Judicial Review of Migration Decisions

How to identify jurisdictional error in asylum cases

JusticeNet CPD Seminar for pro bono lawyers

Introduction

1. The *Migration Act 1958* establishes a regime under which non-citizens seeking to enter or remain in Australia are required to obtain permission from the Minister for Immigration and Citizenship. The permission is "to be known as a visa".[1] The *Migration Act* and the *Migration Regulations 1994* establish a great number of classes and subclasses of visa, each of which may be granted, on application, if the applicant meets prescribed criteria.

2. This paper focuses particularly on the provisions that have relevance to applications for *protection visas*. This is the class of visa generally sought by the class of persons who are commonly identified as "asylum seekers". The paper necessarily glosses over important provisions of the *Migration Act* regime which do not, or are less likely to, have application to protection visas.

3. As will quickly become apparent, the *Migration Act* itself is incredibly complex. It is not possible to provide a manageable overview that covers absolutely every eventuality and every potentially relevant provision.

4. As is the case in relation to most administrative law issues, the legislation conferring decision-making power and the legislative framework under which decisions are to be made and reviews of decisions conducted are of great importance. It is the legislation that identifies the decision-making power conferred on each relevant decision maker and, just as importantly, the legal limits on that decision-making power. Judicial review in the courts is, of course, concerned with the identification of legal error.

5. The aim of this paper, then, is to provide a general overview of the relevant legislative provisions which provide for the making and review of administrative decisions relating to applications for protection visas, and the bases on which judicial review of such decisions may be sought.

Decision makers and appeals to tribunals

6. Section 29(1) of the *Migration Act* provides that the Minister for Immigration and Citizenship may grant a non-citizen permission, in the form of a visa, to (a) travel to and enter Australia and/or (b) remain in Australia. Provisions of the *Migration Act* and *Migration Regulations* prescribe numerous classes of visas.[2] In general, if a non-citizen wishes to obtain a visa, they must make an application to the Minister for the grant of that visa.[3]

7. The Minister is empowered to delegate his powers under the *Migration Act*[4] and, in practice, most first-instance decisions on applications for visas are not made by the Minister personally but by a delegate of the Minister.

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1 *Migration Act*, s 29(1).

2 *Migration Act*, s 31.

3 *Migration Act*, s 45.

4 *Migration Act*, s 496(1).

8. One class of visa, which is created by s 36 of the *Migration Act*, is the "protection visa". The relevant decision adversely affecting an "asylum seeker" will almost invariably be a decision to refuse an application for a visa and, in particular, a protection visa.

9. Decisions as to whether or not to grant a visa are usually made by a delegate of the Minister for Immigration in the first instance. If the delegate decides not to grant the visa, the visa applicant has a right of appeal. Where the visa sought is a protection visa, the appeal lies to the Refugee Review Tribunal ("**the RRT**").[5] In the case of other visa classes, an appeal lies to a different tribunal, the Migration Review Tribunal.[6] Certain other decisions made under the *Migration* Act may also be reviewed by the Administrative Appeals Tribunal.[7]

10. The Tribunal is required to engage in a full merits review of the delegate's decision. The Tribunal is not bound by any of the findings of the delegate. It can make its own inquiries and may have regard to material that was not before the delegate. It has to come to its own conclusion. It may decide an application for a visa on grounds that are quite different than those which were relied upon by the original decision maker.

11. Because the Tribunal considers the decision entirely afresh, and on the merits, it is extremely unusual, and usually unprofitable, for an application to seek judicial review of a decision of the original decision maker, the Minister's delegate. The kinds of arguments that can successfully be advanced in an application for judicial review are far more limited than those which may be advanced before the Tribunal. Any errors that could be lead to a decision being set aside in judicial review proceedings can also be raised in the Tribunal. Further, because a complete merits review is available in the Tribunal, it is to be expected that a court on judicial review of the decision of a delegate of the Minister would almost invariably decline to grant a judicial review remedy on discretionary grounds.

Judicial review jurisdiction in relation to migration decisions

12. Migration decisions are administrative decisions made by officers of the Commonwealth, usually pursuant to powers granted by the *Migration Act* and the *Migration Regulations 1994*. As has been seen, these officers include the Minister for Immigration and Citizenship and his or her delegates, the Migration Review Tribunal and the Refugee Review Tribunal.

13. By s 75(v) of the Constitution, jurisdiction is conferred upon the High Court of Australia in any matter "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". Mandamus and prohibition, together with certiorari, are the main remedies granted in judicial review proceedings.

14. Occasionally migration decisions are challenged in proceedings commenced in the original jurisdiction of the High Court. However, this is relatively rare. It may be appropriate where there an important issue of construction on which differently constituted Federal Courts have expressed different views, where a constitutional issue is raised, or where the same issue is likely to determine a large number of cases and is of general importance.[8] In most cases, if

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5 *Migration Act*, s 411(1)(c) and (d).

6 *Migration Act*, s 338(1).

7 See *Migration Act*, s 500(1).

8 Examples of migration judicial review decisions in the original jurisdiction of the High Court include *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR

judicial review proceedings are commenced in the High Court's original jurisdiction, that court will remit the matter for hearing in the Federal Magistrates Court or the Federal Court.

15. Section 476 of the *Migration Act 1958* provides that, subject to that section, "the Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution". The effect is to confer on the Federal Magistrates Court (now the Federal Circuit Court) judicial review jurisdiction in relation to "migration decisions". The expression "migration decision" is defined, by a somewhat roundabout route, to mean all decisions made or purportedly made under the *Migration Act*.[9]

16. An exception to the judicial review jurisdiction of the Federal Magistrates Court is in relation to "a primary decision",[10] which is effectively defined to mean a decision that is reviewable by the Refugee Review Tribunal, the Migration Review Tribunal or the Administrative Appeals Tribunal. In other words, if merits view of a decision is available, the Federal Magistrates Court does not have judicial review jurisdiction in relation to that decision.

17. Section 476A provides that the Federal Court has original jurisdiction in relation to a migration decision "if, and only if", it is a decision of a particular limited kind. The practical effect of s 476A, for present purposes, is to exclude any original jurisdiction of the Federal Court to hear and determine judicial review proceedings in relation to most decisions under the *Migration Act*, including decisions on applications for protection visas.[11] Section 484(1) excludes the jurisdiction of all courts other than the Federal Magistrates Court, Federal Court and High Court in relation to migration decisions.

18. The effect of ss 476, 476A and 484 of the *Migration Act*, then, is that judicial review proceedings in relation to protection visa decisions generally are to be commenced in the Federal Magistrates Court (now the Federal Circuit Court).

Time limitation for commencement of judicial review proceedings

19. Section 477 of the *Migration Act* provides that an application to the Federal Magistrates Court for judicial review in relation to a migration decision must be made within 35 days of the date of the decision. The Federal Magistrates Court may extend the time if satisfied that it is in the interests of the administration of justice to do so.[12]

Appeals

20. By s 24(1)(d) of the *Federal Court of Australia Act 1976*, an appeal lies to the Federal Court as of right from a decision of the Federal Magistrates Court (now the Federal Circuit Court) on an application for judicial review. The appellate jurisdiction of the Federal Court is

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441; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

9 See *Migration Act*, s 5(1) (definition of "migration decision"), s 474(2) (definition of "privative clause decision") and s 474(6) (definition of "non-privative clause decision").

10 *Migration Act*, s 476(2)(a).

11 Section 476A expressly prevails over s 39B(1) of the *Judiciary Act 1903*, which provides that the original jurisdiction of the Federal Court "includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth".

12 *Migration Act*, s 477(1).

exercised by a single judge of that Court, unless a judge of the Federal Court considers it appropriate that the appeal be heard by a Full Court.[13] Usually the appellate jurisdiction is exercised by a single judge. Appeals must be filed within 21 days of the decision the subject of the appeal.[14]

21. An appeal lies to the High Court by special leave from a decision of the Federal Court (whether constituted as a single judge or as a Full Court) on appeal from a decision of the Federal Magistrates Court.[15]

Substantive provisions concerning protection visas

22. After a considering a valid application for a visa, the Minister (or his delegate) must grant the application if satisfied that the criteria prescribed in respect of that visa are met.[16] If the Minister is not satisfied that the relevant criteria are met, he must refuse to grant the visa.[17] In relation to protection visas, the Minister is required to make a decision within 90 days of the day when the application was made (or remitted, in the case of a decision remitted by a court to the Minister for reconsideration).[18]

23. Although the provisions of the *Migration Act* are generally cast in terms of "the satisfaction of the Minister", on a review by the RRT, the RRT stands in the shoes of the original decision maker, so that, on a review by the RRT, the relevant question is the satisfaction of the RRT itself.[19] It is not required (or permitted) to defer in any way to the views of the Minister or his delegate.

24. Section 36(2) of the *Migration Act* prescribes one of the criteria that must be met if a protection visa is to be granted. (Other criteria are provided by regulation.[20]) It provides:

> A criterion for a protection visa is that the applicant for the visa is:
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> (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
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> (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa; or

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13 *Federal Court of Australia Act*, s 25(1AA).

14 *Federal Court Rules 2011*, r 36.03.

15 Constitution, s 73; *Federal Court of Australia Act*, s 33.

16 *Migration Act*, s 65(1)(a).

17 *Migration Act*, s 65(1)(b).

18 *Migration Act*, s 65A(1). However, failure to comply with this requirement does not affect the validity of the decision ultimately made: s 65A(2).

19 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at 20 [37] per Gummow and Hayne JJ.

20 *Migration Regulations*, Item 866.

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

25. Paragraph (aa) is a relatively recent inclusion in s 36(2). It can be left to one side for the present purposes (although it may assume significance in particular cases).

26. Paragraph (a) makes reference to "the Refugees Convention as amended by the Refugees Protocol". The "Refugees Convention" is the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, and the "Refugees Protocol" is the Protocol relating to the Status of Refugees done at New York on 31 January 1967.[21]

27. The whole of the Convention is not integrated as part of Australian law. Rather, the question under s 36(2) is whether the applicant for the visa is a person to whom Australia owes protection obligations under the Convention.

28. Australia has protection obligations under the Refugees Convention to the persons identified in Article 1A(2) of that Convention:

> A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

29. As will be apparent, the definition includes a number of elements. It is convenient to break them down as follows:

29.1. The applicant has "a well-founded fear of being persecuted";

29.2. The persecution feared by the applicant is "for reasons of race, religion, nationality, membership of a particular social group or political opinion" (commonly referred to compendiously as persecution for "a Convention reason";

29.3. The applicant is "outside the country of his nationality" or has no nationality;

29.4. The applicant is unable or unwilling to avail himself of the protection of the country of his nationality (or, if he has no nationality, the country of his former habitual residence).

30. Sections 91R and 91S of the *Migration Act* also affect the meaning to be given to the expressions used in Article 1A(2):

30.1. Section 91R(1) provides that Art 1A(2) of the Refugee convention does not apply in relation to persecution for a Convention reason unless:

30.1.1. the reason(s) is/are the essential and significant reason(s) for the persecution;

30.1.2. the persecution involves serious harm to the person; and

30.1.3. the persecution involves systematic and discriminatory conduct.

30.2. Section 91R(2) provides a non-exhaustive definition of "serious harm", which gives some indication of the kinds of harm a person must fear in order to be a fear of

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[21] *Migration Act*, s 5(1), definitions of "Refugees Convention" and "Refugees Protocol".

"persecution.[22] These include:

30.2.1. a threat to the person's life or liberty;

30.2.2. significant physical harassment of the person;

30.2.3. significant physical ill-treatment of the person;

30.2.4. significant economic hardship that threatens the person's capacity to subsist;

30.2.5. denial of access to basic services, where the denial threatens the person's capacity to subsist; and

30.2.6. denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

30.3. Section 91S(1) provides that, where a person claims to fear persecution by reason of their membership of a particular "social group" that consists of the person's family, the decision-maker must disregard any persecution or fear of persecution that any other member of the family has experienced for a non-Convention reason.[23]

31. In addition to the statutory clarification or modification of terms used in the Convention and incorporated into the protection visa criterion in s 36, there are large bodies of authority dealing with, for example:

31.1. what constitutes, or is capable of constituting "persecution" within the meaning of the Convention, and how it is to be assessed;[24]

31.2. the extent to which protection obligations may be owed if an applicant who fears persecution in a country is able to avoid persecution by relocating within that country;[25]

31.3. what is meant by the requirement that a "fear" of persecution be "well-founded";[26] and

31.4. what is meant by the concept of "a particular social group".[27]

Distinct regimes for on-shore and off-shore visa applicants

32. The provisions explained above have direct application in cases where person makes an *application* for a protection visa. However, there is one group of persons who are *not able to* make a valid application for a visa. An "offshore entry person" is a person who:

(a) has, at any time, entered Australia at an excised offshore place after the excision time for that offshore place; and

(b) became an unlawful non-citizen because of that entry.

The statutory concept of an "offshore entry person" is, it appears, largely synonymous with

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22 See *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1.

23 See *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 556.

24 See, eg, *S395 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1.

25 See, eg, *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437; *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18; *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426.

26 See, eg, *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389, 396-7, 406, 413 and 429; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-2 and 596.

27 See, eg, *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

what the government has referred to as an "irregular maritime arrival".

33. An "excised offshore place" is defined to include each of the Territories of Christmas Island, Ashmore and Cartier Islands and Cocos (Keeling) Islands, as well as other external territories or islands prescribed by regulation.[28] In the case of each of the three named Territories, the "excision time" was a date in 2001.[29]

34. Section 46A[30] of the *Migration Act*, entitled "Visa applications by offshore entry persons", relevantly provides:

> (1) An application for a visa is not a valid application if it is made by an offshore entry person who:
>
> (a) is in Australia; and
>
> (b) is an unlawful non-citizen.
>
> (2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.
>
> (3) The power under subsection (2) may only be exercised by the Minister personally.
>
> …
>
> (7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

35. The intention behind s 46A was not that the refugee claims of non-citizens in excised offshore places should not be considered. The intention was that officers of the Department of Immigration should conduct a "Refugee Status Assessment" to ascertain whether each offshore entry persons was a person to whom Australia owes protection obligations. In the event that an offshore entry person was found to be a person to whom Australia owed protection obligations, a recommendation to that effect would be made to the Minister, and the Minister would then issue a notice to that person under s 46A(2), lifting the bar otherwise imposed by s 46A(1) and allowing the person to make a valid application for a visa. On application, the offshore entry person would then be granted a protection visa.

36. Unless and until the Minister exercised the power under s 46A(2), there could be no valid application for a visa by an offshore entry person, and so no basis for the RRT to review a refusal of any purported application by such person. Instead of review by the RRT, the Commonwealth engaged an independent contractor, Wizard People Pty Ltd, to make available specified persons to conduct what was termed an "Independent Merits Review"; a review of an adverse determination by an officer of the Department. The only function of the Independent Merits Reviewer was to make a recommendation about whether protection obligations were owed to the offshore entry person in question. Any decision to permit the making of an application for a visa would be made by the Minister.

37. It appears that the reason for this elaborate extra-statutory scheme was to avoid merits

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28 *Migration Act*, s 5(1), definition of "excised offshore place".

29 *Migration Act*, s 5(1), definition of "excision time".

30 Section 195A(2) of the *Migration Act* is also relevant: it allows the Minister to grant a visa to a person who is in immigration detention, if he thinks that it is in the public interest to do so, whether or not the person has applied for the visa.

review by the RRT and judicial review by the courts, while still enabling Australia to fulfil its international obligations under the Convention.

38. In 2008, the Minister made an announcement and the Department published manuals which (in the words of the High Court) were:[31]

> cast in terms that made plain that the processes for which each provided were to be applied to all unlawful non-citizens who entered Australia at an excised offshore place and who, as the RSA Manual said, raised "claims or information which prima facie may engage Australia's protection obligations".

39. In *M61/2010E v The Commonwealth*, the High Court considered this regime. In brief summary, the Court held:

    39.1. The effect of s 46A(7) was that the Minister could not be compelled (by *mandamus*) to exercise, or to consider the exercise of, his power under s 46A(2) to lift the bar to the making of a valid application for a visa;[32]

    39.2. However, by his announcement in 2008, the Minister had indicated that consideration would be given to the exercise of his power under s 46A(2) "in every case in which an offshore entry person claimed that Australia owed that person protection obligations";[33]

    39.3. The continued detention of an offshore entry person during the conduct of the assessment and review processes was lawful only because those processes were directed to whether powers under s 46A or s 195A could or should be exercised;[34]

    39.4. "[O]nce it [was] decided that the assessment and review processes were undertaken for the purpose of the Minister considering whether to exercise power under either s 46A or s 195A, it follow[ed] from the consequence upon the claimant's liberty that the assessment and review must be procedurally fair and must address the relevant legal question or questions";[35]

    39.5. Declarations should be made that the processes undertaken to arrive at the reviewer's recommendation were flawed.[36]

40. In this way, effective judicial review was available of a decision made by an officer of the Department or by a reviewer on an Independent Merits Review.

41. In the event, the High Court held that, in relation to each of the plaintiffs in *M61/2010E v The Commonwealth*, "the reviewer made an error of law by treating the *Migration Act* and decided cases as no more than guides to decision making".[37] Further, in each case the reviewer had failed to provide procedural fairness (which, not being clearly excluded, was applicable to its decision) by failing to put to the offshore entry person "country information" upon which the reviewer relied.

42. Ironically, the common law rules of procedural fairness, which were held to apply to the Independent Merits Review process, are actually more stringent than the statutory

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31 *M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 342 [39].
32 (2010) 243 CLR 319 at 353 [77].
33 (2010) 243 CLR 319 at 350-1 [70].
34 (2010) 243 CLR 319 at 348 [62].
35 (2010) 243 CLR 319 at 353 [77].
36 (2010) 243 CLR 319 at 359-60 [101]-[104].
37 (2010) 243 CLR 319 at 358 [97].

procedures applicable to decisions of the RRT: see [62]-[66] below.

43. The Independent Merits Review regime has subsequently (in March 2011) been replaced with a similar regime known as Protection Obligations Determination. Under this regime, the second stage of assessment is not conducted by a person engaged pursuant to an independent contractual arrangement, but by an Independent Protection Assessor appointed by the Minister. The principal difference between the Independent Merits Review regime and the Protection Obligations Determination regime appears to be that:

    43.1. under the Independent Merits Review regime, the Departmental officer first considering the claims of an offshore entry person would make a decision as to whether protection obligations were owed to the person and, if the decision was negative, the offshore entry person concerned could "apply" for review by an Independent Merits Reviewer; whereas

    43.2. under the Protection Obligations Determination regime, if the Departmental officer in the first instance is unable to make a positive "Protection Obligations Evaluation" ("**POE**") in respect of a person, the matter is referred automatically for Independent Protection Assessment. The "Assessment" carried out by an Independent Protection Assessor is thus not a "review" of a decision, but an assessment in circumstances where there has not yet been any decision because the Department was not prepared to make a positive POE.

44. The important point is that, while "judicial review" in the traditional sense — where the remedies sought are the writs of *certiorari*, *mandamus* and prohibition, is not available in respect of an Independent Protection Assessment (because the Minister's powers under s 46A(2) and 195A(2) of the *Migration Act* are not compellable), the courts will nevertheless consider whether decisions are legally or procedurally flawed, and will make declarations to that effect. In practical effect, this is likely to be equivalent to obtaining a writ of *certiorari*.

The privative clause, "privative clause decisions", and the decision in *Plaintiff S157/2002 v The Commonwealth*

45. Section 474(2) of the *Migration Act* defines "privative clause decision" to mean:

> a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

Section 474(4) identifies various provisions of the *Migration Act*, decisions under which are not "privative clause decisions". Section 474(5) authorises regulations specifying that a decision or class of decisions are not privative clause decisions.

46. Relevantly for present purposes, all decisions of the Minister or his delegate, and of the RRT, concerning applications for protection visas, are "privative clause decisions".

47. Section 474(1) provides:

> A privative clause decision:
>
> (a) is final and conclusive; and
>
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

48. In *Plaintiff S157/2002 v The Commonwealth*,[38] the High Court considered the interpretation and effect of s 474(1). It was held that the reference to "a decision" was to a legally valid decision. A *purported* decision made without jurisdiction was, as a matter of law, *no decision at all*.[39] Accordingly, on its proper construction, the privative clause did not prevent judicial review of purported decisions which were not, as a matter of law, decisions *under* the *Migration Act*: the privative clause did not prevent review for "jurisdictional error".[40]

49. In the case brought by Plaintiff S157/2002, the plaintiff claimed that the RRT's decision, confirming a decision of a delegate of the Minister to refuse the plaintiff's application for a protection visa, had been made following a procedure which denied the plaintiff procedural fairness. The High Court held that the requirement for the RRT to observe the rules of procedural fairness was (as the *Migration Act* then stood) a condition on the exercise of the power conferred on the RRT to review a decision of the Minister. In other words, Parliament was to be taken to have intended that compliance with the procedural fairness hearing rule should be essential to the validity of the exercise of power by the RRT.[41]

50. Much ink has been spilt over the question of what effect, if any, the privative clause actually has. On the one hand, the High Court indicated that the privative clause did not preclude review for jurisdictional error (and had it purported to do so, it would have been invalid). As the Full Federal Court said in *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs*:[42]

> It must be emphasised that the aim of the process of reconciliation [of all the provisions of the *Migration Act*, including the privative clause] is to determine whether the impugned act is within the jurisdiction granted by the *Migration Act*. As such the process does not distinguish between jurisdictional errors that are and are not protected by the privative clause. It distinguishes between errors that are jurisdictional errors and those that are not jurisdictional errors.

51. This passage, as well as the judgment of the plurality in *Plaintiff S157/2002* itself,[43] may appear to suggest that there are some errors of law that do not go to jurisdiction and which may, therefore, be protected from review. However, the practical content of the class of non-jurisdictional errors of law, at least in relation to migration decisions, is elusive.

52. One kind of error which might be classified as "error of law", but which need not necessarily result in the RRT exceeding its jurisdiction, is an error in applying or complying with procedural steps in the decision-making process. In such a case, the question of whether a decision is vitiated by non-compliance is to be determined through a process of statutory construction and, in particular, by asking whether it is a purpose of the legislation that an act done otherwise than in compliance with a particular procedural step should be legally

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38 (2003) 211 CLR 476.

39 See, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-5 per Gaudron and Gummow JJ, at 618 [63] per McHugh J and at 646-7 [152] per Hayne J.

40 See, eg, *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 488 [19] and 495 [41] per Gleeson CJ and at 505-6 [75]-[77] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

41 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 490 [25] and 494 [37] per Gleeson CJ and at 508 [83] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

42 (2003) 199 ALR 43 at 51 [33] per Hill, Branson and Stone JJ.

43 (2003) 211 CLR 476 at 507 [81].

ineffective.[44] See further [67] below.

What is a jurisdictional error?

53. In *Craig v South Australia*, the High Court distinguished between inferior courts, on the one hand, and administrative decision-makers and tribunals. The class of errors amounting to jurisdictional error for inferior courts is narrower than the class of errors which go to jurisdiction for administrative decision-makers and tribunals. The High Court said of administrative tribunals:[45]

> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. … If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

54. In *Minister for Immigration and Multicultural Affairs v Yusuf*, after quoting from the passage from *Craig* set out in the preceding paragraph, McHugh, Gummow and Hayne JJ said:[46]

> "Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

55. For most purposes, it seems safe to proceed on the *prima facie* assumption that every error of substantive law[47] committed by an administrative tribunal will be jurisdictional error, providing the error of law can be seen to have contributed to the decision reached by the tribunal. That is because it is presumed that Parliament did not intend that the jurisdiction of an administrative tribunal should extend to wrongly determining questions of law, or making a decision otherwise than in accordance with the law.

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44 See *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-9 [91].

45 (1995) 184 CLR 163 at 179.

46 (2001) 206 CLR 323 at 351 [82].

47 This excludes errors as to the content of *foreign law* or *international law* (except insofar as the relevant principles of international law are incorporated into Australian domestic law), because questions of foreign law or international law are regarded as questions of fact: see *Singh v Minister for Immigration and Multicultural Affairs (No 2)* [2001] FCA 327 at [22] per Heerey J.

Some examples of jurisdictional error

56. In the following paragraphs, I attempt to distil some of the more common grounds of judicial review that may be available in relation to decisions of the RRT. This is not intended to be an exhaustive list. Furthermore, the grounds may often overlap so that it is possible to characterise a particular error in more than one way.

Denial of procedural fairness and failure to comply with statutory procedures concerning the conduct of the review

57. As has been seen, in *Plaintiff S157/2002 v The Commonwealth*, it was held that, on the proper construction of the *Migration Act* provisions as they then stood (in 2003), compliance with the common law rules of procedural fairness was an essential precondition to the exercise of the RRT's power to "review" a decision.

58. The general position of the common law was stated by Mason CJ in *Kioa v West*:[48]

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intent.

59. The last point is important: the rules of procedural fairness apply presumptively and can only excluded by a *clear manifestation of a contrary statutory intent*. Theoretically, it may be possible to exclude the rules of procedural fairness by implication, but the modern approach usually insists on unambiguous express language to achieve that, particularly where the subject matter of the decision is as important as the granting or withholding of a visa to a person who claims to be subject to persecution and entitled under international law to Australia's protection.

60. Since 2003 there have been important changes to the provisions of the Act dealing with the duties of the RRT with respect to the procedural fairness hearing rule. (As indicated above, in the case of a Protection Obligations Determination for an offshore entry person, the common law rules of natural justice would seem to continue to apply.)

61. Division 4 of Part 7 of the Migration Act is entitled "Conduct of review". The Division:

    61.1. makes provision for the provision of documents to the RRT by the applicant the Secretary of the Department of Immigration and Citizenship;[49]

    61.2. empowers the RRT to seek information and may invite persons to provide information;[50]

    61.3. provides for the giving of notice of the day on which an applicant is to appear before the Tribunal;[51]

    61.4. requires the RRT to invite an applicant to appear before it if it is not able to make a favourable determination of the application;[52]

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48 (1985) 159 CLR 550 at 584.

49 *Migration Act*, s 423.

50 *Migration Act*, s 424.

51 *Migration Act*, s 425A.

52 *Migration Act*, s 425.

61.5. requires the RRT to give to an applicant, either orally at the hearing[53] or in writing,[54] clear particulars of any information that the Tribunal considers would be "the reason, or part of the reason",[55] for affirming the decision under review (but subject to the exception discussed in [63] below);[56] and

61.6. prescribes the requirements for invitations to applicants to give information or to comment on or respond to information.[57]

62. In addition, Division 7A of Part 7 prescribes acceptable *methods* for the provision of documents by the RRT to the Secretary of the Department if Immigration and to other persons (including, importantly, visa applicants).

63. By reason of s 424AA(3) and 424A(3), the RRT is *not* required to draw to the attention of the applicant information that was provided by the applicant himself or herself, information that should not be disclosed in the public interest, or information "that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member".

64. An important example of information of the latter class is general information about the conditions prevailing in relevant foreign countries, and the general treatment of persons belonging to particular social, ethnic or religious groups — commonly referred to as "country information". "[C]ountry information is treated as a class of information which need not be drawn to the attention of applicants for review by the [RRT]".[58] This is noteworthy because it constitutes a clear departure from the common law requirements of procedural fairness, and can potentially lead to the making of valid decisions by the RRT which are procedurally unfair.

65. Section 422B(1) of the *Migration Act*, which is the first provision in Division 4 of Part 7, now provides:

> This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

66. A question of construction arises as to exactly what are the "matters" that Division 4 of Part 7 "deals with".[59] It is suggested that the expression "the matters it deals with" in s 422B cannot be limited to the provision of only the particular "information" identified in s 424(1) (ie,

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53 *Migration Act*, s 424AA.

54 *Migration Act*, s 424A.

55 As to the meaning of the The Tribunal is under no obligation to draw to an applicant's attention all adverse material that would *not* be "the reason, or part of the reason" for affirming the decision under review: see *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507.

56 *Migration Act*, ss 424AA(3) and 424A(3).

57 *Migration Act*, s 424B.

58 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 357 [91]; See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 261 [21] and 266-7 [38]-[42] per French, Gummow, Hayne, Crennan and Kiefel JJ.

59 An analogous question arose, in a different context, in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252. In that case, the Court held that provisions dealing with the provision of information in the case of applications for visas that could be granted when the applicant was in the migration zone did not "deal with" applications for visas that could not be granted when the applicant was in the migration zone, so that the relevant division did not displace the common law natural justice hearing rule in relation to his case.

information the RRT *is* required to provide): to so limit it would be to render s 422B otiose.[60] Section 424A "deals with" the matter of "the provision [by the RRT] of information, more generally relevant and adverse, for comment"[61] — including the provision of information of the kinds that is not specifically about the applicant or another person but just about a class of persons. The better view, it is suggested, is that s 424A(3) "deals with" information of that kind by indicating expressly that the requirement of s 424A(1) does not apply to it.[62]

67. As s 422B(1) makes clear, the requirements of Division 4 of Part 7 are imperative (ie, the RRT is under a duty to comply with them) and are designed to ensure fairness to the applicant. However, it does not follow that every departure from those requirements will necessarily result in procedural unfairness. Nor does it follow that departures from the statutory requirements which do not produce any unfairness will result in the ultimate decision of the RRT being invalid.

68. In *Minister for Immigration and Citizenship v SZIZO*, the High Court said:[63]

> While the legislature may be taken to have intended that compliance with the steps in ss 441G and 441A [Ie, provisions in Part 7A] would discharge the Tribunal's obligations with respect to the giving of timely and effective notice of the hearing, it does not follow that it was the intention that any departure from those steps would result in invalidity without consideration of the extent and consequences of the departure. … No question arises, in the case of an applicant who has received timely and effective notice of the hearing, of the loss of an opportunity to advance his or her case.
>
> Notwithstanding the detailed prescription of the regime under Divs 4 and 7A and the use of imperative language it was an error to conclude that the provisions of ss 441G and 441A are inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review. They are procedural steps that are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing; a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice. There was no denial of natural justice in this case.

69. Thus, the result of non-compliance with the procedural requirements of Divs 4 and 7A falls to be determined by reference to the question of whether the result of the non-compliance was a failure to accord natural justice to the applicant. The status of the High Court's decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*,[64] which pre-dated the insertion of s 422B in the *Migration Act*, and which held that failure to comply with the requirements of s 424A constituted jurisdictional error, is not entirely clear.[65]

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60 Cf *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 267 [41], citing *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 at 469 [59] per Lindgren J.

61 Cf *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 267 [42] per French, Gummow, Hayne, Crennan and Kiefel JJ, referring to s 57 of the *Migration Act*.

62 This is consistent with the view expressed in *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173 at [40] per Buchanan J, considering ss 359A(1) and (4) of the *Migration Act*, which are expressed in terms similar to ss 424A(1) and (3) respectively.

63 (2009) 238 CLR 627 at 640 [35]-[36].

64 (2005) 228 CLR 294.

65 However, the decision itself is not inconsistent with the Court's later decision in *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, so it is suggested that s 424A should continue to be treated as a mandatory provision, non-compliance with which constitutes jurisdictional error.

"No evidence" to support a finding

70. In *Australian Broadcasting Tribunal v Bond*, Mason J made reference to "the traditional common law principle that an absence of evidence to sustain a finding or inference of fact gives rise to an error of law".[66] It is, it is suggested, clear that Mason CJ intended to assert a general proposition applicable to all fact-finding: it is an *error of law* to make a finding of fact that is supported by *no evidence*. The common law principle is not restricted to "jurisdictional facts".

71. If the general proposition that the RRT's jurisdiction does not extend to acting otherwise than in accordance with law is accepted, then it would seem to follow that the making by the RRT of any *finding of fact* that is supported by *no evidence* should be regarded as a jurisdictional error. Of course, such an error will only be jurisdictional error, resulting in the RRT failing to have performed its statutory function, if the finding of fact is material to the ultimate decision. Presumptively, it may be expected that findings of fact which are specifically referred to by the RRT in its reasons have contributed to its decision.

72. However, there are cases in which it has been held that the "no evidence" ground of review will only avail an applicant where the fact which is said to have been unsupported by evidence was one of which the RRT was required to be satisfied as a precondition to the exercise of its jurisdiction.[67] In other words, a decision would only be set aside on the basis that a finding of fact was made which was unsupported by evidence, if that fact was itself a "jurisdictional fact", or if the decision-maker's satisfaction that that fact existed was a "jurisdictional fact".

73. The judgment of Gummow and Hayne JJ in *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* appears to provide some support for this approach.[68] In that case, the RRT had made a finding that the applicant suffered from post-traumatic stress disorder. The RRT then used that finding in assessing the credibility of the factual account advanced by the applicant. Gummow and Hayne JJ said in *SGLB*:[69]

> To return to the first ground identified in the Federal Court, the "no evidence" ground, nothing in the Act made the question of whether or not the respondent suffered from PTSD a precondition to the exercise of jurisdiction. No question of a 'no evidence' ground of jurisdictional error arises.

74. If this approach were generally accepted it would seem restrict very significantly the scope and application of the "no evidence" ground.

75. On the other hand, in *Minister for Immigration & Multicultural Affairs v Eshetu*, Gummow J observed that "a criterion of 'reasonableness review' would permit review in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds".[70] It may be, therefore, that at least some cases of material findings unsupported by evidence will still be open to challenge on the ground that the decision was unreasonable, illogical or irrational.[71]

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66 (1990) 170 CLR 321 at 358.

67 See, eg, *SZAPC v Minister for Immigration and Multicultural Affairs* [2005] FCA 995.

68 (2004) 207 ALR 12.

69 (2004) 207 ALR 12 at [39] (Gleeson CJ agreeing).

70 (1999) 197 CLR 611 at 656-7.

71 See also *SZAPC v Minister for Immigration and Multicultural Affairs* [2005] FCA 995 at [58] per Madgwick J.

76. Some care needs to be taken with the "no evidence" ground. For example:

76.1. It may well be that a positive finding of fact is to be distinguished from a refusal to find a fact proved because, for example, the RRT doubts the veracity of a factual claim made by an applicant. The RRT is not bound to accept every factual claim advanced in support of a visa. It is entitled to find that it is not "satisfied" that an applicant has a well-founded fear of persecution for a Convention reason simply because it does not accept the applicant's version of events. It seems to follow that, providing the RRT expresses itself simply in terms of not being satisfied of a fact asserted by the applicant, and not as making a positive finding that different facts exist, it will not be a valid ground of complaint that there was "no evidence" to support the rejection of the applicant's factual claim.[72] The RRT commonly rejects the factual accounts given by applicants because, for example, they are internally inconsistent, are inconsistent with information provided by the applicant at an earlier stage of the proceedings (eg, in interview with the Minister's delegate or the visa application form), or are implausible in the light of objective information available to the RRT.

76.2. The "evidence" for a finding need not be direct evidence of the fact ultimately found by the RRT. It is sufficient if there is evidential material from which an inference of fact could reasonably be drawn; that is, that an inference is available on the whole of the material before the RRT.

Unreasonableness and irrationality

77. It has been recognised that a decision will be affected by jurisdictional error if it is *irrational*, *illogical*, or *so unreasonable that no reasonable decision maker could make it*. The essential reason for this was explained by Gaudron J in *Abebe v The Commonwealth*, in the following terms:[73]

> [I]t is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition to the exercise of that power that it be exercised reasonably, at least in the sense that it not be exercised in a way that no reasonable person could exercise it.

78. In *Minister for Immigration and Citizenship v SZMDS*,[74] Gummow ACJ and Kiefel J approved the following passage from the judgment of Gummow and Hayne JJ in *SGLB v Minster for Immigration and Multicultural and Indigenous Affairs*:[75]

> The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or

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72 In some circumstances, particularly where the factual claim is not inherently implausible or contradicted by other evidence, it may still be possible to challenge a decision based on a rejection of an applicant's claim, on the basis that the decision was irrational or was one which no reasonable decision maker could have made. However, this approach will not succeed where there are other rational grounds supporting the RRT's ultimate decision: see *AZABM v Minister for Immigration and Citizenship* [2012] FCA 860 at [38] per Besanko J.

73 (1999) 197 CLR 510 at 554 [116], quoted or cited with approval in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 625 per Crennan and Bell JJ and in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [29] per French CJ and [89] per Gageler J.

74 (2010) 240 CLR 611 at 625 [40].

75 (2004) 207 ALR 12 at 20-21 [38].

> inferences of fact supported by logical grounds. If the decision did display these defects, it will be no answer that the determination was reached in good faith.

79. However, their Honours cautioned that "what is characterised as the 'critical question' should not receive an affirmative answer that is lightly given". It has been emphasised that "unreasonable", "irrational" or "illogical" means more than strong disagreement with the decision reached; it is not to be used as a form of "merits review".

80. The illogicality or "unreasonableness" grounds of review are often invoked in a challenge to the *outcome* of a decision-making process, or the *reasoning* by which that outcome is reached. It should be noted that arguments based on unreasonableness may also be applied to the procedural approach adopted by a decision-maker, where the adoption of an unreasonable approach (such as refusing an adjournment in circumstances where it was unreasonable not to grant the adjournment sought[76]), can be said to have affected the decision.

Failure to conduct a "review"

81. Section 414(1) of the *Migration Act* provides that, if a valid application is made under s 412 for review of an RRT-reviewable decision, the RRT must *review* the decision.

82. If it be accepted that the power of the RRT to "review" a decision of the Minister is confined by the requirement that it decide in accordance with the law, then it is probably technically correct to describe every such error as leading to the conclusion that the RRT, by reaching a decision otherwise than in accordance with the law, has failed to conduct a "review" of the particular kind which the *Migration Act* requires it to perform. By exceeding the bounds of its jurisdiction, the Tribunal has not carried out a "review" of the kind contemplated by the *Migration Act*, even if it may be said as a matter of fact to have carried out a review of some other kind. In that sense, failure to undertake the review required by the Act is synonymous with "jurisdictional error".

83. There are some cases, however, where what the RRT has done, or omitted to do, can more naturally be characterised as a failure of the Tribunal to carry out a "review" of a decision.

84. A relatively common example is where the applicant has raised a ground on which it is suggested that the applicant may have a well-founded fear of persecution for a Convention reason, but where the RRT has failed to consider that ground. This sometimes occurs when the applicant

85. In *Htun v Minister for Immigration and Multicultural Affairs*, Allsop J said:[77]

> The requirement to review the decision under s 414 of the Act requires the tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration … It is to be distinguished from errant fact finding. The nature and extent of the task of the tribunal revealed by the terms of the Act … make it clear that the tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant.

86. In general, the duty of the RRT to "review" will not require it to consider claims that are not

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[76] See, eg, *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

[77] (2001) 194 ALR 244 at [42] (Spender J agreeing).

either expressly advanced by the applicant himself or herself, or addressed in the decision under review. In rare circumstances, a claim may be so obvious on the material before the RRT that the duty to "review" the decision requires the RRT to address that claim. Matters of degree are obviously involved.

87. In other cases, an applicant may not have identified their claim perfectly, but the claim as expressed may be sufficiently related to another claim that proper conduct of a "review" requires the RRT to consider that other claim. Thus, in *Dranichnikov v Minister for Immigration and Multicultural Affairs*, the Full Court of the Federal Court said:[78]

> The Tribunal must, of course, deal with the case raised by the material and evidence before it. An asylum claimant does not have to pick the correct Convention "label" to describe his or her plight, but the Tribunal can only deal with the claims actually made.

88. However:[79]

> A judgment that the Tribunal has failed to consider a claim not expressly advanced is … not lightly to be made. The claim must emerge clearly from the materials before the Tribunal.

89. A court is unlikely to look favourably on an application for judicial review that is based on a failure to consider a claim, unless the claim was squarely raised with the RRT, either as a matter of evidence (ie, the applicant gave evidence of events which, if accepted, was capable of giving rise to conclusion that the applicant had a well-founded fear of persecution for a Convention reason) or argument.

Duty to investigate or inquire?

90. There is no *general* duty on the RRT to investigate or make inquiries beyond the material which it sees fit to obtain and which may be provided to it by the applicant.

91. However, in *Minister for Immigration and Citizenship v SZIAI*, six members of the High Court said:[80]

> Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a 'duty to inquire', that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. It 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. It is not necessary to explore these questions of principle in this case.

92. This passage nicely illustrates the point made earlier, regarding the scope of the concept of a failure of the RRT to "review" a decision.

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78 [2000] FCA 1801 at [49].

79 *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 22 [68] per Black CJ, French and Selway JJ.

80 (2009) 259 ALR 429 at 436 [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. (Footnotes omitted.) See also *SZMJM v Minister for Immigration and Citizenship* [2010] FCA 309 at [7] and [30]-[32] per Bennett J; *SZNYI v Minister for Immigration and Citizenship* [2010] FCA 221 at [37]-[40] per Yates J.

93. It is impossible to identify in advance situations where it might be held that a failure to make an obvious inquiry amounted to a "failure to review". However, it appears that this much can be said: if an applicant is to succeed in a claim that the RRT has failed to make an obvious inquiry and has thereby failed to "review" the decision, it will be necessary to identify the particular inquiry which it is said the RRT should have made but failed to make, and the "critical fact" which the Tribunal easily could have, but failed to, ascertain.

Error of law

94. As earlier indicated, the jurisdiction of the RRT does not extend to making a decision otherwise than in accordance with law. It appears that every kind of "jurisdictional error" is an error of law in the broad sense. (Even jurisdictional error that is based on the non-existence of a "jurisdictional fact": in such a case the error of law is proceeding in circumstances where the jurisdictional fact does not exist.[81]) That is not to deny that, sometimes, a serious factual error may *evidence*, for example, that the RRT has asked itself the wrong question or has misunderstood or misapplied the law: an error of law.

95. The principal kind of error of law which will commonly be discernible, and which is not covered by the other grounds already discussed, is an error in the interpretation or application of the substantive provisions of the *Migration Act* which govern the grant of protection visas. In *Applicants S134/2002 v The Commonwealth*, Gaudron and Kirby JJ said:[82]

> The detailed specification of matters bearing upon the grant of a protection visa inserted into the Act at the same time as was s 474 [ie, the privative clause] makes it clear that the Parliament was not enacting provisions to the effect that decision-makers could validly grant or refuse to grant protection visas on the basis of a bona fide attempt to determine whether the criteria for the grant of a protection visa have been satisfied, as distinct from the decision-maker's actual satisfaction or lack of satisfaction as to those criteria. And as already pointed out, a decision-maker cannot be said to be satisfied or not satisfied if effect is not given to those criteria because, for example, they have been misconstrued or overlooked.

96. Some of the more important of provisions concerning the criteria applicable to the grant of protection visas are set out and discussed in [22]ff above.

Decisions supported on multiple grounds / "alternative streams of reasoning"

97. It is not uncommon to see the RRT reason in this fashion. It may, for example, find that it is not satisfied that a factual account given by the applicant is true. It may go on to decide that, assuming the applicant's factual account were to be accepted, the RRT would not regard those facts as giving rise to a "well-founded fear of persecution" or whether any fear of persecution which he did have would be a fear of persecution for a Convention reason.

98. It has been held that, where a decision rests upon "alternative streams of reasoning", and one of those streams of reasoning is either not challenged or, although challenged, is not found to be affected by error, then the court will not grant relief on an application for judicial

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81 Cf *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 144 FCR 1 at 16 [53].

82 (2003) 211 CLR 441 at 471 [85]. This passage was quoted by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at 24 [51], where it was said to be "compelling".

review.[83] All that is meant by an "alternative stream of reasoning" in this context is alternative bases that are independent of each other and each of which would be sufficient to compel the RRT to determine the Appellant's claim against him.

99. There appear to be two alternative justifications for this approach, each of which is reflected in the reasons given in different cases.

100. First, arguably the *decision* of the RRT cannot be said to be vitiated by jurisdictional error if the decision is fully supported by a line of reasoning that is unaffected by any relevant error.[84] If there are two or more independent lines of reasoning leading to the same conclusion, and only one is affected by error, then establishing that error itself provides no reason why the decision should not be effective. It would be wrong to hold that such a decision was "no decision at all".

101. Alternatively, if a court on an application for judicial review finds that the RRT has made a finding that is unaffected by error and which has the consequence that the RRT would be bound to reject the Applicant's claim, regardless of the Court's conclusion in relation to any other findings, then the court should refuse relief on discretionary grounds, because in such a case granting relief would be futile.[85]

102. In short, then, if a decision contains two or more streams of reasoning, each of which is independent from the other, it will be necessary to identify either:

    102.1. an error that arguably affects the Tribunal's approach to the whole decision; or

    102.2. distinct arguable errors that affect each stream of reasoning.

10 May 2013

S A McDonald

Hanson Chambers

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83 *VEAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 291 at 308 [55] per Gray J. For a recent examples of the High Court endorsing this approach, see *AZABM v Minister for Immigration and Citizenship* [2013] HCASL 74 at [2]; *Bains v Minister for Immigration and Citizenship* [2013] HCASL 75 at [2]-[3].

84 See, eg, *VEAJ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 678 at [55] per Gray J; *SZCJH v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1660 at [23] per Sackville J; *VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 965 at [33] per North J; *NBAN v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 57 at [6] per Moore J; *SZNJV v Minister for Immigration and Citizenship* [2009] FMCA 937 at [139]-[145] per Nicholls FM.

85 *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at [28]-[29] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, at [49]-[90] per Kirby J and at [91] per Hayne J; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at 265 [232]-[233] per Allsop J.