University of New South Wales
University of New South Wales Faculty of Law Research Series
2011

Year 2011 *Paper* 59

Judicial Review under Section 75(v)

John Basten*

*New South Wales Bar

Judicial Review under Section 75(v)

John Basten

Abstract

The 2003 High Court year commenced with the delivery of judgment in two cases heard together the previous September, each involving challenges to the privative clause which was inserted in the Migration Act 1958 (Cth) by the Migration Legislation Amendment (Judicial Review) Act 2001 (Cth). The important judgments appear in Plaintiff S157/2002 v Commonwealth. In the following week the Court handed down judgment in the matter of Ex parte Lam in which five members of the Court reconsidered the doctrine of "legitimate expectation" and indicated a willingness to revisit some aspects of Minister for Immigration and Ethnic Affairs v Teoh. If the tenor of Ex parte Lam was restraint, a more expansive view of procedural fairness was reflected in Dranichnikov v Minister for Immigration and Multicultural Affairs, a judgment handed down some three months later.

JUDICIAL REVIEW UNDER SECTION 75(v)

A paper prepared for the 2004 Constitutional Law Conference

20 February 2004

John Basten QC

The Judgments

The 2003 High Court year commenced with the delivery of judgment in two cases heard together the previous September, each involving challenges to the privative clause which was inserted in the *Migration Act* 1958 (Cth) by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth). The important judgments appear in *Plaintiff S157/2002 v Commonwealth*.[1] In the following week the Court handed down judgment in the matter of *Ex parte Lam*[2] in which five members of the Court reconsidered the doctrine of "legitimate expectation" and indicated a willingness to revisit some aspects of *Minister for Immigration and Ethnic Affairs v Teoh*.[3] If the tenor of *Ex parte Lam* was restraint, a more expansive view of procedural fairness was reflected in *Dranichnikov v Minister for Immigration and Multicultural Affairs*,[4] a judgment handed down some three months later.

In June, *Ex parte Applicant S20/2002* was added to the list of cases reviewing the concept of "jurisdictional error" and the ground of irrationality.[5]

In the second half of the year developments were more subdued. In early October there were two further immigration decisions, but neither involved significant constitutional statements. *Ex parte Palme*[6] involved an application in the original jurisdiction of the Court, based on procedural fairness and irrationality grounds, but only Kirby J, in dissent, embarked on any significant reconsideration of matters of

---

1 (2003) 211 CLR 476; the other matter being *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441.

2 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 77 ALJR 699.

3 (1995) 183 CLR 273.

4 (2003) 77 ALJR 1088.

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

6 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 77 ALJR 1829.

principle. The second case, *Ex parte Applicant S154/2002*[7] concerned procedural fairness in the conduct of a hearing by the Refugee Review Tribunal. *Applicant S154* has greater significance, because it has given rise to a debate in the Federal Court as to what must be demonstrated by an applicant who asserts procedural unfairness based on the conduct of an administrative decision-maker.

Constitutional Issues

For constitutional purposes, the dominant principle to be extracted from these cases is an affirmation of the constitutionally guaranteed role of the Court in identifying the limits of Executive and of Legislative power. That has sometimes been described, and on occasion with great eloquence, as an affirmation of "the rule of law". Unfortunately, that is a phrase which tends to conceal more than it reveals about principles of constitutional law.

A second, less noted, theme is the obverse of the first, namely that a doctrine of separation of powers which defines an area of exclusive operation for the Court will also define exclusive areas for the Legislature and the Executive. The fact that the Court may police the boundaries does not mean that it can itself exercise legislative or executive functions: indeed the contrary is true. However, the manner in which this may impose constitutional limits on judicial review has not been widely discussed in the literature or the case law.[8]

These twin themes, based on the separation of powers, provide, on one view an explanation, and on another view a justification, for the continued insistence in the jurisprudence of the Court on the concept of "jurisdictional error" as a test of the scope of constitutional review by the Court. Of course, an aspect of that issue is whether one should properly describe jurisdictional error as "the basis" for constitutional review.

Duncan Kerr and George Williams have described *Plaintiff S157* as having significance comparable to the *Communist Party Case* in our constitutional

[7] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909.

[8] See, however, general statements such as that of Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36.

jurisprudence.[9] That is not a judgment I wish to debate here, although it invites the intriguing question as to whether (and how) the Australian Communist Party posed a similar threat to our way of life after the Second World War to that posed by prospective immigrants after September 11, 2001. I will, however, return to an issue which received passing reference in the *Communist Party Case* and in *Plaintiff S157* which deserves greater attention than it has received in the commentaries.

Plaintiff S157 concerned a privative clause: that is a clause which purports to oust the jurisdiction of the courts so as to preclude any review on any ground, and, for good measure, the granting of any relief, with respect of an administrative decision to which it applies. To an overseas lawyer, at least in relation to the jurisdiction of the High Court, it may seem obvious that such a provision cannot stand in the face of s.75(v) of the Constitution. Such a person might well be bemused that the Court, in 2003, affirmed a line of authority extending over more than half a century which seems to refuse to acknowledge the obvious. *Plaintiff S157* upheld the validity of s.474 of the *Migration Act*, but it did so by noting that the privative clause only applied to decisions made "under the Act" and did not apply to conduct which could not properly be characterised as a decision under the Act. Following *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[10] the Court concluded that a decision tainted by jurisdictional error was not such a decision and hence was not one to which the ouster clause applied, in its own terms. Of course, the Court went further in its reasoning and noted that the Parliament would have difficulty in legislating, consistently with s.75(v), so as to preclude review of decisions which were so tainted.

It is at this point that the text of the Constitution appears to bite, but in a manner which requires some care in analysis. The critical concept for the purpose of this analysis is "jurisdictional error". Indeed, the centrality of that concept was recently affirmed in a special leave application in which the Minister unsuccessfully sought to

[9] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1: see Kerr D and Williams G *"Review of executive action and the rule of law under the Australian Constitution"* (2003) 14 Pub Law Rev 219.

[10] (2002) 209 CLR 597.

review two judgments of the Federal Court in which the failure to apply statutory criteria had been found by the Federal Court to constitute jurisdictional error.[11]

Public lawyers in this country sometimes bemoan the fact that the distinction between jurisdictional and non-jurisdictional errors, apparently abolished in England in *Anisminic Ltd v Foreign Compensation Commission*,[12] has not been abandoned in Australia. On the other hand, the language found in later English cases and commentary appears to have merely replaced the term "jurisdictional error" with the term "ultra vires". At least in relation to administrative decision-makers (as opposed to courts) it is difficult to identify the differences of approach to judicial review in this country and in the United Kingdom as flowing in any significant way from this change in language. There is no reason why the language of ultra vires could not be adopted in this country.[13]

The real question which underlies the role of privative clauses in Commonwealth legislation must be identified in terms of the separation of powers in the Commonwealth Constitution. Further, it does not ultimately depend on a line drawn between judicial and executive power, but between judicial and legislative power. This was clearly recognised by the Court in *The Queen v Coldham*[14] in which the Court articulated how an ouster clause could operate without falling foul of Ch III of the Constitution. In substance, the principle is that the boundaries of administrative power are expanded by removing (in part) the limits within which a decision can be made which is not invalid because ultra vires. For reasons noted below, the privative clause is an indirect and constitutionally inappropriate means of seeking to achieve that result. The legitimate question remains whether the Parliament can achieve a similar result by a more appropriate means.

The removal of control over administrative decision-making needs to address two categories of limitation on power. The first concerns the substantive limits on a power; the second the procedural limits.

---

11 See *Minister for Immigration and Multicultural and Indigenous Affairs v Scargill* and *Minister for Immigration and Multicultural Affairs v Lobo,* judgment dismissing application for special leave, 13 February 2004.

12 [1969] 2 AC 147.

13 In relation to the English debate, see, e.g., *Boddington v British Transport Police* [1999] 2 AC 143 at 158E (Lord Irvine LC) and generally see C. Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing 2000).

Turning first to the substantive limits, there is a traditional distinction between the preconditions for the exercise of a power, and limitations on the power itself, once engaged. But *Plaintiff S157* casts doubt on the usefulness of this distinction, at least as a basis for identifying jurisdictional error. Under the *Migration Act*, the only express precondition to the exercise by the Tribunal of its power of review was the making of a valid application to review a particular visa refusal. That precondition was not in doubt: jurisdictional error was said to arise from the manner of exercise of conceded authority. In *Applicant S134*, the challenge was to the application of a relevant prescribed criterion.[15] Jurisdictional error arose because the *Migration Act* imposed a duty on the Tribunal to grant a visa if satisfied that the relevant criteria had been fulfilled. One means to avoid this result might be for the Parliament to abolish the present scheme for granting visas in accordance with prescribed criteria. That is, it might seek to generalize the unfettered discretionary power given to the Minister under ss.351 and 417. However, such provisions are an invitation to arbitrary decision-making and inevitably give rise to suspicions of unfairness and misuse of power. It is most unlikely that the Parliament would revert to such a scheme for all administrative decision-making under the *Migration Act*. This would effectively involve replacing the mandatory criteria with discretionary decision-making based on detailed government 'policy guidelines'. (I return to the question of judicial power and the control of discretionary decision-making below.)

Putting to one side such extreme measures, the Parliament might seek to limit the opportunity for judicial review by retaining the prescribed criteria, but removing the scope for error in applying them. The first element of this approach, which now appears to be routine, is to render an administrative decision dependent upon the state of satisfaction of the decision-maker, rather than upon the existence of objectively determined facts. A second element is to make authority dependent upon the view of the decision-maker not only as to the facts, but as to the criteria to be satisfied. (This is not the time or place to address the trend in the case law to identify questions of statutory construction as questions of law rather than fact, although that may limit the scope for this device.[16]) However, this technique was

[14] *The Queen v Coldham; Ex parte The Australian Workers' Union* (1982) 153 CLR 415; see also *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1994-5) 183 CLR 168, 179 (Mason CJ); 197 (Brennan J).

[15] *Applicant S134* failed because the obligation to consider the criterion was found not to have been engaged, the visa application having been made on a different basis.

[16] See *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389.

addressed in *Plaintiff S157*, the Court noting that it is ultimately a matter for the Parliament to prescribe the legal limits of the decision-maker's power and for the Court to enforce those limits: it is no part of the Executive power for a Commonwealth officer to determine the limits of his or her own authority by forming a relevant state of satisfaction as to some matter of law.

In addition to redefining the substantive limits of authority, the Parliament could seek to remove legal fetters from the specification of procedural requirements. In this regard, the Parliament might seek to adopt one of three broad approaches. First, it may leave the procedures undefined, effectively allowing the decision-maker to adopt appropriate procedures, which will be subject to general law requirements as to procedural fairness. Secondly, it can prescribe procedures without purporting to exclude implied requirements. Thirdly, the Parliament can prescribe the proper procedures and seek to exclude all other forms of implied general law requirements.

The Parliament has moved through each of these approaches in amendments to the *Migration Act*. So far, its attempts to prescribe exclusive procedural schemes have met with limited success.[17]

The underlying premise of statutory prescription is that, while decision-makers are required to apply specified criteria and follow fair procedures, breach of some statutory requirements might not lead to invalidity and the Parliament could prescribe which requirements were, in the old terminology, mandatory and which were not. [18] It is that understanding which underlies the principle that, whilst specifying a relevant criterion or procedure, the Parliament can confer power to make a valid decision even in the absence of compliance with its prescription.

The obverse of this premise is reflected in the view that where a court has acted without authority the Parliament may legislate to give effect to the invalid decisions of the court. This course has been undertaken in relation to decisions under the *Family Law Act*[19] and decisions under the cross-vesting legislation which have proved to be

[17] See, eg, *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. The third stage had not been reached in relation to Tribunal decisions for the purposes of *Plaintiff S157*; but see now the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 and ss.357A and 422B of the *Migration Act*.

[18] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

[19] *The Queen v Humby; Ex parte Rooney* (1973) 129 CLR 231.

invalid.[20] In one sense, a provision like a privative clause is a prospective mechanism for validating that which might otherwise have been invalid.

However, there may be constitutional limits on this apparent blurring of the separation of powers. For example, in *Re Macks; Ex parte Saint*, Gummow J noted that the Legislature had historically exercised power to make decisions of the kind which had been invalidly made by the courts and retrospectively given legislative effect by the Parliament.[21] (The same may be said with some force about most administrative decisions, however, including decisions with respect to rights to enter and remain in a particular country.[22])

The bipartite question which thus arises may be formulated as follows:

(1) is there an irreducible constitutional core of review, which can be exercised by the High Court?

(2) is there a limitation on the scope of judicial review, beyond which it would not be an exercise of judicial power and hence not within the constitutional jurisdiction of a Chapter III court?

Before addressing the first part of the question, which raised a key issue in *Plaintiff S157*, it should be noted that the second part of the question also involves an essential element for, as noted by McHugh and Gummow JJ in *Ex parte Lam*:[23]

> *"An aspect of the rule of law under the* Constitution *is that the role or function of Chapter III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration."*

This is a limitation which prevents the Parliament purporting to confer on the court the power to rewrite a statute.[24] This principle requires that some care must be take in applying the apparently broad mandate of provisions such as s.15A of the *Acts Interpretation Act* and by s.3A of the *Migration Act* to give a distributive operation to partially invalid provisions. These sections purport to confer on the court a power to

[20] *Re Macks; Ex parte Saint* (2000) 204 CLR 158.
[21] (2000) 204 CLR 158 at [210]-[211].
[22] See eg, the *Naturalization Act* 1903 (Cth).
[23] (2003) 77 ALJR 699 at [76].
[24] See *Plaintiff S157/2002,* 211 CLR 476 at [102].

read down legislation which may infringe a constitutional limitation so as to give effect to an enactment to the extent to which it would not be in excess of the constitutional power supporting it. Their role must be limited.

Of s.15A, Brennan J stated in *Re Dingjan; Ex parte Wagner*:[25]

> *"But section 15A can save a provision that is literally in excess of legislative power only if two conditions are satisfied:*[26] *first, that 'the law itself indicates a standard or test which may be applied for the purpose of limiting, and thereby preserving the validity of, the law'*[27] *and, second, that the operation of the law upon the subjects within power is not changed by placing a limited construction upon the law."*[28]

This passage was cited with approval in the joint judgment of Brennan CJ and Toohey J in *Gould v Brown*.[29] The principle underlying the statement is that identified by Dixon J in *Bank of New South Wales v The Commonwealth*,[30] namely that any broader power would involve "an inadmissible delegation to the Court of the legislative task of making a new law from the constitutionally unobjectionable parts of the old."[31]

The insertion of a privative clause in the form of s.474 into the lengthy and complex provisions of the *Migration Act*, with the implicit invitation to undertake an exercise in statutory construction which might somehow diminish the statutory obligations imposed in other parts of the Act, might well have involved the conferral of a legislative function on the court. This exercise was avoided in *Plaintiff S157*, but only by providing a construction of s.474 which rendered it impotent in relation to decisions which were otherwise invalid. It is for this reason that I describe the use of a privative clause in these circumstances as an indirect and inappropriate, because

---

25 (1994-95) 183 CLR 323 at 339.6.
26 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485-486, per Brennan and Toohey JJ.
27 *Pidoto v Victoria* (1943) 68 CLR 87 at 109 per Latham CJ; see also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 61, 80.
28 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 493 per Barwick CJ.
29 (1998) 193 CLR 346 at 392.4.
30 (1948) 76 CLR 1 at 372.3.
31 See *Nationwide News,* supra, 177 CLR at 80.9, where Deane and Toohey JJ make express reference to this passage in the judgment of Dixon J: see also at 105.4 where McHugh J noted that the application of s.15A could not "require this Court to engage in the legislative process which is the domain of Parliament."

potentially unconstitutional, device to avoid the Parliament specifying the limits of invalidity.

The first part of the question posed above requires one to look at the content of judicial review to identify any immutable core which remains beyond the power of the Parliament to diminish. In a paper presented at the 1999 National Administrative Law Forum, Dr Jeremy Kirk argued against the implication of any such immutable constitutional core. He argued that no basis for such core principles could be derived from any existing authority, including *Hickman*.[32] He argued (correctly) that the principles identified by Dixon J in *Hickman*[33] were principles of statutory construction; next he argued (less persuasively) that they could not therefore demonstrate a minimum guaranteed content of the Court's constitutional jurisdiction. The latter conclusion requires consideration of the source of one of Dixon J's preconditions for unreviewability, namely that the decision-maker have exercised an administrative power in good faith. To the extent that Dixon J derived support for this element from an 1874 Privy Council decision concerning a commercial dispute governed by a mining Act,[34] that may have provided an unlikely basis for a constitutional guarantee. Nevertheless, Dixon J appeared to be saying that no privative clause could put a decision made in bad faith beyond review.

Plaintiff S157

In *Plaintiff S157* the Court held that a decision to refuse a protection visa made in breach of the obligation to accord procedural fairness was not protected by the privative clause in s.474. Was that conclusion simply a matter of statutory construction, or did it rest on some inviolable minimum content of judicial review derived from the grant of jurisdiction to the Court in s.75(v)?

The Chief Justice stated in one passage:[35]

> *"People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness."*

[32] See J. Kirk, *Administrative Justice and the Australian Constitution,* in R. Creyke and J. McMillan (eds) *Administrative Justice – The Core and the Fringe* (AIAL 2000) 78 at 90.
[33] *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 615.
[34] *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417.
[35] Ibid at [37].

However, it is clear from the context that this statement, and the ensuing conclusion that s.474 did not render a decision reached in contravention of the rules of procedural fairness valid, was an exercise in statutory interpretation. Similarly, the third principle of statutory construction identified by the Chief Justice, namely that "the Australian Constitution is framed upon the assumption of the rule of law", supported by a passage from the judgment of Brennan J in *Church of Scientology Inc . v Woodward*,[36] does not suggest that the rule of law is being relied upon as a principle giving substantive content to s.75(v). Nevertheless, his Honour did have comments to make in relation to the constitutional issue. For example, he stated:[37]

> *"It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power."*

There is nothing inconsistent in the joint judgment of all other members of the Court (other than Callinan J) with this proposition. The joint judgment, which ended with a statement of some "general principles", included two pregnant paragraphs, which need to be read in full, but which, in essence stated:[38]

> *"The Act must be read in the context of the operation of s.75 of the* Constitution*. That section, and specifically s.75(v), introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review.*
>
> *…*
>
> *Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s.75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review."*

[36] (1982) 154 CLR 25 at 70; *Plaintiff S157* at [31].
[37] Ibid at [9].
[38] Ibid at [103] and [104].

In relation to the *Hickman* provisos and, relevantly for present purposes the requirement of bona fides, the joint judgment said this:[39]

> *"A proper reading of what Dixon J said in* Murray[40] *is not that a privative clause is construed as meaning that decisions are protected so long as they conform to 'the three* Hickman *provisos'. Rather, the position is that the 'protection' which the privative clause 'purports to afford' will be inapplicable unless those provisos are satisfied."*

This implies that the obligation to act in good faith is something more than a principle of statutory construction. Like the Chief Justice, the joint judgment affirmed the proposition that a statutory provision such as a privative clause "cannot confer on a non-judicial body the power to determine conclusively the limits of its own jurisdiction".[41] The joint judgment noted that if the Act were to be construed to refer to decisions "purportedly" made under the Act, or to decisions "of the kind that might have been made under the Act", there would be a direct conflict with s.75(v) of the Constitution. Their Honours continued:[42]

> *"Further, they would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Chapter III of the* Constitution *that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s.71."*

Callinan J followed an approach not dissimilar in this regard to that of the Chief Justice. After referring to *Willan*, his Honour noted:[43]

> *"It is very likely that fraud or bribery also would be amenable to correction under s.75(v), being squarely within the* Hickman *doctrine as conduct falling short of being a bona fide attempt to exercise the relevant power. It may be, for example, that to attract the remedies found in s.75(v) of the* Constitution *when jurisdictional error is alleged, no less than a grave, or serious breach of*

---

39 Ibid at [64].
40 *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399-400.
41 Ibid at [73].
42 Ibid at [75].
43 Ibid at [159].

> *the rules of natural justice will suffice, a matter which it is unnecessary to decide at this stage of the proceedings."*

It is difficult not to conclude that *Plaintiff S157* provides a significant step in the exposition of s.75(v), but that it does not greatly expand, or even identify with any precision, some constitutionally entrenched "rule of law" principle. The judgments were formulated at a level of abstraction which meant that there was no occasion to define some core concept of "fairness" which might operate with respect to administrative decision-making generally. It seems that the underlying analysis is this: an applicant for a visa entitling him or her to enter and remain in Australia has a procedural right to have the application determined according to law. If that course has not been properly undertaken, relief will flow to ensure that it is, and that the Commonwealth, through its officers, does not take steps on the basis that an adverse decision has been made, when that is not the case. As noted by Callinan J, *Plaintiff S157* concerned a challenge to a legislative enactment, not just to an administrative decision.[44]

The question of a core content for judicial review will arise if, for example, the Parliament failed to set standards or criteria by which visas might be granted, or sought to vest in the decision-maker complete control over the procedures to be followed, including an express statement that the decision-maker did not need to address the substance of the application except to the extent that time permitted and that failure to comply with any principle of procedural fairness would not invalidate the decision. If such a case were ever to arise it is quite possible the Court would accept the proposition that the rule of law provided a constitutional underpinning which precluded such legislation. That would be consistent with comment made in the course of argument in *Plaintiff S157* that a law which permitted a Commonwealth officer to act on whim might not be a law at all, a view which was also expressed in the joint judgment.[45]

Procedural Fairness

Before leaving the topic of procedural fairness, three other cases should be noted.

[44] Ibid at [118].

[45] Ibid at [102]; see also Gleeson M, *"Courts and the Rule of Law"* in Saunders C and Le Roy K, *The Rule of Law* (Fed. Press, 2003) pp.179-180.

The first is *Dranichnikov*, decided by the Court on 8 May 2003. The applicant in that case had sought a protection visa on the basis that, being a Russian national, he was a member of a particular social group consisting of businessmen who publicly criticised law enforcement authorities for failing to protect their citizens against criminal activity, but whose claims had been misunderstood by the Refugee Review Tribunal and not properly addressed. His challenge was dismissed by the Federal Court, but at a time when the bifurcated jurisdiction prevented the Federal Court considering the ground of procedural unfairness. A majority of the High Court held that there had indeed been a breach of procedural fairness. Gleeson CJ dissented, but did not express any disagreement with the principles identified by other members of the Court. The leading judgment is that of Gummow and Callinan JJ, in which Hayne J agreed. Kirby J gave reasons which were to substantially similar effect as those of the other members of the Court.

The facts in *Dranichnikov* raise an issue reminiscent of a principle applied some years ago by Gummow J, amongst others, in the Federal Court, namely that there was reviewable error on the part of a tribunal which failed to give "proper, genuine and realistic consideration" to an application before it.[46] Although that line of authority has been relied on in argument in recent cases in the High Court,[47] it has never been in terms adopted by the Court. However, a very similar principle was adopted as an element of procedural fairness in *Dranichnikov*. Thus, Gummow and Callinan JJ stated:[48]

> *"To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice."*

Similarly, Kirby J stated:[49]

> *"Obviously, it is not every mistake in understanding the facts, in applying the law, or in reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction. But where, as here, the mistake is essentially*

[46] See, eg, *Khan v. Minister for Immigration, Local Government and Ethnic Affairs* (1987) 14 ALD 291; and *Broussard v. Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472.
[47] Including by the respondent in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.
[48] At [24].
[49] At [88].

> *definitional, and amounts to a basic misunderstanding of the case brought by an applicant, the resulting flaw is so serious as to undermine the lawfulness of the decision in question in a fundamental way."*

Mr Dranichnikov, it may be noted, appeared in person.

The second case, *Ex parte Lam*, was decided before *Dranichnikov*, but shares a number of elements with the third case, so that they can conveniently be addressed together.[50]

The third case is *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002*.[51] In this case this prosecutor was unsuccessful (Kirby J dissenting), the leading judgment being given by Gummow and Heydon JJ, with whom Gleeson CJ agreed. Callinan J joined the majority, finding, in emphatic terms, that there had been no breach of procedural fairness.[52]

In one sense the background to the case was unpromising for the prosecutor and the conclusions largely uncontroversial, in terms of principle. However, the case has given rise to differing views in the Federal Court as to the correct approach to procedural fairness and therefore requires attention.

Some have sought to argue in recent cases in the Federal Court that there is an obligation on an applicant who complains of procedural unfairness positively to establish that, absent the unfair process, he or she would have taken a different course, and that the process has resulted in practical injustice.[53] Support for these propositions has been sought in both *Ex parte Lam*[54] and *Applicant S154*.[55]

However, this argument seems to be based on a misapprehension as to the scope of the principle enunciated in these two cases. In particular, a distinction must be drawn between those cases where the issue is whether there has been a breach of

---

50 As there is a separate conference paper, prepared by and devoted entirely to *Ex parte Lam*, no separate summary of its judgment is called for.
51 (2003) 77 ALJR 1909.
52 Ibid at [127]-[130].
53 See *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 52 (31 March 2003) and *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 298 (19 December 2003).
54 (2003) 77 ALJR 699.
55 (2003) 77 ALJR 1909.

procedural fairness and those cases where the breach is established, but the consequences are in doubt. *Ex parte Lam* and *S154* fall into the former category.

Most cases involving alleged procedural unfairness are, like *Kioa v West*,[56] cases where the decision-maker has failed to put the applicant on notice that there is available for consideration material which militates against the application. There are, in such cases, facts to be established before there will be a finding of procedural unfairness. However, the focus of that exercise will be on the nature of the material before the Tribunal and the failure of the Tribunal to communicate to the applicant the substance of the information before it. By contrast, *Ex parte Lam*, involved a situation where the unfairness was said to have arisen from a statement undoubtedly made by the decision-maker, which involved an element of misrepresentation. The point of *Ex parte Lam*, and really the sole point, was that the mere fact of a misrepresentation was not sufficient to establish procedural unfairness. That point was made in clear and unambiguous language by Gleeson CJ:[57]

> *"But what must be demonstrated is unfairness, not merely departure from a representation. Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation. In some contexts, the existence of a legitimate expectation may enliven an obligation to extend procedural fairness. In a context such as the present, where there is already an obligation to extend procedural fairness, the creation of an expectation may bear upon the practical content of that obligation. But it does not supplant the obligation. The ultimate question remains whether there has been unfairness, not whether an expectation has been disappointed."*

Re Refugee Review Tribunal; Ex parte Aala[58] bore a marked resemblance to *Lam*. The complaint turned upon a statement made by the Tribunal which, as it turned out, was untrue. The first issue was whether there had been a denial of procedural fairness and, if so, its consequences. As to that, Gleeson CJ stated:[59]

> *"As to the first issue, the statement in question covered a matter which had a bearing upon the credibility of the prosecutor. It misled the prosecutor, as a*

[56] (1985) 159 CLR 550.
[57] (2003) 77 ALJR 699 at [34].
[58] (2000) 204 CLR 82.
[59] Ibid at [3].

> *consequence of which he was deprived of the opportunity to answer, by evidence and argument, adverse inferences which were based in part upon a misunderstanding of his previous conduct. Had he been given an opportunity to correct the misunderstanding, a different view might have been taken as to his credibility."*

It is thus clear that in *Ex parte Aala*, the prosecutor had established on the facts not merely that there had been a misrepresentation by the Tribunal, but that he was misled by it and, as a result, failed to take steps which he might otherwise have taken to correct a misapprehension on the part of the Tribunal. In order to establish that result, he gave affidavit evidence in the High Court as to what he would have done differently, had he not been misled. However, he was not required to establish the likelihood of any different result. In dealing with the question of consequences of the breach of procedural fairness, all members of the Court (including McHugh J in dissent[60]) applied the principle established in *Stead v State Government Insurance Commission*,[61] namely that relief should not be refused unless the Court is confident "that the breach could not have affected the outcome".

When *Ex parte Aala* and *Ex parte Lam* are read together, it is clear that the references in the latter to establishing "practical injustice" refer not to the consequences of a breach, but to establishing an essential element of the alleged unfairness.

In *Applicant S154*, the applicant had recounted the fact that she had been raped by police in Sri Lanka. Without going into detail, she indicated that the topic was painful and she did not wish to tell the story. The Tribunal member responded: [62]

> *"OK. I don't need to ask you any further questions about that particular incident."*

The complaint made by the applicant in the High Court was that she had been denied procedural fairness because the statement by the Tribunal had led her to

[60] Ibid at [104].
[61] (1986) 161 CLR 141 at 145.
[62] Ibid at [12] (italicised passage).

believe that her claim of rape was accepted. Her case, and evidence on the critical issue, were summarised by Gummow and Heydon JJ as follows:[63]

> *"The primary argument advanced by the prosecutrix was that the Tribunal Member misled her and induced a false belief in her that the Tribunal had accepted her claim of rape and that there was no need to go further.*
>
> *…*
>
> *Nor, in any of her three affidavits, did the prosecutrix say she had been misled or that she would have taken a different course if she had not been misled by the Tribunal Member's statement that he did not need to ask any further questions about the rape claim."*

Their Honours concluded on the facts, from her absence of contrary evidence, that she had not been misled and that there was no direct evidence she could have given to the Tribunal, which she had withheld because of the member's statement or the inference she had drawn from it.[64] *S154* was thus on all fours with *Lam*. Neither case supports the proposition that once unfairness is established, an applicant must demonstrate the likelihood of a different result or some additional element of 'practical injustice'.

Unreasonableness

The other major topic addressed during 2003 was the concept of manifest unreasonableness as a ground of judicial review. The issue arose in *Ex parte Applicant S20/2002*[65] but was dealt with only in tantalising dicta. That was because, of five members of the Court, only Kirby J would have upheld the application to set aside the decision of the Tribunal.[66] His Honour would have set aside the decision of the Full Court and dismissed the application in the original jurisdiction.[67] As with *Applicant S154*, the Chief Justice dealt with the case on a restrained basis which ultimately dismissed the challenges to the decision of the Tribunal as unfounded. In short, his Honour rejected the assertion of illogicality in the process by which the

---

63 At [24] and [29].
64 Ibid at [38] and [39].
65 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165.
66 As with many matters in the bifurcated jurisdiction of the old s.476, the case involved both an application in the original jurisdiction of the High Court and an application for special leave to appeal from the decision of a Full Court of the Federal Court.

Tribunal reasoned to a rejection of the visa application. The joint judgment of McHugh and Gummow JJ reached the same conclusion. Callinan J dealt even more briefly with the matter, in substance agreeing with the reasons of McHugh and Gummow JJ that there was, on a proper understanding of the Tribunal's reasons, no jurisdictional error. Thus, in terms of its ratio, the case is uninteresting, from a constitutional perspective. The interest lies rather in the comments made in the joint judgment with respect to jurisdictional error and unreasonableness as grounds of review under s.75(v). Two broad principles may be extracted from this discussion, although the detail will require elucidation in future cases.

The first point is that administrative lawyers should abandon their fascination with *Australian Broadcasting Tribunal v Bond*.[68] As noted above, in *Dranichnikov* the joint judgment abandoned the uninstructive characterisation of failure to consider an applicant's claims as "error of law", recharacterising it as procedural unfairness. So, in *Applicant S20*, the joint judgment abandoned the characterisation in *Bond* of erroneous factual findings involving "an error of law", for the purposes of the *ADJR Act*, as misconceived in relation to s.75(v). Their Honours blandly noted that there may be errors of law within jurisdiction and errors of law which are jurisdictional. They then continued:[69]

> *"In any event, as the judgments in* Minister for Immigration and Multicultural Affairs v Rajamanikkam[70] *illustrate, what was said in* Bond *respecting erroneous fact finding and review under s.5 of the ADJR Act may give rise to differences of opinion in this Court."*

With this somewhat enigmatic statement, following a decade of virtual silence, it may be that we have moved beyond what Aronson and Dyer described as "exercises in alchemy, or how to turn factual errors into errors of law".[71]

In terms of elucidating the operation of s.75(v) two further points arise from the exegesis in *Applicant S20.* First, their Honours were at pains to reject the proposition that a bright line can be drawn between errors of fact and errors of law.[72]

---

67 This was another case where, because of the bifurcated jurisdiction, relief was sought by way of special leave to appeal from the Federal Court and in the Court's original jurisdiction.
68 (1990) 170 CLR 321.
69 Ibid at [57].
70 (2002) 76 ALJR 1048.
71 M. Aronson and B. Dyer, *Judicial Review of Administrative Action* (2000), p.205.

> *"The introduction into this realm of discourse of a distinction between errors of fact and law, to supplant or exhaust the field of reference of jurisdictional error, is not to be supported."*

What is important, their Honours suggested, is that the jurisdictional fact which engages a relevant power or obligation, is shown to be fulfilled. Where the jurisdictional fact is an opinion of the decision-maker as to specified matters, a court must be satisfied that the proper state of satisfaction was achieved.[73]

So much may readily be accepted: there is, as Professor Aronson has noted, a sense in which this approach merely restates the question.[74] We still need to know how to test an asserted opinion to know whether it conforms to the statutory regime. In this regard, one is forced back to the judgment of Gummow J in *Eshetu* and in particular his Honour's reliance on *Hetton Bellbird Collieries*.[75] In that case Latham CJ stated, after reference to an opinion based on irrelevant considerations or misconstruction of the relevant legislation:

> *"In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide."*

In *Applicant S20,* the Chief Justice made similar remarks with respect to a challenge to a state of satisfaction, referring to *Avon Downs Pty Ltd v Federal Commissioner of Taxation.*[76] His Honour also stated:[77]

> *"If in a particular context, it is material to consider whether there has been an error of law, then it will not suffice to establish some faulty inference of fact. On the other hand, where there is a duty to act judicially, a power must be exercised 'according to law, and not humour', and irrationality of the kind described by Deane J in* Australian Broadcasting Tribunal v Bond *may involve non-compliance with the duty.'"*

---

[72] Op cit at [54].
[73] Ibid at [54].
[74] Aronson M, *"The Resurgence of Jurisdictional Facts"* (2001) 12 Pub Law Rev 17.
[75] *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 and 432 cited in *Eshetu,* 197 CLR 611 at [133].
[76] (1949) 78 CLR 353 at 360 cited in *Applicant S20* at [8].
[77] Ibid at [9].

His Honour did not pursue the point as it was not necessary in the circumstances of the case, except to say that discussion of irrationality, illogicality and unreasonableness at a level of abstraction, may well not be helpful in resolving the legal consequences of perceived error.

The second point of importance is that in dealing with the jurisdiction of the Court under s.75(v), the joint judgment sought to confirm the comment in the judgment of Gummow J in *Eshetu* [78] that "some stricter view" may apply to applications for constitutional review than that which applies under the general law. The essence of the stricter view remains to be worked through. Their Honours specifically adopted a passage from *Melbourne Stevedoring*.[79] Ironically, precisely the same passage is set out in Aronson and Dyer, by way of contrast to a passage from a judgment of Gummow J in the Federal Court in 1987, the authors noting that the later opinion constituted "a far cry from the timidity of the 1950's" as epitomised in *Melbourne Stevedoring*.[80] The irony lies in the fact that the passage from Gummow J is that which is now reflected in *Dranichnikov* as revealing procedural unfairness.

Kirby J found error in the approach of the Full Court and for that reason did not need to address the constitutional aspects of judicial review. However, his Honour took the opportunity to comment that the establishment of a different regime under s.75(v) was not entirely attractive. His Honour stated:[81]

> *"Such an approach would add another layer of obscurity to what are already elusive distinctions. The correctness of that proposition may also depend upon what is taken as the relevant comparator."*

At the end of the day, the language used by several members of the Court in *S20* tends to confirm existing developments in the construction and application of s.75(v). We still do not have an answer to the question whether there are immutable standards of administrative decision-making built in to the Constitution. The questions left open were identified by Kirby J in the following terms:[82]

---

78 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [146].
79 *R. v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120.
80 Aronson and Dyer, op cit, at 207.
81 Ibid at [154].
82 Ibid at [168].

> *"They include the constitutional principle of the separation of powers that defends the entitlement of the repository of the relevant power to decide conclusively the merits of the case, though does not permit it to make conclusive determinations of the law or questions upon which its jurisdiction depends. Further, as Dixon J recognised more than 50 years ago, our Constitution is also framed to give effect to the traditional conception of the rule of law as one of its fundamental assumptions. The full significance of that notion for the availability of the constitutional writs remains to be explored."*

Conclusions

May I conclude with two comments arising from this inclusive exercise. First, it is quite possible that the question whether the Constitution contains some immutable core of administrative justice may never arise. It is almost inconceivable that Parliament would pass a law expressly providing that a decision-maker could act arbitrarily, capriciously, irrationally or in bad faith. But if it does not do that, for the reasons stated by the Chief Justice in *Plaintiff S157*, the Court will construe Parliament's words as not seeking to achieve that result. In other words, the question of a constitutional core of administrative justice will not arise because there is a conventional acceptance of the existence of such a core.

My second point is that if there is such a core, Chapter III is a curious place to locate it. It must be an implication with a far broader basis. As the Court has already indicated, the power to legislate is the power to make laws: a statute which purports to vest arbitrary or capricious power in a Commonwealth officer may well not answer the description of a 'law' and thus not fall within the power of the Parliament for that reason. What seems more curious is that there has been little attention paid in this context to the Executive power of the Commonwealth under s.61 of the Constitution. In the classical conception, the rule of law is thought of as a constraint on the exercise of executive power. A developing theory of a constitutional rule of law cannot for long ignore the role of s.61 in the overall constitutional structure.