University of New South Wales
University of New South Wales Faculty of Law Research Series
2010

Year 2010 *Paper* 67

The Expanding Role of Process in Judicial Review

Greg Weeks*

*University of New South Wales

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/unswwps-flrps10/art67

Copyright ©2010 by the author.

The Expanding Role of Process in Judicial Review

Greg Weeks

Abstract

This article examines the state of the law of procedural fairness and procedural error, demonstrating that inadequacy of process is now central to findings that decisions of the Executive are so lacking in quality as to manifest an error of law. The article argues that fairness of outcome and legitimacy of review need not be defined only in relation to the faultlessness of process.

The expanding role of process in judicial review

Greg Weeks*

This article examines the state of the law of procedural fairness and procedural error, demonstrating that inadequacy of process is now central to findings that decisions of the Executive are so lacking in quality as to manifest an error of law. The article argues that fairness of outcome and legitimacy of review need not be defined only in relation to the faultlessness of process.

INTRODUCTION

Procedural fairness is a cornerstone of the law of judicial review. A fair and unbiased hearing has been an essential element of the "rules of natural justice" from the very beginning. Indeed, "process" has traditionally been viewed as what judicial review of administrative action is all about, as opposed to review of the "substance" or "merits" of a matter, which have unarguably been seen as the sole domain of the Executive. While the simplicity of this "classical model" of judicial review has been challenged, the importance of process has not diminished in modern times. Rather, it has expanded such that challenges to decisions of the Executive outside the parameters of procedural fairness, for example on the grounds of *Wednesbury* unreasonableness,[1] or irrationality or illogicality,[2] tend not to succeed unless some flaw in the process of the decision-maker can be demonstrated.

Process is a concept that operates on at least three distinct levels within administrative law. First, there is the notion that people affected by administrative decisions have procedural rights. One of the foundation principles of administrative law is that natural justice requires that, before making a decision which will affect the interests of a person, a decision-maker must give that person a chance to be heard. In *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396, Dixon CJ and Webb J noted that "the older authorities ever recur to the lines from Seneca's *Medea*" in support of the hearing rule of procedural fairness, doubtless to emphasise the ancient origins[3] of the modern hearing rule. David Bennett QC gives Seneca's lines the following translation:[4]

> Whoever has made a decision, the other party being unheard, has not been just, although he has made a just decision.

Secondly, there is the tension between the adoption of a stated set of "soft law"[5] procedures in making administrative decisions in order to enhance the consistency and thereby the fairness of such decisions and the requirement that a decision-maker be able to exercise his or her discretion without being fettered.[6]

---

* BA (Sydney), M Bus (UTS), LLB (UNSW); Lawyer, Corrs Chambers Westgarth. The author wishes to thank Professor Mark Aronson, Dr Matthew Groves, Emily Bell and Caitlin Fegan, as well as the anonymous referee, for their extensive and helpful comments on this article in its draft form.

[1] *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680.

[2] *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1164; 198 ALR 59.

[3] See Rares S, "Blind justice: The pitfalls for administrative decision making" (2006) 50 *AIAL Forum* 14.

[4] Bennett D, "Is natural justice becoming more rigid than traditional justice?" (2006) *AIAL National Lecture Series on Administrative Law No 3* 3 at 6.

[5] See Aronson M, "Private Bodies, Public Power and Soft Law in the High Court" (2007) 35 Fed L Rev 1 at 3; *Minister for Citizenship & Immigration v Thamotharem* [2007] FCA 198 at [56] (Evans JA) (Canadian Federal Court).

[6] See generally Aronson, n 5.

Hosted by The Berkeley Electronic Press
© LawBook Co
Electronic copy available at: http://ssrn.com/abstract=1448205

Thirdly, process has been used to define the permissible limits of judicial review of administrative action. The classical model of judicial review had always treated the distinction between process and substance as definitive. Under this model, issues relating to outcome – the substance of a decision – are considered to go inevitably to 'the merits'. The place of judicial review is to ensure that decision-making is procedurally, not substantively, sound. Indeed, it has become so axiomatic that "the merits" of a decision are off-limits to a court exercising a judicial review function that matters going to the quality of a decision are considered with the greatest caution lest the boundary between merits and substance (famously described by Brennan J in *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-36) be transgressed.

This article examines the concept of process, both within the law of procedural fairness and more generally, to make the argument that fairness of outcome and legitimacy of review need not be defined only in relation to faultless process.

PART 1

A. Procedural fairness and procedural error

Judicial review for failures of process is divided between review for procedural errors leading to an invalid final decision and failure to provide procedural fairness. These are not necessarily coextensive, since an obligation of a merely procedural variety may be breached in any number of ways, not all of which produce invalidity.[7] On the other hand, failure to provide procedural fairness will always constitute a failure of procedure which results in invalidity.[8]

Review of decisions which have been affected by a failure of process, whether or not it amounts to a failure to afford procedural fairness, may be available under a statutory regime, such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act), or at common law.

Judicial review is available at common law for procedural errors that are jurisdictional. Where a final decision is affected by a procedural error going to the decision-maker's jurisdiction,[9] writs of mandamus and prohibition may lie to remedy the error. Certiorari, while not mentioned in s 75(v) of the *Constitution*,[10] is available to remedy errors of law apparent on the face of the record, whether or not these are jurisdictional errors. Aronson, Dyer and Groves point out that the common law of judicial review will usually not respond to procedural errors unless they are jurisdictional. The only exceptions are certiorari and (if relief is sought and granted before a final decision subsumes the non-jurisdictional error) declarations and injunctions.[11]

Practically, common law remedies will only be sought in the absence of a remedy under the AD(JR) Act or another statutory regime. Nonetheless, case law relating to common law review of procedural failures is still highly influential. As stated above, the common law hearing and bias rules, which respectively state that a decision-maker must hear a person before making a decision which affects that person's interests and must be disqualified from making a decision where the decision-maker's conduct raises a reasonable apprehension that he or she lacks impartiality, have ancient origins. As Aronson, Dyer and Groves have noted, these are rules which "address the manner in which a decision is made, and not the merits of the decision itself"[12] and are therefore rules about the procedural conduct of a matter rather than its substance.

---

[7] "McHugh, Kirby and Hayne JJ have held [in *SAAP*] that, at least with respect to explicit statutory requirements on the exercise of a decision-making power, the test for whether a breach of such a requirement amounts to jurisdictional error is the test for invalidity propounded in [*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355]", viz, parliamentary intent: O'Donnell B, "Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Australian Constitution" (2007) 28 Aust Bar Rev 291 at 320.

[8] Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (3rd ed, Lawbook Co, 2004) p 323.

[9] The presence of jurisdictional error is a requirement for the availability of relief under *Constitution*, s 75(v).

[10] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 139 [156] (Hayne J).

[11] Aronson et al, n 8, p 322.

[12] Aronson et al, n 8, p 370 (citing *Kioa v West* (1985) 159 CLR 550 at 566-567 (Brennan J)); *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 at 1174-1175 (Lord Brightman).

http://law.bepress.com/unswwps-flrps10/art67
Electronic copy available at: http://ssrn.com/abstract=1448205

The classic statement in Australia of the content of the obligation to provide procedural fairness was given by the High Court in *Kioa v West* (1985) 159 CLR 550. In that case, Mason J outlined a common law obligation to "act fairly" when making decisions which "affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention" (at 584).[13] Brennan J preferred to characterise this obligation as stemming from implied statutory intention rather than the common law,[14] although his Honour noted that all statutory construction should be conducted "against a background of common law notions of justice and fairness" (at 609). The basic content of the obligation to provide procedural fairness at common law was nonetheless "similar in effect"[15] under both approaches.

As will be discussed below, *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 has seen the High Court refine procedural fairness obligations at common law as they have developed since *Kioa v West* by rejecting notions of the acceptability of minor breaches in favour of emphasising the essentiality of correct process. This has doubtless made the common law standard of procedural fairness "clearer",[16] although the renewed procedural focus of the doctrine will still allow a court to grant relief where the decision-maker's ultimate decision was compelled for another reason.[17]

B. Procedural failure under the AD(JR) Act

Section 5(1)(b) of the AD(JR) Act says:

> A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision on any one or more of the following grounds:
>
> …
>
> (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed.[18]

Section 5(1)(b) demands that there be certain procedures "required by law", which will often be the result of another statutory provision.[19] The Full Federal Court stated in *Minister for Health & Family Services v Jadwan Pty Ltd* (1998) 89 FCR 478 at 494 159 ALR 375 at 391 that while "the words 'in connection with', as used in s 5(1)(b) of the ADJR Act, are to be read widely",[20] contravention of the section requires that a decision-maker fail to observe procedures that he or she is *required* to observe. In *Jadwan*, the Minister's delegate gave directions to a panel in the erroneous belief that she was legally entitled to do so. The court stated that even such a failure to observe a procedure required under the regulations "did not constitute a failure to observe any procedure required by law in connection with" the relevant decision (at 494; 391) because the Minister's delegate was not required to follow *any* procedure in regard to giving the instructions she had.[21] It is

[13] The scope of the obligation to provide procedural fairness where a decision will affect a "legitimate expectation" has since been moulded by the High Court in *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.

[14] Professor Aronson considers that the decision of the High Court in *Griffith University v Tang* (2005) 221 CLR 99 is the "strongest indication so far that the High Court will resolve the long-running debate about the provenance of natural justice against the 'common law' school led originally by Mason CJ and in favour of the 'implied or imputed intention of Parliament' school, led originally by Brennan CJ", in which regard he says that the decision in *Tang* spells "long-term trouble": Aronson, n 5 at 2.

[15] Aronson et al, n 8, p 382.

[16] See Barnett M, "Dobbing-in and the High Court – *VEAL* refines procedural fairness" (2007) 30(1) UNSWLJ 127.

[17] Izzo M, "High Court on procedural fairness: SAAP and VEAL" (2006) 13 AJ Admin L 186.

[18] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 6(1)(b) is in the same terms for review of conduct related to making of decisions.

[19] See, eg *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479-485 (Wilcox J).

[20] See *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479-480 (Wilcox J).

[21] See also *Ivanovic v Australian Customs Service* (2007) 162 IR 104 at 112 (Lucev FM).

bepress Legal Repository

© LawBook Co.
Hosted by The Berkeley Electronic Press

clear from this that mere failures of procedure are not remediable under s 5(1)(b) unless there is a legal compulsion on a decision-maker to follow that procedure.

Aronson, Dyer and Groves have noted that review under the "procedural error" ground is not expressly restricted to breaches which produce invalidity but goes beyond the concept of "jurisdictional error".[22] This is consonant with *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, in which the majority of the High Court stated (at [43] (footnote omitted)):

As is illustrated by the outcome in *Muin v Refugee Review Tribunal*, the grounds of review specified in the AD(JR) Act cast a wider net than those concerned with excess of jurisdiction. Whilst s 75(v) of the *Constitution* reflects the jurisdictional limitations flowing from the constitutional structure itself, the AD(JR) Act, with the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Ombudsman Act 1976* (Cth), provided a comprehensive legislative scheme for the redress of grievances concerning federal administrative action (*Shergold v Tanner* (2002) 209 CLR 126 at 130 [3]).

C. Statutory procedural fairness regimes

Legislation is able to provide an "exhaustive statement" of the requirements of procedural fairness. This is the case under a number of Acts,[23] most notoriously the *Migration Act 1958* (Cth). Division 4 of Pt 7 of the *Migration Act* "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with",[24] namely, the conduct of reviews of decisions by the Refugee Review Tribunal (RRT). Common law notions of procedural fairness are therefore displaced in relation to decisions made by the RRT under the *Migration Act*. This has the concomitant effect that any "subversion" of the procedures set out in Div 4 of Pt 7 "subverts the observance by the [RRT] of its obligation to accord procedural fairness to applicants for review".[25] In *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [32]; 237 ALR 64, the High Court noted, in a unanimous judgment, the effect of the fraud of a third party in subverting the statutory procedural fairness obligations of the RRT:[26]

> Given the significance of procedural fairness for the principles concerned with jurisdictional error, sourced in s 75(v) of the *Constitution*,[27] the subversion of the processes of the [RRT] in the manner alleged by the present appellants is a matter of the first magnitude in the due administration of Pt 7 of the Act.

The result was that the RRT failed to fulfil its obligation to provide natural justice to the appellants in *SZFDE*, even though it had not been aware that a fraud had been perpetrated by a third party and was itself blameless. This was because the fraud "had the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants" (at [49]). Because the *Migration Act* provides a code for the provision of natural justice, "stultification" of the legislative scheme is necessarily treated as a failure to provide natural justice.

However, not all breaches of the statutory requirements are treated as a failure to provide natural justice. As at common law, where the broad obligation to "act fairly"[28] is not breached by every procedural flaw, "the failure to observe the procedural requirements of [Div 4 of Pt 7 of the *Migration*

[22] Aronson et al, n 8, ppa320-321; cf breaches reviewable under the *Migration Act 1958* (Cth), discussed below at Part 1(C), "Statutory procedural fairness regimes".

[23] See, eg *Wilderness Society Inc v Minister for Environment & Water Resources* (2007) 96 ALD 655; [2007] FCA 1178 at [138] (Marshall J) re the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

[24] *Migration Act 1958* (Cth), s 422B(1), which was added to Pt 7 Div 4 by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).

[25] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [32]; 237 ALR 64 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ.

[26] This "subversion" took the form of the appellants' migration agent counselling the appellants from appearing before the RRT "fraudulently" and "for personal gain": *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [40].

[27] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; 75 ALJR 52; 176 ALR 219.

[28] *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J.

bepress Legal Repository

http://law.bepress.com/unswwps-flrps10/art67

Act] in circumstances where there was no unfairness or failure to accord procedural fairness" does not amount to jurisdictional error.[29] In *NAHV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 129 FCR 214 at 219, the Full Federal Court said that it is a question of statutory interpretation whether Parliament intended that certain breaches should mean that a decision of the RRT is invalid, in the sense of being "no decision at all".[30] Courts reviewing RRT decisions are obliged to reach a conclusion on this issue due to the effect of the privative clause in Pt 8 of the *Migration Act*,[31] which only allows review of decisions which are not "privative clause decisions" for the purpose of providing remedies under s 75(v) of the *Constitution*. Such decisions must therefore demonstrate jurisdictional error to be reviewable.[32]

SZBYR v Minister for Immigration & Citizenship (2007) 81 ALJR 1190 provided an interesting example of the different results that can occur under a statutory procedural fairness regime as compared with the common law. It had to do with alleged breach of s 424A of the *Migration Act*, which relevantly provides at subs (1) that the RRT must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars[33] of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review;[34] and

(c) invite the applicant to comment on or respond to it.

Section 441A of the *Migration Act* dictates that the obligations under s 424A(1) be met by the "transmission of a written document. Oral communication is not sufficient." The majority referred[35] to the analysis of s 424A in *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 79 ALJR 1009 at [13]; 215 ALR 162, which concerned the *Migration Act* as it stood prior to the insertion of s 422B, where it was held that any breach of s 424A constituted jurisdictional error and that the obligations imposed by s 424A are not temporally limited to the pre-hearing stage.

The appellants in *SZBYR* sought review of the decision of the RRT on the ground that, in argument before the RRT, the Tribunal Member had put to the male appellant inconsistencies between his oral evidence and a previously sworn statutory declaration, but did not provide *written* notification that the statutory declaration was "information that the [RRT] considers would be the reason, or a part of the reason, for affirming the decision that is under review", as required by s 424A. The majority noted that:

> there was nothing in the conduct of the hearing which was itself procedurally unfair [at common law] and, given the presence of s 422B, it might be surprising if s 424A were interpreted to have an operation that went well beyond the requirements of the hearing rule at common law … The "information" in this case consisted of the appellants' own prior statutory declaration, to which the [RRT] explicitly drew their attention during the course of the hearing. If the common law rules of procedural fairness applied, one would certainly not criticise the [RRT's] approach in this regard.[36]

[29] *NAHV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 129 FCR 214 at 220-221 per Carr, Kiefel and Allsop JJ.

[30] See *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [51] (Gaudron and Gummow JJ), [63] (McHugh J), [152] (Hayne J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[31] *Migration Act 1958* (Cth), s 474.

[32] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

[33] This section now demands "clear particulars".

[34] This section now continues "and the consequences of it being relied on in affirming the decision that is under review".

[35] *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190 at [11] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[36] *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190 at [14].

© LawBook Co.
Hosted by The Berkeley Electronic Press
bepress Legal Repository

The appellants in *SZBYR* failed due to the majority's finding, inter alia, that the statutory declaration was *used* to reach a conclusion about inconsistencies, which in its turn was used to make a conclusion about credibility. The "information" therefore did not activate the obligations in s 424A(1). It was also held that the appellants had not shown that the statutory declaration was "the reason, or a part of the reason" for the RRT's decision. The anomaly between common law and statutory procedural fairness requirements was not thrown into particularly sharp relief in *SZBYR* because s 424A was not engaged at all on the facts of the matter.[37] Had it been, the result on the analysis of the majority would have been that an unimpeachably fair process at common law would have breached the procedural fairness requirements of the *Migration Act*.

The majority added (at [15]) to what had been said about s 424A in *SAAP*[38] by reasoning that the mandatory obligation of the RRT to provide written notice is limited by the circumstances of each matter.[39] Analysis of whether s 424A has been engaged at all will therefore be critical to any future application of the finding of the majority in *SAAP* that s 424A is mandatory and not temporally limited. It nonetheless remains possible that s 424A will be engaged and breached in circumstances where the duty to provide procedural fairness would have been met at common law. This is the result of a test which focuses on process (namely, the *mandatory* provision of written notice) rather than fairness.

This issue would not have arisen under the approach advocated in the judgment of Hayne J. His Honour said that no consideration of s 424A was necessary[40] because the appellants' claims were bound to fail for want of a Convention nexus[41] and therefore the discretion to grant relief would be exercised against them. It follows from this that Hayne J views breach of even a mandatory procedural fairness provision[42] in the *Migration Act* as an issue to be considered only in the event that the party to whom procedural fairness was owed would otherwise have succeeded. This is at odds with the view of the majority – and the result from *SAAP*[43] – that *any* breach of the obligation owed under s 424A amounts to jurisdictional error.[44] The relative flexibility of the approach of Hayne J has not been accepted by the High Court as a whole, which favours a much more process-driven approach to procedural fairness obligations.[45]

Interestingly, it is implicit in the short judgment of Hayne J that the procedural requirements of the *Migration Act* had in fact been breached. If this were not the case, there would be no reason for his Honour to have couched his reasoning in terms of the court exercising its discretion not to grant relief.[46] The conclusion of the majority's analysis that s 424A had not been engaged on the facts denied this finding. Rather, the majority took the opportunity to affirm the finding in *SAAP* that any breach of the legislative scheme will result in jurisdictional error. In so doing, the majority reinforced the essentiality of adherence to the procedures demanded by the legislative scheme and reached its result by finding that the RRT was not *required* to comply with s 424A at all in the circumstances. This reasoning has the effect of alleviating some of the practical difficulty which had resulted from

[37] *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190 at [21].

[38] Which neither Kirby J nor Hayne J would have done: see *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190 at [34], [92].

[39] *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190 at [15].

[40] *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190 at [92]; see also Kirby J at [34].

[41] Namely, that their claims did not make them persons whom Australia was obliged to protect under the *Convention relating to the Status of Refugees*.

[42] As s 424A was held to be in *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 79 ALJR 1009 at at [78], [173], [208]; 215 ALR 162.

[43] In which case, Hayne J formed part of the majority.

[44] See O'Donnell, n 7 at 318-320.

[45] Note the comments of the Commonwealth Solicitor-General on the topic of flexibility: Bennett, n 4 at 3.

[46] *SZBYR v Minister for Immigration & Citizenship* (2007) 81 ALJR 1190 at [91] (Hayne J citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82); see also at [90} where Kirby J also reached his conclusion on the basis that the court's discretion should be refused.

Bepress Legal Repository

http://law.bepress.com/unswwps-flrps10/art67

the majority's finding in *SAAP* while emphasising the basic point from *SAAP* that the processes required by the *Migration Act* are to be interpreted strictly.

PART 2

A. The process / substance distinction in judicial review

The various procedural obligations on decision-makers outlined above are of course breached from time to time. What, then, are the possible results of flawed process?

The extent of the supremacy of "process" in judicial review can be seen in *VEAL*,[47] where an applicant to the RRT was the subject of a letter sent to the Minister. The letter made certain allegations:

> First, the author said that the appellant had admitted that he had been accused of killing a person prominent in the political affairs of the appellant's country of origin (Eritrea). Secondly, the author alleged that the appellant was in fact a supporter of, and working for, the government of Eritrea.[48]

These allegations were relevant to whether or not the appellant had a "well-founded fear of persecution for a Convention reason".[49] The RRT did not alert the appellant to the existence of the letter, which had been sent confidentially,[50] but stated in its reasons that "no weight" had been given to the letter in reaching the conclusion to refuse the appellant's application.[51] In a unanimous decision,[52] the High Court allowed the appellant's appeal on the basis that, rather than considering the statement of the RRT, a court performing judicial review should have asked:

> What procedures should have been followed? The relevant inquiry is neither what decision should the decision-maker have made, nor what reasons did the decision-maker give for the conclusion reached.[53]

The High Court acknowledged that the RRT "sought to act fairly", but this was irrelevant because "the procedure in fact adopted was not fair".[54] Nor was it relevant "how trivial the breach" may have been:[55] for a judicial review court to examine the materiality of a breach of procedural fairness to the final decision is to assess the merits. This is consistent with the reluctance of Australian courts[56] to embrace the judgment of Lord Diplock in *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456 at 488, in which his Lordship included within the doctrine of natural justice that a decision be "logically probative".[57] While Spigelman CJ cautioned in *Bruce v Cole* (1998) 45 NSWLR 163 at 187 against letting such a doctrine lead to "impermissible merits review",[58] Aronson, Dyer and Groves have mounted a compelling case[59] for distinguishing procedures from purely deliberative processes on the basis that "externally" impeccable decision-

[47] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88.

[48] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [3].

[49] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [20].

[50] The High Court held that, under these circumstances, the Tribunal's common law duty to provide procedural fairness was acquitted by advising the applicants of the substance of the letter but that no information should have been given which would reveal the identity of the letter's author: *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [7]; applied by Besanko J in *Harrington v Andrews* (2007) 97 ALD 96 at [54]-[58]; [2007] FCA 1287.

[51] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [5].

[52] Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

[53] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [19].

[54] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [29].

[55] Izzo, n 17 at 192.

[56] Recently reiterated by Bell J in *Wonson v Greyhound & Harness Racing Regulatory Authority* [2005] NSWSC 584.

[57] See Aronson et al, n 8, p 372.

[58] Spigelman CJ noted nonetheless that "no logical defect in the reasoning" had been suggested in that matter.

[59] Aronson et al, n 8, p 372.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

making is of vital importance regardless of a decision-maker's "internal" perception of a matter's substantive issues.

Michael Izzo has pointed out that the High Court's approach in *VEAL* may have consequences which reach further than intended.[60] This is because the requirement that a decision-maker "make its own inquiries and form its own views"[61] in relation to material "relevant" to a pending decision on an applicant's claim[62] means, in effect, that any "relevant" allegation before a decision-maker must be inquired into in full regardless of the fact that it may have a low *degree* of relevance. While Izzo doubts that the High Court intended that *VEAL* would have this effect, an approach which requires courts to assess degrees of relevance seems to be precisely what the High Court was seeking to depart from when it refused to uphold a decision which is unlikely to have differed even had it been procedurally unimpeachable.[63]

The broader point which has become evident is the reinforcement of the place of "process" at the forefront of a decision-maker's duties. It follows from the High Court's reasoning in *VEAL*[64] that procedural flaws alone are sufficient to invalidate a decision on the ground that procedural fairness has not been given. Even if, in fact, there has been no, or only minimal, substantive unfairness, this is irrelevant since assessing degrees of "fairness" is beyond the scope of judicial review.[65] Courts exercising judicial review may in turn feel that they are confined to questions of "process" more generally. This would have a clear chilling effect on quality review.

B. The role of process in quality review

"Quality review" refers to judicial review of decisions made by the executive branch of government where the lawfulness of a decision is alleged to be vitiated by its poor quality, but where the presence of an error of law is not disclosed on other grounds. Under this banner falls review for apprehended bias, failing to take account of a relevant consideration bound to be taken into account or taking account of an irrelevant consideration.

The most frequently argued ground of quality review is *Wednesbury* unreasonableness.[66] Since the decision of the High Court in *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1164; 198 ALR 59, quality review has also been available for irrational or illogical decision making. The differences between *Wednesbury* unreasonableness and the *S20* irrationality and illogicality ground are not great, in practical terms[67] and what *S20* has

[60] Izzo, n 17 at 189; note, however, that a tribunal still "is not required to consider a case that is not expressly made or does not arise clearly on the materials before it": *NAVK v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 124 at [31] per Nicholson and Edmonds JJ.

[61] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [26].

[62] Which goes significantly further than existing Federal Court authority: in *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155 at 169, Wilcox J stated that a duty exists for decision-makers to inquire into "readily available" and "centrally relevant" material.

[63] Assuming that the RRT did in fact attach no weight to the letter. However, Izzo argues that it is hard to accept that the RRT "may not have been subconsciously influenced by the letter, despite its declaration that it gave no weight to it": Izzo, n 17 at 190.

[64] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [19].

[65] Although there remains a line of authority that a failure to provide procedural fairness will not invalidate a decision where the breach could not have altered the outcome on the merits, eg, *Stead v State Government Insurance Commission* (1986) 161 CLR 141. However, the authorities cited by Izzo (Izzo, n 17 at 190-192) where there was an independent ground for coming to the same decision on the merits, or where it was unlikely that a different decision would have been made, would seem to have some doubt placed on them in the wake of *VEAL* and the reiterated procedural focus of the High Court.

[66] A decision "so unreasonable that no reasonable authority could ever have come to it": *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR.

[67] Indeed, there is a school of thought which argues that the *S20* review ground is not separate from *Wednesbury* unreasonableness. Carroll has argued that "the proposed ground in *S20* is not an independent ground of review, but extreme cases of irrationality or illogicality may fall within *Wednesbury* unreasonableness if they satisfy the accepted test": Carroll E, "Scope of Wednesbury unreasonableness: In need of reform?" (2007) 14 AJ Admin L 86 at 95. However, the better view is that *S20* irrationality is "conceptually distinct from *Wednesbury* unreasonableness" since the latter ground had been precluded as a

UNSW Legal Repository

http://law.bepress.com/unswwps-flrps10/art67

achieved is in some respects an open question. Aronson, Dyer and Groves have noted that it has not been made clear "just *how* irrational or illogical a decision must be to fall foul of *S20*'s standard".[68] No test currently exists for *S20* irrationality, and some judges remain apt to use the *Wednesbury* standard.[69] This doubt should not, however, be understood as representing doubt that *S20* established a new ground of review.[70] In fact, the existing ground of *Wednesbury* unreasonableness has been split, so that *Wednesbury* is now restricted to review of the discretionary components of decisions, and *S20* applies to review of fact-finding.[71] This may signify that, even as the scope of *Wednesbury* review seems to decline, alternative paths are being opened for courts of judicial review to assess the quality of decision-making.[72] Greater leeway is thus afforded to counsel to argue, and courts to find, that legislative restrictions on quality review do not apply.

Gleeson CJ gave an indication in *S20* (at [5], [9]) of another way that this may occur by finding that the common law proscription of irrational and illogical fact-finding rested on principles of natural justice. His Honour stated that, if it is suggested that there is a "legal consequence" to the description of a decision as "unreasonable", or "irrational", or "illogical", then "it may be necessary to be more precise as to the nature and quality of the error attributed to the decision-maker".[73] However, the Chief Justice put the requirement in terms which suggest that, rather than merely pointing to an "extreme" decision which may be recognised intuitively by the court as offending the relevant standard, what needs to be demonstrated is that analysis of the decision under another ground of review, such as procedural fairness, reveals a want of rationality in the decision. That the application for judicial review in *S20* was framed specifically as being on the ground that the RRT used an illogical "*process* of reasoning" therefore opened the way for suggesting the presence of irrationality and illogicality in the decision.

While McHugh and Gummow JJ preferred to see "irrationality and illogicality" as an independent common law ground of review, in the time since the decision in *S20* the principles of procedural fairness have been applied on several occasions in a fashion which indicates the presence of a "rationality" standard.[74] This is more consistent with the approach of Gleeson CJ. Along with the tendency to term it as part of the merits,[75] and through legislative attempts to proscribe *Wednesbury*

ground of review by the privative clause in *Migration Act 1958* (Cth), s 476(2)(b): *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [62] per Santow JA. See also *Re Griffiths; Ex parte Homestyle Pty Ltd* (2005) 139 LGERA 178 at 195 [64] (McLure JA): her Honour states that "there appears to be a further ground of review that does not, or may not, overlap with unreasonableness in the traditional sense and that is review on the basis of [*S20*] irrationality or illogicality".

[68] Aronson et al, n 8, p 266.

[69] For example, *Buckley v Victims' Compensation Fund Corporation* [2004] NSWSC 513 at [33]; *Director of Animal & Plant Quarantine v Australian Pork Ltd* (2005) 146 FCR 368 at 383 [65]. Indeed, some judges doubt that an "irrationality" standard is relevantly different from *Wednesbury* unreasonableness, eg *Inglewood Olive Processors Ltd v Chief Executive Officer of Customs* [2005] FCAFC 101 at [46] (Kiefel, Weinberg and Edmonds JJ).

[70] And nor should the fact that only Kirby J in dissent actually applied the new ground of review in the appellant's favour because in order to have even entertained the appeal in *S20*, the High Court was obliged to allow an application on the new ground so the privative clause in the *Migration Act* did not take effect, cf Carroll, n 67 at 98.

[71] For all that *Wednesbury* is now restricted to review of discretionary decisions, and *S20* applies to review of fact-finding, the stringency of the review standards means that there is little practical difference to when *Wednesbury* served both offices, if there is any relevant difference at all: see *Inglewood Olive Processors Ltd v Chief Executive Officer of Customs* [2005] FCAFC 101 at [46] (Kiefel, Weinberg and Edmonds JJ). Certainly, Carroll (Carroll, n 67) is correct in this respect in her refutation of the suggestion that the decision in *S20* has expanded the *Wednesbury* unreasonableness ground. In another sense, however, the new "split" grounds of review may turn out to be greater than the sum of their parts.

[72] Even if rebadging a decision "so unreasonable that no reasonable decision-maker could have come to it" as an "irrational or illogical" decision may not have any effect on individual cases. It did not in *S20*.

[73] See also *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626 [40] (Gleeson CJ and McHugh J).

[74] Which is nonetheless less demanding than either *Wednesbury* unreasonableness or *S20* irrationality.

[75] Even an allowable part, as Mason P saw it in *Weal v Bathurst City Council* (2000) 111 LGERA 181 at [6]; [2000] NSWCA 88, although Aronson, Dyer and Groves have noted that his Honour's position is "unique": Aronson et al, n 8, p 147 (fn 411).

bepress Legal Repository

© LawBook Co
Hosted by The Berkeley Electronic Press

unreasonableness by way of privative clauses,[76] the resurgent judicial emphasis on process has played a leading role in restricting the availability of quality review.

For example, in *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [71], 80 ALJR 367, Kirby J commented that "jurisdictional error amounts to a failure of the decision-maker to fulfil the essential requirements of the decision-making *process* established by law" (emphasis added). Under this rubric, establishing jurisdictional error for unreasonableness, or irrationality and illogicality, is inevitably linked to demonstrating faults in the decision-making process rather than qualitative faults in the decision per se.

This point is demonstrated by the judgment of Gillard J in *Byrne v Law Institute of Victoria Pty Ltd* (2005) 24 VAR 36. *Byrne* involved a judicial review application regarding a disciplinary hearing conducted "on the papers" although certain facts were in dispute. Gillard J stated expressly that the "process was illogical but more importantly unfair" (at [87]). The respondent contended that his Honour had engaged in impermissible merits review by seeking to examine the fairness of the decision. This argument was rejected on the basis that "the decision-making *process* was flawed" (at [66] (emphasis added)) because the respondent had purported to make findings as to disputed facts "on the papers" rather than by inviting evidence to be given. The result was held to be "pure speculation" and Gillard J stated that it was impossible that the decision-maker could "logically and rationally" have "come to that conclusion on the evidence" (at [67]).

Seen in this light, his Honour's application of *S20* is more consonant with Gleeson CJ's judgment in that case, which regarded "irrationality and illogicality" of such extremity as to give rise to jurisdictional error as properly being characterised as a breach of natural justice.[77] What becomes clear from *Byrne* is that even where there has been palpable and obvious illogicality in a decision-maker's fact-finding, it will be difficult in practice to strike that decision down without the additional ingredient of some failure of process,[78] not least because of the inevitable allegation that examination of a qualitatively flawed decision is impermissible merits review.

In *Dranichnikov v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 77 ALJR 1088, 197 ALR 389 the High Court[79] gave relief under the constitutional writs of certiorari, prohibition and mandamus on the ground that the RRT had failed to accord the applicant procedural fairness. The RRT failed to exercise its jurisdiction because it had not made its decision about whether the applicant feared to return to Russia for a Convention reason in response to the case presented to it. The applicant contended that the relevant class of persons to which he belonged was "businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals". The RRT found that there is no "general persecution of businessmen in Russia" (at [19]), but finding against the applicant for this reason erred in law.

Gummow and Callinan JJ examined the decision of the RRT, which was "either characterised as a failure to accord natural justice or *as that, and more*, which we consider it to be" (at [25] (emphasis added)), in order to establish whether the applicant was entitled to relief under s 75(v) of the *Constitution*. In other words, the *form* of the failure to accord natural justice was the delivery of a decision by the RRT without having assessed the actual claim put to it – an error of process. The *quality* of the RRT's decision was therefore indirectly at issue.[80] The breakdown of process in the

[76] As was the case in both *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 and *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1164; 198 ALR 59.

[77] Rather than under its own ground of review, as McHugh and Gummow JJ, and Kirby J in a separate judgment, saw such an error of law as being covered.

[78] Rather than as a result of qualitatively poor decision-making per se.

[79] Gummow and Callinan JJ (with whom Hayne J agreed) and Kirby J; Gleeson CJ dissented on the facts but expressed no disagreement with the statements of principle expressed by the majority.

[80] As Gummow and Callinan JJ noted when discussing the discretionary nature of relief under s 75(v), the applicant may also have been entitled to relief under the *Migration Act* as it then stood. On this occasion, the availability of alternative relief was not seen as a bar to the discretionary issue of constitutional writs, inter alia because of the uncertainty of its outcome: *Dranichnikov v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 77 ALJR 1088, 197 ALR 389 at [33]. While not made express, it seems implicit in the reasoning of Gummow and Callinan JJ that the applicant could additionally

bepress Legal Repository

http://law.bepress.com/unswwps-flrps10/art67

RRT led it into an error which Gummow and Callinan JJ doubted it would have made on the merits.[81] This is unimportant to the availability of judicial review for the error but serves to emphasise the extent to which procedural deficiencies underpin findings that a decision has been vitiated by a qualitative flaw.

In *NAIS*, the relevant issue was whether a decision of the RRT had breached the requirements of procedural fairness due to extreme delay between evidence being given and the decision being handed down. By majority, the High Court held that the delay:

> was so extreme that, in the absence of any countervailing considerations advanced in the reasons of the Tribunal, it should be inferred that there was a real and substantial risk that the Tribunal's capacity to assess the appellants was impaired.[82]

Gleeson CJ stated that such a result is dependent on the relevant default being that of the RRT, rather than due to events outside its control or influence.[83] In this sense, the jurisdictional error is caused not by the length of the delay – the procedural flaw – but by the unreasonableness of the Tribunal in allowing the delay before making findings of fact. This is to say that "delay" is not of itself indicative of a breach of procedural fairness without "a real and substantial risk that the Tribunal's capacity to make [assessments of fact] is impaired".[84] The reasoning of the Chief Justice seems to be imposing a rationality standard, breach of which requires substantially less than the "lunacy" required for a decision to be *Wednesbury* unreasonable. In this sense, his Honour's approach provides a useful back-door to quality review.

Kirby J was explicit about the fact that whether the consequences of a delay "which on its face … gives ground for real concern"[85] are sufficient to amount to jurisdictional error can only be assessed against an objective standard.[86] This standard is one of reasonableness, or whether "it can reasonably be inferred from the serious delay … that there was a real risk that the Tribunal's capacity to assess the appellants' evidence was impaired".[87] Kirby J rejected the argument of Hayne J that the onus falls to an applicant for judicial review to demonstrate that the unreasonable delay led to jurisdictional error,[88] noting that such an onus would "necessarily [involve] an impermissible review of the merits of the decision".[89] The reasoning of Kirby J seems therefore to infer the presence of a jurisdictional

have skirted the privative clause within the *Migration Act* which proscribed a statutory basis for review on the ground of a breach of procedural fairness. See also Crock ME, "Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions" [2000] MULR 6 at Pt VII: "The Federal Court has on several occasions referred to a failure by [the RRT] to consider the 'real question which it was its duty to consider' or failure to ask and determine the 'real question' as constituting a 'constructive failure by [the RRT] to exercise its jurisdiction'. Such a characterisation, if pursued, might survive even the attempts to introduce privative clauses into the [*Migration Act*]".

[81] Their Honours concluded that, had the RRT addressed the claim put to it, "it would in all likelihood have permitted of only one answer, an affirmative one": *Dranichnikov v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 77 ALJR 1088 at [28], 197 ALR 389.

[82] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [10]; (2005) 80 ALJR 367 per Gleeson CJ (Kirby J and Callinan and Heydon JJ agreeing).

[83] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [11].

[84] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [9]; here, the relevant assessment was regarding the demeanour of the appellants. It should be noted that the dissenting judgments of Gummow J (at [55]) and Hayne J (at [136]) did not disagree with this approach, but found that the facts did not demonstrate that the delay had produced a breach of natural justice, and thereby jurisdictional error. That the minority judgments in both *Dranichnikov* and *NAIS* dissented only on the facts of the cases supports the view that the High Court was on both occasions engaged in a form of quality review.

[85] *Dyer v Watson* [2004] 1 AC 379 at 402 [52] per Lord Bingham of Cornhill.

[86] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [84].

[87] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [106] per Kirby J.

[88] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [136].

[89] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [106].

Australasian Legal Repository

Hosted by The Berkeley Electronic Press

error as the only explanation for a manifestly unreasonable result,[90] namely, that a manifestly unreasonable process is a prima facie indication of the presence of jurisdictional error.

Seen in this light, a finding of a breach of procedural fairness on the ground of unreasonable delay has an undeniable qualitative element. However, the reasoning of the majority does not criticise the quality of the tribunal's reasoning. Rather, the decision was struck down because the decision-maker's reasoning *process* had disabled him from properly forming a view of the necessary quality. The decisions of the High Court in *Dranichnikov* and *NAIS* demonstrate that, whatever the current content of *Wednesbury* unreasonableness and *S20* irrationality or illogicality, a lower standard may be applicable if the decision alleged to be unreasonable / irrational or illogical also demonstrates a procedural deficiency. Similarly, while a decision impugned on the basis that it is "unfair" is unlikely to lead to a finding of error of law where the decision-maker provides *any* reason in support of the exercise of his or her discretion which do not demonstrate error of law on their face, this is not a limitation which affects the reasoning that a manifestly unreasonable *process* may indicate the presence of a jurisdictional error.[91]

Even when a fact-finding process is questionable, there are heavy limitations on judicial review of fact-finding. A good example of this can be found in the judgment of the Full Federal Court in *Director of Animal & Plant Quarantine v Australian Pork Ltd* (2005) 146 FCR 368,[92] where a decision of the Director of Quarantine to allow the importation of pork from abroad was challenged on a number of grounds, including that it was *Wednesbury* unreasonable.[93] At first instance, Wilcox J found for the applicant on this ground alone. No claim was made which attacked either the good faith or expertise of the panel (at [63]). Rather, Wilcox J based his finding on the fact that, although legitimately called upon to speculate on a possible future state of affairs, the panel "took an unarguably reasonable, if unquantified, factual conclusion and applied it to a qualitative, verbal standard" (at [68]) and consequently found facts in support of which there was "no material" (at [56]).[94] Separately to his analysis of the grounds of review, Wilcox J also "concluded there [were] significant problems about the quality of the recommendations" made by the panel (at [49]). On appeal, the Full Federal Court held that a questionable or even unsatisfactory scientific method, even in a panel charged with making scientific recommendations to the Director, was not enough to establish unreasonableness or irrationality (at [4]). Heerey and Lander JJ agreed that the scientific method of the panel "was not an ideal process" and said that experiments may usefully have been conducted to test the outcomes upon which the panel had speculated (at [68]). Still, there was no requirement that experiments be done and the panel's speculative finding of facts was not considered to be *Wednesbury* unreasonable. Even Wilcox J accepted that the panel's decision represented "common sense" (at [68]) in spite of the questionable process and methodology upon which it was based.

It follows from the approach of the High Court and Full Federal Court to quality review in these cases that failures of process have become a de facto requirement for finding that an error of law has been caused by unreasonableness or irrationality.

---

[90] It is in this sense analogous to the reasoning of Sir Owen Dixon in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 and *Klein v Domus Pty Ltd* (1963) 109 CLR 467; see *Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1164 at [66]-[69] (McHugh and Gummow JJ); *East Australian Pipeline Pty Ltd v Australian Competition & Consumer Commission* (2007) 81 ALJR 1868; at [78]-[80] (Gummow and Hayne JJ).

[91] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [106] per Kirby J.

[92] Heerey and Lander JJ (with whom Branson J agreed on review of the decision for unreasonableness) still refer to review of fact-finding as being on the ground of *Wednesbury* unreasonableness rather than *S20* irrationality or illogicality, but the difference in nomenclature was not relevant to their Honours' reasoning.

[93] Under *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(2)(g).

[94] Wilcox J also rejected a claim on the ground that there was no evidence to support the Director's decision because it would have been antithetical to his view on unreasonableness: *Director of Animal & Plant Quarantine v Australian Pork Ltd* (2005) 146 FCR 368 at [57].

Professional Repository

http://law.bepress.com/unswwps-flrps10/art67

C. The rise of process: Within and without procedural fairness

Adherence by a decision-maker to a specified process can be important other than in order to provide procedural fairness. For example, process provides certainty in relation to which factors will be considered before making a decision. In *East Australian Pipeline Pty Ltd v Australian Competition & Consumer Commission* (2007) 81 ALJR 1868, the High Court considered whether the ACCC could, in setting a value for an asset, apply a list of statutory factors in a manner which allowed it to use an "idiosyncratic" valuation methodology. In rejecting this contention by the ACCC, a majority of the High Court (Gleeson CJ, Heydon and Crennan JJ) stated (at [59]) that an interpretation of the statutory provisions:

> which permitted the process set out in s 8.10 [of the relevant legislation] to be put aside would render it difficult, if not impossible, for either service providers or the consuming public (through the consultation processes) to treat s 8.10 as a certain list of factors to be taken into account in setting [a valuation of assets]. This would complicate the task of any service provider in preparing a proposed Access Arrangement of an established pipeline, as required by s 2.2 of the [relevant legislation]. The complicated nature of that process can be gleaned from the chronology of the approval process in this case … Further, the task of establishing a rate of return on investment, for regulatory purposes, commensurate with prevailing market conditions for funds and the risk involved would be rendered a much less certain process than it is already. Such a result could distort future investment decisions about essential infrastructure.

On this issue, the High Court departed from the reasoning of the Full Federal Court, which had said that the ACCC had discharged its statutory responsibilities by considering all of the factors set out in the legislation (at [44]). Gleeson CJ, Heydon and Crennan JJ disagreed, thereby upholding the approach of the Australian Competition Tribunal, on the basis that only a sequential consideration of the statutory factors would amount to an application of the statutory process (at [57]). This reasoning indicates that process has significance beyond the judicial review ground of procedural fairness, but aimed at substantially the same issues. In this case, various parties had an interest in the sale of the pipeline infrastructure and in the predictable application of the legislation but were not owed any obligation of procedural fairness by the ACCC. The court was nonetheless prepared to recognise their legitimate interest in the predictable application of the legislation by requiring that it not be applied in a "novel or idiosyncratic" manner (at [54]).

In contrast, adherence to process is not necessarily sufficient to prevent a finding of procedural unfairness. In respect to the statutory procedural fairness regime under Pt 7 Div 4 of the *Migration Act*, the High Court has held that even where the prescribed procedures have been followed by the RRT, the requirements of the Act may be construed as not having been met if the fraud of a third party intervenes.

In *SZFDE*, the appellants were a Lebanese couple who sought review of the Minister's refusal to grant them visas. They had consulted a man called Mr Hussain whom they believed to be a practising solicitor and migration agent, but who did not inform them that his practising certificate had been cancelled by the Law Society of New South Wales and that his registration had been cancelled by the Migration Agents Registration Authority. The court cited evidence given by the female appellant that Mr Hussain had told her not to attend the hearing before the RRT because "if you go they will refuse you". He told her that he would be writing to the Minister on behalf of her and her husband and that he was "worried that if you go to the [Tribunal] you will say something in contradiction to what I will write".[95] The court considered that the inference was open on the evidence that "Mr Hussain acted as he did for self-protection, lest in the course of a Tribunal hearing there be revealed his apparently unlawful conduct in contravention of restrictions imposed" by the *Migration Act*.[96] The Tribunal, unable to put questions to the applicants, affirmed the decision of the Minister to refuse to grant visas.

bepress Legal Repository

[95] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [39].

[96] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [45].

Hosted by The Berkeley Electronic Press

The appellants applied for judicial review before a Federal Magistrate, who held that Mr Hussain had acted fraudulently in his dealings with the appellants.[97] This was held to vitiate the invitation issued by the RRT to the appellants to attend the hearing such that it was not a "meaningful invitation" under s 425 of the Act.[98] A majority of the Full Federal Court (Allsop and Graham JJ (French J dissenting)) allowed the Minister's appeal on the basis that the statutory process demanded by the Act had been followed and was not corrupted by the fraud of Mr Hussain. Allsop J remarked that the appellants' complaint was with Mr Hussain rather than the RRT.[99] The High Court, in a unanimous joint judgment, rejected this reasoning and stated that "the fraud of Mr Hussain had the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants".[100] This was so because the fraud of Mr Hussain in his dealings with the appellants had the effect of nullifying the "critically important"[101] natural justice provisions of the Act. His acts were therefore fraud *on* the Tribunal, with the consequence that the RRT constructively failed to exercise its jurisdiction.[102]

The court cited *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 in regard to the constructive failure of a decision-maker to exercise jurisdiction.[103] That case involved a decision-maker who, realising that he had made a decision infected with jurisdictional error due to his failure to provide procedural fairness to the applicant,[104] purported to make his decision afresh. The High Court upheld the capacity of the decision-maker to do this on the grounds that "a decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all" (at 614-615 per Gaudron and Gummow JJ).

The decision in *SZFDE* expands the notion of how a decision may become a nullity[105] due to jurisdictional error. Even strict compliance with the requirements of the *Migration Act's* natural justice regime[106] was insufficient to prevent the RRT from falling into jurisdictional error. Following the correct process can therefore be seen as a sine qua non to the making of decisions without jurisdictional error but still insufficient to prevent a decision from invalidity if the jurisdiction of the decision-maker is constructively unexercised. This outcome means that even procedurally impeccable decisions will lack finality.

The decision of the High Court in *SZFDE* is problematic when considered alongside the High Court's earlier decision in *NAIS*. In *NAIS*, it was implicit in the judgments of Kirby J and Callinan and Heydon JJ,[107] and explicit in the judgment of Gleeson CJ,[108] that delay will only vitiate a decision where the decision-maker is responsible for the delay. Gleeson CJ also stated:

> Many events, outside the control and influence of the Tribunal, might occur to make it more difficult to evaluate the claim of an applicant. That does not make the procedure unfair.[109]

---

[97] It was noted in the Full Federal Court and again by the High Court that the Federal Magistrate's finding of fraud was supported by insufficient reasoning, however, the finding of fact that Mr Hussain had acted fraudulently was not challenged on appeal: *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [40]-[41].

[98] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [40].

[99] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [43].

[100] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [49].

[101] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [51].

[102] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [52].

[103] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [52].

[104] But not only for that reason, as both Gleeson CJ and Callinan J pointed out: *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 606, 648-649. See also Aronson et al, n 8, p 621 (fn 14).

[105] Note the discussion of this term in Aronson et al, n 8, p 620; and generally in Aronson M, "Nullity" (2004) 40 *AIAL Forum* 19.

[106] Namely, an adherence to the requisite *process*.

[107] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [105]-[106], [172].

[108] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [10].

[109] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [11].

bepress Legal Repository

http://law.bepress.com/unswwps-flrps10/art67

This is doubtless true, yet it is inconsistent with the finding in *SZFDE* in as much as, if delay has the "consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants",[110] it would not appear to be relevant to whom that delay was attributable. Likewise, if there has been a stultification of the exhaustive statutory scheme for procedural fairness, it cannot matter whether or not the *decision-maker's* procedure was fair. This position is reinforced by the fact that the court would retain discretion to refuse relief under s 75(v) to a party who was in some fashion the architect of his or her own doom.

The problems occur when it is asked in what ways a decision may be vitiated despite impeccable process being followed by a decision-maker. The High Court warned against misunderstanding the significance of its judgment in *SZFDE* and cited the judgment of French J in the Full Federal Court which:

> correctly emphasised that there are sound reasons of policy why a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision made.[111]

This is because not every mishap that may befall a person whose case is before an administrative tribunal will cause the tribunal to fall into jurisdictional error upon making a decision. Fraud by a third party was said to stand in a special position because both the applicant *and* the decision-maker are ignorant of all the facts upon which a valid decision would be made, regardless of the decision-maker's procedural propriety.

However, as a matter of principle, there is no reason why a decision should be invalidated only on this basis. In the case of unacceptable delay, there is no reason why a decision should be invalidated only when that delay is the fault of the decision-maker, namely, when the decision-maker "disables itself"[112] as opposed to when it *is disabled*. If the operation of the legislative scheme to afford natural justice is stultified other than due to the fault of the applicant, responsibility for that stultification must be beside the point.[113]

One result of the disconnection between the High Court's reasoning in *SZFDE* and *NAIS* is to reinforce the extent to which the outcome in *NAIS* was based on unreasonableness rather than a breach of the Tribunal's procedural fairness obligations per se. On this view, it was the poor quality of the decision rather than any failure of process that was the true cause of the jurisdictional error. This explains why the decision-maker's responsibility for the delay, rather than the fact of the delay itself, was expressly stated by Gleeson CJ to be "important".[114]

The rise of process may be understood, when seen in this light, to be something of a stalking horse for review on other grounds, such as quality. The High Court has been critical of the expansive way in which the *Wednesbury* doctrine has been applied in Australia. In a number of cases before the Full Court of the Federal Court,[115] including *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611,[116] an application for review for *Wednesdbury* unreasonableness has been successful when there has been a dissenting judgment. This led Gleeson CJ and McHugh J to infer that the presence of "an issue of fact upon which different minds could reach different conclusions" meant that *Wednesbury* had been incorrectly applied (at [32]). It is against this background that the High Court has stressed the paramountcy of process in a number of recent

[110] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [49].

[111] *SZFDE v Minister for Immigration & Citizenship* (2007) 81 ALJR 1401 at [53].

[112] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [172] per Callinan and Heydon JJ.

[113] It is, of course, otherwise at common law because *SZFDE* applies specifically to the statutory scheme for procedural fairness under the *Migration Act*. The common law obligations of procedural fairness cannot be breached other than by a procedural failure *by* the decision-maker because there is no exhaustive scheme that can be stultified despite impeccable procedure by the decision-maker. It follows that *SZFDE* would not have had the same result at common law.

[114] *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 470 at [11].

[115] Listed in Aronson et al, n 8, p 341 (fn 260).

[116] Davies and Burchett JJ; Whitlam J dissenting.

Hosted by The Berkeley Electronic Press

judgments[117] in order to discourage the misuse of quality review and reinforce the essential nature of judicial review as a protector of procedural rights rather than substantive rights.

This does not signal the death of review for any reason other than procedural failure. Nonetheless, it does entrench the importance of failure of process to successful review, to the extent that it may now be seen as a de facto requirement for finding that an error of law has been caused by unreasonableness or irrationality. This is an unfortunate development since it is likely to discourage quality review altogether, rather than only its misuse. Quality review plays a valuable part in the law of judicial review[118] and this will be impeded by tying the unreasonable exercise of a discretion or irrational and illogical fact finding to procedural errors.

Calls for restraint in judicial application of quality review have been legion. The author does not oppose this principle. However, this object need not be achieved by reducing quality review to a subset of the procedural fairness ground, if for no other reason than that it is conceivable that a decision of such poor quality that it reveals an error of law may follow from an otherwise impeccable process. This would be a rare event, but this is precisely for what Lord Greene MR intended the ground of *Wednesbury* unreasonableness to cater: nameyly, to provide a "safety net" when no other ground of review was available to remedy a patently unreasonable decision.[119]

However, in another sense, the rise of process, at least in relation to the legislative schemes such as under the *Migration Act*, can be seen as an extension of the doctrine of parliamentary sovereignty. A majority of the High Court held in *SAAP*[120] that where a legislative scheme for the provision of procedural fairness is expressed in emphatic language,[121] failure to comply with the legislatively prescribed process is necessarily a jurisdictional error and:

> whether [that process] would be judged to be necessary or even desirable in the circumstances of a particular case, to give procedural fairness to that applicant, is not to the point. The Act prescribes what is to be done in every case.[122]

While such an approach may be described as "rigid" or as "calcifying the requirements of natural justice",[123] such a "black letter" approach can scarcely be condemned as incorrect. Indeed, although David Bennett has argued persuasively in favour of retaining the "flexible" approach which has been the hallmark of common law procedural fairness,[124] it would in many ways be better not to think of legislative statements as to the prescribed requirements of procedural fairness[125] as having anything to do with the common law doctrine. In a sense, the highly technical reasoning that is apparent in the High Court's approach to matters brought under Div 4 of Pt 7 of the *Migration Act* is no more than a reflection of the increasingly technical nature of the legislation.

The High Court has fallen clearly on the side of construing the legislative scheme under the *Migration Act* through a strict process of statutory interpretation. Consequently, the relevance of "fairness" where the statutory procedure has not been complied with is minimal.[126] This fits with the High Court's later judgment in *SZFDE*, in as much as that the issue in that case was whether effect

---

[117] Such as *SZFDE*, *NAIS*, *SAAP*, *VEAL* and *Dranichnikov*.

[118] For the author's thoughts on the correct application of "quality review", including *Wednesbury* unreasonableness, see Weeks G, "Litigating Questions of Quality" (2007) 14 AJ Admin L 76.

[119] Aronson et al, n 8, p 336.

[120] *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 79 ALJR 1009.

[121] Namely, "must" instead of "may".

[122] *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 79 ALJR 1009 at [208] per Hayne J.

[123] Bennett, n 4 at 17.

[124] Bennett, n 4.

[125] Especially when they are described as being "exhaustive", as is the case under the *Migration Act* since the inclusion of s 422B. This section was not part of the Act as it was considered by the High Court in *SAAP*.

[126] *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 79 ALJR 1009 at [207] (Hayne J); *SZEEU v Minister for Immigration & Multicultural Affairs* (2006) 150 FCR 214 at [182] (Weinberg J).

bepress Legal Repository

http://law.bepress.com/unswwps-flrps10/art67

had been given to the statutory scheme. In that sense, adherence to process is not an "end in itself"[127] since it will not, of itself, prevent an applicant from obtaining relief if the statutory scheme has miscarried.

This is also borne out in *SZBYR*, where the High Court was prepared to find that provisions of the *Migration Act* were able to be breached in spite of a process which would not have been procedurally unfair at common law. These cases demonstrate that the terms of a legislative scheme are construed by applying the normal principles of statutory interpretation, a process which has little or nothing to do with a broader understanding of procedural fairness.

However, these judgments in turn serve to emphasise the odd way in which failures of process are so heavily relied upon in order to obtain relief when an administrative decision is of poor quality. The inference which is capable of being drawn once the case law is assessed is that courts will look to ground relief against unreasonable decisions in findings of failed process the better to insulate such findings from accusations that they have interfered in the merits.

CONCLUSION

Process, in various forms, is a dominant concern of judicial review. As such, the language of "process" is able to add legitimacy to review of decisions which may otherwise have been challenged on other grounds, such as their poor quality. It is nonetheless clear from a close review of recent High Court authority that, regardless of the way in which analysis of such applications for judicial review is phrased, the quality of the decision under review will sometimes influence a court's ultimate finding. There is much to be said for the proposition that the concept of process is leaned upon more heavily than is necessary and failures of process ought not to be seen as the only basis upon which successful applications for judicial review can be based.

In contrast, interpretation of legislative schemes of judicial review is increasingly linked to issues of process, regardless of whether a procedural error is large or small. The proposition that process need not be the only basis for judicial review should not be seen as challenging the legitimacy of the High Court's approach to interpretation of the procedural fairness provisions of the *Migration Act* since it is based in an approach to statutory interpretation rather than avoidance of the merits of a matter.

bepress Legal Repository

[127] Bennett, n 4 at 17.

Hosted by The Berkeley Electronic Press