The Centrality of Statutory Interpretation to Judicial Review

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Introduction.

The centrality of statutory interpretation to judicial review can be demonstrated in the very definition of judicial review. Therefore, what I will do first is define judicial review, and consider the implications of that definition.

After that I will move on first, to a brief reminder of the grounds of judicial review, and second, to two areas of statutory interpretation which are of particular interest, because they highlight the role statutory interpretation has played in allowing the High Court to recognise, develop and maintain important restraints on the exercise of administrative power, for the protection of those affected by its exercise.

Those two areas of statutory interpretation are first, the interpretation of privative clauses, and second, the implication of a duty to accord procedural fairness and the implication of its content.

What is judicial review?

Judicial review is the process by which the Courts determine whether or not an administrative decision-maker has acted within the power conferred upon him or her by Parliament.

That places the question of statutory construction at the heart of the enquiry.

The question that Courts are called upon to answer is whether or not the provision or provisions of a statute under which the decision-maker acted empowered them (that is, gave them jurisdiction) to make the decision which they did, for the reasons which they did, following the procedure which they did.

In other words, the heart of the enquiry when engaging in judicial review is the interpretation of the statute to determine what the decision-maker is entitled to do, and what the decision-maker must do.

The inverse of that proposition is that the categories of jurisdictional error simply represent the ways in which a decision-maker can go outside the power conferred upon them by the statute, or fail to do what the statute requires them to do.

What are the grounds of judicial review?

ADJR Act and State equivalents.

In Australia, the *Administrative Decisions (Judicial Review) Act* 1977, with its codified grounds of review, remains available as a means to review at Commonwealth level (with similar schemes in several states[1]).

The *ADJR Act* was the product of the *Commonwealth Administrative Review Committee Report* of 1971[2], "the Kerr Report" (yes, the very Sir John Kerr better popularly remembered for his performance as Governor General).

The grounds of review reflect an attempt to simplify and reform the common law grounds of review as they were at that time.

I've attached a copy of sections 5-7 of the *ADJR Act* to this paper. They remain broadly similar to the common law grounds of review. It is outside the scope of this paper to reflect upon the differences.

Jurisdictional error.

However, as Beech-Jones SC (as he then was) has observed, every galah in the administrative law pet-shop is now squawking jurisdictional error[3], which is now an

[1] Judicial Review Act 1991 (Qld), Judicial Review Act 2000 (Tas), Administrative Decisions (Judicial Review) Act 1989 (ACT).

[2] Commonwealth Administrative Review Committee Report, Parl Paper No 144 (1971)

[3] The Impact of External Administrative Law Review: The Role of the Courts, Beech-Jones SC, (2007) 57 AIAL Forum 70.

entrenched minimum standard of judicial review available at both Commonwealth and State level, as we shall see.

In other words, if you can squawk "jurisdictional error", you squawk the language of contemporary Australian judicial review.

The following is a brief list which I've compiled of some of the ways in which an administrative decision-maker can be said to have gone beyond, or failed to exercise, their jurisdiction;

(1) Mistakenly asserting or denying the very existence of jurisdiction[4].

(2) Misapprehending or disregarding the nature or limits of the decision-maker's functions or powers.

(3) Misconstruing the relevant statute in such a way that the exercise of power is affected, leading the decision-maker to identify a wrong issue, or ask a wrong question[5].

(4) Acting on a mistaken view about the existence of a particular fact, occurrence, or event, but only if the existence of that fact, occurrence, or event, is necessary for the valid exercise of the power (a "jurisdictional fact")[6].

(5) Failing to take into account a matter that the Act implicitly requires the decision-maker to take into account. What the Act implicitly requires the decision-maker to take into account is determined with reference to the subject-matter, scope and purpose of the Act[7].

(6) Taking into account a matter that that the Act explicitly or implicitly does not permit the decision-maker to take into account[8].

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[4]See Mark Aronson's list in *Jurisdictional Error without the Tears*, in Australian Administrative Law, Groves and Lee (eds) Cambridge University Press (2007) p330, at p335, which also includes my second species of error. Aronson's list was referred to and accepted by the High Court in *Kirk, op.cit.* at [71].

[5] *Craig v South Australia* (1995) 184 CLR 162, at p179.

[6] *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 73 ALD 1, at [53] – [60], per McHugh and Gummow JJ.

[7] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, per Mason J, at p39; per Brennan J, at p56.

[8] *Peko-Wallsend*, *op. cit.,* per Mason J, at p40.

(7) Exercising a discretionary power in such a way that no reasonable decision-maker could exercise it[9].

(8) Reaching a conclusion upon which the exercise of a power is dependent in a manner which is totally contrary to reason, illogical, or irrational[10].

(9) Acting in bad faith when making a decision.

(10) Failing to accord procedural fairness, either by acting in a manner giving rise to a reasonable apprehension of bias, or by failing to afford a party personally affected by a decision procedural fairness where it is required, the subject to which we will return when considering the High Court's evolving protection of a party who stands to be affected by an exercise of administrative power.

There may be other errors; as the High Court said in *Kirk*[11]:

"It is neither necessary, nor possible, to attempt to mark out the metes and bounds of jurisdictional error".

The use of the expression *"metes and bounds"* might equally be used to describe the extent of the power granted or duty imposed by the statute, rather than the ways it may be exceeded.

In all cases, to identify what is beyond the power of the decision-maker, the first task is to *"mark out the metes and bounds"* within which the decision-maker is empowered to act, with reference to the empowering statute.

The categories of jurisdictional error are not closed, because the ways in which a decision-maker might go beyond the *"metes and bounds"* of the authority conferred upon him by Parliament cannot be determined in advance.

[9] *Minister for Immigration and Citizenship v Xiujuan Li* [2013] HCA 18 (2013) 297 ALR 225; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[10] *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32 (per Gleeson CJ at [38]); *SZMDS* per Crennan and Bell JJ, at [136].
[11] *Kirk* (op. cit.) at [71].

The gentle art of statutory interpretation.

Having listed at least some of the categories of jurisdictional error, we can now turn to two areas where the High Court has employed the tools of statutory construction to interpret statutes in such a way as to incite Aronson to ask whether the Court is engaged in statutory interpretation or embarking upon a program of judicial disobedience[12].

In construing the empowering statute, all the normal tools of statutory construction are brought to bear. Perhaps of most interest in recent years is the way in which the High Court has used the tools of statutory interpretation to entrench a minimum level of judicial scrutiny of administrative action, and to ensure a minimum level of fairness in the processes by which decisions are reached.

On the one hand, the High Court emphasises that its role is limited to ensuring that administrative decision-makers act within the power conferred on them by statute.

In the oft-quoted words of Justice Brennan in *Attorney-General v Quin*[13] (1990) 170 CLR 1, at p36:

"The duty and jurisdiction of the court to review administrative action does not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

Were the Court to trespass on the merits of administrative action, it would put its own legitimacy at risk, because to do so would conflict with the recognition of the effectiveness of the due exercise of power by the other branches of government (*Attorney-General v Quin*[14]).

[12] M. Aronson, 'Statutory Interpretation or Judicial Disobedience?" UK Cost. L. Blog (1 June 2013) (available at http://ukconstitutionallaw.org).
[13] (1990) 170 CLR 1, at p36
[14] *op. cit.* at p38.

That remains a definitive statement about the limits of judicial review with respect to the merits of administrative decisions, and when you start to get a feel for this fundamental but elusive distinction, you are well on the way to becoming an effective judicial review practitioner.

On the other hand, when it comes to *process*, the position is less clear.

As the High Court put it in *Saeed*[15]:

"The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with ***irresistible*** *clearness, derives from the principle of legality which, as Gleeson CJ observed in* ***Electrolux Home Products Pty Ltd v Australian Workers' Union****, "governs the relations between Parliament, the executive and the courts."* [My emphasis.]

His Honour added [at 23]:

"The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

For the remainder of the paper, I will focus on two areas where the High Court has used principles of statutory interpretation to protect still evolving common law notions of fair process to defeat the apparent purpose of legislative provisions.

In the area of process in particular, I will suggest that the High Court has been increasingly willing to impose its own values; the *merits* of the outcome might ordinarily be off limits, but the merits of the *process followed* are not.

The first principle which is now established is that any person affected personally by an administrative decision has a right to recourse to the Courts to confine the decision-maker within the power granted to him or her by statute.

[15] (2010) 241 CLR 252

The second principle which is now well enshrined is that in the normal course of events, a person affected personally by an administrative decision is entitled to a fair process, and the Courts will not readily relinquish the right to approach the content of that entitlement with reference to the flexible principles of the common law.

You could say that both these principles reflect a single, fundamental value of the judicial system, which is that a party has a right to be heard in relation to decisions which are made which affect them personally, both before the decision is made, and by way of review in the Court.

In these two areas, the tools of statutory interpretation have been employed by the High Court to develop a minimum level of judicial review, and to maintain and develop flexible rules about what administrative decision-makers are required to do in order to ensure that the process they follow in reaching a decision is fair.

Construing privative clauses.

Privative clauses are clauses enacted by Parliament which, at least to the eye untrained in the gentle art of statutory interpretation, appear to immunise administrative decisions from judicial review; they appear to forbid access to the Courts to review the legality of the decision made.

Nothing is more difficult for a court to accept, however, than that the Parliament could have intended to relieve them of the duty of policing executive power.

The Court sees inherent in a privative clause a contradiction; the particular statute grants powers, and with it, imposes limits and duties upon decision-makers attached to those grants of power, but the statute then states that the decision stands and is valid even if those limits and duties are not observed.

As Griffith CJ said in 1909[16], *"a grant of limited jurisdiction coupled with a declaration that the jurisdiction shall not be challenged seems to me a contradiction in terms."*

An additional issue, at Commonwealth level, is the Constitutional recourse to section 75(v) of the Constitution. Section 75(v) empowers the High Court to issue prerogative writs, now

[16] *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114.

commonly known as "the constitutional writs", the means by which the High Court grants relief against a decision which is beyond the power of the decision-maker.

In *Hickman*[17], Dixon J confirmed that a privative clause could not remove the High Court's power to prevent a federal body from acting beyond its power.

His Honour then had to reconcile the contradiction of a clause which purported to oust the Court's jurisdiction with the Court's power under section 75, and the apparently limited grant of power in the specific provisions of the statute.

The outcome of this reconciliation process in Hickman was that some limits were still imposed upon the exercise of the power, but they were reduced to a minimum.

Dixon J said that the privative clause operated to protect a decision to which it applied provided that it:

"is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."[18]

The Court referred to this reconciliation process as determining the "inviolable limitations" on the power.

Once those inviolable limitations were determined, provided the decision-maker did not transgress them, the decision-maker had a free reign to determine the matter as they saw fit.

In other words, a privative clause had the effect of widening the jurisdiction of the decision-maker with respect to the decisions it protected; provided the decision-maker came within the inviolable limitations imposed by the statute, the decision would be within power, even if, in the absence of the privative clause, it would involve error.

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[17] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598

[18] *Hickman op. cit., at p615.*

The privative clause in S157.

In S157[19], the High Court dealt privative clauses a fundamental blow, where federal administrative decision-making power is involved.

The privative clause which the High Court was considering was a step in the ongoing efforts waged by governments of both persuasions to restrict review of migration decisions by the courts.

"S157" was a disappointed Bangladeshi asylum-seeker who wanted to challenge an unfavourable decision of the Refugee Review Tribunal.

He was confronted by the following apparently clear statement of legislative intention, in the form of section 474 of the *Migration Act*:

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

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

(2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, ***under this Act*** *or under a regulation or other instrument made* ***under this Act*** *(whether in the exercise of a discretion or not……"* [My emphasis.]

On the face of it, this was a strong privative clause, attacking, in apparently unambiguous terms, both the right to seek review (s474(1)(b)), and the power of a court to grant an effective remedy *"on any account"* (s474(2)).

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19 (2002) 211 CLR 476.

Gaudron, McHugh, Gummow, Kirby and Hayne JJ gave a joint judgment, outlining a number of steps involved in determining whether a decision was protected by a privative clause, and if so, to what extent.

Their Honours focused on a preliminary step in determining a privative clause's effect.

That first step was to ascertain its meaning or *"to ascertain the protection it purports to afford"* (at [70]).

In other words, what does it apply to, or what type of decision is it intended to protect?

Their Honours referred to two rules of statutory construction (at [71] and [72]) relevant to the interpretation of privative clauses;

The first[20] is that:

"..if there is an opposition between the Constitution and any such provision, it should be resolved by adopting [an] interpretation consistent with the Constitution that is fairly open."

The second basic rule is that it is presumed that Parliament does not intend to cut down the jurisdiction of the courts any more than the legislation in question expressly states or necessarily implies. Accordingly privative clauses are strictly construed.

Applying the first rule, first, the privative clause had to be read consistently with the High Court's power to grant prerogative relief pursuant to section 75(5) of the Constitution, if possible.

Second, it would be inconsistent with the Constitution to allow a Commonwealth body exercising administrative power to determine the limits of its own jurisdiction, because if it did so, it would be exercising judicial power.

Armed with these principles, the answer proved strikingly simple; the privative clause protected only those decisions made *"under this Act"*.

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[20] *S157*, *op. cit.*, at [71].

Any decision which was not within the power of the decision-maker would not be a decision made under the Act; it would be an invalid decision, and thus only *"a purported decision"*.

The privative clause did not protect decisions which were in excess of jurisdiction, therefore, it did not operate to expand the jurisdiction of the decision-maker.

There is a certain circularity in the Court's reasoning; the privative clause is not expressed as operating with respect to decisions affected by jurisdictional error, therefore, it does not apply to expand the field in which the decision-maker can operate without falling into jurisdictional error.

Although the "second basic rule" of statutory construction referred to by the Court did not receive a further mention in the Court's judgment, there can be little doubt that it played a role in the Court's decision.

In other words, remembering the language of *Electrolux*, the privative clause did not preclude review for jurisdictional error, or expand the jurisdiction of the decision-maker with *"irresistible clearness"*, and thus judicial review was not excluded.

Had it in fact, excluded judicial review, the majority said that it would have been inconsistent with section 75(v) of the Constitution, and thus invalid (at [75]).

The effect of *S157* is that, as a general rule, there is now an entrenched minimum standard of judicial review in relation to Commonwealth decisions which cannot be excluded by the legislature[21].

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[21] *Futuris* (2008) 237 CLR 146, is an exception. Section 175 provided that a tax assessment under the *Income Tax Assessment Act* 1936 (Cth) was not to be taken to be invalid because of non-compliance with the Act (though not the *Hickman* provisos). The majority of the High Court held that it was effective to immunise such assessments from section 75(v) review.

However, it is best explained by reference to the fact that there were comprehensive merits review procedures, and a right to judicial review of those decisions, even though the majority did not base the decision on those facts.

The privative clause in Kirk v IRC.[22]

The method by which the High Court reached its decision in *S157*, by reference to section 75 of the Constitution, left open the possibility that privative clauses at State level might enjoy greater success.

That possibility was diminished by the High Court's decision in *Kirk*[23], which incidentally contains a good discussion of the history of the prerogative writs.

In *Kirk*, the issue which the High Court was considering was whether section 179 of the *Industrial Relations Act* 1996 (NSW) operated to prevent judicial review of a decision of the Industrial Relations Commission by the Supreme Court of New South Wales.

Section 179 was in its terms every bit as discouraging to judicial review as section 474 of the *Migration Act*. Indeed, it even stated that it protected against "purported decisions".

The Court[24] held that there was a power, every bit as entrenched as the High Court's power to review federal decisions, in the Supreme Court of each State, to quash decisions for jurisdictional error.

The Court said:

"In considering State legislation, it is necessary to take account of the requirement of Ch III of the Constitution that there be a body fitting the description "the Supreme Court of a State", and the constitutional corrollory that "it is beyond the legislative power of a State so as to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description"". (At [96].)

"The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial powers by persons and bodies other than the Supreme Court." (at [105]).

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[22] *Kirk v IRC* (2010) 239 CLR 521
[23] *Kirk v IRC, op. cit.*
[24] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

In summary, legislation which removed the supervisory jurisdiction of a State Supreme Court would be inconsistent with the Constitution, and hence invalid (at 100).

Just as in *S157*, the Court read the privative clause *"in a manner which takes account of these limits on the relevant legislative power"* (at [101]), which meant that *"Section 179, on its proper construction, does not preclude the grant of certiorari for jurisdictional error. To grant certiorari on that ground is not to call into question a "decision" of the Industrial Court as that term is used in s 179(1)*". (At [105].)

The High Court interpreted away the problem created by the extension of the operation of the privative clause to "purported decisions" in the course of its exposition at [103] – [105].

Statutory interpretation and procedural fairness.

The modern common law approach.

Privative clauses now happily put in their place, I can turn to procedural fairness (procedural fairness and natural justice being, in effect, synonyms, when used in relation to administrative law decisions).

First of all, I will outline the broad and flexible approach preferred by the High Court since *Kioa v West*[25]. I will then suggest that, just as with privative clauses, the legislature's attempt to deal with the uncertainty as to what precisely is required of decision-makers by replacing the common law with codified procedures has not had the desired effect.

In other words, the High Court has used the tools of statutory interpretation to resist the efforts of the legislature, which have not been *irresistibly* clear.

The implication of procedural fairness; *Kioa v West.*

As a broad proposition, where a person is personally affected by a decision, the principles of natural justice require that information which is *"credible, relevant, and significant"* should be put to the person concerned (*Kioa v West*[26]).

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[25] (1985) 159 CLR 550
[26] *op. cit*, per Brennan J, at p628

The requirement that a party affected by a decision be afforded natural justice, and the content of that duty are determined with reference to the statute, and will normally be implied where a statutory power has the capacity to affect a person's rights or interests personally.

In *Kioa v West*, Mason CJ put it this way[27]:

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

His Honour added that:

"Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the statute."

Effectively, His Honour Justice Brennan, was saying much the same thing when he said:

"At base, the jurisdiction of a court judicially to review a decision made in the exercise of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power…..When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise ***in the absence of a clear contrary intention****…."*

The content of procedural fairness.

It is difficult to spell out in advance what procedural fairness will require in any given case. Just how uncertain is the application of the underlying content of procedural fairness is evident from some of the broad judicial statements quoted by His Honour Justice Brennan, in *Kioa v West*[28]:

[27] *op. cit.* at p584
[28] *op. cit.*, at p613

"What the law requires is the discharge of a quasi-judicial function is judicial fairness. That is not a label for a fixed body of rules. What is fair in a given situation depends upon the circumstances. And it is not a one-sided business." (citing Kitto J).

"Natural justice is but fairness writ large and juridically. It has been described as "fair play in action"". (citing Lord Morris of Borth-y-Gest).

In His Honour Justice Brennan's words:

"The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise."

In these broad statements, you see reflected the common law's preference for flexibility, individual justice, and the incremental, case by case development of principle.

This does not necessarily sit well with decision-makers, who look for efficiency in decision-making and clear rules about the decision-making process which they are to follow.

Just as with privative clauses, migration is one area where the legislature has attempted to clarify and simplify what procedural steps are required to achieve fairness.

In several key cases the High Court has rejected these attempts.

Most particularly, it has resisted a construction of the statutory scheme which would have the effect of excusing the decision-maker from providing information which would have had to be provided under the common law.

Just as with privative clauses, the effect has arguably been to interpret the statute in a way other than that which Parliament actually anticipated; just as with privative clauses, the legislature needs to exclude common law procedural fairness with *Electrolux*'s "irresistible clearness".

Ex Parte Miah[29]

In *Ex Parte Miah*[30], the High Court was considering whether the enactment of detailed provisions in a sub-division dealing with the Minister's decision to grant or refuse a visa (*Migration Act* 1958 (Cth) Part 2, Division 3, sub-division AB, entitled "code of procedure for dealing fairly, efficiently and quickly with visa conditions") indicated a legislative intention to displace common law requirements of procedural fairness with a simplified, statutory code.

The provisions went into considerable detail about what kind of information the decision-maker was required to give the applicant an opportunity to respond to.

Section 57 of the *Migration Act* required the decision-maker to disclose information which the decision-maker considered:

"(a) would be the reason, or part of the reason, for refusing to grant a visa; and

(b) is specifically about the applicant or another person ***and is not just about a class of persons of which the applicant or other person is a member…."*** [My emphasis.]

If the section operated as a code in relation to what adverse information had to be provided to the applicant, it would have limited such information to adverse information which was just about him, or just about a specific person.

This would be a more limited obligation than that which would normally be imposed under the common law, which would consider the adverse information on its merits, and determine what fairness required in the particular circumstances of the case.

Like S157, Mr Miah was an asylum-seeker from Bangladesh. Having read a number of such claims, I have come to the conclusion that post-secession Bangladeshi politics is turbulent, frequently violent, and rather like a less poetic version of King Lear's post-abdication England.

Mr Miah claimed that his father had been murdered in 1971 because of his organising of cultural and theatrical activities, and his opposition to Muslim fundamentalism, which he

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[29] (2001) 197 ALR 238
[30] *op. cit.*

claimed distorted Islam. Mr Miah had continued the activities of his father, and held and expressed similar, anti-fundamentalist beliefs.

As a result, he was severely physically assaulted on several occasions by fundamentalists. On one occasion, he was stabbed multiple times, and on another, he was attacked with an axe. He suffered further violence when he married a Hindu woman. He was branded an unbeliever, lashed 101 times along with his wife, and banished from his village.

Having concluded that enough was enough, he left in fear for his life, convinced he would be pursued wherever he went in Bangladesh.

He claimed the Bangladeshi Nationalist Party was in alliance with the fundamentalists, had a fundamentalist character, and would not protect him.

By the time the decision-maker made his decision, the Bangladeshi Nationalist Party was no longer in power.

The decision-maker based his decision on that fact, finding that the change of government to the Awami League meant that he would be protected from the harm that he feared.

In other words, the information about the change of government, and the conclusion which the decision-maker drew from it was critical to the decision-maker's rejection of the Applicant's claim.

However, this was information which did not engage section 57(b) of the *Migration Act*, because it was not personal to the applicant or any other particular person, but general information about the situation in Bangladesh.

In the High Court, the Minister argued that the clear intention, given the reference to a "code of procedure" and the clearly articulated class of material which had to be put to an applicant, was that the only information which had to be put to the applicant was information coming within the terms of section 57(b) of the Act, that is, information which was just about the applicant, not information about a change of government in Bangladesh.

The majority, in separate judgments[31] rejected that argument. The majority found that natural justice was not excluded by the operation of the statutory provisions, and that the information should have been put to the applicant in order that he might respond to it.

Each of the majority reiterated that the principles of natural justice were flexible and adapted to the facts of the particular case, thus preserving for the courts the flexibility needed to allow a fair process, to be determined from decision to decision.

Saeed[32]

Ms Saeed had applied from Pakistan for a skilled migrant visa on the basis of her work as a cook in a restaurant in Rawalpindi. Australian immigration officers in Rawalpindi decided to investigate the restaurant where she worked, and found that there were no records kept at the restaurant. They were told that no woman had ever worked in the kitchen.

The Department refused Ms Saeed her visa for that reason, without first informing Ms Saeed, and giving her an opportunity to respond.

By the time of *Saeed*[33], Parliament had introduced section 51A at the commencement of subdivision AB, which was in the following terms:

*"**Exhaustive statement of the natural justice hearing rule***

(1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with…."

In his second reading speech, the Minister made the following statements, as the plurality[34] duly noted:

"Therefore, the purpose of this Bill is to make it expressly clear that particular codes in the Migration Act do exhaustively state the requirements of the natural justice or procedural fairness rule."

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[31] Gaudron, McHugh, and Kirby JJ

[32] (2010) 241 CLR 252

[33] *op. cit.*

[34] French CJ, Gummow, Hayne, Crennan, Kiefel JJ.

"This will have the effect that common law requirements relating to the natural justice or procedural fairness hearing rule are effectively excluded, as was originally intended."

"In conclusion, these amendments are necessary to restore the Parliament's original intention that the Migration Act should contain codes of procedure that allow fair, efficient and legally certain decision making processes that do replace the common law requirement of the natural justice hearing rule."

The Minister's comments were clearly a direct response to the decision in *Miah*, a point that the plurality duly noted.

They were also a fairly direct suggestion that as far as the Minister was concerned, the High Court had misunderstood the intent of the codified provisions.

The plurality commented (at [31]):

"As Gummow J observed in Wik Peoples v Queensland, it is necessary to be keep in mind that when it is said that the legislative "intention" is to be ascertained, "what is involved is the 'intention ***manifested****' by the legislation". Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning."* [Emphasis in original.]

Section 57(3) defined *"relevant information"* (section 57 (1)) in a way which meant that it did not include applicants who applied for a visa from outside Australia.

The effect was that section 57 did not impose an obligation to disclose any adverse information on applicants who applied off-shore.

The conclusion which the Department wished to reach with respect to the information that they had unearthed in their intrepid raid on a Rawalpindi restaurant was clearly highly damaging to Ms Saeed, but if section 57 operated as a code in relation to the provision of adverse information to visa applicants in general, there was no requirement to put it to Ms Saeed in order to give her an opportunity to respond.

The way round the privative clause in S157[35] was to limit the operation of the clause by defining a "decision made under the Act" as a decision lawfully made.

Here, the way round the exclusion of any requirement that adverse information be put to an off-shore applicant lay in limiting the operation of the exclusion of common law procedural fairness by limiting the "matters" with which it dealt.

The plurality concluded (at [42]) that:

"In order to give s51A operation it is necessary to refer to the subject of the "matter" with which s57 deals as the provision of information, more generally relevant and adverse, for comment. But there is a qualification to the description of the "matter" which arises from the persons to whom the information is to be provided. The terms of the section limit such persons to onshore visa applicants. The "matter" with which s57 deals, is the provision of such information to onshore visa applicants. The provision of information to offshore applicants, such as the appellant, is not a "matter" dealt with by the sub-section. It follows that the application of the hearing rule in dealings with the appellant's application is not excluded by subdiv AB."

If "the matter" it dealt with was the provision of relevant and adverse information to visa applicants in general, it would have excused the decision-maker from providing any adverse and relevant information to off-shore visa applicants.

The extent to which section 51A operates to exclude common law principles of natural justice is uncertain on this approach, because it depends on how broadly the Court characterises the "matters" with which the subdivision deals.

However, it is likely that the High Court will not readily allow the section to operate in a way which would allow an unfair process.

SZBEL[36]

While the Court is reluctant to divine a legislative intention to exclude common law principles of natural justice, it is less reluctant to find that prescriptive statutory procedures impose

[35] *op. cit.*
[36] (2006) 228 CLR 152

more onerous mandatory obligations upon a decision-maker than would otherwise be implied under the common law.

An excellent example is *SZBEL*[37], another migration matter. In *SZBEL*, the decision challenged in the Court was a decision of the Refugee Review Tribunal, a body who reviews decisions to refuse protection visas.

SZBEL was an Iranian sailor who claimed to have converted from Islam to Christianity. SZBEL said that his conversion had come to the attention of the ship's captain, that he feared he would be killed as an apostate, and that he had therefore jumped ship in Australia and claimed asylum.

The original decision-maker did not accept that SZBEL was genuinely committed to Christianity, and therefore did not accept that his claim to fear harm for that reason was true. The delegate mentioned one aspect of his story which was implausible.

The Tribunal affirmed the decision of the delegate. The Tribunal based its decision on three aspects of SZBEL's account which it said were implausible. None of its concerns about these three matters were put to SZBEL at hearing.

When determining what procedural fairness would require in relation to merits review, normally a party would be expected to understand that the review body was entitled to accept or reject the evidence that was put to them as they saw fit, provided evidence which was "credible, relevant, and significant" and adverse to the applicant was put to the applicant.

As the High Court noted, procedural fairness does not ordinarily require a decision-maker to give an applicant a running commentary on what it thinks about the evidence that is given.

As Lord Diplock said…. *"If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."* (*F Hofmann-La Roch and Co AG v Secretary of State for Trade and Industry*[38]).

In other words, a decision-maker does not ordinarily have to disclose his or her internal thought process.

[37] *op. cit.*
[38] [1975] AC 295 at 369

Just as with the regime under which Ms Saeed's decision was made, the procedures before the Tribunal were highly particularised.

Section 425(1) of the *Migration Act* was in the following terms:

"The Tribunal must invite the applicant to appear before the Tribunal ***to give evidence and present arguments relating to the issues arising in relation to the decision under review****."*

The High Court focused on the passage in bold. The Court observed that the Tribunal was not confined to the issues considered dispositive by the original decision-maker. However, it said that the Act defined the nature of the opportunity to be heard, which was an opportunity *"to give evidence and present arguments relating to the issues arising in relation to the decision under review"*.

The applicant was entitled to assume that those issues were the issues identified by the original decision-maker, in the absence of a contrary indication from the Tribunal.

If the Tribunal intended to travel beyond those issues identified by the original decision-maker, it was obliged to bring those issues (or at least those which were critical, to the attention of the applicant).

If the Tribunal failed to do so, *"there would not have been compliance with s 425(1); the applicant would not have been afforded procedural fairness"*.

In other words, the High Court found this natural justice requirement within section 425 of the Act itself.

Parliament has now inserted a parallel provision to section 51A with respect to the operation of the Refugee Review Tribunal (section 422B), apparently restricting natural justice to that which is prescribed by the statute.

However, because the High Court found this natural justice requirement within section 425 of the Act itself, section 422B would not operate to exclude it or modify it.

In requiring the Tribunal to disclose aspects of their internal reasoning, the High Court's reading of section 425 appears to impose a significantly more onerous requirement upon the Tribunal than would normally be implied by the common law.

It is a surprising decision from an administrative lawyer's point of view; SZBEL's claims had been rejected as not credible by the original decision-maker. One might have thought that he would have recognised that it was up to him to persuade the decision-maker of the truth of his claims, and that he was on notice that his explanations might not be accepted.

It is also difficult to imagine that this is what the Parliament intended when it enacted section 425, and is an example of the unpredictable intentions which may be manifest in any statutory provision.

The outcome in *SZBEL* suggests that the High Court is prepared to read into statutory provisions which seek to particularise the "fairness" procedures which decision-maker's are to follow in reaching a decision requirements more onerous than the common law.

Combined with the tendency of the High Court to simultaneously preserve the common law's flexible and broad approach to the content of procedural fairness, Parliament and drafters of legislation might legitimately conclude that efforts to secure certainty are more likely to end in tears than in triumph.

They could muse that it is not at all easy to express oneself irresistibly.

Conclusion.

The question that the Court asks in judicial review proceedings is whether or not the decision-maker has acted within the power granted to them by the enabling statute. In order to determine whether that has occurred, it is necessary to consider the powers conferred and duties imposed by the statute.

The categories of jurisdictional error are simply ways of describing what a decision-maker has done when they have gone beyond the power conferred upon them by the statute, or when they have failed to exercise a power conferred upon them by the statute.

The categories of error are not closed because there could always be another way of describing what a statute requires or forbids and how that obligation or restriction has not been complied with.

In this paper, I have focused on two areas of administrative law where there is tension between the High Court and the legislature, the interpretation of privative clauses and the implication of, and requirements of, procedural fairness in administrative decision-making.

The High Court has used the tools of statutory interpretation to preserve the right of those personally affected by administrative decisions to a level of judicial review which confines the decision-maker to the power specifically granted under the statute.

Equally, the High Court has used those tools to develop and maintain a flexible approach to ensuring that the process followed by a decision-maker in accordance with the Court's expectations of what is fair in the particular circumstances of the case.

I will conclude with this thought. It is at least arguable that it is Parliament's attempts to restrict access to the Courts in particular (and Parliament's efforts to confine the content of procedural fairness to a lesser extent) which has led to the flourishing of a system of judicial review which is more flexible, more robust, and more extensive than ever before.

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Attachment "A".

Administrative Decisions (Judicial Review) Act (Cth), sections 5 and 6.

5 Applications for review of decisions

(1) 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 Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no

evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

6 Applications for review of conduct related to making of decisions

(1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the conduct on any one or more of the following grounds:

(a) that a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connection with the conduct;

(b) that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed;

(c) that the person who has engaged, is engaging, or proposes to engage, in the conduct does not have jurisdiction to make the proposed decision;

(d) that the enactment in pursuance of which the decision is proposed to be made does not authorize the making of the proposed decision;

(e) that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;

(f) that an error of law had been, is being, or is likely to be, committed in the course of the conduct or is likely to be committed in the making of the proposed decision;

(g) that fraud has taken place, is taking place, or is likely to take place, in the course of the conduct;

(h) that there is no evidence or other material to justify the making of the proposed decision;

(j) that the making of the proposed decision would be otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who proposes to make the decision is required by law to reach that decision only if a particular matter is established, and there is no evidence or other material (including facts of which he or she is entitled to take notice) from which he or she can reasonably be satisfied that the matter is established; or

(b) the person proposes to make the decision on the basis of the existence of a particular fact, and that fact does not exist.

Attachment "B".

Section 75 of the Commonwealth Constitution.

75 Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;
(ii) affecting consuls or other representatives of other countries;
(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
(iv) between States, or between residents of different States, or between a State and a resident of another State;
(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.