JUDICIAL REVIEW: CAN WE ABANDON GROUNDS?

Justice John Basten*

Since its commencement on 1 October 1980 the recognised point of reference for a statement of the grounds for judicial review has been s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). That is true not only of statutory review within the terms of the ADJR Act but also of review in the supervisory jurisdiction of state Supreme Courts, where the ADJR Act does not apply, and (though perhaps to a lesser extent) in proceedings under s 75(v) of the *Constitution*. The influence of the ADJR Act, despite questioning in recent years as to its continued relevance, cannot be doubted. However, only five years after the ADJR Act commenced, Lord Diplock, in *Council of Civil Service Unions v Minister for the Civil Service*[1] (*CCSU*), characterised the grounds as procedural impropriety, illegality and irrationality. The commentary in the CCH Service on the ADJR Act, edited by then Alan Robertson SC, applied this characterisation in discussing the grounds for an order of review.[2] Although the grounds were not coterminous with common law principles, the language of the ADJR Act was generally seen as reflecting the common law, as explained by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, dealing with failure to take into account a relevant consideration.[3]

A number of factors have caused both courts and commentators to reconsider the operation of the grounds over the 40 years since they were drafted. It is sufficient, by way of background, to note three such events. First, and perhaps obscurely for those not working in the area, there was the insertion of a new s 166LB in the *Migration Act 1958* (Cth), now better known as s 476, which sought to permit judicial review on some grounds but not others. One of the included grounds was that 'the decision was an improper exercise of the power conferred by [the Act]', but that ground was said to exclude taking an irrelevant consideration into account or failing to take a relevant consideration into account. This attempt by the Migration Act, then the major source of federal judicial review decisions, to adopt the language of s 5 of the ADJR Act but to carve out some grounds as unavailable failed. It was doomed to fail because it ignored the fact that the grounds were expressed in imprecise language at a reasonably high level of generality and involved much potential overlap. Failure to take account of a mandatory consideration must, one would think, be an error of law, but error of law was an available ground of review. The exercise came unstuck,[4] not only because it was internally incoherent but also because it failed to take into account the statutorily immune jurisdiction of the High Court to grant relief by way of the constitutional writs.

The second event involved a further amendment of the Migration Act by which Parliament sought to include a strong privative clause in order to constrain the availability of judicial review. That occurred in the immediate aftermath of 9/11. The *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) was part of a suite of legislation to which assent was given on 27 September 2001 and which came into operation almost immediately. That led, in *Plaintiff S157/2002 v Commonwealth of Australia*,[5] to the enlistment of 'jurisdictional error' as a description of the constitutional limit

* *Justice Basten is a judge of the Court of Appeal of the NSW Supreme Court. This is an edited version of the keynote address presented at the Australian Institute of Administrative Law National Conference, University of New South Wales, Sydney, NSW, 27 September 2018.*

on the effectiveness of a Commonwealth privative clause in constraining the supervisory jurisdiction of the High Court.

The third event was the adoption of the same concept of 'jurisdictional error' as a constitutional constraint on the power of a state Parliament to limit the supervisory jurisdiction of state Supreme Courts, as explained in 2010 in *Kirk v Industrial Court (NSW)*.[6]

These developments set the scene for what has become, as I read recent judgements, a major rethinking of how we approach the availability of judicial review in Australia.[7]

However, I want to start not in this country but with an English decision — not one of the UK Supreme Court or the Court of Appeal but of a Divisional Court of the Queen's Bench Division. Unusual cases can lead us to question basic assumptions underlying conventional thinking, and this was a most unusual case. *The Queen (on the application of DSD and NBV) v The Parole Board of England and Wales*[8] (*Radford*) was remarkable because it involved a challenge to a decision of the Parole Board to release a prisoner. (The prisoner called himself John Radford, and I will use that name for the case.) The case arose in this way. Mr Radford, then known as Worboys, was convicted in March 2009 of 19 serious sexual offences committed on women who had been passengers in his taxi. (He was then a cab driver in London.) In April 2009, he was sentenced to an indeterminate sentence for public protection, with a minimum term of eight years imprisonment. That period expired in February 2016, but Mr Radford was only eligible to be released if the Parole Board was satisfied that 'it is no longer necessary for the protection of the public that the prisoner should be confined'.[9]

There was more to Mr Radford's history than the 19 counts on which he had been convicted. They alone might not have led to the title of 'the black cab rapist'. A dossier supplied to the Parole Board, based on information provided by the police, identified 'at least 80 potential victims' in addition to the women involved in the charged offending for which he had been convicted. This material (together with the results of other litigation) was not considered by the Parole Board. In a judgement delivered on 28 March 2018 the Divisional Court held that the material should have been considered; accordingly, the Court set aside the decision of the Parole Board. Mr Radford remained (and remains) in custody.

There are two background matters which warrant attention before turning to the reasoning of the Court. First, there was an interesting issue in relation to standing to bring the proceedings challenging the release order. Much was made in the media at the time of the fact that the relevant minister, the Justice Secretary, did not challenge the order. The primary applicants, known as DVD and NBV, were women who had been the victims of conduct of which Mr Radford had been convicted. However, applications were also brought by the Mayor of London and by News Group Newspapers Ltd, although News Group's challenge was limited to restrictions on publication. The standing of the complainants was not challenged and the Court held that the Mayor did not have standing, although it had regard to his submissions.

The Divisional Court itself noted the uniqueness of the case, noting that:

(a) 'never before has a decision to direct the release of a prisoner been challenged'; and;
(b) '[b]ecause the only parties to a hearing before the Parole Board are the Secretary of State and the prisoner, it also follows that never before has judicial review been mounted by anyone other than a party to the proceedings'.

(That may not be quite correct; we would think of *Re McBain; Ex parte Australian Catholic Bishops Conference*.[10]) The Court also noted that there had not previously been a challenge to a rule prohibiting publication of information about proceedings before the Parole Board and the names of persons concerned in the proceedings.[11]

The second background matter concerns other proceedings brought by DSD and NBV against the Commissioner of Police under the *Human Rights Act 1998* (UK). Those proceedings alleged a failure of the police to conduct effective investigations into Mr Radford's crimes. They claimed compensation, being successful at trial. An appeal by the Police Commissioner was dismissed in June 2015.[12] A further appeal to the UK Supreme Court was dismissed on 21 February 2018.[13] (Given the relevance of human rights law to both domestic tort law and the regulatory functions of administrative law, this decision is important in its own right.) The relevance of the Human Rights Act litigation for present purposes was that the judgement was available to the Parole Board, but the findings of fact made by the trial judge had been made in proceedings to which Mr Radford was not a party.

Mr Radford was fully aware of the difficulties he faced in persuading the Board that he was no longer a threat to public safety. He sought to acknowledge his offending and demonstrate a degree of insight by what the Divisional Court thought may have been 'a carefully calibrated account, steering adroitly between admitting too much and too little, rather than one that is entirely open and forthcoming'.[14] He also changed his surname from Worboys to Radford.

In substance, the challenge to the decision of the Parole Board turned on two related factors: first, what was described as 'missing material'; and, secondly, procedural fairness. The Parole Board did not have before it a number of sources of information against which to judge the credibility and reliability of the offender's account to it of his offending. Thus, in the Human Rights Act proceeding, the trial judge (Green J) had found that Mr Radford had committed 'in excess of 105 rapes and sexual assaults upon women in his taxi'. He also provided 'critical detail of the circumstances of the police arrest and what was found (all of which could, in any event, have been made available to the Parole Board)'.[15]

Turning to the reasoning of the Divisional Court, its first step was to consider whether the decision of the Parole Board, assessed upon an examination of the material that it took into account rather than by reference to that which, arguably, it ought to have taken into account, was *Wednesbury* unreasonable or irrational. The Court rejected a challenge mounted on that basis.[16]

The Court's second step was to consider a challenge based on failure to have regard to 'relevant considerations', identified as evidence of extensive offending beyond the convictions for which he had been sentenced. Recognising that, in the absence of any express statutory obligation, it was necessary to imply an obligation to take such material into account, the Court rejected that ground. It reasoned that such an obligation would only be implied 'if evidence of wider offending were always relevant to the statutory question: it cannot depend on the circumstances of individual cases'.[17]

On its face, that reasoning is curious. It is not difficult to bring to mind statutes which identify mandatory considerations in express terms but which will be subject to an express or implied qualification that such factors must be considered, but only so far as relevant in the circumstances of the case. To give but one example, old s 79C of the *Environmental Planning and Assessment Act 1979* (NSW) (now s 4.15) requires a consent authority dealing with a development application to take into consideration 'such of the following matters as are of relevance to the development the subject of the development application'.

However, there may be a more nuanced approach to this aspect of the reasoning, to which I will return.

In the result, the Divisional Court upheld the challenge to the release order on the basis that the Board ignored 'a matter [which] is so obviously material that it would be irrational to ignore it', applying *Wednesbury* principles of unreasonableness.[18] The central issue on the parole application was identified as the honesty and veracity of Mr Radford's account of his offending. The Divisional Court, reflecting reasoning of the kind adopted by the High Court in *ACMA v Today FM*[19] (*ACMA*) said, 'whereas we agree … that it is not the role of the Parole Board to determine whether a prisoner had committed other offences, we cannot accept the extension of that submission … that it is precluded from considering evidence of wider offending when determining the issue of risk'.[20]

How should we assess this approach in Australia? First, *ACMA* held that the licensing authority could determine that a licensee had committed an offence and thus breached a licence condition, although the authority was not a criminal court. That was a step further than merely 'considering evidence'; it involved a determination of breach for the limited purpose of the licensing function. Secondly, although our High Court has been guarded in imposing an obligation to inquire, it accepts that there may be circumstances where that is necessary. In *Minister for Immigration and Citizenship v SZIAI*,[21] the Court said:

> [I]t may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.[22]

We should not reject out of hand a ground of review based on a duty to inquire, but the label we apply may raise two other questions.

First, by seeking out statutory implications, are we really adopting a fig leaf of legislative justification for what is in substance the imposition of a requirement by the court? Secondly, does the adoption of terms like 'jurisdictional error' and 'constructive failure to exercise jurisdiction' merely substitute one label for another, so that we are adopting higher and higher levels of generality to describe the exercise being undertaken by a reviewing court, with a resultant diminution in transparency? If these concerns have substance, the conventional grounds of review, despite their vagueness and elements of overlapping, would at least provide greater particularity.

In relation to the first question, it is time to return to the way the Divisional Court dismissed the 'relevant considerations' ground. It is tolerably clear that mandatory considerations are not all of a kind. Taking s 4.15 of the Environmental Planning and Assessment Act, several of the mandatory considerations are provisions of various kinds of planning instruments. A failure to apply the provision of an instrument will turn on whether it is applicable in the circumstances. That is likely to involve a matter of construction of the instrument and hence a question of law. On the other hand, a requirement to consider 'the likely impacts of [the] development' and 'the suitability of the site for the development' will engage an evaluation of the facts. Further, it is said that 'the public interest' is a mandatory consideration. What that would encompass cannot be determined in the abstract. It too will depend upon the circumstances of the case and may involve highly contestable judgements. But it is important that these factors be informed by the specific statutory context within which the decision is made.[23] The label provides little assistance.

In relation to the second question, consider the statement of Gummow and Callinan JJ in *Dranichnikov v Minister for Immigration and Multicultural Affairs*[24] (*Dranichnikov*) that '[t]o

fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice'.[25] Their joint reasons further noted that it may also be 'either characterised as a failure to accord natural justice or as that, and more, which we consider it to be, including a constructive failure to exercise jurisdiction'.[26]

I see no difficulty in identifying, as a mandatory consideration, the content of an application. If an asylum seeker alleges a fear of persecution in his or her country of nationality, it would be legal error for the decision-maker to fail to assess the basis of the claim. That does not mean that factual assertions must be accepted, but it may mean that a plausible claim which, if accepted, would engage the *Convention Relating to the Status of Refugees*,[27] Art 1, must be assessed. If the challenge is that the decision-maker did not assess the claim adequately, is that a failure to address a mandatory consideration, a failure to inquire or simply a failure to exercise the statutory power? Or should one acknowledge that genuine, proper and realistic consideration of a claim will involve matters of degree and judgement and really we are applying a reasonableness standard?

Let me now turn to the High Court's recent decision in *Probuild Constructions v Shade Systems*[28] (*Probuild*). The issue was whether an adjudicator's determination of a dispute in relation to a progress payment under the *Building and Construction Industry Security of Payment Act 1999* (NSW) was reviewable for error of law on the face of the record. The Court of Appeal had said no; the High Court agreed. The plurality said the only question was whether the statutory scheme ousted the jurisdiction of the Supreme Court to quash for error of law on the face of the record — a power now found in s 69 of the *Supreme Court Act 1970* (NSW).[29] The plurality said that the jurisdiction was ousted by necessary implication. Gageler J and Edelman J reached the same result but by routes which dealt rather differently with the supervisory jurisdiction. For present purposes I want to consider two propositions in the reasoning of Gageler J.

Gageler J identified *Attorney General (NSW) v Quin*[30] as a 'turning point' in the development of Australian jurisprudence. For that characterisation he had the support of the Court in *Corporation of the City of Enfield v Development Assessment Commission*,[31] which described the principle formulated by Brennan J as encapsulating '[t]he fundamental consideration in this field of discourse'.[32] Gageler J summarised the point in *Attorney General (NSW) v Quin*[33] in the following passage:

> In the course of giving reasons for allowing an appeal against an order of the Court of Appeal of the Supreme Court of New South Wales, which order had been sought to be justified as an exercise of the Supreme Court's supervisory jurisdiction, Brennan J there formulated the principle that '[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power'.[34] His Honour added that '[i]n Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.[35] His Honour went on to explain both reasonableness[36] and procedural fairness[37] as within the category of limitations on the exercise of a statutory power that are ordinarily implied.[38]

The second step in Gageler J's argument was to pick up the common law presumption of statutory interpretation 'that a statutory conferral of decision-making authority on a person or body other than a court is conditioned by an implied statutory requirement that the person or body can validly exercise that authority only on a correct understanding of the law applicable to the decision to be made'.[39] The presumption, Gageler J stated, is 'similar in concept and in operation to the common law presumptions of statutory interpretation which support the statutory implication of conditions of reasonableness and procedural fairness'. That is, they condition the exercise of power so that breach of the requirement is a jurisdictional error.

The consequence of those two propositions, Gageler J continued, is that the power of a superior court to issue certiorari to quash for non-jurisdictional error of law on the face of the record is 'anomalous'.[40] In other words, if the decision-maker has no power to make a decision based on a wrong understanding of the law then any error of law can be corrected for jurisdictional error; if the decision-maker is entitled to make a decision based on a wrong understanding of the law, it 'would at best be supererogation and at worst conducive of incoherence' to provide a power to quash the decision for error of law on the face of the record.

The result in *Probuild*, in Gageler J's view, was that, if one were satisfied that the adjudicator was entitled to make a determination on a wrong construction of the contract, it made no sense to then invoke a presumption that certiorari would be available for error of law on the face of the record — the record in this case constituting the adjudicator's reasons. This reasoning is attractive because it addresses, at least inferentially, the puzzle at the heart of the concept of certiorari — namely, what is non-jurisdictional error of law? However, one might go a step further and question the concept of 'error of law', which is at the heart of Gageler J's second proposition, as itself fraught with difficulties.

One may appreciate the willingness to look behind 'presumptions' which are an important part of statutory construction. On the other hand, I am not persuaded that a supervisory jurisdiction based on error of law on the face of the record is either incoherent or necessarily illogical. A trial judge in the Supreme Court undoubtedly has power to determine the facts of a case and the relevant law and apply the law to the facts. It is neither incoherent nor illogical to allow an appeal by way of rehearing from the trial judge's decision. On one view, where the supervisory jurisdiction is engaged with respect to an alleged error of law on the face of the record, it is little different from an appeal for error of law.[41]

However, there is a more fundamental consideration to be drawn from this discussion. That is this: if one wishes to understand better the scope and limitations of the supervisory jurisdiction of the court, as opposed to its appellate jurisdiction, one is working at the intersection of the common law and statute.[42] There are a number of principles of statutory interpretation which are important. Those principles operate in the sphere of public law and therefore rely on public law doctrines including the separation of powers; that doctrine requires the courts to supervise the legal limits of powers but not to exercise the powers which are conferred on officers within the executive branch. That is what Brennan J said in *Quin*.

Judicial review may be founded in statute or in the general law, as with the s 75(v) jurisdiction of the High Court and the s 69 jurisdiction of the New South Wales Supreme Court — the latter being mirrored by forms of statutory recognition in other states. Not all, but most, exercises of administrative power by government agencies are statute-based. The scope of the power will be determined by the statute conferring the power. Not all, but most, disputes arise from the exercise or failure to exercise powers which are discretionary or based on conditions of engagement which require evaluative judgements (which is a closely related concept). I assume that Mr Radford's Parole Board had no power to refuse him release if satisfied that his continued incarceration was not necessary for the protection of the public. No-one but the Parole Board could make that inherently contestable predictive judgement. The question was: could it take into account findings of fact made by a trial judge in proceedings to which Mr Radford was not a party (and which, incidentally, the Commissioner of Police, who was the defendant, did not challenge)? Could it otherwise place weight on unproven allegations and complaints? The Parole Board declined to do so on the basis that to place weight on this material would be a breach of procedural fairness. That view was said to be manifestly unreasonable and even irrational.

So how should the Parole Board have used this material? The answer given by the Divisional Court was that it could be used to challenge the sincerity and reliability of Mr Radford's account of the limited nature of his offending and his degree of insight into his conduct. For this purpose, at a hearing various matters would need to have been presented to Mr Radford for his response or explanation.

Before finding that the Parole Board's procedures were manifestly unreasonable, or even irrational, one would wish to know more about the workload of the Parole Board, how it conducted hearings and so on.

Of course, to set aside a decision may have a limited effect on the rights of an affected individual; the process can be repeated. But the judgement of the reviewing court should engage sufficiently in a practical sense with the powers and procedures of the decision-maker to allow a repeat consideration of the application to be carried out lawfully.

It is this last point which, albeit based on a highly charged case, leads me to a conclusion that we do not do judicial review very well in unusual or difficult cases.

In part that is because we have grounds of review which operate at different levels of generality. At the highest level, we have 'jurisdictional error', or 'error of law on the face of the record'. Both of these phrases are unhelpful without more precise analysis. At the next level, we have the tripartite classification from the *CCSU* case of procedural impropriety, illegality and irrationality. These concepts are useful to the extent that they tell us that reviewable error can arise if unfair procedures are adopted, if a legal constraint on power is breached, and if the result is assessed by the court to be unacceptable.[43]

At a third, and more specific, level we have the s 5 grounds from the ADJR Act. They are not entirely satisfactory because, as every experienced pleader knows, what is essentially one challenge can be classified in different ways.

Is there another way? Some years ago I had a clash of events. I was due to give a paper on administrative law to our judges but had hoped to attend the launch by then Chief Justice French of a review of the UNSW Law School curriculum. I rang to apologise. Having ascertained that my talk was due to start 15 minutes before the launch, French CJ explained that there was no problem. 'All you need to say', he told me, 'is that administrative law is all about statutory interpretation. You can easily do that in 15 minutes'.

I accept the point; most questions of power will require careful attention to the power-conferring statute. However, that gives rise to a different set of issues: how best to construe statutes and how to apply, in a particular statutory context, general law principles of procedural fairness and reasonableness. In this exercise, labels will not assist.

Let me finish with an example. There is no doubt that the 'reasonableness' criterion relied on in *Radford* is fraught in two broad respects. First, it unavoidably requires a court to engage in an evaluative assessment of the actual decision (and perhaps, as in *Radford*, with the procedures adopted to reach that decision). The High Court, after a period of doubt, has reaffirmed the principle of restraint implicit in Brennan J's statements in *Quin*: within the limits of power, the court is not concerned with the merits.[44] The court has no mandate to re-exercise the power or to set a decision aside on the basis that it would have reached a different decision.

Secondly, in their terms the tests of manifest unreasonableness and irrationality (which operate differently) provide no criteria for what is ultimately an evaluative judgement. In that context there is an attraction in structured proportionality reasoning. Why not ask: (1) for

what legitimate purpose is the power conferred; (2) does its exercise impinge on individual rights; and (3) is there a less intrusive result which is reasonably adapted to the legitimate purpose? (Of course, depending on context, this human rights protective version may need to be reformulated.) Those who resist that approach note that it recasts the exercise the decision-maker should take; it therefore invites the court to revisit the merits — a function denied by conventional jurisprudence.

My conclusion: I am not averse to labels. They can be useful as a checklist; and, for busy lawyers and judges, they may provide better guidance than principles articulated at a high level of generality. However, they may promise greater precision than they can deliver, and it is clear they do not describe independent, self-contained concepts.

On the other hand, in less straightforward cases we must have regard to basic constitutional principles such as the separation of powers and rely on implied statutory constraints, engaging principles of statutory interpretation and placing weight on the context provided by the specific statute.[45] We in Australia tend to place far more weight on these factors than do the British. That may be the influence of our written *Constitution*. But recall that the canonical statement of Brennan J in *Quin* was made in relation to state jurisdiction, not federal jurisdiction.

Would an Australian court decide *Radford* differently? It is not my purpose to answer that question, but I would leave you with two thoughts.

First, a decision to release on parole, unlike the initial sentence, is a decision for the executive. The relevant minister presented material to the Board and accepted the Board's decision. The only person with a legal interest affected by the outcome was Mr Radford. Would we allow a member of the public to seek judicial review? Were not the interests of the victims, so far as the liberty of the offender was concerned, at an end with the convictions and sentencing? Secondly, we would probably call it a constructive failure to exercise jurisdiction but otherwise, as the joint reasons stated in *ACMA*, 'it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action'.[46]

The basis of judicial review lies in the breach of a mandatory condition imposed on the exercise of a specific power, usually statutory. The statute, not a taxonomic label, will determine the validity of the decision.

Endnotes

1 [1985] AC 374.
2 *Australian High Court and Federal Court Practice*, Vol 1 [¶10-635].
3 (1986) 162 CLR 24, 39; [1986] HCA 40.
4 See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30.
5 (2003) 211 CLR 476; [2003] HCA 2.
6 (2010) 239 CLR 531; [2010] HCA 1.
7 See most recently *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34.
8 [2018] EWHC 694 (Admin).
9 *Criminal Justice Act 2003* (UK) s 239(1)(b).
10 (2002) 209 CLR 372; [2002] HCA 16.
11 [2018] EWHC 694 (Admin) [3].
12 *Commissioner of Metropolitan Police v DVD* [2016] QB 161; [2015] EWCA Civ 646 (Lord Dyson MR, Laws and Kitchen LJJ).
13 *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11.
14 [2018] EWHC 694 (Admin) [127].
15 [2018] EWHC 694 (Admin) [51]–[52].
16 [2018] EWHC 694 (Admin) [116], [130].

17 [2018] EWHC 694 (Admin) [142].
18 [2018] EWHC 694 (Admin) [141], [156], [159]–[162].
19 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352; [2015] HCA 7.
20 [2018] EWHC 694 (Admin) [155].
21 (2009) 83 ALJR 1123; [2009] HCA 39 at [25].
22 See further *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1, [22]–[23] (French CJ and Kiefel J), [74]–[75] (Gummow J), [91] and [92] (Heydon and Crennan JJ agreeing).
23 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34, [27] (Kiefel CJ, Gageler and Keane JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248; [2018] HCA 4, [44], [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [102] (Edelman J).
24 (2003) 77 ALJR 1088; [2003] HCA 26.
25 (2003) 77 ALJR 1088; [2003] HCA 26, [24].
26 (2003) 77 ALJR 1088; [2003] HCA 26, [25].
27 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
28 (2018) 92 ALJR 248; [2018] HCA 4.
29 (2018) 92 ALJR 248; [2018] HCA 4, [2].
30 (1990) 170 CLR 1; [1990] HCA 21.
31 (2000) 199 CLR 135; [2000] HCA 5.
32 (2000) 199 CLR 135; [2000] HCA 5, [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
33 (1990) 170 CLR 1.
34 (1990) 170 CLR 1, 35–36.
35 (1990) 170 CLR 1, 36.
36 (1990) 170 CLR 1, 36.
37 (1990) 170 CLR 1, 39–40.
38 (2000) 199 CLR 135; [2000] HCA 5, [71].
39 (2018) 92 ALJR 248; [2018] HCA 4, [75].
40 (2002) 209 CLR 372; [2002] HCA 16, [276]; (2018) 92 ALJR 248; [2018] HCA 4, [77].
41 Which is not inconsistent with its origins; cf *Hossain* [2018] HCA 34, [60] (Edelman J).
42 [2018] HCA 34, [28] (Kiefel CJ, Gageler and Keane JJ).
43 [2018] HCA 34, [19]–[20].
44 *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713; [2018] HCA 30, [11] (Kiefel CJ), [52]–[53] (Gageler J), [82] (Nettle and Gordon JJ), [134]–[135] (Edelman J).
45 (2018) 92 ALJR 713; [2018] HCA 30, [134] (Edelman J).
46 (2015) 255 CLR 352; [2015] HCA 7, [33].