Honours made particular reference to the international law context of the provisions and the various obligations thereby implicated as regards at least persons already determined to be refugees. They considered that the statutory references to a country that provides access to certain procedures and protections of certain kinds must be understood as referring to access and protections of the kind that Australia itself has undertaken to provide under international law – which involve a myriad of obligations relating to such matters as education, religion, employment, housing, court access etc.[174] Therefore, the Commonwealth's attempt to limit the inquiry under s 198A(3)(a)(iii), for example, to whether as a matter of fact there is a real risk that a person determined to be a refugee in the country they are to be taken to will be returned to relevant danger, failed for multiple reasons. Their Honours reinforced their reasoning here by reference to the specific interrelationship of the s 198A subsections,[175] and a careful disassembly of the Commonwealth's reliance on the 'safe third country' cases[176] and the political context of the enactment of the relevant provisions.[177]

In his separate reasons, French CJ[178] considered that the judgment required by the declaration criteria was necessarily a judgment that the circumstances described were present and continuing, and that this pointed to the need for a supporting legal framework. Correlatively, it indicated that a declaration based upon a hope or belief or expectation that a country will meet the criteria in the future would not be valid. French CJ considered that this appeared to be, at least in part, how the Minister approached the issues.[179] Moreover, his Honour felt that the questions the Minister must ask himself, about 'access' and 'protection' and 'human rights standards', are questions which could not be answered without reference to the domestic laws and international obligations of the relevant country. French CJ considered that the exercise of power had miscarried here for these reasons, and made specific reference to the legal fragility of the asylum seekers' position under the Malaysian system.[180] He did however confirm, conversely to the main focus of the case, that reference only to a country's laws and international obligations would not be the end of the inquiry: the criteria do require consideration of the extent to which a country actually adheres to its relevant obligations.[181]

On the final issue raised in the case, the necessity of ministerial consent to the removal of the second plaintiff, the joint majority also found in favour of the plaintiff (despite it being strictly not necessary to do so). It was held that a determination (when made) by the Minister that an unaccompanied minor should be taken to a declared country under s 198A would not constitute a consent in writing of the kind required by s 6A of the *Immigration (Guardianship*

of Children) Act 1946 (Cth) ('*IGOC Act*'). Nor, it was said, would a s198A removal fall within the express exemptions to the consent requirement found in s 6A(4) of the *IGOC Act*, as s198A was not a 'law regulating the departure of persons from Australia' within the meaning of that exemption.[182] Pointing to a very important consequence of these conclusions, the joint majority noted that a consent decision of the requisite kind would engage the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act')* with regard to the giving of reasons and potential review.[183] Of course the engagement of review mechanisms in relation to minors, *ADJR* or otherwise, would seriously complicate the government's intended Malaysia arrangements. French CJ and Kiefel J expressed agreement with the joint majority on the issue of guardian consent.[184]

Implications for government refugee processing policy

The reference to political context in the discussion above of the joint majority's reasoning leads us to a critical question: what is the future of offshore processing under this or other arrangements? The political context referred to above was of course the establishment of a processing regime on Nauru – then not a signatory to the relevant international conventions.[185] The joint majority, and indeed French CJ,[186] viewed sceptically the Commonwealth's attempt to rely on this background in the construction of s 198A. Yet more importantly, the joint majority noted (albeit tentatively) that the Nauru arrangements seemed 'very different' to those in issue given that in that case it was Australia that would provide the relevant access and protection and in that case the arrangement appeared to create obligations between the parties. Of course a proper assessment of the satisfaction of the s 198A declaration criteria, on the interpretation of the provisions offered by the Court, could be a highly complicated and contested matter.

With reference to the Malaysian example, the joint majority did suggest that a country 'provides access' to effective procedures for assessing asylum claims of the kind described in s 198A(3)(a)(i) if its domestic law provides for such procedures or if it is bound, as a matter of international obligation, to allow some third party (such as the UNHCR) to undertake such procedures (or to do so itself). The mere provision of permission for a body such as UNHCR to undertake its own procedures would not be sufficient. Moreover, it was suggested that a country does not provide protections of the kind described in s 198A(3)(a)(ii) or (iii) unless its domestic law deals expressly with the classes of persons mentioned there or it is internationally obliged to provide the particular protections. It was said in particular that a country does not provide protection to those given refugee status, pending their voluntary repatriation or resettlement, unless it provides to those persons rights of the kind mentioned in the *Refugees' Convention*. Here, not only did the Arrangement not oblige Malaysia to provide any of those rights, no provision was made in the Arrangement that (if carried out) would provide any of those rights.[187]

Subsequent advice of the Commonwealth Solicitor-General emphasized, in relation to Nauru (which acceded to the *Refugees' Convention* and *Protocol* on 28 June 2011), that 198A removals to that country would only be available if it were able to be demonstrated to the satisfaction of an Australian court that appropriate arrangements were in place to ensure practical compliance by Nauru with its international obligations; and that Nauru in its treatment of asylum seekers and refugees complied in practice with human rights standards acceptable at least to the UNHCR. These are, it was noted, complex issues of fact and degree.[188] The Solicitor General also suggested that 'significant development' to Papua New Guinea's international obligations or domestic laws relating to refugees would be necessary for a valid application of the s 198A process to that country.

The legal complications of the assessment task, and the surrounding controversies, might be largely pre-empted by foreshadowed amendments to the relevant *Migration Act* provisions. However, protection of the executive assessment from judicial intervention would not in itself

avoid the additional practical difficulties arising from the need for Ministerial consent to any removal of minors.

Implications for Administrative Law

In pure administrative law terms, ultimately the joint majority appeared to classify the s 198A declaration criteria as objective jurisdictional facts, objectively reassess their satisfaction, and define the error accordingly.[189] At one point they noted (a little confusingly) that it was not necessary to determine whether or to what extent there could be judicial review of a Minister's determination that 'factual elements' were met here – because the criteria contained the further element that the access and protections in question should be provided under domestic or international legal obligation.[190] This perhaps hinted at a disinclination to fully reassess the facts in issue. However, ultimately their Honours did appear to conduct an objective reassessment of the satisfaction of the relevant criteria (rather than, for example, the Minister's opinion as to those criteria).[191] It was emphasised that it was not open to the Minister to make a declaration in relation to Malaysia where it was agreed that Malaysia: does not recognize the status of refugees nor undertake relevant reception, registration, documentation and status determination activities (it generally permits the UNHCR to undertake those tasks in Malaysia); is not a party to the relevant international law instruments; and has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments. A conclusion that asylum seekers in Malaysia have access to UNHCR assessment processes and that neither asylum seekers nor refugees are ill-treated there was said to be insufficient. Critically, it was ultimately stated that the 'jurisdictional facts necessary to making a valid declaration…were not and could not be established.'[192]

French CJ, in his separate judgment, engaged more directly with the plaintiffs' submissions on the precise nature of the Minister's error and the jurisprudence relating to jurisdictional facts.[193] His Honour noted that clear language would be needed to support the contention that the criteria were facts that themselves conditioned the exercise of the Minister's power to make a declaration, such that the courts could substitute their judgment for that of the Minister. He considered that the language and factors at play indicated the need for 'ministerial evaluative judgment'. However, his Honour noted that the Minister must properly construe the criteria, otherwise he would be making a declaration not authorized by the enactment and the misconstruction would be a jurisdictional error. He stepped back and pointed in this context to the established formulas of jurisdictional error as listed in the *Yusuf* decision.[194] However, he did acknowledge the sharper possibility that the relevant power could be treated as being, by necessary implication, conditioned upon the formation of an opinion or belief that each of the matters listed were true – and noted that the requisite opinion or belief would be a jurisdictional fact and must not be based on a misconstruction such that it would not be an opinion or belief which the subsection requires in order that the power be enlivened.[195]

In an important respect French CJ's approach is perhaps preferable to that of the joint majority: it avoids the need for a court to directly reassess the factually, legally and politically complex criteria. Such a descent into the executive arena would not be relished by subsequent review courts. Despite the joint majority's express reluctance to assess the actual performance of particular countries,[196] it seems extremely likely that their reading of the provisions could require this in particular cases.

Of course, the Minister's failure to engage with all of the criteria (properly interpreted) and consequent erroneous conclusion could be conceptualized and classified in various ways (e.g. according to objective or subjective jurisdictional fact principles,[197] or a straight 'relevant considerations' analysis). However, ultimately in this case the point was somewhat moot as on the majority's reading of the legislation, error could be readily demonstrated here in

multiple ways. Perhaps the more important aspect of the judgment is the preparedness of the joint majority to reach through the statutory provisions to the underlying international law obligations

The decision should be seen as a further step in the High Court's recent assertion of the rule of law. The Court was not prepared to leave it to the executive government to assess whether Malaysia was a compliant country. Given that the statutory criteria in s 198A(3) marked the boundary of the Minister's discretion, the majority of the Court was not deferential to considerations of comity in ensuring the Minister acted upon a correct understanding of the statutory pre-requisites that conditioned his declaration. *Plaintiff M70* joins the other cases surveyed in this study as an assertion of judicial vigilance requiring the executive to comply with legislative prescriptions, particularly where human rights values are at stake.

Conclusion

Returning from the fine detail of these five important High Court cases at the frontier of Australian administrative law, what themes are emerging in the jurisprudence of the French Court and do they allow for confident prediction of future directions?

Perhaps the biggest winner in the recent wave of cases is the centrally important and ever controversial doctrine of natural justice. While the precise requirements of 'procedural fairness' continue to grow organically with evolving regulatory methodology and perceptions of citizen-state relations, the High Court is now once again shoring up the doctrine's broader advance in important ways. In the first place, the result of the migration skirmishes in *Saeed* and *M61* indicate that legislative attempts to exclude natural justice will need to be irresistibly clear. The Court clinically cut through the attempts in these two cases, with considerable textual and conceptual effort, to emerge with conventional fairness obligations that were of course found not to have been met. The 'clear contrary intention' rule, as regards attempted exclusion of natural justice, has therefore perhaps never been stronger. At the very least we have returned (with a larger High Court majority) to the conviction of the *Miah* decision – stepping over some interim lower court retreat in the *Lay Lat*[198] line of cases.

In addition to the good health of the 'clear contrary intention' rule, natural justice is of course a conspicuous beneficiary of the constitutionalisation of jurisdictional error review (now extended to the State level by *Kirk*), and indeed of the progressive elucidation of the essential features of constitutionally protected judicial process.[199] In emphasising the importance of natural justice in administrative process the Court is reinforcing for contemporary times some core tenets of executive accountability, fairness and equality before the law.

The current High Court is yet to provide definitive guidance on the old debate over the true source of natural justice obligations (statute v common law?), and is yet to revisit some of the specific doctrinal troubles of the last decade (such as the stumbling addition of an 'actual unfairness' requirement and the difficulties surrounding 'legitimate expectations'). However, the strength of the general advance indicates that we have now emerged from the circumspection of the *Lam* era.[200] In the process, it should be added, the Court has dismantled some central components of the 'off shore' approach to illegal immigration control.

The constitutional dimension is an interesting one – *Kirk* is a once-in-a-decade public law decision both in terms of its clarity and practical impact. The High Court so confidently embraced the entrenchment of Supreme Court supervisory jurisdiction, thereby adding to the contemporary re-invigoration of *Kable*-style thinking, that it seems likely that the constitutional dimension has now been clearly identified as a potential organizing rationale

for the ongoing development of a distinctively Australian administrative law. Yet, while the constitutional exploration still has some distance to run, the Court appears determined to avoid *ad hoc* development of principle. In both *Saeed* and *M61* constitutional issues were raised, but the Court largely avoided those arguments.

Perhaps the lesson for administrative lawyers is that while they will now need to come equipped with an awareness of Chapter III constitutional principles, they can expect that the bold collaboration of constitutional and administrative law in Australia will emerge in a carefully measured way – and things will not always be as easy as they were in *Kirk.* Ultimately, however, having taken the step in *Kirk* to protect the institution of judicial review, the Court may be induced in future cases to explore questions regarding the efficacy of that guarantee of review. It is arguably meaningless to have a constitutionally embedded system of review if it is deficient in content.

The *SZMDS* case perhaps stands on its own in this selection as a more tentative offering by the French Court. It did present the opportunity for the Court to provide some significant clarification of the notions of irrationality and unreasonableness, the relationship between the two, and the capacity of judicial review courts more generally to respond to allegations of inadequate factual reasoning. There are many unresolved issues here. Yet the Court ultimately adopted the more incrementalist approach of earlier eras, consistently with what has been described as a "settled practice" of leaving constitutional issues undetermined unless it be necessary for those issues to be confronted and, potentially, decided. Compatibly with this approach to the exercise of judicial power, the French Court in *SZMDS* was content to acknowledge some of the doctrinal difficulties but not stray far beyond the essentials required for disposition of the case.

The decision in *M70* presented no significant doctrinal advance; the judges' varying characterizations (in administrative law terms) of the errors identified was more instinctive than closely reasoned. However, the decision is remarkable in at least two ways. First, it is notable for the joint majority's readiness to step to the outer reaches of judicial review methodology in such a politically-charged context. Their Honours categorized the broadly-drawn statutory criteria at issue as objective jurisdictional facts, which annexed to the judicial review process the actual assessment of their satisfaction. It is difficult to recall another example of such a deep judicial descent into executive function. French CJ's more circumspect approach to the dispute may prove to be more sustainable. Secondly, the case is notable for the preparedness of the Court to reach through the domestic statutory provisions to the detailed and somewhat aspirational international law underlay. International law principle has rarely been so accessible to administrative law complainants in Australia. *M70* is clearly a case that sits at the frontier of Australian administrative law and it contributes significantly to the meaningful solidification of the 'rule of law' ideal.

It is difficult to deny that it is an exciting time for administrative law in Australia. Whilst we continue to proceed in a somewhat insular manner, diverging further from our comparable legal neighbours, the new jurisprudence is generally marked by a confidence and slowly emerging coherency that will be appealing to lower court judges, practitioners and academics.

Endnotes

1 [2011] HCA 32.
2 (2010) 241 CLR 252.
3 (2010) 239 CLR 531.
4 [2010] HCA 16.
5 [2010] HCA 41.

6 See Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1.

7 (1985) 159 CLR 550.

8 John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 12 *Federal Law Review* 335.

9 This case is also discussed by Rebecca Heath, 'Saeed v Minister for Immigration and Citizenship' (2010) 18 *Australian Journal of Administrative Law* 9.

10 (2001) 206 CLR 57.

11 Although the Court did not need to address several constitutional issues advanced by the plaintiffs concerning a claimant's right to effective judicial review under s 75(v), it is evident that these constitutional arguments, presently lurking in the background, will have to be resolved in future litigation.

12 *Saeed* (2010) 241 CLR 252, 267 [42].

13 Ibid 258–9 [11]–[15], 271 [58]–59].

14 Ibid 259 [15]. See further *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ); *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 28–30 [31] (French CJ); *Lacey v Attorney-General, Queensland* [2011] HCA 10, [17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Hogan v Hinch* [2011] HCA 4, [6], [27], [29], [36] (French CJ); *Momcilovic v The Queen* [2011] HCA 34, [41]–[51] (French CJ).

15 *Saeed* (2010) 241 CLR 252, 263 [26], 265–6 [34]–[35], 267 [42], 271 [57].

16 Ibid 281–2 [84]–[85].

17 Ibid 268 [44]–[46].

18 Ibid 265–6 [33]–[34]; 280–1 [82] (Heydon J).

19 Ibid 264–6 [30]–[34].

20 Explanatory memoranda may still be relevant in some cases; see *Haskins v The Commonwealth* [2011] HCA 28 and *Commissioner of Taxation v BHP Billiton Lim*ited [2011] HCA 17. Recourse to these is authorised by s 15AB(1) and (2)(e) of the *Acts Interpretation Act 1901* (Cth) in appropriate cases.

21 Chief Justice Robert French, 'The Role of the Courts in Migration Law' (Paper presented at the Migration Review Tribunal and Refugee Review Tribunal, Annual Members' Conference, Torquay, Victoria, 25 March 2011,)17.

22 *Saeed* (2010) 241 CLR 252, 269–70 [52], 271[59].

23 See ibid 270 [53]–[55].

24 In that case a reviewing court must usually rely on a non-characteristic departure of the administrative decision from what could be reasonably expected to support an inference that a relevant consideration could not have been taken into account when arriving at the requisite state of 'satisfaction' or the decision-maker must have misunderstood the legal nature of the function to be performed: *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 (referred to further in notes below). Either conclusion is near-impossible to reach unless the decision is egregiously discordant with reality.

25 Such a principle arguably underlies the Court's decision in *Bodrudazza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651. In *Saeed* the applicant submitted that procedural fairness is an incident of the judicial power with which Chapter III of the Constitution is concerned; *International Finance Trust Company Ltd v New South Wales Crime Commission* [2009] HCA 49, [54] (French CJ). The Commonwealth has no power to pass a law that requires a court exercising federal jurisdiction to act in a way repugnant to the standards of Chapter III. This would include permitting a Commonwealth officer to act in a way that is fundamentally unfair but unreviewable. This is consistent with the view that under s 75(v) the High Court can restrain breaches of natural justice (*Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 81, 101 [41] (Gaudron and Gummow JJ).

26 This phenomenon has been described as the "constitutionalisation" of Australian administrative law. See Linda Kirk, `The Constitutionalisation of Administrative Justice' in Robin Creyke and John McMillan (eds) *Administrative Justice – The Core and the Fringe: Papers presented at the 1999 National Administrative Law Forum* (2000) 106. The primacy of the Court's jurisdiction to ensure Commonwealth officers operate within the bounds of legality is affirmed in cases such as *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–9 [44]–[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) and indeed in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

27 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ). Regarding the general duty see Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2010) 33 *Sydney Law Review* 170.

28 [2011] HCA 24. Although not directly engaging s 75(v), the Court held by majority that a constitutional limitation may be derived from Chapter III of the Constitution that rendered invalid State legislation which failed to provide for giving of reasons in a case where the liberties of a person were threatened. While not expressed in positive terms the Court effectively held that there was a constitutional requirement for Supreme Court judges, when acting in their personal capacity under State law to make certain orders restricting a person's liberty, to give reasons for their decisions.

29 *Kirk* (2010) 239 CLR 531.

30 For analysis and contrasting views, see, e.g. Neil Foster, 'General Risks or Specific Measures? The High Court Decision in *Kirk*' (2010) 23 *Australian Journal of Labour Law* 230 and Kelly Godfrey, 'The High Court Finishes Workcover's Sport with Mr Kirk But the Game is Not Over Yet!' (2010) 38 *Australian Business Law Review* 196.

31 See, e.g. the arguments in *Inspector Hamilton v John Holland Pty Ltd* [2010] NSWIRComm 72; *Thiess Pty Limited v Industrial Court of New South Wales* [2010] NSWCA 252; *Kirwin v Laing O'Rourke (BMC) Pty Ltd* [2010] WASC 194; *NK Collins Industries Pty Ltd v Peter Vincent Twigg* [2010] QIRComm 63; *R v FRH Victoria Pty Ltd* [2010] VSCA 18.

32 Note particularly the comments of Heydon J: *Kirk* (2010) 239 CLR 531, 585 [113]ff.

33 *Kable v DPP* (1996) 189 CLR 51 ('*Kable*').

34 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

35 Most recently, see, eg, *Mount Gibson Mining Ltd v Anstee-Brook* [2011] WASC 172; *GPI (General) Pty Ltd v Industrial Court of New South Wales* [2011] NSWCA 157. A number of other recent cases will be referred to in context below.

36 The privative clause provided in effect that a decision was final and could not be appealed against, reviewed, quashed or called into question by any court or tribunal, and this was extended to any relief or remedy (writ, equitable remedy or otherwise) by s179(5).

37 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Heydon J agreed generally with the substance of the joint majority reasoning, but dissented as to orders.

38 *Kirk* (2010) 239 CLR 531, 553[13]ff.

39 Ibid 559 [30].

40 Ibid 565 [50]ff.

41 Ibid 573 [71]ff.

42 *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*').

43 *Kirk* (2010) 239 CLR 531, 573–4 [71]–[73]. Cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ).

44 *Kirk* (2010) 239 CLR 531, 574–5 [74]–[77].

45 Ibid 575 [78]ff.

46 Cf earlier comments in, for eg, *Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police* (2008) 234 CLR 532, 591 [161] (Crennan J); *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 73–4 [57]ff (Gummow, Hayne and Crennan JJ).

47 *Kirk* (2010) 239 CLR 531, 566 [55], 578-9 [91]ff.

48 See, eg, the comments in Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Paper presented at Gilbert & Tobin Centre for Public Law 2010 Constitutional Conference, Sydney, 19 February 2010).

49 *Kirk* (2010) 239 CLR 531, 566–7 [55], 580 [97]ff.

50 Ibid 566–7 [55], 581 [100].

51 Ibid 581 [100].

52 Ibid 581–2 [101]ff.

53 For further exploration of these issues, see Simon Young and Sarah Murray, 'An Elegant Convergence? The Constitutional Entrenchment of 'Jurisdictional Error' Review in Australia' *Oxford University Commonwealth Law Journal* Winter 2011/12 (forthcoming).

54 See more recently *Wainohu v New South Wales* (2011) 85 ALJR 746.

55 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

56 See, eg, *Director General NSW Department of Health v Industrial Relations Commission (NSW)* [2010] NSWCA 47.

57 See, eg, Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92, 103; Chief Justice Marilyn Warren, 'The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States' (Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 15, Chief Justice James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 82.

58 See particularly Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Paper presented at Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010); cf Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 14.

59 See additionally Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92; Chief Justice James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.

60 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; *NAIS v Minister for Immigration and Indigenous Affairs* (2005) 228 CLR 470; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627.

61 See *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156.

62 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, especially 504 [69], 506–7 [76]–[78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

63 One consequence of *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 272 ALR 14 has already been a glut of applications in the Federal Magistrates Court for judicial review of recommendations of independent merits reviewers that asylum seekers not be recognised by the Minister for Immigration and Citizenship as people to whom Australia has protection obligations.

64 Under s 486I of the *Migration Act 1958* (Cth) lawyers are obliged to certify in court proceedings in relation to a "migration decision", that there are reasonable grounds for believing that the litigation has a reasonable prospect of success. In the absence of such certification, a federal court must refuse to accept for filing a document commencing such litigation. (See also the forms approved under Rule 31.22(1) of the *Federal Court Rules 2011* and Rule 44.05(1) of the *Federal Magistrates Court Rules 2001*).

65 (1999) 197 CLR 611, 651–7 [131]–[146].

66 (2003) 198 ALR 59, 61.

67 (2004) –207 ALR 12, 20.

68 Approximately a dozen cases are collected at footnote 84 in *SZMDS* in the joint judgment of Crennan and Bell JJ: 240 CLR 611, 638–639[103].

69 Transcript of Proceedings, *Minister for Immigration and Citizenship v SZMDS* [2009] HCATrans 183 (31 July 2009).

70 A criterion under s 36(2)(a) of the *Migration Act* is if the Minister is satisfied that Australia has protection obligations under the Refugees Convention. That Convention, as amended, applies to *inter alia*, a "person who owing to a well-founded fear of being persecuted for reasons of … membership of a particular social group".

71 Since *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 389, 396–397, 406, 413, 429 and *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 571–572, 596 the High Court has accepted it as well settled that the requirement that the "fear" be "well-founded" adds an objective requirement to the examination of the facts and that this examination is not confined to those facts which formed the basis of the fear experienced by the particular applicant: see most recently *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, 25 [18], 49 [105]; cf41–2 [78].

72 *SZMDS v Minister for Immigration and Citizenship* (2009) 107 ALD 361, 370–1 [29]–[30].

73 Ibid 370[26] (emphasis added).

74 Ibid 107 ALD 361, 370 [27] (emphasis added).

75 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

76 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165.

77 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – the Search Continues' (2002) 30 *Federal Law Review* 217, 234.

78 (2003) 211 CLR 476, 508 [83].

79 (1990) 170 CLR 1, 35–36.

80 (1977) AC 1014, 1047.

81 (1944) 69 CLR 407 at 432 ('*Hetton Bellbird*').

82 *Hetton Bellbird* (1944) 69 CLR 407, 432 (Latham CJ), quoted in *SZMDS* (2010) 240 CLR 611, 644–5 [122] (Crennan and Bell JJ), see also 620 [23] (Gummow ACJ and Kiefel J).

83 (1949) 78 CLR 353. .

84 Ibid 360, quoted in *SZMDS* (2010) 240 CLR 611, 639 [104] (Crennan and Bell JJ).

85 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

86 *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 207 ALR 12, 21 (Gummow and Hayne JJ). quoted in *SZMDS* (2010) 240 CLR 611, 625 [40] (Gummow ACJ and Kiefel J).

87 *SZMDS* (2010) 40 CLR 611, 625 [40] (Gummow ACJ and Kiefel J).

88 (1996) 185 CLR 259, 277.

89 *SZMDS* (2010) 40 CLR 611, 625 [42].

90 *R v Secretary of State for Home Development; ex parte Onibiyo* [1996] QB 768,785 (Sir Thomas Bingham MR).

91 William Wade and CF Forsyth, *Administrative Law*, (Oxford University Press, 10th ed, 2009) 312.

92 *SZMDS* (2010) 240 CLR 611,647–8 [130].

93 Examples include: *SZORJ v Minister for Immigration and Citizenship* [2011] FCA 251, [49]–[50] (Cowdroy J); *Kimberley Clark Australia Pty Ltd v Minister for Home Affairs* [2011] FCA 225,[92]–[95] (Edmonds J); *BZAAF v Minister for Immigration and Citizenship* [2011] FCA 480, [14] (Logan J); *WZAOD v Minister for Immigration and Citizenship* [2011] FCA 1044, [60]–[64] (Gilmour J). In *Hardingham v Chief Executive Officer, Department for Child Protection* [2011] WASC 86, [80]–[88], EM Heenan J granted leave to appeal from a decision of the State Administrative Tribunal of Western Australia because the proposed grounds raised questions of law and were supported by real or significant argument. Those grounds included an assertion of illogical reasoning. However the grounds that were established so as to warrant the appeal being allowed did not include any conclusion that there had been illogical or irrational reasoning.

94 (2010) 187 FCR 362 ('*SZLSP*').

95 Ibid 384 [72].

96 (2001) 206 CLR 323.

97 *SZLSP* (2010) 187 FCR 362, 388–9 [91], 390 [98].

98 Ibid 394 [107]–[108], 396 [114]–[116].

99 (2010) 189 FCR 577 ('*SZOCT*').

100 Namely that jurisdictional error is established if the RRT's conclusion of purported "satisfaction" pursuant to s 65 of the *Migration Act* is "one at which no rational or logical decision-maker could arrive on the same evidence": *SZMDS* (2010) 240 CLR 611, 647–8 [130]–[131].

101 *SZOCT* (2010) 189 FCR 577,595–6 [64]–[68].

102 Ibid 580–1 [19]–[23].

103 [2011] FCAFC 76.

104 Ibid, [135]–[136].

105 (1999) 46 NSWLR 55, 63–4 [37]ff.

106 Cf *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].

107 (2000) 199 CLR 135 ('*City of Enfield*').

108 [2011] HCA 32.

109 And essentially endorsed in the joint judgment of Gummow, Hayne, Crennan and Bell JJ in *Plaintiff M70* [2011] HCA 32, [107].

110 The range of indicators relied upon by the Applicant as evidencing that characterisation of the statutory criteria was identified by French CJ: *Plaintiff M70* [2011] HCA 32*,* [56].

111 Ibid [107]–[109].

112 Ibid [57]–[59]. French CJ did conclude, however, that the executive function conferred by s 198A was required to be exercised according to law, meaning *inter alia* that the Minister had to properly conceive and correctly construe the power that he purported to invoke. On the material before the High Court on judicial review that had not occurred, so the purported declaration under s 198A was infected by jurisdictional error and of no effect in law accordingly: ibid [58]–[68].

113 *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159, 171[28]; [2005] HCA 35 applying *R v Patterson; Ex parte Taylor* (2001) 207 CLR 391, 473-474 [248]-[252]. See further Richard Hooker, "'Necessity' in the Eye of the Beholder: Leaving Constitutional Questions Undecided" (2006) 17 PLR 177.

114 See, e.g, by way of recent illustration, *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 161 [355]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 519 [46].

115 *Migration Act 1958* (Cth), s 5(1).

116 *Migration Act 1958* (Cth), s 5(1), s 14.

117 *Migration Act 1958* (Cth), s 5(1). Defined to mean 'a person who entered Australia at an excised offshore place after the excision time for that offshore place and...became an unlawful non-citizen because of that entry'.

118 *Migration Act 1958* (Cth), s 65.

119 *Migration Act 1958* (Cth), s 46A(3), s 195A(5).

120 *Migration Act 1958* (Cth), s 46A(7), s 195A(4).

121 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 United Nations, Treaty Series 150 (entered into force 22 April 1954) ('*Refugee Convention*').

122 *Protocol Relating to the Status of Refugees*, opened for signature 16 December 1966, 606 UNTS 267 (entered into force 4 October 1967).

123 *Refugee Convention*, art 33. See also, generally, James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 307–335.

124 *M61* [2010] HCA 41, [42].

125 Ibid [3].

126 Ibid.

127 Ibid [16].

128 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–9 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

129 Ibid.

130 *M61*[2010] HCA 41, [54].

131 Ibid [57].

132 Ibid [4].

133 Ibid [21].

134 Ibid [23].

135 In illustrating this conclusion, the Court provided an illuminating summation of the many changes made to the Act since 2001 and as a result of the so called 'Pacific Strategy': see *M61* [2010] HCA 41*,* [29]–[36]. For a similar useful history, see Mary Crock and Daniel Ghezelbash 'Due Process and Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers' (2011) 18 *Australian Journal of Administrative Law* 101, 104–106. For a concise history spanning from Federation to the present day, see: Stephen Gageler 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92.

136 *M61* [2010] HCA 41, [15].

137 Ibid [16].

138 Ibid [66].

139 Ibid [65].

140 Ibid [66].

141 Ibid [71].

142 Ibid [70].

143 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

144 *M61* [2010] HCA 41, [69].

145 Ibid [74].

146 (1985) 159 CLR 550, 611 (Brennan J); cf 582 (Mason J).

147 *M61* [2010] HCA 41, [76].

148 Ibid [75].

149 (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

150 For an enlightening perspective on the link between legitimate expectations and the doctrinal question of whether natural justice is sustained by the common law or a product of statutory construction see: Stephen Gageler 'Legitimate Expectation: Comment on the Article by the Hon Sir Anthony Mason AC KBE' (2005) 12 *Australian Journal of Administrative Law* 111.

151 *M61* [2010] HCA 41, [8].

152 Ibid [91], [93]–[96].

153 Ibid [87]–[88], [97]. Despite this result, it seems that some *Departmental materials* continue to misleadingly describe the process as 'non-statutory' and as being 'not bound by the *Migration Act 1958'. See:* http://www.immi.gov.au/media/fact-sheets/75processing-unlawful-boat-arrivals.htm#d.

154 (2003) 216 CLR 277.

155 *M61* [2010] HCA 41, [99].

156 Ibid [100], citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 461 [48].

157 See the discussion of this point in, for example, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 580–581 (Mason CJ, Dawson, Toohey, and Gaudron JJ), 595 (Brennan J). The outcomes of the RSA and IMR process are not mandatory relevant considerations for the Minister when exercising the power to lift the bar: see *M61* [2010] HCA 41, [100].

158 See Mary Crock and Daniel Ghezelbash 'Due Process and Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers' (2011) 18 *Australian Journal of Administrative Law* 101, 105–106.

159 The consideration of this section by the court in *M61* is dealt with above.

160 The provision in full provides that the Minister may: '(a) declare in writing that a specified country: (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for

protection; and (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and (iv) meets relevant human rights standards in providing that protection; and (b) in writing, revoke a declaration made under paragraph (a).'

161 *Plaintiff M70* [2011] HCA 32, [2] (citations omitted).

162 See, eg, ,ibid [76].

163 French CJ and Kiefel J delivered separate judgments, and Heydon J dissented.

164 Cf *Plaintiff M70* [2011] HCA 32, [49] (French CJ).

165 Ibid [90]–[91], referring in part to statements in *M61/2010E v Commonwealth* [2010] HCA 41.

166 Ibid [94], [98].

167 Ibid [94]–[95].

168 Ibid [96]–[97].

169 Ibid [54]–[55]. Cf also [237]ff (Kiefel J).

170 Ibid [103].

171 Ibid [106].

172 See generally the earlier discussion of the decision in *SZMDS* (2010) 240 CLR 611.

173 *Plaintiff* M70 [2011] HCA 32, [109].

174 Ibid [116]–[118].

175 Ibid [119].

176 See, eg, *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443; *Patto v Minister for Immigration and Multicultural Affairs* [2000] FCA 1554. Contrast the view of Heydon J: *Plaintiff M70*, [165]ff.

177 *Plaintiff M70* [2011] HCA 32,[122]ff. See further the discussion of the Howard Government's Nauru arrangements below.

178 Cf ibid [240]ff (Kiefel J).

179 Ibid [61]ff.

180 Ibid [66]. His Honour was referring particularly to the offences created by the Malaysian *Immigration Act 1959*, the status of 'exemption orders' thereunder, and the consequent risks to transferees (see also [30]ff).

181 Ibid [67].

182 Ibid [142]ff.

183 Ibid [146].

184 Ibid [69], [257]. Contrast Heydon J.

185 See also the discussion of this history in the judgment of French CJ: ibid [13]ff.

186 Ibid [13].

187 Ibid [15]–[126].

188 SG No 21 of 2011: http://www.minister.immi.gov.au/media/cb/2011/cb171319.htm.

189 Cf *Plaintiff M70* [2011] HCA 32, [255] (Kiefel J); contrast [161]ff (Heydon J).

190 Ibid [124].

191 See generally the earlier discussion of the decision in *SZMDS* (2010) 240 CLR 611.

192 *Plaintiff M70* [2011] HCA 32, [135].

193 Ibid [56]ff.

194 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; cf *Craig v South Australia* (1995) 184 CLR 163.

195 *Plaintiff M70* [2011] HCA 32, [58]ff.

196 Ibid [114].

197 Cf the alternative arguments put forward by the plaintiffs: see, eg ibid [16] (French CJ).

198 See esp *Minister for Immigration and Multicultural Affairs v Lat* (2006) 151 FCR 214 ('*Lay Lat*').

199 See, eg, *South Australia v Totani* (2010) 242 CLR 1, especially 43 [62] (French CJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, especially 354–5 [55] (French CJ), 366–7 [97]–[98] (Gummow and Bell JJ).

200 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*').