

THE RIGHTS OF NON-CITIZENS IN AUSTRALIA: MODES OF REVIEWING EXERCISES OF DISCRETIONARY POWER UNDER THE MIGRATION ACT 1985 (CTH)

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I. INTRODUCTION

This examination of review of the exercise of discretionary powers under the Migration Act 1958 (Cth) (The Migration Act) identifies the relevant alternative modes of review and the circumstances in which each is available and then offers some discussion of the principles of review which are applied. Finally, an assessment of the adequacy of existing review mechanisms is offered.

Some background facts about Australian immigration are worth noting at the outset. After the end of World War II Australia adopted a large scale immigration program which has resulted in about four million people from 140 different countries settling in Australia.¹ Moreover in 1985 about 40% of Australia's population was either born overseas or of parents born overseas and some 27% of the nation's workforce was born overseas.² Thus it is readily apparent that this pattern of migration has resulted in a substantial degree of ethnic heterogeneity and multiculturalism. The significance of this pattern for present purposes lies in the way we view non-citizens in Australia. The extent and pattern of post-war immigration in Australia make it easier to view non-citizens in Australia not just in instrumentalist terms but as subjects of human rights and in some cases as participating members of Australian society who in each case deserve to be treated in accordance with certain standards of fairness once they arrive in Australia. Certainly they cannot be

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1 Human Rights Commission: *Report No. 13, Human Rights and the Migration Act 1985*, ACPS, 1985 4.

2 *Ibid.*

viewed logically, as many once were, as undesirable foreigners threatening the cohesion of a white homogeneous christian society. Yet at the same time some of Australia's ambivalence to immigration persists. The nature of the Migration Act perhaps encourages or reflects this. It has been noted for instance that:

.. it contains no statement of objectives or principles of immigration policy, no guidelines for selection of migrants, no indication as to how immigration levels should be determined and no statement of the rights of those who have settled in Australia.³

It is simplistic however to expect that problems of non-citizens rights can be resolved only by reference to blunt and amorphous concepts of rights or the national interest. Broader concepts about the role of government in protecting personal freedom are needed. One useful theory for example assesses non-citizens' claims by focusing on his or her participation in the host country and it grades rights according to an ascending scale as his or her identification with the society deepens.⁴ The vision of freedom embodied in this approach incorporates the positive freedom to engage oneself with others and to be and remain a member of a larger social community.⁵

From this associational model of freedom is derived a flexible 'contracts' theory of procedural rights.⁶ The heart of this theory is that an alien's 'contracts' with the country may create a legal interest in entering the nation.⁷ Furthermore, according to this theory, once this threshold interest has been met the extent of the alien's ties influence the nature of the procedure that is due.⁸ The significance of this approach for present purposes is that it shows the complexity of the balancing of interests involved in determining membership of the national community.⁹ The concept of 'citizenship' has conventionally been the legal solution to the problem of determining the membership of the nation but the complexity of the problem, in the words of an anonymous American author, "defies easy solution through rigid categorisation: a unitary concept of citizenship cannot embrace the diversity of forms that membership may take."¹⁰ Thus for example, the returning resident non-citizen who possesses significant ties to Australia by virtue of having lived and worked and become a part of the social community is in many respects similar to the native born Australian yet he remains legally, if not functionally, a non-citizen. In short, much follows from how we regard the various categories of non-citizens. Once for example, we recognise that deportable non-citizens form to some extent an exploited minority within our society and that little has been done to change the social conditions that encourage their presence then procedural defects in the deportation process

3 *Id.*, 5.

4 Anonymous. "Developments in the Law: Immigration Policy and the Rights of Aliens" (1983)16 *Harv L Rev* 863, 1292.

5 *Ibid.*

6 *Id.*, 1324.

7 *Id.*, 1325.

8 *Id.*, 1326.

9 *Ibid.*

10 *Id.*, 1334.

can be more easily seen as worth remedying. The above discussion forms the basis for the following critique of existing modes of reviewing discretionary powers under the Migration Act.

II. THE GRANT AND CANCELLATION OF ENTRY PERMITS

1. General

Unless exempt, a person cannot lawfully enter Australia without obtaining an entry permit.¹¹ Sub-section 6(1) of the Migration Act provides that a non-citizen who enters Australia without being the holder of an entry permit becomes a prohibited non-citizen. Under sub-section 6(2) an officer may grant an entry permit. An entry permit may be either a temporary entry permit or one unrestricted as to time which permits permanent residence. Under sub-section 6(5) an entry permit may be granted to a non-citizen either on arrival in Australia, or subject to section 6A, after he has entered Australia. Section 7 provides to the effect that the Minister may in his absolute discretion cancel a temporary entry permit whereupon unless a further entry permit is granted the non-citizen becomes a prohibited non-citizen and liable to deportation at the discretion of the Minister under section 18. Entry permits authorising permanent residence are not liable to be cancelled by the Minister under section 7. Holders of such entry permits may however become liable to deportation at the discretion of the Minister under section 12 if they are convicted of a criminal offence and sentenced to imprisonment for a period of not less than one year and at the time of the commission of the relevant offence they had been a permanent resident for less than 10 years.

The conditions which must be fulfilled before an entry permit permitting permanent residence shall be granted to a non-citizen after his entry into Australia are set out in section 6A. That is, the section sets out the grounds for change of status from temporary entrant to permanent resident. Section 6A(1)(c) provides to the effect that one of these grounds is that the applicant is the holder of a temporary entry permit and the Minister has determined in writing that he has the status of refugee within the meaning of the 1951 Geneva Convention or of the 1967 New York Protocol Relating to the Status of Refugees. The High Court in *Minister for Immigration and Ethnic Affairs v. Mayer*¹² considered the argument that this paragraph did not expressly or even impliedly confer power on the Minister to make decisions about refugee status but merely referred to the objective fact that a decision on refugee status had already been made under prerogative or executive authority and accordingly such decision was not reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the AD(JR) Act). This

11 S. 3 of the Migration Act exempts certain persons from the requirement to obtain an entry permit.

12 (1985) 61 ALR 609.

argument was rejected by the High Court which held that the said paragraph conferred on the Minister the power to make a decision on refugee status for the purposes of that paragraph and accordingly such decision was reviewable under the AD(JR) Act since it was "a decision made under an enactment" within the meaning of that Act.

2. *Committee for Determination of Refugee Status (The DORS Committee)*

The Convention and Protocol referred to in paragraph 6A(1)(c), to each of which Australia is a party, establishes no particular procedure for the purpose of determining whether an individual is in fact entitled to refugee status.¹³ In practice an inter-departmental committee, the Committee for the Determination of Refugee Status; which is neither constituted nor regulated by statute, makes recommendations to the Minister concerning the grant of refugee status.¹⁴ The Australian representative of the United Nations High Commission on Refugees is invited to attend committee meetings in "an advisory capacity".¹⁵ The Committee provides for a limited form of review on the merits of the Minister's decision on refugee status in the sense that its procedural rules provide for the Minister, of his own volition or at the request of the applicant, to refer a case back to it for reconsideration.¹⁶ In *Simsek v. Minister for Immigration and Ethnic Affairs*¹⁷ the Committee received written representations from the applicant but his legal advisers were denied the opportunity of representing him before the Committee, in accordance with its usual procedure. The applicant argued, inter alia, that this refusal constituted a denial of natural justice and instituted proceedings in the High Court before Stephen J. seeking injunctions against the Minister and the Commonwealth.¹⁸ Stephen J. refused his applications and rejected his argument in regards to natural justice on the basis that, insofar as the applicant sought to rely here on the doctrine of legitimate expectations, the only relevant expectation that existed was that his application would be treated by the Minister, acting through the Committee, in accordance with the said Convention and Protocol.¹⁹ Since each of these are silent as to procedure regarding determination of refugee status, they were incapable of being the source of any rights which he claimed were being denied. This decision is of uncertain authority, however, after the Full High Court's more recent decision in *Kioa v. Minister for Immigration and Ethnic Affairs*²⁰, in which a majority of the High Court, Gibbs C.J. dissenting, held that the exercise of the Minister's discretionary power under section 18 to deport

13 *Simsek v. Minister for Immigration and Ethnic Affairs* (1981-82) 40 ALR 61, 67.

14 *Department of Immigration and Ethnic Affairs: Determination of Refugee Status: Notes for the Guidance of Interviewing Officers*, undated 5.

15 *Id.*, 7.

16 *Ibid.*

17 Note 13 *supra*.

18 *Ibid.*

19 *Ibid.*

20 (1986) 60 ALR 113.

prohibited non-citizens was now subject to the requirement of natural justice and in which Brennan J. went further and argued that "the complex of powers" conferred by sections 6, 6A, 7 and 18 were subject to the need to observe the requirements of natural justice.²¹ This decision will be discussed in more detail later.

While, at first sight, it may seem preferable that the question of eligibility for refugee status should be determined by a judicial body, or at least be subject to some mode of external review on the merits which conducts public hearings, rather than be determined by an executive body such as the DORS Committee; D.H.N. Johnson has pointed out that, in practice, it may be doubtful whether persons claiming refugee status are better served by judicial determinations.²² This is because firstly, the principal criteria of entitlement to refugee status under the 1951 Geneva Convention are: a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and a consequent reluctance to return to one's country of nationality.²³ Secondly, court action necessarily involves publicity and it is not always easy or expedient for a government department to go on record and state to a court that conditions of political persecution exist in countries with which the government wants to remain friendly.²⁴ It may be much easier for an inter-departmental committee to grant refugee status with no reasons given.²⁵

3. *Immigration Review Panels ("Panels")*

A further mode of review on the merits of decisions on entry permits is provided by Immigration Review Panels. The nature of Panels was examined by the Full Federal Court in *Minister for Immigration and Ethnic Affairs v. Kemal Akbas*,²⁶ wherein it was noted that these bodies are not created by statute but are set up administratively to review certain kinds of decisions, primarily relating to applications for permanent resident status, which have been made by Immigration Department officers under the Migration Act.²⁷ Until the *Kemal Akbas* case the jurisdiction of the Panels included review of decisions on applications by prohibited non-citizens for permanent entry permits pursuant to paragraph 6A(1)(e). That paragraph provides to the effect that an entry permit may be granted to a non-citizen if he is the holder of a temporary entry permit and there are strong compassionate or humanitarian grounds for the grant of an entry permit to him. The relevant

21 *Id.*, 145 per Brennan J.

22 D.M.N. Johnson: "Refugees, Deportees and Illegal Migrants", (1980) 9 *Sydney L Rev* 11, 47.

23 Article A(2) of the 1951 Convention as amended by article 1(2) of the 1967 New York Protocol on Refugee Status.

24 D.M.N. Johnson, note 22, *supra*, 48.

25 Since the DORS Committee is not constituted by or regulated by statute its decisions are not made under an enactment within the meaning of s.3 of the AD(JR) Act and hence no obligation to give reasons therefore arises under s.13(1) of that Act.

26 Unreported, Full Federal Court, Sweeney, Morling and Jenkinson JJ. 25 July 1985.

27 *Id.*, 4 per Morling J.

review right then afforded by the Panel was described in the Department's pamphlet as applying to "refusal of permanent residence to a person illegally in Australia who is eligible for consideration under the provisions of Section 6A of the Migration Act".²⁸ The Full Federal Court held that "eligible" did not mean might become eligible but simply eligible, and accordingly a prohibited non-citizen, who by definition was without a temporary entry permit could not be described as a person eligible for consideration under paragraph 6A(1)(e) and such person could not therefore be entitled to review by the Panel.²⁹ The Minister subsequently announced that the Panels would no longer review decisions refusing prohibited non-citizens temporary or permanent residence.³⁰ The Panels currently review the following classes of decisions made by Departmental officers under sections 6, 6A and 7 of the Migration Act: refusal of permanent resident status to persons lawfully in Australia, refusal to issue a return endorsement to a permanent resident of Australia or cancellation of a return endorsement, grant of temporary residence instead of permanent residence to a person arriving in Australia with a migrant visa, refusal of a further temporary entry permit to a person legally in Australia or cancellation of a temporary entry permit.

The Panels report their recommendation to the Minister as to whether a different decision ought to be made.³¹ Each Panel is composed of three members.³² The Chairman in each case is a former Immigration Department officer and the two other members are part-time appointments.³³ The Panels are serviced by a secretariat staffed by Departmental officers.³⁴ It is not usual for the Panel to interview the applicant when reviewing his case or to allow a representative of the applicant to appear before them.³⁵ Thus the review process is normally conducted in private without the applicant being in attendance and on the basis of examining written submissions provided by the Department and the applicant. A statement of reasons for the original decision is provided to the applicant by the Department but usually the applicant is not provided with access to the Department files or the documents the Department gives to the Panel.³⁶ There are two principal defects in this arrangement, it is submitted. Firstly, there is the lack of independence of the Panels. Since they are created by administrative arrangement, they could easily be abolished or radically altered by the Minister. Even the implicit threat of radical change or abolition might be sufficient to undermine the independence of the Panel's judgment. Measures

28 *Ibid.*

29 *Id.*, 5.

30 See Minister's Policy Statement on Illegal Immigrants dated 17 October 1985.

31 Interview with M.S. Raleighmajor, Immigration Review Panel Secretariat, 12th August, 1986.

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

should therefore be taken to enhance the independence of the Panels. Secondly, procedures before the Panels should incorporate minimum standards of fairness or rights to the applicant. These minimum standards should include reasonable notice to the applicant of a hearing at which the review process will occur, the entitlement to legal representation of the applicant at that hearing, the right to present evidence on his own behalf and to cross-examine witnesses presented by the government.³⁷

4. *Judicial Review*

Another means of controlling and reviewing the exercise of discretion in this area is through judicial review. At common law judicial review of administrative action is confined to the legality and not the merits of such action.³⁸ The source of this power for superior courts is their inherent supervisory jurisdiction.³⁹ The Federal Court of Australia however has jurisdiction in respect of two separate bodies of administrative law; that which arises at common law and that which arises out of the Administrative Decisions (Judicial Review) Act 1977 (Cth).

The Federal Court is established pursuant to section 71 of the Constitution and has no inherent jurisdiction as a superior court to review administrative action. The High Court of Australia has an original jurisdiction to review administrative action under sections 75(iii) and 75(v) in regards to respectively all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party and all matters in which a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. However the effect of section 39B, inserted into the Judiciary Act in 1983, is to create (apart from certain narrow exceptions not relevant here) a parallel original jurisdiction in the Federal Court to that of the High Court under section 75(v) of the Constitution. This means that the High Court is now able to remit to the Federal Court, pursuant to section 44(i) of the Judiciary Act, actions commenced in the High Court under the Court's said original jurisdiction. It also means that proceedings can be commenced in the Federal Court by way of mandamus, prohibition and injunction against officers of the Commonwealth.

Section 8 of the AD(JR) Act confers jurisdiction on the Federal Court to hear and determine applications made to the court under that Act. Section 9 of the same Act removed from State courts most of their jurisdiction to review Commonwealth administrative action in accordance with common law principles as well as excluding them for reviewing decisions to which the said Act applies. The effect of the AD(JR) Act is thus to empower the Federal Court to review decisions of an administrative character made under an enactment other than a decision by the Governor-General or a decision

37 These standards conform to the most basic requirements of due process which govern deportation of aliens in the United States and which are incorporated into the provisions of the United States Immigration and Nationality Act. See Note 4 *supra*, 1384.

38 S. Hotop, *Principles of Australian Administrative Law*, (6th ed.) 1985, 168.

39 *Ibid*.

included in any of the classes set out in Schedule 1.⁴⁰ The Migration Act is not included in schedule 1 and accordingly decisions made under it are reviewable under the AD(JR) Act. Section 13 of the AD(JR) Act enables an applicant for review to request the decision maker to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision. This obligation is excluded in the classes of decision set out in Schedule 2 to the Act. Certain decisions under section 6 of the Migration Act 1958 fall within the classes of excluded decisions.

Section 5 of the AD(JR) Act identifies the grounds upon which a decision may be reviewed. They include virtually all the common law grounds of review of administrative action and also some additional grounds. None of the grounds however go to the merits of a decision and it has been firmly established that the Federal Court's review function under the ADJR Act is like that of the courts exercising a supervisory review jurisdiction at common law to review only the legality of the decision.⁴¹

In *Prased v. Minister for Immigration and Ethnic Affairs*⁴² the applicant for an order of review under the AD(JR) Act relied on section 5(1)(e) to the effect that the making by the Minister of a decision to refuse him a permanent entry permit was an improper exercise of the power conferred upon the Minister by the Migration Act. The ground of "improper exercise of power" is elaborated by sub-section (2) and the applicant specifically relied, inter alia, on two paragraphs of sub-section (2), paragraph (b) in failing to take into account relevant considerations and paragraph (g) in exercising the power in such a manner that no reasonable person could have exercised it. The applicant had originally relied on section 6A(1)(b) of the Migration Act 1958 in seeking a permanent entry permit. That section provides that if the non-citizen is the spouse, child or agent parent of an Australian citizen or the holder of an entry permit, an entry permit may be granted. In his case the Minister rejected his application notwithstanding that he was the spouse of a permanent resident on the basis that the applicants marriage had been assessed as being one where the parties did not genuinely intend to continue living as a married couple in Australia, it being the Minister's policy to refuse permanent entry permits in such cases. Wilcox J. found that the Minister's exercise of his discretionary power under section 6A was invalid on each of these two grounds. His Honour relied on the decision of the Full Federal

40 The limitation imposed on jurisdiction of State courts by s.9(1)(d) AD(JR) Act extends beyond an exclusion of decisions reviewable under the AD(JR) Act itself to "any other decision given, or an order made, by an officer of the Commonwealth or any other conduct that has been, is being or is proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or contact given, made or engaged in, as the case may be, in the exercise of judicial power".

41 *Turner v. Minister for Immigration and Ethnic Affairs* (1981) 55 FLR 180; *Borkovic v. Minister for Immigration and Ethnic Affairs* (1981) 39 ALR 186.

42 (1985) 6 FCR 155.

Court in *Peko-Wallsend Ltd v. Minister for Aboriginal Affairs*⁴³ to hold that the Minister's duty to take into account relevant considerations extended to considerations which were within his constructive knowledge in the sense that they should have been within his knowledge. Relevant facts such as a report made by a departmental interviewing officer expressing the opinion that the marriage was genuine clearly fell within this category. In determining whether an administrative decision made under an enactment fell within section 5(2)(g) His Honour adopted Lord Diplock's approach in *Bromley London Borough City Council v. Greater London Council*, namely that the test is whether the decision is "so devoid of plausible justification that no reasonable body of persons could have reached it".⁴⁴

More recently in *Conyngham v. Minister for Immigration and Ethnic Affairs*⁴⁵, Wilcox J. considered an application for review of the Minister's decision to reject a sponsorship application. This decision was preliminary to the determination of applications by members of a group of American entertainers known as "The Platters" for temporary entry permits under section 6 of the Migration Act 1958. While section 6 does not specify any criteria to be applied in considering applications thereunder, the Minister had adopted a statement of policy and procedures in relation to the temporary entry into Australia of foreign entertainers.⁴⁶ The procedure required firstly that the entrepreneur make application to the relevant Department for approval of the sponsorship of particular artists.⁴⁷ Provision was further made for reference of each application to the relevant local unions so as to enable them to make an objection to the proposed sponsorship.⁴⁸ Further provision was made that in the event that "the issue is not clearcut" the Minister or his delegate could refer the matter to a national disputes committee for investigation.⁴⁹ Eventually the said committee recommended the refusal of an entry permit to the group relying on the ground in the Government policy that the group did not possess a level of talent of such merit as to lead to the continuing cultural enrichment of the Australian community. The Minister accepted this recommendation.

The applicants successfully challenged the legal validity of the Minister's decision under the AD(JR) Act before Wilcox J. on three grounds; firstly, that the committees and the Minister had failed to observe the rules of natural justice, secondly, that the Committee and the Minister had omitted from account relevant considerations and thirdly, that the Minister's decision was so unreasonable that no reasonable person in the position of the Minister could have made the decision. His Honour noted that the High Court had found in *Kioa's case* that there was no legislative intention in the Migration

43 (1985) 59 ALR 51.

44 [1983] 1 AC 768, 821.

45 Unreported Federal Court, Wilcox J., 17 July 1986.

46 *Id.*, 4.

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

Act 1958 to exclude the requirement of natural justice from section 18 and his Honour ultimately concluded that there was also no such manifestation in respect of section 6 of the Act.⁵⁰ Accordingly there was a duty to act fairly in relation to the application made by Mr Conyngham and this was breached by the failure of the committee and the Minister to give him an opportunity to deal with serious allegations to the Department that he had falsely advertised the identity of the group. The complaint made in relation to failure to take into account relevant considerations concerned the material put before the Minister at the time of his decision. His Honour found that Mr Conyngham had placed a number of items of information before the Department including items establishing that over a lengthy period the group had enjoyed considerable international demand and favourable reviews. This information however was omitted from the material placed before the Minister and therefore he had failed to take them into account. His Honour further held that the Minister's decision was so unreasonable that no reasonable person in the position of the Minister could have made the decision made by the Minister. Wilcox J. then made orders pursuant to section 16(1)(d) of the AD(JR) Act to the effect that the Minister issue within twenty-four hours to the first applicant an approval of his application for sponsorship of the group, being an approval for the purposes of the subsequent issue of temporary entry permits under section 6 of the Migration Act. His Honour acknowledged that it will be a very rare case in which an applicant is able to argue that as a matter of law he or she is entitled to a positive decision different from that invalidly made and mere legal error would not normally suffice. However, the special circumstances that justified the order here, according to His Honour, was "extreme urgency".⁵¹ Essentially this was a reference to the international travelling schedules of the group which required that if it was to be effective a sponsorship approval should be granted within a few days.

The Full Federal Court subsequently however allowed the Minister's appeal on the issue of the nature of the orders made by Wilcox, J.⁵² The Full Court held that section 16(1)(d) of the AD(JR) Act did not authorise a declaration that an applicant was entitled to a positive decision unless the basis of that entitlement was a legal right. Their Honours stressed that the relevant policy guidelines conferred no legal rights and that the failure of Wilcox J. to recognise that was a source of error. Essentially Wilcox J. had regarded the Minister as bound by his own policy to grant approval of a sponsorship application if the applicant brought himself within its terms. This reasoning was in error because it elevated policy to the status of law and failed to recognise that notwithstanding his policy the Minister under the Migration Act 1958 still had a residual discretion to decide the ultimate question of

⁵⁰ *Id.*, 5.

⁵¹ *Id.*, 7.

⁵² Unreported, Full Federal Court, Sheppard, Beaumont and Burchett JJ., 18 July 1986.

whether or not to grant the temporary entry permits. Accordingly, the Full Federal Court varied the orders of Wilcox J. to the effect that the Minister forthwith consider the relevant applications for temporary entry permits.

III. DEPORTATION OF PROHIBITED NON-CITIZENS

Section 18 of the Migration Act provides that “the Minister may order the deportation of a person who is a prohibited non-citizen under any provisions of this Act”. Almost a decade after *R. v. Mackellar; ex parte Ratu*⁵³ and *Salemi v. Mackellar (No. 2)*⁵⁴ in which the High Court had determined that prior to 1977 a person liable to deportation under this section was not entitled to natural justice, the High Court considered the question again in *Kioa’s case*.⁵⁵ The Court (Gibbs C.J., Mason, Wilson, Brennan and Deane JJ.), firstly, unanimously endorsed earlier Federal Court authority to the effect that paragraph 5(1)(a) of the AD(JR) Act does not have any substantive effect in the sense that where a body would not at common law be under any obligation to observe the rules of natural justice then the AD(JR) Act does not impose any such obligation. Thus whether or not there is a requirement that the decision maker under section 18 observe natural justice is to be determined by the common law test which provides that the requirement must be found from the statutory framework in issue. Secondly, by majority (Gibbs C.J. dissenting), the Court held that because of amendments to the Migration Act since *Salemi’s case* and the introduction of the AD(JR) Act, no relevant statutory framework existed which indicated a legislative intention that the Minister in exercising his discretionary power under section 18 was not obliged to observe natural justice.

Mason J. considered that the most important legislative change that had been made since *Salemi (No. 2)* and *Ratu’s case* was the introduction of section 13 of the AD(JR) Act.⁵⁶ The effect of the AD(JR) Act here was to provide that the making of a deportation order under section 18 was a decision to which section 13 applied and accordingly there was an obligation following receipt of a notice to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence on which these findings are based and giving the reasons for the decision. His Honour went on to observe that the creation of this new obligation to give reasons, especially in association with a right in the person affected to apply for an order of review by a court of the decision, strengthens the argument that there is an obligation to comply with natural justice.⁵⁷ Amongst other legislative amendments noticed by Mason J. were those of the provisions of section 6(5) and section 6A(1) of the Migration Act. At the time of the two

53 (1977) 137 CLR 461.

54 (1977) 137 CLR 294.

55 Note 20, *supra*.

56 *Id.*, 125.

57 *Ibid.*

earlier cases section 6(5) had provided a general discretion to grant an entry permit. The two new sections which have replaced it now prescribe specifically the only grounds on which entry permits may be granted to an immigrant after his entry into Australia. The significance of these amendments according to Mason J. is that the sort of unconditional power that was previously provided in section 6(5), which involved an unregulated discretion to make a deportation order indicated that the Minister was not required to determine any question or form any opinion before making the order. Furthermore it was now an offence under section 27(1)(ab) for a person to become a prohibited immigrant upon the expiry of a temporary entry permit. This was not the case at the time of *Salemi's case* and *Ratu*.

The real question in most cases, according to Mason J. however, is often not whether the principles of natural justice apply, but what does the duty to act fairly, which he equated with natural justice, require in the circumstances of the case. Procedural fairness was to be preferred to natural justice as a description because it more aptly reflected the need to focus "on the adoption in the administrative process of fair and flexible procedures for decision making"⁵⁸ and for "procedures which do not necessarily take curial procedures as their model".⁵⁹ But what does procedural fairness involve in its application to the exercise of the discretionary power conferred by section 18?

Mason J. accepted that procedural fairness did not require in all cases that the affected person was to receive notice that a deportation order was to be made against him since this would only serve to facilitate evasion.⁶⁰ However where, as in the instant case, His Honour argued the decision maker intends to reject the application for an entry permit by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter. Specifically, Mason J. held that Mr Kioa should have had an opportunity to reply to two allegations in the Department's submission to the Minister's delegate, namely that had he been genuine in his desire to seek a legitimate extension of his stay in Australia, he might have sought a decision on his application instead of changing his address without notifying the Department and secondly, that his active involvement with other persons who were seeking to circumvent Australia's immigration laws "must be a source of concern".⁶¹

In *Pushparany Sinnathamby v. Minister for Immigration and Ethnic Affairs*,⁶² the Full Federal Court by majority distinguished *Kioa* on the basis that in that case the material held to require that a chance be given to comment had come from a source other than the applicant whereas in this case the material which

58 *Id.*, 127.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 Unreported, Full Federal Court, Fox, Neaves and Burchett JJ., 5 June 1986.

was prejudicial to the appellant had been provided by the appellant herself.⁶³ In the latter circumstances it was held that the decision maker was not required to give the appellant a chance to comment on the view that he had taken of it; to do so would amount to a general requirement that a decision maker make known in each case his view or evaluation of the material that an applicant puts forward.⁶⁴ As Fox J. put it, the decision maker's "thought processes, if not unreasonably based on evidence or other material, are a matter for him."⁶⁵ In a powerful dissenting judgment Burchett J. saw the threshold issue not as natural justice but as the use made by the decision maker of the allegation of illegality. In short, His Honour argued that the relevant circumstances were that the appellant had committed no offence until she did so by disobeying a departmental instruction.⁶⁶ To hold the consequences of her action in this context against her in a strong and unqualified way made of government policy "an unreasoning taboo"⁶⁷ which constituted an error of law rendering the decision invalid under section 5(2)(f) of the AD(JR) Act as being "an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case".⁶⁸ The majority decision in *Sinnathamby's* case clearly demonstrates, it is submitted, the limited scope of *Kioa's* case and more generally the limited control of discretionary power under section 18 which judicial review provides.

Further illustration of the limited scope of judicial review is found in *Sezdimmezolu v. Minister for Immigration and Ethnic Affairs*.⁶⁹ In that case the applicant for review under the AD(JR) Act relied on the ground of failing to take into account relevant considerations in challenging the Minister's decision to deport him under section 18. Smithers J. stressed that this ground is only made out if it is shown that the decision maker has failed to take into account a consideration which he was bound to take into account.⁷⁰ His Honour relied on *Minister for Immigration and Ethnic Affairs v. Tagle*⁷¹ in pointing out that the Act requires that the Minister should give consideration to whether or not in all the circumstances the prohibited immigrant should be deported.⁷² However, provided the decision maker does consider or take into account all relevant matters which he is bound to consider, he can nevertheless having considered them, afford them little or no weight. That is a matter for him. Moreover, a decision maker may effectively evade the standards which judicial review seeks to impose by simply taking care to

63 *Id.*, 18 per Fox J.

64 *Ibid.*

65 *Ibid.*

66 *Id.*, per Burchett J.

67 *Ibid.*

68 *Ibid.*

69 (1983) 51 ALR 561.

70 *Id.*, 571.

71 (1983) 48 ALR 566.

72 *Id.*, 571.

include language in its decisions indicating apparent conformity with these standards. Therefore ultimately, via judicial review, the courts may affect more the language of the decision makers conclusions than the substance of the decision making process.

IV. THE DEPORTATION OF CRIMINAL NON-CITIZENS

Section 12 of the Migration Act provides to the effect that the Minister may deport a person who is a non-citizen and who has been convicted in Australia of an offence for which he was sentenced to death or to imprisonment for life or for a period of not less than one year. Under section 66E(1) of the Migration Act the Minister's orders for deportation under section 2 may be reviewed by the Administrative Appeals Tribunal (hereafter the Tribunal). The Tribunal's powers in this regard are limited by sub-section 66E(3) which provides to the effect that the Tribunal after reviewing the Minister's decision shall either affirm the decision or remit the matter for reconsideration in accordance with its recommendation. The Tribunal's function is to review the Minister's decision on its merits and to independently determine on the material before it what is the correct or preferable decision.⁷³

The Administrative Appeals Tribunal Act 1975 (Cth) provides no detailed or comprehensive guide to the tests which the Tribunal is to apply in reviewing administrative decisions. In criminal deportation matters the Tribunal has established several very broad principles which serve as a general guide. Smithers J. for example in *Re Chan and Minister for Immigration and Ethnic Affairs*⁷⁴ observed that all relevant factors in this area must be weighed to ascertain where on balance the best interests of Australia lay and that these "best interests" should be

understood not in a narrow and restricted sense, but as extending to seek interests broadly regarded and embracing on occasion and according to circumstance, the taking of decisions by reference to a liberal outlook appropriate to a free and confident nation.⁷⁵

One difficult issue for the Tribunal has been to clearly identify what status government policy has when it reviews decisions. In *Re Becker and Minister for Immigration and Ethnic Affairs*,⁷⁶ Brennan J. then President of the Tribunal, observed that the merits of a decision included not only the facts of the case but also any policy which has been applied or ought to be applied to the facts in reaching the decision so that the Tribunal had jurisdiction to review policy considerations which govern or affect discretionary powers.⁷⁷ His Honour, however, carefully distinguished between policies settled at the higher political level of government and policies settled at the departmental level. He also distinguished between so called basic policies intended to

⁷³ *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

⁷⁴ (1977) 1 ALD 55, 56.

⁷⁵ *Id.*, 57.

⁷⁶ (1977) 3 FLR 469.

⁷⁷ *Id.*, 474.

provide the guideline for the general exercise of power and other policies intended to implement a basic policy. In each case His Honour suggested that more substantial reasons might have to be shown why policies of the former type should be reviewed. In *Drake v. The Minister for Immigration and Ethnic Affairs*⁷⁸ the Full Federal Court made it clear that while the Tribunal was able to consider government policy consistent with the relevant statute, in that case the Migration Act, it should not abdicate its function of determining whether the decision made was on the material before the Tribunal the correct or preferable one by simply determining whether the decision made conformed with government policy.

In the case of deportation of criminal non-citizens under section 12 of the Act, some quite different social and legal issues are raised as compared to the deportation of prohibited non-citizens under section 18. M. Sornarajah has identified the different interests that arise in the following way:

Unlike prohibited immigrants, criminal deportees have a right to remain in Australia which the order terminates. The immigrant may have been brought to Australia through assisted passage schemes and welfare facilities may have been utilised to ensure that he adjusted to his new environment. The deportation involves a loss in terms of the resources expended on him. His deportation may mean hardship to his family and raise the issue of a violation of human rights in that the right to family life is affected. On the other hand there are factors which favour deportation. The crime committed may indicate that the immigrant is totally unsuited to membership of the community and that the interests of the community in the prevention of further crime require that he be removed.⁷⁹

In determining whether on the facts of the case and having regard to any relevant policy considerations the Minister's decision to deport under section 12 is the correct decision, the Tribunal has in a series of cases established principles on the basis of which it will make its review. Perhaps the starting point is the recognition by the Tribunal that a decision to expel a criminal, lawfully in Australia, though not its citizen, should not be made arbitrarily or unjustly or without giving due weight to his position and to the hardship which would be imposed on him and others by his expulsion.⁸⁰ Davies J., President of the Tribunal, has described the nature of the Tribunal's function thus:

The legislation intends that due weight will be given to the position which he has established in this country, to his familial, business and social ties here and to the hardship which he and others, particularly persons in this country, would suffer if he were expelled. These matters are to be weighed against the factors, such as the risk of recidivism and the desirability of removing from Australia persons who do not comply with our laws, which support deportation. That is the crux of the matter.⁸¹

In balancing these various factors the Tribunal has sometimes found the government's policy on the deportation of criminal non-citizens tipping the balance in favour of deportation. Thus in *Re Nevistic and Minister for*

78 (1979) 24 ALR 577.

79 M. Sornarajan, "Deportation From Australia" (1985) 34 *Intl & Comp LQ* 501, 504.

80 See e.g. *Re Barbaro* 3 ALD 1, per Davies J.

81 *Re B.A. Collins*, unreported decision of Davies J., 29 April 1982.

*Immigration and Ethnic Affairs*⁸² the Tribunal found that were it not for the government policy on deportation it might have found in favour of the applicant. The relevant policy gave considerable significance to the desirability of deterring other persons from committing similar drug offences. Davies J. stated that if he were to formulate the policy he would not have given such weight to the factor of deterrence, however, he deferred to the need for policy to be formulated on this subject at a high political level.⁸³ He also accepted the views of Brennan J. in *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)*⁸⁴ that government policy in this area should be given significant weight since it advanced consistency in administrative decision making and the Tribunal ought to apply it unless there were good reasons for not doing so.

V. DEPORTATION OF NON-CITIZENS UPON SECURITY GROUNDS

Under section 14(1) of the Migration Act the Minister is given a discretionary power to determine whether a non-citizen, not being a permanent resident for a continuous or aggregate period of at least ten years, constitutes a security threat and if so to order his or her deportation.⁸⁵ Under section 14(2) the Minister is given another discretionary power to order the deportation of a non-citizen who has committed one of a number of specified offences relating to security. In each case section 14(3) requires however that the Minister give the person notice of his intention before ordering deportation on these grounds and further requires that if the affected person so requests within thirty days of receipt of the notice, an independent commissioner appointed under the section shall consider his case. The Commissioner is thus constituted as a form of external review on the merits. The Commissioner is in turn required by section 14(7) to make a thorough investigation of the case and to report to the Minister pursuant to section 14(6) on whether he considers that the ground specified in the Minister's notice has been established. Furthermore the Minister is prevented by section 14(8) from ordering the deportation of the non-citizen under this section unless either the non-citizen makes no request, fails to attend before the Commissioner or the Commissioner finds the grounds relied on by the Minister in the notice to be established.

A significant feature of this mode of review is that it is expressly provided that the Commissioner is not bound by any rules of evidence and that he

82 (1980-81) 3 ALN No. 7, per Davies J.

83 *Ibid.*

84 (1979) 2 ALD 634.

85 Where the Minister in determining in a particular case whether a threat to security is involved relies on an assessment by ASIO, an applicant, provided he is a permanent resident, can have such assessment reviewed by the Security Appeals Tribunal. The Human Rights Commission has recommended that such advice should be required from ASIO in all cases thereby invoking the jurisdiction of the Tribunal. See Note 1 *supra*, 63.

need not have regard to legal forms in conducting his investigation "but may inform himself on any relevant matter in such manner as he thinks fit".⁸⁶ However, as a mode of review on the merits, the Commissioner suffers less from procedural defects than the Immigration Review Panels referred to earlier. Unlike the Panels in an investigation before a Commissioner, regulation 16 made under the Migration Act provides to the effect that there is an entitlement to be both legally represented and to examine or cross-examine witnesses and address the Commissioner. Moreover under regulation 18(1), a Commissioner has the same protection and immunity as a Justice of the High Court. It may be doubted however, whether there is any right to receive reasons for the Commissioner's decision pursuant to section 13(1) of the AD(JR) Act since although such decision is not excluded by schedule 2 of the AD(JR) Act the obligation to supply reasons thereunder only arises in respect of a decision of an administrative character and although this term has been defined broadly in the cases,⁸⁷ it is submitted that the decision of the Commissioner may nevertheless have enough of the attributes of judicial decision making to exclude it from this definition.⁸⁸ Even if this latter view is mistaken, the obligation under section 13(1) can be excluded on an alternative basis pursuant to section 14(1) of the AD(JR) Act by the Attorney General certifying that such disclosure would be contrary to the public interest by reason of prejudicing national security.

VI. THE COMMONWEALTH OMBUDSMAN

In addition to the modes of review already discussed a further form of review of the exercise of discretionary powers under the Migration Act is available in the form of a complaint to the Commonwealth Ombudsman about a "matter of administration".⁸⁹ Under section 5 of the Ombudsman Act 1976 (Cth) the Ombudsman has the function of investigating action relating to any matter of administration taken by Commonwealth departments and prescribed authorities. However the Ombudsman is expressly precluded under section 5(2) from investigating action taken by a Minister except where the action is in fact taken by a delegate of a Minister and from investigating the conduct of courts and bodies that have the power to take evidence on oath and which are required or permitted to include a judge as one of their members. The latter category includes both a

⁸⁶ S.14(7) Migration Act.

⁸⁷ See e.g. *Lamb v. Moss* (1983) 49 ALR 533 and *Hamblin v. Duffy* (1981) 50 FLR 308.

⁸⁸ This may also be the reason why as yet there appears to have been no attempts to obtain judicial review of the Commissioner's decision under the AD(JR) Act. A further reason may be the expectation that the Federal Court would in many circumstances find review of the Commissioner's decision as undesirable in the sense that some delicate questions of national security are inherently unsuitable for judicial review by courts open to the public and it would accordingly exercise its discretion against granting relief under s.16 of the AD(JR) Act. The Full Federal Court in *Lamb v. Moss* (1983) 5 ALD 446 made it clear that a discretion applied to the granting of relief under s.16.

⁸⁹ Ombudsman Act 1976 (Cth) s.5(1).

Commissioner under section 14 of the Migration Act⁹⁰ and the Administrative Appeals Tribunal. Unlike the Federal Court under AD(JR) Act or the Administrative Appeals Tribunal, the Ombudsman has no power to set aside administrative decisions, instead the aim of his investigation under section 15(1) of the Ombudsman Act is to ascertain whether there has been any defect in administrative action and to report that fact. Ombudsman review and review by the Administrative Appeals Tribunal have been distinguished in terms of their nature, functions, scope, procedures and remedies.⁹¹ The nature of Ombudsman review is investigative and such investigation is conducted in private and in such manner as the Ombudsman thinks fit⁹² and may be conducted without the complainant or any other person appearing before him.⁹³ The Ombudsman exercises only a recommendatory power with power to report to the Prime Minister and the Parliament where a department or authority fails to take adequate action in respect of his recommendation.⁹⁴ The distinction between review on the merits by the Administrative Appeals Tribunal and the Ombudsman finding administrative action defective on the ground set out in section 15(1)(v) of the Ombudsman Act(Cth), that it was in all the circumstances wrong, is, according to the current Ombudsman, merely that where the decision maker is left with a choice between several rather than one reasonable courses of action when making a decision, the Ombudsman will not normally find such a choice to be defective provided that correct procedures have been followed whereas the Administrative Appeals Tribunal will determine what is the correct or preferable decision on the material before it.⁹⁵

Under sections 6(2) and (3) of the Ombudsman Act, the Ombudsman may decline to investigate a complaint where an alternative avenue of review is provided by a court or a tribunal. In accordance with this provision, the Ombudsman has determined that generally the Immigration Review Panels are "the more appropriate initial review forum if there is nothing to suggest that the decision complained of is anything other than a fair and accurate application of the law and of current government immigration policies".⁹⁶ It is also worth noting here that the Ombudsman's own decisions have been held to be of an administrative character and reviewable by the Federal Court under the AD(JR) Act.⁹⁷

The Administrative Review Council has also noted in its report on the relationship between the Ombudsman and the Administrative Appeals

90 Under reg. 13 of the Migration Act *e.g.* the Commissioner has power to administer an oath to a witness.

91 Administrative Review Council; *Report No. 22: The Relationship between the Ombudsman and the Administrative Appeals Tribunal*.

92 S.8(2) Ombudsman Act.

93 S.8(4) Ombudsman Act.

94 S.15(2) and (3) and ss16 and 17 Ombudsman Act.

95 Commonwealth Ombudsman, Sixth Annual Report, 1982-83, 74.

96 *Ibid*.

97 *Kavvadias v. Commonwealth Ombudsman* (No.2)(1984) 6 ALD 198.

Tribunal that one of these forms of review is not a substitute for the other and it identified a number of different factors which tend to make one form of review more appropriate than another in certain circumstances.⁹⁸ Thus it was pointed out that where difficult questions of law or fact which are well suited to an adversary process; where the Minister is the primary decision maker, bearing in mind the Tribunal's jurisdiction to review Ministerial decisions and the statutory exclusion of such decisions from the Ombudsman's jurisdiction, and where the applicant would benefit from having the particular skill and expertise of Tribunal members, then the Tribunal is the more suitable forum.⁹⁹ On the other hand, factors rendering Ombudsman review more suitable include the fact that the disputes relate solely or predominantly to the propriety of administrative processes, where there is a question as to whether the law itself is operating in an unjust manner given that the Ombudsman has a general law reform monitoring role, and where it is likely because of the nature of the complaint that the Ombudsman will be able to resolve the matter more expeditiously than the Tribunal.¹⁰⁰

Although section 9 of the Ombudsman Act confers considerable powers on the Ombudsman to require persons to answer questions, furnish information and produce documents, unlike the Tribunal¹⁰¹ he lacks the power to stay the implementation of a particular decision. Thus his effectiveness in investigating complaints about deportation has sometimes apparently been reduced by the fact that in his own words "the Department has exhibited reluctance to refrain from deportation action which was already well in hand"¹⁰² where such action is subject to his investigation. Although the Ombudsman consoles himself with the statement "that my investigations can proceed as effectively after deportation as before provided we obtain full statements from deportees before they leave",¹⁰³ it would seem unlikely that this fortunate state of affairs would always exist. This and other limitations of the Ombudsman's function require that we do not expect too much of it.

VII. THE HUMAN RIGHTS COMMISSION (THE COMMISSION)

An individual may also complain to the Commission which, under section 9(1)(b) of the Human Rights Commission Act 1981 (Cth), can inquire into acts or practices that may be inconsistent with or contrary to human rights and attempt to settle a complaint in the appropriate circumstances and where this is not appropriate, or where conciliation is unsuccessful, it can report the results of its inquiry and its conciliation efforts to the Attorney-General and

98 *Id.*, 21.

99 *Id.*, 22.

100 *Ibid.*

101 *Ibid.*

102 Commonwealth Ombudsman, Annual Report, 1984-85, 64.

103 *Ibid.*

ultimately in a report to the Commonwealth Parliament. Human rights within the jurisdiction of the Commission are those defined in the International Covenant on Civil and Political Rights, in the Declaration of the Rights of the Child, the Declaration of the Rights of Disabled Persons and the Declaration on the Rights of Mentally Retarded Persons each of which Australia has been ratified and is annexed to the said Act. The Commission is also required by the Racial Discrimination Act 1984 (Cth) and the Sex Discrimination Act 1984 (Cth) to assist in the elimination of discrimination on the grounds of race and sex. In a 1985 report the Commission concluded that there were "significant areas of practice, and of law, where PNC's (prohibited non-citizens) appear to receive less than the standard of treatment required for a full observance of human rights."¹⁰⁴ In particular it noted that the treatment of prohibited non-citizens was very much at the discretion of departmental officers and that such persons were liable to arrest without warrant and in practice may be held for substantial periods in detention centres, are frequently not permitted to work and may be ineligible for social security benefits and thus may be forced into debt and to live in conditions which do not accord with their dignity as persons.¹⁰⁵ In the same report the Commission recommended that an external form of review on the merits of most migration decisions be provided in order to ensure that policy is applied in a fair consistent and non-discriminatory manner.¹⁰⁶ It included only decisions on such matters as visas and other matters subject to "overriding and compelling reasons", such as national security from this recommendation.¹⁰⁷

VIII. CONCLUSION

Ultimately the way Australia treats its non-citizens reflects its own sense of identity and self-confidence. In this sense any substantive or procedural maltreatment of its non-citizens also serves to diminish its wider national community. The following comments addressed to America's treatment of its aliens seem equally applicable to Australia:

Any human association must define itself in part by defining whom it will exclude and how it will treat those who are excluded. Inevitably the ways in which an association defines and treats outsiders will reveal a great deal about its purposes and ideals. The struggle of America's legal system to determine the rights of aliens is therefore a struggle to understand and to shape the purposes and ideals of the nation.¹⁰⁸

In this sense then, expanding the jurisdiction of the Administrative Appeals Tribunal in immigration matters, in accordance with the recommendation of the Human Rights Commission, to at least allow it to

¹⁰⁴ Note 1 *supra*, 16.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Id.*, 87.

¹⁰⁷ *Id.*, 88.

¹⁰⁸ Anonymous; *Id.*, 1463.

review on the merits, exercises of the Minister's discretionary power to deport prohibited non-citizens under section 18 of the Migration Act and introducing other procedural reforms discussed herein, may not be so much a threat to national cohesion but a means of strengthening national identity and self-confidence. A danger however exists that current debate on the future form of review mechanisms may become dominated by short term considerations and questions of cost. It is reported that a recent report of the Administrative Review Council, not yet available to the public, also concludes that existing modes of review of migration decisions are inadequate since they fail to provide for an effective review on the merits.¹⁰⁹ It recommends a two-tier system, according to reports, where people can initially appeal to departmental adjudicators and then appeal to the Administrative Appeals Tribunal.¹¹⁰ The Immigration Department Submission to Federal Cabinet however, is reported as advocating a single tier system with no right of appeal to the Tribunal and the removal of the right to judicial review under the AD(JR) Act.¹¹¹ The Department's submission is reported as being based mainly on the high cost of existing forms of review and it is noted that immigration accounted for almost 50% of applications to the Federal Court under the AD(JR) Act in the last financial year and that the majority of complaints received by the Human Rights Commission relate to immigration.¹¹² These figures however point not only to questions of cost but also the extent of grievance that exists amongst those affected by the exercise of discretionary powers under the Migration Act. Questions of costs therefore should include the hidden social costs of denying adequate forms of review to these people.

109 M. Forbes "Platters case prompts government to limit courts power over ministers" *National Times on Sunday*, 10th August 1986, 5.

110 *Ibid*

111 *Ibid*

112 *Ibid*