HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS APPELLANT

AND

FATHIA MOHAMMED YUSUF RESPONDENT

Minister for Immigration and Multicultural Affairs v Yusuf
[2001] HCA 30
31 May 2001
M10/2000

ORDER

1. *Appeal allowed.*

2. *Appellant to pay respondent's costs of the appeal.*

3. *Set aside order 1 made by the Full Court of the Federal Court on 2 December 1999, and in place thereof, order that:*

   a) *the appeal to that Court be allowed;*

   b) *orders 1 and 3 of the orders made by Finn J on 30 August 1999 be set aside and in place thereof, order that the application for review be dismissed.*

On appeal from the Federal Court of Australia

Representation:

R R S Tracey QC with A L Cavanough QC and P R D Gray for the appellant (instructed by Australian Government Solicitor)

J Basten QC with J A Gibson for the respondent (instructed by Victoria Legal Aid)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS & ANOR RESPONDENTS

EX PARTE FATHIA MOHAMMED YUSUF PROSECUTOR/APPLICANT

Re Minister for Immigration and Multicultural Affairs; Ex parte Yusuf
31 May 2001
M126/2000

ORDER

Application dismissed with no order as to costs.

Representation:

J Basten QC with J A Gibson for the prosecutor/applicant (instructed by Victoria Legal Aid)

R R S Tracey QC with A L Cavanough QC and P R D Gray for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS APPELLANT

AND

OGANES ISRAELIAN RESPONDENT

Minister for Immigration and Multicultural Affairs v Israelian
31 May 2001
M13/2000

ORDER

1. *Appeal allowed.*

2. *Appellant to pay respondent's costs of the appeal.*

3. *Set aside so much of the order made by the Full Court of the Federal Court on 20 May 1999 as dismissed the appeal to that Court, and in place thereof, order that:*

   a) *the appeal to that Court be allowed;*

   b) *orders 1, 2 and 3 of the orders made by R D Nicholson J on 1 May 1998 be set aside and in place thereof, order that the application for review be dismissed.*

On appeal from the Federal Court of Australia

Representation:

R R S Tracey QC with A L Cavanough QC and P R D Gray for the appellant (instructed by Australian Government Solicitor)

B A Keon-Cohen QC with J A Gibson for the respondent (instructed by Armstrong Ross)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS & ANOR — RESPONDENTS

EX PARTE OGANES ISRAELIAN — PROSECUTOR/APPLICANT

Re Minister for Immigration and Multicultural Affairs; Ex parte Israelian
31 May 2001
M127/2000

ORDER

Application dismissed with no order as to costs.

Representation:

B A Keon-Cohen QC with J A Gibson for the prosecutor/applicant (instructed by Armstrong Ross)

R R S Tracey QC with A L Cavanough QC and P R D Gray for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

CATCHWORDS

Minister for Immigration and Multicultural Affairs v Yusuf
Re Minister for Immigration and Multicultural Affairs; Ex parte Yusuf
Minister for Immigration and Multicultural Affairs v Israelian
Re Minister for Immigration and Multicultural Affairs; Ex parte Israelian

Immigration – Refugees – Review by Refugee Review Tribunal of decision to refuse application for protection visa – Whether s 430(1)(c) of *Migration Act* 1958 (Cth) imposes a duty or obligation on Tribunal to make, and to set out, findings on all objectively material questions of fact.

Administrative law – Judicial review – Refugees – Application for protection visa – Judicial review of decision of Refugee Review Tribunal – Scope of grounds of review in Pt 8 of *Migration Act* 1958 (Cth) generally – Jurisdictional error as ground for review in s 476 of *Migration Act* 1958 (Cth).

Administrative law – Judicial review – Refugees – Application for protection visa – Judicial review of decision of Refugee Review Tribunal – Where Tribunal failed to refer to alternative basis of applicant's claim to have a well-founded fear of persecution – Whether constitutes a ground for judicial review in s 476 of *Migration Act* 1958 (Cth).

Administrative law – Judicial review – Refugees – Application for protection visa – Judicial review of decision of Refugee Review Tribunal – Significance of past acts to applicant's claim to have a well-founded fear of persecution – Where Tribunal made no express finding about one of three alleged past acts – Whether constitutes a ground for judicial review in s 476 of *Migration Act*.

Immigration – Refugees – Whether possible application of law of general application can give rise to a well-founded fear of persecution.

Constitution, s 75(v).
Migration Act 1958 (Cth), Pt 8, ss 430 and 476.

Minister for Immigration and Multicultural Affairs v Singh (2000) 98 FCR 469, disapproved.

1 GLEESON CJ. I agree with the reasons for judgment of McHugh, Gummow and Hayne JJ, and with the orders they propose. In view of the division of opinion which has emerged in the Federal Court, I would make the following additional comments.

2 In each of the present appeals, the respondent applied for a protection visa under s 36 of the *Migration Act* 1958 (Cth) ("the Act"), claiming to satisfy the criterion set out in s 36(2). In summary form, the respondent set out to satisfy the Minister's delegate, pursuant to s 65 of the Act, that the respondent had a well-founded fear of persecution for a Convention reason if she or he returned to the country of her or his nationality. Having failed to satisfy the delegate, the respondent applied to have the delegate's decision to refuse to grant the visa reviewed, under Pt 7 of the Act, by the Refugee Review Tribunal ("the Tribunal").

3 The proceedings before the Tribunal, which were conducted in accordance with the procedures prescribed by Pt 7, were not adversarial. There was no contradictor who joined issue upon all or any of the facts alleged by the respondent. There was an ultimate question, expressed in terms of the Convention definition of a refugee, for determination by the Tribunal. In each case the respondent, for the purpose of satisfying the Tribunal that there should be a favourable resolution of that question, gave a history of past events, and an account and justification of present fears. In each case, the Tribunal, in setting out its reasons for its decision, made certain findings about the facts asserted, and contentions advanced. In each case, the Federal Court, when reviewing the decision of the Tribunal, under Pt 8 of the Act, considered that there were questions of fact raised in support of the visa application which were material, even if the Tribunal had not regarded them as such, and which had not been the subject of a finding made and set out in the Tribunal's reasons. Therefore, it was held, there had been a failure by the Tribunal to comply with s 430(1)(c) of the Act, which meant that the ground of review in s 476(1)(a) had been made out, and the decision of the Tribunal should be quashed.

4 As McHugh, Gummow and Hayne JJ point out, a failure by the Tribunal to deal, in its reasons for decision, with some assertion of fact made by a visa applicant may, or may not, have consequences for judicial review of the Tribunal's decision, either in the Federal Court or in this Court, quite apart from whatever consequences it may have under s 476(1)(a). A consideration of those other possible consequences has been necessary in deciding the outcome of the present appeals, and applications under s 75(v) of the Constitution. But the first issue for determination in this Court concerns the application of s 476(1)(a).

5 When the Tribunal prepares a written statement of its reasons for decision in a given case, that statement will have been prepared by the Tribunal, and will be understood by a reader, including a judge reviewing the Tribunal's decision, in the light of the statutory requirements contained in s 430. The Tribunal is required, in setting out its reasons for decision, to set out "the findings on any material

questions of fact". If it does not set out a finding on some question of fact, that will indicate that it made no finding on that matter; and that, in turn, may indicate that the Tribunal did not consider the matter to be material. It was not suggested, in either of the present cases, that the Tribunal made some finding of fact which it failed to set out. The substance of the complaint was that the Tribunal failed to make a finding upon a particular question.

6 Such a complaint could only invoke the ground of judicial review in s 476(1)(a) if a failure to make a finding on a question of fact means that a *procedure* required by the Act to be observed in connection with the making of the decision has not been observed.

7 If s 476(1)(a) has that meaning, then there is an incongruity in the section when read as a whole, because s 476(3)(e) qualifies s 476(1)(d) by excluding the Tribunal's failure to take a relevant consideration into account from the category of an improper exercise of power. The difference between failing to make a finding on a material question of fact, and failing to take a relevant consideration into account, is elusive. The former is narrower than the latter, but most examples of the former could also be presented as the latter. Both of the present cases involve a contention which is not materially different from a claim that the Tribunal failed to take a relevant consideration into account.

8 To treat a failure to make a finding on a question of fact as a failure to observe a procedure in connection with the making of a decision involves a strained interpretation of the statutory language, especially in a context which distinguishes between legal review (indeed, somewhat attenuated legal review) and full merits review (of the kind in which the Tribunal engages when it reviews a delegate's decision).

9 The major difficulty for the respondents, however, lies in the language of s 430. There is nothing in that language which imposes a requirement to make a finding on every question of fact which is regarded by the Federal Court, on judicial review of the Tribunal's decision, as being material. A good deal of materiality jurisprudence has developed from the attempt to relate ss 476(1)(a) and 430. Questions of fact which appear to have been regarded by the Tribunal as material are sometimes described as "subjectively material", to distinguish them from questions of fact which are regarded as material by a court reviewing the Tribunal's decision. Facts of the latter kind are then described as "objectively material". And the level of generality, or particularity, at which facts are to be classified for the purpose of determining their materiality is a problem. The distinction between facts in issue, particulars, and evidence, which may be difficult even in adversarial litigation conducted with or without formal pleadings, is even more difficult when applied to proceedings before the Tribunal.

10 The requirement imposed by s 430 is to prepare a written statement that, in the context of setting out the Tribunal's reasons for decision, "sets out the findings"

on any material questions of fact. It is impossible to read the expression "the findings" as meaning anything other than the findings which the Tribunal has made. By setting out its findings, and thereby exposing its views on materiality, the Tribunal may disclose a failure to exercise jurisdiction, or error of a kind falling within a ground in s 476(1) other than s 476(1)(a), or may provide some other ground for judicial review. There may be cases where it is proper to conclude that the Tribunal has not set out all its findings. The consequences that might follow are not presently in issue. No one suggests that the present are such cases. But all the Tribunal is obliged to set out is such findings as it has made. The construction of s 430 for which the respondents contend in effect eliminates the definite article from s 430(1)(c), treats "any" as meaning "all", and finds in an express obligation to make a written record of findings of fact an implied obligation as to the ambit of the findings which must be made. None of this is impossible, but, like the meaning that the respondents attribute to s 476(1)(a), it is strained. When to that is added the incongruity associated with s 476(3)(e), and the problems of determining materiality on an "objective" basis in the context of legal review of a decision which commonly turns upon the Tribunal's assessment of the credibility of a person seeking to establish the status of a refugee, it is a construction I am unable to accept.

11 GAUDRON J. These four proceedings, being two appeals and two applications for relief under s 75(v) of the Constitution, were heard together. The proceedings arise out of separate applications for protection visas by Ms Yusuf, a citizen of Somalia, and Mr Israelian, an Armenian. Both applications were rejected by a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister"). The decisions were separately reviewed and affirmed by the Refugee Review Tribunal ("the Tribunal")[1]. Ms Yusuf and Mr Israelian separately sought judicial review of the Tribunal's decisions in the Federal Court of Australia pursuant to Pt 8 of the *Migration Act* 1958 (Cth) ("the Act").

12 At first instance, both applications for judicial review were successful and the decisions of the Tribunal were set aside by the Federal Court. It was separately held in each case that the Tribunal failed to comply with procedures required by the Act in that it failed to set out findings on material questions of fact as required by s 430(1)(c) of the Act[2]. From each of those decisions, the Minister appealed unsuccessfully to the Full Federal Court. The Minister now appeals to this Court from the decisions of the Full Court.

13 The Minister's appeals to this Court are separately resisted by Ms Yusuf and Mr Israelian on the ground that the decisions of the Full Court are correct. Additionally, it is contended in each appeal that the decision of the Full Court should be affirmed on grounds other than the failure of the Tribunal to set out findings in accordance with s 430(1)(c) of the Act. And because Pt 8 of the Act limits the grounds upon which the Federal Court may review a decision of the Tribunal, Ms Yusuf and Mr Israelian each seek relief under s 75(v) of the Constitution in the event that the Minister's appeals are successful[3].

Relevant legislative provisions

14 Part 7 of the Act provides with respect to the review by the Tribunal of certain decisions made under the Act by the Minister or by his or her delegate[4], including decisions with respect to the refusal to grant a protection visa[5].

---

1 In the case of Mr Israelian, the review in question was conducted pursuant to an order of the Federal Court of Australia following the setting aside of an earlier decision by the Tribunal.

2 In *Israelian v Minister for Immigration and Multicultural Affairs*, R D Nicholson J also found that the decision involved an error of law (incorrect interpretation of applicable law).

3 See *Abebe v Commonwealth* (1999) 197 CLR 510.

4 As to the decisions which are reviewable, see s 411 of the Act.

5 See s 411(1)(c).

Division 4 of Pt 7 provides, as its heading indicates, with respect to the conduct of a review. As the provisions of Pt 7 stood at the relevant time, they specified what material might be given to the Tribunal[6] and how the Tribunal was to conduct its hearings[7]. They also set out the Tribunal's powers[8] and the rights of applicants[9] in relation to Tribunal hearings.

15 Division 5 of Pt 7 of the Act is concerned with decisions of the Tribunal. Section 430, which is in Div 5, provides in sub-s (1) as follows:

> " Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:
>
> (a) sets out the decision of the Tribunal on the review; and
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based."

16 Part 8 of the Act provides with respect to the review of certain decisions by the Federal Court, including decisions of the Tribunal[10]. The grounds upon which a decision may be reviewed are set out in s 476(1) which provides that, subject to sub-s (2), which is not presently relevant:

> "... application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:
>
> (a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
>
> (b) that the person who purported to make the decision did not have jurisdiction to make the decision;

---

6 Section 423.

7 Sections 425 and 429.

8 Sections 427 and 428.

9 Sections 425 and 426.

10 Section 475(1)(b).

(c) that the decision was not authorised by this Act or the regulations;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

(f) that the decision was induced or affected by fraud or by actual bias;

(g) that there was no evidence or other material to justify the making of the decision."

17 The grounds specified in ss 476(1)(d) and (g) of the Act – improper exercise of power and want of evidence – are circumscribed, respectively, by sub-ss (3) and (4) of that section. It is necessary to refer only to sub-s (3) which provides:

" The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:

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

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

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

but not as including a reference to:

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

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

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

(g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c)."

Background facts and the Tribunal's decisions

Ms Yusuf

18 Ms Yusuf sought a protection visa on the basis that she was a refugee as defined in the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together referred to as "the Convention")[11]. More particularly, she claimed she had a well-founded fear of persecution on the ground of race if returned to Somalia.

19 In support of her claim that she was a refugee as defined in the Convention, Ms Yusuf gave an account of her home in Mogadishu being invaded and of her husband being attacked by members of another clan, the Hawiye. As a result, she claimed, her husband had to run away and she and her children were left behind. She also claimed that, on two later occasions, she was attacked by members of the Hawiye clan when she left her home to go shopping. On both occasions, she said, she was rescued by neighbours who were also members of the Hawiye clan.

20 In a supplementary statement, Ms Yusuf claimed that her sister and three of her sister's children had been killed by members of the Hawiye. According to that statement, her sister's husband and one child survived and, in accordance with tradition, she was required to marry and, in fact, married her sister's husband.

21 The Tribunal rejected Ms Yusuf's claims with respect to her sister and her sister's children but accepted that she had twice been attacked by members of the Hawiye clan. However, the Tribunal found that her clan membership was not the motive for those attacks. In so finding, the Tribunal noted that there was advice from the Department of Foreign Affairs and Trade that the Abaskul clan, of which Ms Yusuf was a member, was not targetted by the Hawiye. The Tribunal also noted that, on the occasions when she was attacked, Ms Yusuf had been rescued by members of the latter clan.

22 No finding was made by the Tribunal with respect to Ms Yusuf's claim that her home had been attacked and her husband forced to run away. This notwithstanding, the Tribunal held that "neither [Ms Yusuf's] individual

---

11 Article 1A(2) defines a refugee as any person who:

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

circumstances nor her membership of the Abaskul clan expose[d] her to a real chance of ... persecution" as required by the definition of "refugee" in the Convention. Accordingly, Ms Yusuf was not entitled to a protection visa[12].

Mr Israelian

23 Mr Israelian's application for a protection visa was based on the claim that he feared persecution if returned to Armenia. According to his application, that persecution would be the result of his failure to answer a call-up notice for military service. He said that he failed to answer the call-up notice because of his conscientious objection to all war and, also, because of his objection to being involved in the Nagorno-Karabakh conflict. Additionally, he did not respond to the call-up notice because, having married an Australian, he was then living in Australia and did not expect that he would have to return to Armenia.

24 In his submissions to the Tribunal, Mr Israelian contended that he was a refugee as defined in the Convention because his persecution would stem from his political opinions which both favoured Communism and opposed the Nagorno-Karabakh conflict and, also, from his membership of a particular social group comprised of "deserters and/or draft evaders". In elaboration of that latter claim, Mr Israelian stated that he would be treated as a deserter, imprisoned and forced to serve at the front line. Moreover, he said that his failure to answer his call-up notice would result in his being denied a passport with the consequence that he would not be able to work or obtain accommodation in Armenia.

25 The Tribunal found that Mr Israelian had "no genuine subjective fears [with respect to] his support of the Communist Party, other than his fears in respect to the war over [Nagorno-Karabakh]." It also found that he was not opposed to all war and that his opposition to the war over Nagorno-Karabakh was not based on "ethical, moral or political grounds" but on "a desire to avoid personal danger". The latter finding was made in a context in which there was material indicating that the United Nations High Commissioner for Refugees ("the High Commissioner") had issued an order to the effect that Armenian draft resisters should be given refugee status. Further, the Tribunal concluded that, even if Mr Israelian were a conscientious objector, "his punishment for avoiding his call-up notice would not be motivated by a Convention reason but would be the application of a law of common application".

---

12 A criterion for the issue of a protection visa is that the Minister or his or her delegate is satisfied that the applicant is a person to whom Australia has protection obligations under the Convention: the Act, ss 36(2) and 65; Migration Regulations 1994 (Cth), reg 2.03, Sched 2, cl 866.221.

26 By reason of the findings set out above, the Tribunal concluded that Mr Israelian was not a refugee as defined in the Convention and, thus, not entitled to a protection visa.

The Federal Court decisions

27 At first instance, it was held by the Federal Court (Finn J) that Ms Yusuf's claim that her home had been invaded and her husband forced to flee was a material question of fact upon which the Tribunal was required by s 430(1)(c) of the Act to make findings in the written statement setting out its decision. Because it had not, it was held pursuant to s 476(1)(a) that a procedure required by the Act in connection with the making of a decision had not been observed. Accordingly, the Tribunal's decision was set aside. As already mentioned, that decision was upheld by the Full Federal Court.

28 In the case of Mr Israelian, it was held by the Federal Court (R D Nicholson J), at first instance, that his application for review should be allowed and the Tribunal's decision set aside because the Tribunal failed to consider whether "the International Community through the [High Commissioner] had condemned the military action in [Nagorno-Karabakh] as contrary to basic rules of human conduct and whether [in] all the circumstances of the matter, deserters and/or draft evaders in Armenia were a particular social group; that is defined, united or linked otherwise than by the fear of the allegedly persecutory law."

29 Because of the Tribunal's failure to consider the matters set out above, it was held that "[its] decision [with respect to Mr Israelian] involved an error of law, being an error involving an incorrect interpretation of the applicable law." Further, it was held that that failure was a failure to set out findings on material questions of fact as required by s 430(1)(c) of the Act and, therefore, a failure to observe procedures required by the Act. That latter holding was affirmed by the Full Court. The Full Court had no reason to consider and, in fact, did not consider whether the decision also involved an error of law.

Section 430 of the Act and procedures required by the Act

30 At the relevant time, s 430 of the Act was headed "Refugee Review Tribunal to record its decisions etc and to notify parties". Logically, the making of a decision and the recording of it are distinct steps. Were the ground of review allowed by s 476(1)(a) expressed in terms of procedures to be observed in the making of a decision, there might, perhaps, be some scope for an argument that it does not extend to procedures to be observed in recording a decision. However, the phrase used in s 476(1)(a) is "in connection with the making of the decision" – a phrase signifying a less precise connection than "in the making of the decision". Moreover, s 430 is not concerned solely with the recording of a decision. In terms,

it is also concerned with the "prepar[ation of] a written statement that ... sets out the decision of the Tribunal".

31 Notwithstanding that the making of a decision and the recording of a decision are logically distinct steps, the making of a decision and the preparation of a written statement setting out that decision often constitute a single process. Given that that is so and given, also, that the expression used in s 476(1)(a) is "in connection with the making of [a] decision", there is no basis for reading s 476(1)(a) as not extending to the procedures required by s 430 of the Act. However, that is not, of itself, determinative of the question raised by the Minister's appeals: there remains a question as to the nature and extent of the procedure required by s 430(1)(c).

32 The issue of substance presented by the Minister's appeals is whether, properly construed, s 430(1)(c) of the Act requires the Tribunal to state its findings on what it considers to be material questions of fact or whether, as was contended for Ms Yusuf and Mr Israelian, it requires the Tribunal's written statement to conform to some objective standard to be ascertained by reference to the particular application and the material available to the Tribunal in relation to that application.

33 Clearly enough, pars (a) and (b) of s 430(1), which require the Tribunal to set out "the decision of the Tribunal" and "the reasons for [that] decision", refer, respectively, to the Tribunal's decision and the Tribunal's reasons for its decision. In that context and in the absence of any requirement that the Tribunal either identify the legal or factual issues presented by the application or specify the material before it, it is difficult to construe s 430(1)(c) as obliging the Tribunal to do more than set out its findings on what it considers to be material questions of fact.

34 Of more significance to the construction of s 430(1)(c) of the Act is the consideration that, in recording its decision, the Tribunal can only set out the findings which it makes. Conversely, findings which are not made cannot be set out. Once that is accepted, s 430(1)(c) must be construed as requiring the Tribunal only to set out its findings on what it considers material questions of fact.

35 The corollary to the construction of s 430(1)(c) of the Act set out above is that it is to be inferred from the absence of a reference to, or, a finding with respect to some particular matter that the Tribunal did not consider that matter to be material. As will later appear, there may be cases where that will indicate error of a kind that will ground review under s 476(1) of the Act or, even, jurisdictional error which will ground relief under s 75(v) of the Constitution. For the moment, however, it is sufficient to note that the failure of the Tribunal to make a finding with respect to a particular issue is not, of itself, a failure to observe procedures required by the Act. Thus, the Minister's appeals must succeed unless the orders of the Full Federal Court are to be upheld by reference to one or more of the grounds

specified in the notices of contention filed on behalf of Ms Yusuf and Mr Israelian, respectively.

Failure to make findings may be reviewable or jurisdictional error

36 The question whether the failure of the Tribunal to deal with some particular aspect of an applicant's claim reveals reviewable error for the purposes of s 476 of the Act necessitates immediate reference to s 476(3)(e). That paragraph limits the ground of review allowed to the Federal Court by s 476(1)(d) – improper exercise of power – so that it does not extend to the failure of the Tribunal to take a relevant consideration into account. However, no other ground of review is limited in that way.

37 As already indicated, if in its written statement setting out its decision, the Tribunal fails to refer to or fails to make findings with respect to a relevant matter, it is to be assumed, consistently with the clear directive in s 430 of the Act, that the Tribunal has not regarded that question as material. And depending on the matter in issue and the context in which it arises, that may or may not disclose reviewable error. For example, the failure to make a finding on a particular matter raised by the applicant may, in some cases, reveal an error of law for the purposes of s 476(1)(e) of the Act.

38 Moreover, as McHugh, Gummow and Hayne JJ point out in their judgment, an error of law which will ground review by the Federal Court under s 476(1)(e) of the Act may, in some cases, also have the consequence that there has been what is known in the jurisprudence relating to relief under s 75(v) of the Constitution as "jurisdictional error". If so, the failure to make a finding on the matter in issue may have the result that the decision is reviewable by the Federal Court either on the ground that the Tribunal lacked jurisdiction (s 476(1)(b)) or on the ground that its decision was not authorised by the Act (s 476(1)(c)). Clearly, that will be so if the error is such that the Tribunal exceeds its jurisdiction.

39 The terms of ss 476(1)(b) – "[no] jurisdiction to make the decision" – and (c) – "the decision was not authorised by [the] Act" – direct attention to errors which lead the Tribunal to exceed its jurisdiction. However, as I pointed out in *Abebe v Commonwealth*, the notion of jurisdictional error for the purposes of relief under s 75(v) of the Constitution "is not confined to situations in which a tribunal either lacks jurisdiction or exceeds its jurisdiction" but extends to situations in which it "wrongly den[ies] the existence of its jurisdiction or ... mistakenly place[s] limits on its functions or powers"[13]. And in that case, I indicated that error

---

13 (1999) 197 CLR 510 at 552 [107], [108].

of that kind was reviewable under s 75(v), although "not reviewable by the Federal Court in proceedings under Pt 8 of the Act"[14].

40 The statement that errors involving the wrong denial of jurisdiction or the placing of limits on a tribunal's powers or functions are not reviewable under s 476(1) of the Act requires qualification. That is because notions that have been developed in relation to the grant of mandamus and prohibition, whether by way of prerogative relief or pursuant to s 75(v) of the Constitution, do not have precise equivalents in the scheme established by Pt 8 of the Act or, indeed, in other statutory schemes providing for judicial review of administrative decisions.

41 For the purposes of mandamus and prohibition, a tribunal is said to have failed to exercise its jurisdiction if it has wrongly denied the existence of its jurisdiction or mistakenly placed limits on its functions or powers. If the tribunal wrongly holds it has no jurisdiction or is not authorised to make a particular decision, there is said to be "an actual failure to exercise jurisdiction". On the other hand, there is said to be a "constructive failure to exercise jurisdiction" when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form[15]. A constructive failure to exercise jurisdiction may be disclosed by the tribunal taking an irrelevant consideration into account. Equally, it may be disclosed by the failure to take a relevant matter into account.

42 Although the notion of constructive failure to exercise jurisdiction developed in relation to the grant of prerogative relief and, later, the grant of relief under s 75(v) of the Constitution, it is one that has some bearing on statutory schemes for judicial review of administrative decisions of the kind set out in Pt 8 of the Act. For example, it may be that the failure of the Tribunal to take a particular matter into account indicates that, in the circumstances, the Tribunal has

---

14 (1999) 197 CLR 510 at 552 [108].

15 See *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 per Jordan CJ. See also *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-268 per Aickin J; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 350 per Wilson, Deane and Gaudron JJ; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 143-144 per Brennan J; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1356 [31] per Gleeson CJ, Gaudron and Hayne JJ; 174 ALR 585 at 594-595.

misunderstood its duty or applied itself to the wrong question and has, on that account, failed to conduct a review as required by s 414 of the Act[16].

43 The power of the Tribunal to affirm, vary or set aside a decision of the Minister or his or her delegate is a power which can only be exercised when it has conducted a review of the decision in question. So much follows from the direction in s 414(1) that, if a valid application is made, the Tribunal "must review the decision". So, too, it is to be discerned from s 430 which speaks of a "decision on a review". A decision made other than on review is not a decision authorised by the Act. So, too, a decision made other than on a review of the kind required by the Act is not a decision that is authorised by the Act.

44 It follows from what has been written above that the failure of the Tribunal to make findings with respect to a particular matter may, at the same time, reveal failure to exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act. And the latter constitutes reviewable error for the purposes of ss 476(1)(b) and (c) of the Act.

Notices of contention

Ms Yusuf

45 On behalf of Ms Yusuf, it was contended that the Minister's appeal should be dismissed and the Full Court decision upheld on the basis that, independently of s 430, the Tribunal's failure to make any finding with respect to the claimed attack on her home constitutes reviewable error for the purposes of ss 476(1)(a), (b), (c), (d) and/or (e) of the Act.

46 So far as concerns the contention that the Tribunal's decision is reviewable under s 476(1)(a), it was put that there was a failure to conduct a review as required by s 414 and, accordingly, a failure to observe procedures required by the Act. In my view, that contention must be rejected. The conduct of a review is no mere procedural requirement. It is the jurisdictional precondition to the exercise of the power to affirm, vary, or set aside the decision under review. If there was a failure to conduct a review as required by the Act, the resulting decision was not authorised by the Act and is reviewable under ss 476(1)(b) or (c), but not on the ground that "procedures ... were not observed".

47 Nor, in my view, can the decision of the Federal Court be upheld on the basis that the Tribunal's decision involves an error of law for the purposes of

---

16 Subject to exceptions not presently relevant, s 414(1) of the Act provides that "if a valid application is made under section 412 for review of an RRT-reviewable decision, the Tribunal must review the decision."

s 476(1)(e) of the Act. No such error is revealed. All that is revealed is that the Tribunal failed to take a particular matter into account, albeit that that matter was one of considerable relevance to Ms Yusuf's claim that she feared persecution if returned to Somalia. And because the failure to take a relevant matter into account is excluded from the ground of review allowed to the Federal Court by s 476(1)(d) – improper exercise of power – its decision cannot be upheld on that basis.

48 It is necessary now to consider whether the decision of the Full Federal Court should be upheld on the basis either that the Tribunal did not have jurisdiction (s 476(1)(b)) or that its decision was not authorised by the Act (s 476(1)(c)). In this regard it is to be noted that, relevantly, the Tribunal's jurisdiction is to review the decision of the Minister or his or her delegate refusing a protection visa. Correspondingly, the Tribunal has a duty to review the decision in question, as is made clear by the direction in s 414(1) of the Act that "the Tribunal must review the decision" if a valid application is made for review.

49 Clearly, a decision can only be reviewed if regard is had to such of the material that was available to the primary decision-maker as might be decisive of the outcome of the application. Ms Yusuf's claim that her house had been invaded was, in my view, material of that kind.

50 Ms Yusuf's claim that she had a well-founded fear of persecution was made by reference to events involving herself and her family which were capable of being found to constitute past persecution[17]. She claimed to be directly involved in three of those events. Any one of the events in which she claimed to be involved was capable of being regarded by the Tribunal as having given rise to a well-founded fear of persecution for reasons of race. To find that two only of those events were not racially motivated, was to leave unresolved an aspect of her claim which could have affected its outcome. More precisely, it was to leave an aspect of the delegate's decision unreviewed.

51 The failure of the Tribunal to make findings with respect to Ms Yusuf's claim that her home was attacked by members of the Hawiye clan has the consequences that the Tribunal lacked jurisdiction to affirm the earlier decision of the Minister's delegate and, also, that its decision was not authorised by the Act.

Mr Israelian

---

17 As to the relevance of past events to which a person has been subjected, see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 387 per Mason CJ; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 74 ALJR 1556 at 1570 [83] per McHugh J; 175 ALR 585 at 604; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 at [66]-[68] per Gaudron J.

52 It was contended on behalf of Mr Israelian that the failure of the Tribunal to deal with his claim that he feared persecution by reason of his membership of a social group comprised of deserters and/or draft evaders reveals an error of law for the purposes of s 476(1)(e) of the Act. It was further contended that the decision of the Tribunal was not authorised by the Act and, also, that it was made without jurisdiction.

53 The contentions advanced on behalf of Mr Israelian were advanced solely by reference to the Tribunal's failure to deal with the question whether Mr Israelian was a member of a particular social group comprised of deserters and/or draft resisters. No argument was addressed to the material suggesting that the High Commissioner had condemned the military action in Nagorno-Karabakh, a matter that R D Nicholson J thought should have been considered by the Tribunal.

54 Although it is not strictly necessary to deal with the issue, it may be noted that, in my view, the Tribunal's finding that Mr Israelian's opposition to military service was not based on "ethical, moral or political grounds" rendered any further question with respect to the Nagorno-Karabakh conflict irrelevant. That being so, failure to consider the nature of the Nagorno-Karabakh conflict reveals no reviewable error for the purposes of s 476(1) of the Act.

55 Nor, in my view, does the failure of the Tribunal to make a finding as to whether or not Mr Israelian was a member of a particular social group comprised of deserters and/or draft resisters reveal reviewable error for the purposes of s 476(1) of the Act. The Tribunal's conclusion that the punishment Mr Israelian would face "for avoiding his call-up notice ... would be the application of a law of common application" necessarily involves the consequence that that punishment would not be discriminatory and, hence, would not constitute persecution[18]. In that context, the question of Mr Israelian's membership of a particular social group comprised of deserters and/or draft resisters became irrelevant.

Relief under s 75(v) of the Constitution

56 In the case of Ms Yusuf, the Minister's appeal must be dismissed. Accordingly, consideration of her claim for relief under s 75(v) of the Constitution is unnecessary. In the case of Mr Israelian, the considerations which lead to the

---

18 See as to the need for persecution to involve discriminatory conduct, *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 per Mason CJ, 429-430 per McHugh J; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

conclusion that the Tribunal's decision does not disclose reviewable error for the purposes of s 476(1) of the Act also have the consequence that it does not involve jurisdictional error for the purposes of s 75(v) of the Constitution.

Orders

57 Ms Yusuf

1. The appeal should be dismissed with costs.

2. The application for relief under s 75(v) of the Constitution should be dismissed. There should be no order as to costs.

58 Mr Israelian

1. The appeal should be allowed. The orders of the Full Federal Court, other than with respect to costs, should be set aside. In lieu, the appeal to that Court should be allowed and the orders of R D Nicholson J set aside, other than with respect to costs, and Mr Israelian's application to the Federal Court dismissed.

2. The application for relief under s 75(v) of the Constitution should be dismissed. There should be no order as to costs.

59 McHUGH, GUMMOW AND HAYNE JJ. The facts and circumstances which give rise to the present proceedings, and the relevant statutory provisions, are set out in the reasons for judgment of Callinan J. We do not repeat them except to the extent that is necessary to explain the reasons for the conclusions we have reached.

60 The central questions in the proceedings were said to be whether the Refugee Review Tribunal was obliged to make findings on material questions of fact and, if the Tribunal was obliged to do so, whether failure to make such findings was a ground for review by the Federal Court of Australia under s 476 of the *Migration Act* 1958 (Cth) ("the Act") or was a ground upon which this Court might grant relief under s 75(v) of the Constitution.

61 The formulation of the first of these questions, and its references to "obligation" and to "material" questions of fact, stemmed from a series of decisions of the Federal Court about the operation of ss 430 and 476(1)(a) of the Act[19] which culminated in the decision of the Full Court of the Federal Court (constituted as a bench of five members of the Court) in *Minister for Immigration and Multicultural Affairs v Singh*[20]. Although *Singh* was decided after the Full Court made the decisions under appeal in the present matters[21], it is convenient to use the decision in *Singh* to identify why this first question was formulated as it was.

---

19 *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28; *Logenthiran v Minister for Immigration and Multicultural Affairs* [1998] FCA 1691; *Perampalam v Minister for Immigration and Multicultural Affairs* (1999) 84 FCR 274; *Thevendram v Minister for Immigration and Multicultural Affairs* [1999] FCA 182; *Ahmed v Minister for Immigration and Multicultural Affairs* [1999] FCA 811; cf *Addo v Minister for Immigration and Multicultural Affairs* [1999] FCA 940; *Sivaram v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 379; *Xu v Minister for Immigration and Multicultural Affairs* (1999) 95 FCR 425; *Doss v Minister for Immigration and Multicultural Affairs* [1999] FCA 1780.

20 (2000) 98 FCR 469.

21 *Minister for Immigration and Multicultural Affairs v Yusuf* (1999) 95 FCR 506; *Minister for Immigration and Multicultural Affairs v Israelian* [1999] FCA 649.

A "duty" to make findings

62 In *Singh*, four members of the Full Court (Black CJ, Sundberg, Katz and Hely JJ) concluded[22] that s 430 of the Act "calls for a recording of matters that are essentially matters of fact, namely the decision to which the [Tribunal] came, the actual reasons for coming to that decision, the findings of fact that were actually made and the material on which those findings were based". To this general proposition, however, their Honours added a qualification[23]: that "[i]f the [Tribunal] fails to make a finding on a fact which is in truth … a material fact, then s 430(1)(c) will not have been complied with, even though the [Tribunal] has recorded its findings in relation to the facts before it that it regarded as material." This, so their Honours concluded[24], is because "the [Tribunal] is under a duty to make, and to set out, findings on all matters of fact that are objectively material to the decision it is required to make".

63 It is appropriate for a court to speak of a decision-maker being "obliged", or having a "duty", to make findings of fact only if that obligation or duty can be enforced in the courts. It is necessary, therefore, to examine the content of the asserted duty and to consider whether established processes of judicial review of administrative action provide a remedy to persons affected by a decision if there has not been a finding on a material matter of fact. That examination must begin from the premise that "[t]o expose all findings of fact, or the generality of them, to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government."[25]

64 Two features of the asserted duty to make findings may be noticed. First, the duty is said to relate to the decision which the Tribunal is *required* to make rather than to the decision the Tribunal *actually* made. It is, therefore, a duty whose content is to be measured against what the decision-maker was statutorily obliged to do in the particular case. The inquiry focuses upon what should have been done, not on what was done. The findings to which attention is directed are those that ought to have been made. That might be thought to go so far as allowing or requiring inquiry about not only the *process* of proper decision-making, but also the *correctness* of what was decided.

---

22 (2000) 98 FCR 469 at 480 [44].

23 (2000) 98 FCR 469 at 481 [47].

24 (2000) 98 FCR 469 at 481 [48].

25 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341 per Mason CJ.

65 Secondly, the facts about which findings must be made are said to be those which, on later judicial inquiry, are found to be objectively material, not those which the Tribunal considered to be material. It follows that inquiring whether the duty has been performed would require examination of the whole of the Tribunal's fact-finding process. The function of fact-finding would no longer be left to the Tribunal. Moreover, as the course of decisions in the Federal Court shows, the reference to "objectively material" facts is not without difficulties. Does it, as the Full Court of the Federal Court held in *Xu v Minister for Immigration and Multicultural Affairs*[26], require the making of findings on ultimate facts rather than primary facts? Is materiality to be determined by reference to the facts on which the Act expressly or impliedly requires the decision-maker to make findings? Or is it, as the Full Court held in *Singh*[27], to be determined by reference to the way in which the Tribunal in fact approached the case? The wider the definition of "material", the wider the inquiry that must be made into the Tribunal's fact-finding.

66 It is necessary to begin consideration of whether there is a duty of the kind suggested by examining s 430. Only that section deals expressly with findings of fact by the Tribunal. Further, in the various decisions we have mentioned, the Federal Court identified only this section as the source of the duty. Counsel for Mr Israelian relied upon the reasoning adopted in those decisions.

67 Section 430(1) of the Act obliged the Tribunal to prepare a written statement that does four things:

> "(a) sets out the decision of the Tribunal on the review; and
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based."

As was rightly observed in the joint judgment in *Singh*[28], this section calls for a recording of matters that are matters of fact. In particular, s 430(1)(c) requires the Tribunal to set out the findings of fact which it made. But does it require more?

---

26 (1999) 95 FCR 425.

27 (2000) 98 FCR 469 at 482 [54].

28 (2000) 98 FCR 469 at 480 [44].

Does it oblige the Tribunal to make findings on any and every matter of fact objectively material to the decision which it was required to make?

68 Section 430 does not expressly impose such an obligation. In its terms, it requires no more than that the Tribunal *set out* the findings which it *did* make. Neither expressly nor impliedly does this section require the Tribunal to *make*, and then set out, some findings additional to those which it actually made. In *Singh*, significance was attached to the use of the word "material" in s 430(1)(c). It was said[29] that "material" in the expression "material questions of fact" must mean "objectively material". Even if that were right, it would by no means follow that the Tribunal was bound to set out findings that it did not make. But it is not right to read "material" as providing an objective or external standard of materiality. A requirement to set out findings and reasons focuses upon the subjective thought processes of the decision-maker. All that s 430(1)(c) obliges the Tribunal to do is set out its findings on those questions of fact which *it* considered to be material to the decision which it made and to the reasons *it* had for reaching that decision.

69 It is not necessary to read s 430 as implying an obligation to *make* findings in order for it to have sensible work to do. Understanding s 430 as obliging the Tribunal to set out what were its findings on the questions of fact it considered material gives the section important work to do in connection with judicial review of decisions of the Tribunal. It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that conclusion. Similarly, a court which is asked to review the decision is able to identify the Tribunal's reasons and the findings it made in reaching that conclusion. The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material[30]. This may reveal some basis for judicial review by the Federal Court under Pt 8 of the Act, or by this Court in proceedings brought under s 75(v) of the Constitution. For example, it may reveal that the Tribunal made some error of law of the kind mentioned in s 476(1)(e) of the Act, such as incorrectly applying the law to the facts found by the Tribunal. It may reveal jurisdictional error[31]. The Tribunal's identification of what *it* considered to be the material questions of fact may

---

29 (2000) 98 FCR 469 at 481 [47]-[48].

30 *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 446 per Brennan J; *Sullivan v Department of Transport* (1978) 20 ALR 323 at 348-349 per Deane J, 353 per Fisher J; cf *Fleming v The Queen* (1998) 197 CLR 250 at 262-263 [28]-[29].

31 *Craig v South Australia* (1995) 184 CLR 163 at 179.

demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration[32].

The "duty" to make findings and traditional grounds of review

70 Counsel for Ms Yusuf submitted that the Tribunal's duty to make findings of fact arose not just from s 430, but from a consideration of the structure of the Act taken as a whole, including the role of the Tribunal and the task it performs in reviewing decisions by the Minister. Section 47 requires the Minister (whose powers may be delegated by writing under s 496) to consider a valid application for a visa, including a protection visa, a class of visa established by s 36. Section 54 obliges the Minister to have regard to all the information in the application. After considering the application, the Minister is required by s 65 to grant or refuse the visa.

71 The task of the Tribunal is to review the decisions of the Minister, or a delegate of the Minister, to refuse to grant a protection visa under s 36 of the Act[33]. In carrying out that task, the Tribunal may exercise all the powers and discretions that are conferred by the Act on the person who made the decision[34]. It may affirm the decision or set it aside and substitute a new decision[35] and, if it takes the latter course, the decision is taken to be a decision of the Minister[36]. As the Act stood at the relevant time, the Tribunal was obliged to conduct its review in accordance with Div 4 of Pt 7 of the Act and unless it was prepared to make the decision on the review that was most favourable to the applicant[37] it was obliged to give the applicant an opportunity to appear before it to give evidence[38] and to give the applicant notice that he or she could ask the Tribunal to obtain oral evidence from others[39].

---

32 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

33 A decision which s 411(1)(c) provides is an "RRT-reviewable decision".

34 s 415(1).

35 s 415(2)(a) and (d).

36 s 415(3).

37 s 424(1).

38 s 425(1)(a).

39 s 426(1)(b), (2) and (3).

72 In interpreting these provisions collectively as imposing an obligation on the Tribunal to make findings, counsel for Ms Yusuf relied upon *Minister for Immigration and Ethnic Affairs v Guo*[40] and what was said about the significance that consideration of past events may have for determining whether future persecution is likely. In particular, he referred to the statement in the joint judgment that "[i]n the course of determining whether there was a real chance of persecution … the Tribunal made findings about past events … as it was entitled and, *indeed, bound* to do"[41]. This, so it was submitted, was consistent only with the Tribunal having a duty of the kind alleged.

73 It is, of course, essential to begin by considering the statutory scheme as a whole. To that extent the submission is right. On analysis, however, the asserted duty to make findings may be simply another way of expressing the well-known duty to take account of all relevant considerations. The considerations that are, or are not, relevant to the Tribunal's task are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of the case that the Tribunal is called on to consider[42]. In that regard it is important to recall, as Brennan J said in *Attorney-General (NSW) v Quin*[43]:

> "The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*[44]: 'It is, emphatically, the province and duty of the judicial department to say what the law is.' The duty and jurisdiction of the court to review administrative action do 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."

---

40 (1997) 191 CLR 559.

41 (1997) 191 CLR 559 at 574 (emphasis added).

42 *Abebe v Commonwealth* (1999) 197 CLR 510 at 579 [195] per Gummow and Hayne JJ.

43 (1990) 170 CLR 1 at 35-36.

44 (1803) 1 Cranch 137 at 177 [5 US 87 at 111].

74 This does not deny that considerations advanced by the parties can have some importance in deciding what is or is not a relevant consideration. It may be, for example, that a particular statute makes the matters which are advanced in the course of a process of decision-making relevant considerations for the decision-maker. What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts.

75 As was pointed out in argument, applicants for protection visas often, but not invariably, claim that they have been subject to persecution. In *Minister for Immigration and Ethnic Affairs v Guo*[45], six members of the Court said:

> "In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events."

If the Tribunal, confronted by claims of past persecution, does not make findings about those claims, the statement of its reasons and findings on material questions of fact may well reveal error. The error in such a case will most likely be either an error of law (being an erroneous understanding of what constitutes a well-founded fear of persecution) or a failure to take account of relevant considerations (whether acts of persecution have occurred in the past)[46]. It is not accurate, however, to say that the Tribunal is, therefore, under a duty to make all material findings of fact, if, as seems probable, that formulation of the duty is intended to extend the ambit of judicial review beyond accepted and well-established limits. If it is not intended to have that effect, it is not useful to formulate the duty in that way. Rather, the relevant inquiry remains whether the Tribunal has made an error of law, has failed to take account of relevant considerations, or has taken account of irrelevant considerations.

Judicial review under Pt 8 of the Act

---

45 (1997) 191 CLR 559 at 575 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

46 *O'Brien* (1985) 155 CLR 422 at 446 per Brennan J; *Sullivan* (1978) 20 ALR 323 at 348-349 per Deane J, 353 per Fisher J.

76 Framing the inquiry in these terms presents some further questions about the operation of those provisions of the Act that deal with review of decisions of the Tribunal by the Federal Court. The various provisions of s 476 enumerate the grounds on which judicial review of Tribunal decisions may be sought. The section does so in a way that, at least at first sight, allows more limited grounds than the grounds on which judicial review may ordinarily be sought.

77 The Federal Court granted review in these cases on the basis that, by reason of the Tribunal's failure to make findings, the Tribunal had failed to comply with "procedures that were required by this Act or the regulations to be observed in connection with the making of the decision"[47]. It is implicit in what has already been said about s 430 that a complaint that the Tribunal has not made a finding of fact on a material question cannot support review on this ground. An alleged failure to *make* a finding of fact on a material question is not a failure to observe a "procedure … required" by the Act. If it is an error, it is an error of substance. Moreover, it may greatly be doubted that an obligation to *set out* findings could be said to be a procedure which is to be observed in connection with the *making* of the decision in question, as the setting out of the decision and reasons assumes that the decision has already been made. It is, however, enough to say that the conclusion that, so far as now relevant, s 430 requires only the recording of what *was* found and does not impose any duty to *make* findings, means that an asserted failure to make findings is not a breach of s 430. Accordingly, s 476(1)(a) is inapplicable.

78 That is not to say that the Federal Court has no jurisdiction to deal with cases in which it is alleged that the Tribunal failed to make some relevant finding of fact. For the reasons stated earlier, a complaint of that kind will often amount to a complaint of error of law or of failure to take account of relevant considerations. It is necessary, therefore, to consider some further aspects of s 476, especially s 476(1)(b), (c) and (e) and s 476(3)(d) and (e). Counsel for Ms Yusuf, in the alternative to par (a) upon which the Full Court had based its decision, relied upon one or more of pars (b), (c) and (e) of s 476(1).

79 Paragraphs (b), (c) and (e) of s 476(1) give as grounds for review by the Federal Court of a decision of the Tribunal:

> "(b) that the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (c) that the decision was not authorised by this Act or the regulations;

---

47 s 476(1)(a).

…

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision".

Before considering these grounds, it is necessary to notice the other provisions in s 476, especially sub-ss (2), (3) and (4). Section 476(2) excludes grounds of breach of natural justice and unreasonable exercise of power from the grounds for review available in the Federal Court. That sub-section is cast in general terms and is, therefore, to be read as qualifying the whole of s 476(1).

80 By contrast, the limitations set out in s 476(3) and (4) have more limited operation. Section 476(3) limits the construction of the reference in s 476(1)(d) to improper exercise of power by excluding questions of relevant and irrelevant considerations from the ambit of that ground. That qualification does not apply, however, to the other paragraphs of s 476(1) and it casts no light on how those paragraphs should be understood. Similarly, s 476(4) has no relationship with s 476(1)(b), (c) and (e). Sub-section (4) qualifies the "no evidence" ground of review in s 476(1)(g) by limiting its operation to cases in which the decision-maker was required by law to reach a decision only if a particular matter was established, and there was no evidence or other material from which the person could reasonably be satisfied that the matter was established[48] or if the decision-maker based the decision on the existence of a fact which did not exist[49]. Again, this casts no light on how pars (b), (c) and (e) of s 476(1) should be understood.

81 The Minister submitted that the use of overarching concepts, such as "jurisdictional error", is inconsistent with a statutory scheme which enumerates both specific grounds of review that are available in the Federal Court, and others that are not. It was therefore submitted, for example, that par (b) of s 476(1), which speaks of "the person" who purported to make the decision not having "jurisdiction" to make the decision, extended only to matters in which the Tribunal, or the person who constituted the Tribunal, was not properly authorised to make the decision (because, for example, the Tribunal was not constituted in a proper way).

---

48 s 476(4)(a).

49 s 476(4)(b).

82 It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*[50], if an administrative tribunal (like the Tribunal)

> "falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

"Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive[51]. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law[52].

83 No doubt full weight must be given to s 476(3) and the limitations which it prescribes in the construction of improper exercise of power in par (d) of s 476(1). Equally, however, it is important to recognise that these limitations, unlike those prescribed by s 476(2), are limitations on only one of the grounds specified in s 476(1). All this being so, there is no reason to give either par (b) or par (c) of s 476(1) some meaning narrower than the meaning conveyed by the ordinary usage of the words of each of those paragraphs. In particular, it is important to recognise that, if the Tribunal identifies a wrong issue, asks a wrong question, ignores relevant material or relies on irrelevant material, it "exceeds its authority

---

50 (1995) 184 CLR 163 at 179.

51 cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52; 176 ALR 219.

52 *Craig* (1995) 184 CLR 163 at 179.

or powers". If that is so, the person who purported to make the decision "did not have jurisdiction" to make the decision he or she made, and the decision "was not authorised" by the Act.

84 Moreover, in such a case, the decision may well, within the meaning of par (e) of s 476(1), involve an error of law which involves an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. That it cannot be said to be an *improper* exercise of power (as that expression is to be understood in s 476(1)(d), read in light of s 476(3)) is not to the point. No doubt it must be recognised that the ground stated in par (e) is not described simply as making an error of law. The qualification added is that the error of law involves an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. That qualification emphasises that factual error by the Tribunal will not found review. Adopting what was said in *Craig*, making an erroneous finding or reaching a mistaken conclusion is not to make an error of law of the kind with which par (e) deals. That having been said, the addition of the qualification to par (e) is no reason to read the ground as a whole otherwise than according to the ordinary meaning of its language. If the Tribunal identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material in such a way as affects the exercise of its powers, that will very often reveal that it has made an error in its understanding of the applicable law or has failed to apply that law correctly to the facts it found. If that is so, the ground in s 476(1)(e) is made out.

85 Paragraphs (b), (c) and (e) would thus each be engaged in such a case and the Federal Court would have jurisdiction under Pt 8 of the Act to review the Tribunal's decision. This Court would also have original jurisdiction in the matter and could grant relief under s 75(v).

86 We turn then to consider the particular complaints made in the present matters.

Yusuf

87 The essence of Ms Yusuf's complaint was that the Tribunal made no finding about whether one of the three principal incidents upon which she relied as revealing past acts of persecution was capable of giving rise to a well-founded fear of persecution. She had said that there was an invasion of her house by members of the Hawiye clan during which her husband (and perhaps, she) had been attacked and her husband had been obliged to flee. The Tribunal mentioned an attack on Ms Yusuf's husband in its s 430 statement but did not, in terms, describe a house invasion.

88 The house invasion was said by Ms Yusuf to be an important incident demonstrating that she had a well-founded fear of persecution for a Convention reason – membership of the particular race or social group constituted by her Abaskul clan. In her evidence to the Tribunal Ms Yusuf also spoke of two other incidents. In this Court it was submitted that the Tribunal had dealt with those two other incidents but that it had not dealt with the house invasion.

89 For the reasons given earlier, even if it were said that whether this invasion occurred in the manner, and with the consequences, described by Ms Yusuf was a material question of fact, a failure to make a finding about it would not amount to a breach of s 430, for the house invasion was not material to the decision the Tribunal actually made. Nor, in the particular circumstances of this case, does any failure by the Tribunal to make a finding about this matter in its s 430 statement reveal any error of law by the Tribunal or any failure to take account of a relevant consideration.

90 In its "Discussion of Evidence and Findings" the Tribunal began by saying:

> "The Tribunal accepts that the applicant has twice been attacked since the outbreak in 1991 of the civil war in Somalia and that she identified her attackers as being of the Hawiye clan. It notes that the two attacks occurred some time ago and that on each occasion she was assisted by other members of the Hawiye clan."

On its face this amounts to a finding that the Tribunal was persuaded that there had only been two attacks and was not persuaded that there had been more. That view is reinforced by the Tribunal's later reference to "the two isolated occasions the applicant encountered problems" and its reference to her having "twice [come] under attack".

91 Further, in rejecting the argument that the two attacks it accepted had occurred could give rise to a well-founded fear of persecution, the Tribunal made a finding that the Hawiye clan was not targeting the Abaskul clan. This finding, being a finding at a higher level of generality than the question of specific incidents, may well explain why the Tribunal made no detailed finding about the house invasion. That being so, it is not demonstrated that the Tribunal made some error of law. It is not shown that it failed to take account of a relevant matter or that it asked itself the wrong question.

92 The highest point Ms Yusuf's contention reaches, if it is accepted that there were three attacks, is that the Tribunal made an error of fact in concluding, as it did, that there were only two. That does not establish any of the grounds in s 476 or any other ground for judicial review. It follows that the Minister's appeal should be allowed, the orders of the Full Court of the Federal Court save as to costs be set

aside, the appeal to that Court allowed and in lieu the application for review dismissed. Ms Yusuf's application for order nisi should be dismissed. Consistent with the terms on which special leave was granted, the Minister should pay the respondent's costs of the appeal and the orders as to costs made in the courts below should not be disturbed. There should be no order as to the costs of the application for order nisi.

Israelian

93 Mr Israelian contended that the Tribunal failed to make a finding about one of the two bases upon which he claimed to have a well-founded fear of persecution. He claimed that he was a refugee both because of his political opinions (being his conscientious objection to military service in connection with a particular territorial dispute between Armenia and Azerbaijan) and because of his membership of a particular social group (being deserters or draft evaders).

94 The Tribunal found that if, on his return to Armenia, Mr Israelian was punished for not meeting his obligation to give military service it would be "the application of a law of common application, imposed by the authorities regardless of … any political opinion". This, in the opinion of the Tribunal, did not constitute persecution[53]. The Tribunal framed its discussion of the issues in its s 430 statement in terms of Mr Israelian's claim to be a "conscientious objector" and concluded that his expressed views "do not disclose genuine convictions based on ethical, moral or political grounds". It did not, in its reasons, refer expressly to his alleged membership of a social group (being that of deserters or draft evaders) although it expressed its conclusion about unwanted consequences that might happen to him on his return as punishment which "would not be motivated by Convention reasons".

95 The failure to refer to one of the alternative bases on which an applicant for a protection visa based a claim would, in many cases, reveal a failure to take account of relevant considerations or an error of law such as would enable judicial review on the grounds stated in s 476(1)(b), (c) and (e). Cases can, however, readily be imagined where the factual findings relating to one asserted basis for protection necessarily and inevitably denied any other basis for protection.

96 This was said to be such a case. It was submitted on behalf of the Minister that the finding that Mr Israelian was not a conscientious objector inevitably

---

53 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 74 ALJR 775; 170 ALR 553.

denied both the holding of a relevant political opinion and the membership of a relevant social group. We do not accept that this is such a case. The social group identified by Mr Israelian was defined by reference to the fact of avoidance of military service, not the reasons for that avoidance. It follows that the finding of fact that was made by the Tribunal did not conclude the issues raised by Mr Israelian's alternative claim.

97 Nevertheless, it must be recalled that the Tribunal did not base its conclusion affirming the decision to refuse Mr Israelian a protection visa only on its finding about conscientious objection. It concluded that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application. The Tribunal is not shown to have made an error of law in that respect. Moreover, the evidence to which counsel for Mr Israelian pointed as suggesting that the sanctions imposed on Mr Israelian would go beyond the application of the general law related to deserters, not draft evaders. It was not demonstrated that those groups formed part of a single "social group" within the meaning of the Convention definition. That being so, no relief under Pt 8 of the Act or under s 75(v) should go. Special leave having been granted on the same terms as were imposed in the matter concerning Ms Yusuf, there should be orders allowing the Minister's appeal, setting aside the orders of the Full Court of the Federal Court save as to costs and in lieu ordering that the appeal to that Court be allowed, the orders of the trial judge save as to costs set aside and in lieu ordering that the application for review be dismissed. The application for order nisi should be dismissed with no order as to costs.

98 KIRBY J. These proceedings concern the obligation of the Refugee Review Tribunal ("the Tribunal")[54], pursuant to s 430(1) of the *Migration Act* 1958 (Cth) ("the Act"), to prepare a written statement setting out its decision, reasons, findings on material questions of fact and reference to the evidence when disposing of an application for a protection visa under the Act.

99 The central question for decision concerns the scope of the Tribunal's obligation under s 430(1). A second question is whether a failure to meet the requirements of s 430 is reviewable by the Federal Court, having regard to that Court's narrowed jurisdiction[55]. If judicial review is available, a further question arises as to the remedies appropriate to the case under s 481 of the Act.

100 In approaching these questions, which have been answered in different ways by majority[56] and minority[57] decisions of the Full Court of the Federal Court, I remind myself of the remarks of Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu*[58]. His Honour observed that the requirement in s 430(1) for the Tribunal to "prepare a written statement dealing with certain matters … thereby furthers the objectives of reasoned decision-making and the strengthening of public confidence in that process". But it does not "provide the foundation for a merits review of the fact-finding processes of the Tribunal".

101 This Court is obliged to resolve the differences that have emerged in the Federal Court. The resolution lies in elucidating the meaning of the Act and in reconciling the achievement of the objectives mentioned by Gummow J in a way that avoids the risk of error to which he drew attention.

The facts, course of proceedings and legislation

102 Four proceedings are before this Court. Two concern Fathia Mohammed Yusuf ("Ms Yusuf") and two concern Oganes Israelian ("Mr Israelian"). Primarily, each is a respondent to an appeal brought, by special leave, from a

---

54 Established by the *Migration Act* 1958 (Cth), s 457.

55 The Act, ss 475, 476 and 485; see *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469 at 476 [22] ("*Singh*").

56 Reasons of Black CJ, Sundberg, Katz and Hely JJ in *Singh* (2000) 98 FCR 469 and the contrary opinion of Whitlam and Gyles JJ in *Xu v Minister for Immigration and Multicultural Affairs* (1999) 95 FCR 425 ("*Xu*").

57 R D Nicholson J, who was the third member of the Full Court in *Xu*, did not consider that it was necessary to determine the point.

58 (1999) 197 CLR 611 at 646 [117] ("*Eshetu*").

judgment of the Full Court of the Federal Court. In each case, the appeal is brought by the Minister for Immigration and Multicultural Affairs ("the Minister").

103 Against the possibility that they might fail in such appeals, Ms Yusuf and Mr Israelian, defensively, commenced proceedings in the original jurisdiction of this Court. Each sought the issue of writs provided by ss 75(iii) and 75(v) of the Constitution directed to the Minister (and the Tribunal), in effect, to prohibit the implementation of the respective decisions of the Tribunal (and related relief to quash those decisions). The Tribunal has submitted to the orders of this Court. As a practical matter, the latter proceedings need to be determined only if the Minister succeeds in the appeals.

104 The background to the two cases is sufficiently stated in the reasons of Callinan J[59]. His reasons also contain references to the unanimous opinion of the Full Court in *Yusuf*[60] and the divided opinion of that Court in *Israelian*[61]. Because Callinan J's reasons set out in some detail the dissenting opinion of Emmett J in *Israelian*[62] and the concordant joint opinion in *Xu*[63], with which his Honour agrees, it will be necessary for me to supplement these reasons with references to the opinions of other judges of the Federal Court. With comparatively few

---

59 Reasons of Callinan J, re *Yusuf* at [187]-[195]; re *Israelian* at [225]-[231]. See also reasons of Gaudron J at [18]-[26].

60 Reasons of Callinan J at [202] extracting from the reasons of the Full Court in *Minister for Immigration and Multicultural Affairs v Yusuf* (1999) 95 FCR 506 at 510 [12] per Heerey, Merkel and Goldberg JJ.

61 Reasons of Callinan J at [231] extracting from the reasons of the Full Court in *Minister for Immigration & Multicultural Affairs v Israelian* [1999] FCA 649.

62 Reasons of Callinan J at [245] citing Emmett J in *Minister for Immigration & Multicultural Affairs v Israelian* [1999] FCA 649 at [32]-[34].

63 (1999) 95 FCR 425 at 437-438 [31]-[36] per Whitlam and Gyles JJ cited by Callinan J at [216].

exceptions[64], they have repeatedly favoured an opinion contrary to that now adopted by a majority of this Court[65].

105 Because of differences that had earlier emerged in the Federal Court, the preliminary issue concerning the scope of s 430 was committed for argument before a Full Court of the Federal Court exceptionally constituted by five judges[66]. The controversy was resolved in favour of a broad view of the statutory requirements. A majority (Black CJ, Sundberg, Katz and Hely JJ) adhered to the approach which, until *Xu*, had been consistently followed in the Federal Court. However, Kiefel J preferred the contrary line of reasoning. Callinan J describes Kiefel J's dissent in *Singh* as a "strong ... opinion"[67]. But the strength of numbers, both in *Singh* and in the many cases in the Federal Court where the preliminary issue has been argued and resolved, under the earlier provisions of the Act[68] and in relation to its current form[69] (and under other federal legislation to like effect[70]) has been to the contrary[71].

106 The preliminary issue of the scope of s 430 was bound to arise for early decision of this Court, not only because of the conflicting opinions in the Federal Court but also because the issue presented has the potential to arise in many applications to the Federal Court for judicial review of a decision of the Tribunal.

---

64 *Ahmed v Minister for Immigration and Multicultural Affairs* (1999) 55 ALD 618; *Addo v Minister for Immigration & Multicultural Affairs* [1999] FCA 940; *Sivaram v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 379; *Doss v Minister for Immigration & Multicultural Affairs* [1999] FCA 1780.

65 Including *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28; *Logenthiran v Minister for Immigration and Multicultural Affairs* (1998) 56 ALD 639: see *Singh* (2000) 98 FCR 469 at 473 [8], 474 [12].

66 *Singh* (2000) 98 FCR 469.

67 Reasons of Callinan J at [204].

68 *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402.

69 *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287.

70 *Administrative Appeals Tribunal Act* 1975 (Cth), s 43: *Dodds v Comcare Australia* (1993) 31 ALD 690 at 691 per Burchett J, referred to in *Singh* (2000) 98 FCR 469 at 482 [55].

71 Although, in *Singh*, an application for special leave to appeal to this Court was commenced, it was withdrawn.

By s 430, the Tribunal, where it makes its decision on a review[72], must prepare a written statement setting out the specified matters[73]. What is to happen where the person affected complains that the "written statement" provided does not conform to the requirements laid down in the Act? According to the majority opinion in *Xu*[74], unless the defect in the written statement involves a failure on the part of the Tribunal to set out findings of fact and reasons required by reference to the statutory criteria (on which the decision to grant or refuse a visa depends[75]) *no* relief is available in the Federal Court. Unless, in such circumstances, the person affected can successfully invoke relief in this Court, under s 75 of the Constitution, he or she must simply accept the defective statement of the Tribunal and the result (ordinarily removal from Australia) that follows. This is not a conclusion that immediately appeals to me.

The background and common ground

107 *Competing arguable constructions*: As with any difficult problem of statutory construction, upon which opinions in other courts have differed, it must be accepted that there are arguments for each of the competing interpretations. Words are ideas wrapped in language. The perception of the meaning of words is influenced by the understanding, experience and attitudes of those who hear or read them. It is therefore unsurprising that differences of the present kind should arise from time to time, as they do here.

108 *No binding determination*: In *Abebe v The Commonwealth*[76], three members of this Court, in the course of their reasons, made observations about the "procedures" which the Act requires the Tribunal to observe. They did so without mentioning s 430 of the Act[77]. It was properly conceded by the Minister that the

---

72 The Act, s 411: the Tribunal may review, among other things, applications for protection visas, where protection is required under the Convention relating to the Status of Refugees, signed at Geneva, 28 July 1951; *Australia Treaty Series* (1954), No 5 as amended by the Protocol relating to the Status of Refugees, signed at New York, 31 January 1967; *Australia Treaty Series* (1973), No 37.

73 The terms of s 430(1) of the Act appear in the reasons of Gaudron J at [15]. See also reasons of Callinan J at [197].

74 (1999) 95 FCR 425 at 437-438 [32]-[36].

75 The Act, s 65.

76 (1999) 197 CLR 510 ("*Abebe*").

77 (1999) 197 CLR 510 at 548 [96] per Gaudron J, 564 [151] per Gummow and Hayne JJ.

specific question of the relationship between s 430 and s 476(1)(a) of the Act[78] was not examined in that case. In *Singh*, the joint judgment, correctly in my view, described the passages in *Abebe* relied on by the Minister as "too slight a foundation" upon which to base a view that s 476(1) does not extend to the requirements of s 430[79]. Accordingly, the present problem must be approached on the footing that there is no binding decision of this Court on the question now before it. Nor are there considered *dicta* that lend support to either of the competing constructions.

109 *A common federal standard*: The meaning of s 430 must be determined having regard to the fact that the section reflects, with immaterial variations[80], what is substantially a common federal standard for application to administrative decision-makers in the making of decisions (and in the provision to those affected of the reasons for such decisions)[81]. To the extent that s 430 reflects this common federal standard, it reinforces the observations about its purpose to which Gummow J referred in *Eshetu*[82].

110 At the time s 430 was introduced into the Act, and many like provisions were adopted by the Parliament, this Court had accepted[83] that the common law did not impose on administrators a duty to provide reasons to those who were affected adversely by their decisions. The enactment of provisions such as s 430 must therefore be viewed as an important reform. They are designed to improve available remedies[84] and to contribute to more transparent and accountable public administration in Australia.

---

78 The relevant provisions of s 476 of the Act are set out in the reasons of Gaudron J at [16]-[17].

79 *Singh* (2000) 98 FCR 469 at 477 [27].

80 For example the order of obligations is different in s 430 of the Act when compared to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 13. See also *Administrative Law Act* 1978 (Vic), ss 8, 10; *Tribunals and Inquiries Act* 1992 (UK), s 10.

81 See eg *Acts Interpretation Act* 1901 (Cth), s 25D; *Social Security (Administration) Act* 1999 (Cth), s 177; *Administrative Appeals Tribunal Act* 1975 (Cth), s 43(2B).

82 See above at [100] referring to *Eshetu* (1999) 197 CLR 611 at 646 [117].

83 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; cf *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at 848 [43]; Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 448-449, 451-452.

84 As required in the case of review by the Tribunal under the Act, see eg s 353.

111 The Minister did not contest the importance of s 430. His arguments were addressed solely to the extent to which, by the language of the section, the reform operates. The duty of a court is to give effect to the purpose which it attributes to the Parliament, as that purpose is derived from the language in which the Parliament has expressed itself[85]. But in finding meaning, purpose is an important guide.

112 *An objective, not subjective, standard*: One reading of the joint reasons in *Xu* might suggest that the majority were confining what was a "material" question of fact to the exclusive opinion of the Tribunal itself[86]. As a matter of law, such self-definition is impermissible. To hold otherwise would be to return to the error of the majority in the House of Lords in *Liversidge v Anderson*[87]. It would be to embrace the mistake which Lord Atkin expressed provocatively by reference to Alice, Lewis Carroll's perceptive observer of irrationality[88]:

> "'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'
>
> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'"

113 A similar question may be posed here. When the Parliament, by providing that a repository of power under an enactment "must prepare a written statement" that sets out certain matters including "findings on any material questions of fact", does that mean that it is left entirely to the decision-maker to decide what he or she shall "set out" in the "decision"? Can it be left exclusively to the Tribunal to decide which "questions of fact" are "material"? Were this the correct interpretation of s 430(1)(c), the error identified by Lord Atkin would be repeated more than fifty years later. In my opinion, such a conclusion could not be tolerated

---

85 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; cf *Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 at 420.

86 See eg *Xu* (1999) 95 FCR 425 at 437-438 [31]-[36] set out in the reasons of Callinan J at [216]. This point was recognised by the majority in *Singh* (2000) 98 FCR 469 at 481 [49].

87 [1942] AC 206.

88 [1942] AC 206 at 245 citing *Through the Looking Glass* c vi (emphasis in original); cf *Singh* (2000) 98 FCR 469 at 481 [47].

in a system observing the rule of law. Least of all should it be adopted after fifty years of administrative law enlightenment[89].

114 To the extent that some of the reasoning of the majority in *Xu* might suggest otherwise, I would not take their interpretation of s 430(1)(c) to propound a purely subjective standard of what is a "material" fact. The decision-maker's opinion of what is required by the section is not immune from judicial measurement. Any suggestion to such effect must be firmly rejected.

115 Nevertheless, the view propounded in *Xu* limits review to a decision-maker's failure to make, record and explain a finding on an "ultimate fact", that is, one which the statute expressly or impliedly lays down to constrain the decision-maker. This proposition is reflected in the following sentence in the majority's reasons in *Xu*[90]:

> "Where a statute does not expressly or impliedly constrain the decision-maker, the decision-maker is the sole judge of materiality and there can be no judicial review of that question, no matter how wrong or illogical the decision-maker is seen to be by a judge."

116 The essential point of difference, therefore, is not between those who hold to a purely *subjective* standard and those who hold to an *objective* one. It is between two conceptions of the objective standard. One of these confines the applicable obligation to the setting out of "ultimate facts", as laid down by the legislation. The other is not so confined. Therein lies the controversy.

117 *A practical and realistic standard*: There is common ground that it would be intolerable if a view were taken of the requirements of s 430 that would oblige a decision-maker to proceed in a line by line refutation of every submission of a party[91]. The subject matter of judicial review remains the decision itself, rather than the "written statement".

118 Nevertheless, the purpose of imposing on bodies such as the Tribunal duties of the kind expressed in s 430 of the Act clearly includes that of facilitating the

---

89 An analogous legal development is the retreat from exclusive self-definition of the scope of legal obligations in medical negligence cases. Standards of prudent medical practice have been replaced by objective standards, legally determined: *Rogers v Whitaker* (1992) 175 CLR 479; cf *Reibl v Hughes* [1980] 2 SCR 880; *F v R* (1983) 33 SASR 189 at 190.

90 (1999) 95 FCR 425 at 437 [32].

91 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 416 [65] per McHugh J; 168 ALR 407 at 423.

process of judicial review. In the past, such review could easily fail because it was confined to a "record" that omitted essential elements of the decision, reasons, findings and evidence. Accordingly, a view must be taken of the obligation that does not defeat, or unreasonably frustrate, the achievement of its beneficial legislative objective. In the real world of administrative decision-making, that aim must also accept standards of performance that are achievable, not unrealistically heroic[92]. The majority in *Singh* addressed this important concern in the following passage, with which I agree[93]:

> "The [Minister] submits that it would be absurd if failure to observe procedures of that type led to the decision on review being quashed. We agree. But the power of the Court to make orders under s 481 is discretionary, and the Court would be justified in declining to make any order on the basis of ... trivial and inconsequential contraventions. The discretion extends to whether or not to grant relief if a basis for relief is otherwise established, as well as to the form of any relief."

119 *Discretionary relief and practical outcomes*: Section 481, referred to in the foregoing passage, is not set out in the reasons of Callinan J[94]. As the Federal

---

92 *Eshetu* (1999) 197 CLR 611 at 646 [117] per Gummow J.

93 *Singh* (2000) 98 FCR 469 at 479 [37].

94 Section 481 of the Act relevantly provides (with emphasis added):

> "(1) On an application for review of a judicially-reviewable decision, the Federal Court *may, in its discretion*, make all *or any* of the following orders:
>
> (a) an order affirming, quashing or setting aside the decision …
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration …
>
> (c) an order declaring the rights of the parties …
>
> (d) an order directing any of the parties to do, or to refrain from doing, any act or thing [considered] necessary to do justice between the parties.
>
> (2) On an application for a review in respect of a failure to make a judicially-reviewable decision ... the Federal Court may make any or all of the following orders:

(Footnote continues on next page)

Court noted in *Singh*[95], where a statement of reasons is part of a statutory requirement for the lawful exercise of a decision-making power, a substantial failure by a tribunal to state the reasons for its decision may constitute an error of law which vitiates the decision[96]. Theoretically, a case might therefore arise where the decision, reasons, findings and reference to the evidence mandated by s 430, set out in the "written statement", are so defective that the purported "decision" is not a "decision" at all or indicate that no "review" has in truth occurred. It is unnecessary to explore that possibility in the present proceedings. Nor is it appropriate to consider the relief (if any) that would be available in the Federal Court were such an extreme case demonstrated.

The Minister's narrow construction of ss 430 and 476(1)(a)

120 The Minister propounded a narrow construction of s 476(1)(a) of the Act and hence of the Federal Court's power to review decisions involving a complaint of non-compliance with s 430. I accept that there are arguments in favour of his approach. I set them out in order to ensure that my conclusion is informed by weighing the considerations that tell against it:

121 First, there is the context. The Minister argued that it was not enough to view s 430 as a beneficial provision, intended to have "teeth". Whilst it is one of several similar enactments, it appears in legislation which already severely circumscribes the facility of judicial review in the Federal Court. Review in that Court for a failure to comply with s 430 would arise only where such default amounted to non-observance of "procedures that were required by [the] Act or the regulations to be observed in connection with the making of the decision"[97]. In judging what such "procedures" are, it is relevant to adopt a partly cautious approach to the ambit of the Federal Court's powers. This is because the general

---

(a) an order directing the making of the decision;

(b) an order declaring the rights of the parties …

(c) an order directing any of the parties to do, or to refrain from doing, any act or thing [considered] necessary to do justice between the parties".

95 (2000) 98 FCR 469 at 479 [39].

96 *Dornan v Riordan* (1990) 24 FCR 564; cf *Dodds v Comcare Australia* (1993) 31 ALD 690.

97 The Act, s 476(1)(a).

purpose, revealed by s 476 of the Act, is to limit such powers to particular grounds and to exclude some grounds that would otherwise apply[98].

122 Secondly, the term "procedures" was said to be inapt to cover the Tribunal's preparation of a written statement of a decision, reasons and findings. This was because such a written statement would ordinarily be made only after all proceedings (and thus "procedures") in the Tribunal were concluded. It would be prepared in private.

123 Thirdly, the Minister contended that the language of s 430 took its requirements outside the description of "procedures" in s 476(1)(a). The preparation of a written statement is required by s 430(1) only "[w]here the Tribunal makes its decision". Thus, it was argued, the contemplated "written statement" follows the making of a decision, rather than being involved with it. This construction of s 430 gained further support, so it was submitted, from the fact that the only "procedures" which s 476(1)(a) of the Act envisages as being within the relevant "judicially-reviewable decision" are those "in connection with the *making* of the decision". Hence, notwithstanding the broad words used ("*in connection with*"), s 476(1)(a) did not, by its terms, attach to the *post*-decision preparation of the written statement contemplated by s 430(1) of the Act. This was the crucial textual argument for the Minister's position[99].

124 Fourthly, reliance was placed upon the background material surrounding what was later to become s 476(1)(a) of the Act. An Explanatory Memorandum suggested that the "procedures" referred to in that paragraph were those set out in the statutory code of procedures contained in the Act[100]. That "code" was designed to replace the common law rules of natural justice governing the Tribunal's procedures. On this footing, s 430 was not concerned with the type of "procedures" for which s 476(1)(a) provided. Had the contrary been intended, the Explanatory Memorandum might have been expected to refer to it explicitly. A different word of broader ambit would then have been used to make it clear that defaults in compliance with s 430 of the Act were within the grounds upon which a judicially reviewable decision could be reviewed by the Federal Court.

125 Fifthly, the Minister drew attention to the exclusion from the powers of the Federal Court of review of a decision on the ground of "an improper exercise of the

---

98 *Eshetu* (1999) 197 CLR 611 at 632 [64].

99 *Xu* (1999) 95 FCR 425 at 432 [20]; cf *Singh* (2000) 98 FCR 469 at 476 [24]-[25].

100 Migration Reform Bill 1992 (Cth), cl 33 (proposed s 166LB): Explanatory Memorandum at 81.

power"[101] where the error alleged was that of "failing to take a relevant consideration into account in the exercise of a power"[102]. According to this argument, such express exclusion made it difficult to introduce, "by a side wind"[103], the omission to take a relevant consideration into account in discharging the obligations imposed by s 430.

126 Sixthly, much emphasis was placed on the practical scheme of the Act and the undesirability of turning judicial review into a reconsideration by a court with limited jurisdiction of the factual merits of the case. To the extent that the Federal Court was invited to "comb through" the "written statement" required by s 430, in order to scrutinise for adequacy the decision, reasons, findings and reference to evidence, it ran the risk of allowing the Court to intrude into the fact-finding process which, by law, is reserved to the Tribunal. Carried to its logical extreme, it was suggested, such an approach would subject all written statements of the Tribunal to the very line by line scrutiny that past decisions of this Court have discouraged[104]. It would involve the Federal Court in imposing its view of materiality, relevance, necessity and appropriateness of the facts and reasoning about them for that of the Tribunal, which is the repository of the power selected by the Parliament.

127 These textual and contextual arguments, together with the conception advanced for the proper (and limited) function of the Federal Court, led to the construction of the Act favoured in *Wu*. That construction adopted a narrow approach, both as to the obligation imposed on the Tribunal by s 430 and as to the grounds of review available in the Federal Court pursuant to s 476(1)(a) of the Act.

128 So far as s 430 was concerned, it was submitted that the obligations there provided were limited. The obligation to set out "findings on any material questions of fact" in s 430(1)(c) was said to apply only to those questions of *ultimate* fact that were imported by the express terms of the legislation. So far as s 476(1)(a) was concerned, any omission in complying with s 430 did not give rise to a ground that "procedures" required by the Act had not been observed. There being no other applicable ground (indeed s 476(3)(e) excluding such omissions from the grounds of judicial review) no review was available in the Federal Court upon such complaints. Relief, if any, was confined to that available in this Court under the Constitution.

---

101 The Act, s 476(1)(d).

102 The Act, s 476(3)(e).

103 *Xu* (1999) 95 FCR 425 at 436 [28].

104 eg *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291-292.

129 The foregoing obviously represents an arguable case. However, that case does not persuade me. I share the opinion that has gathered the support of the great majority of the judges of the Federal Court. Because a majority of this Court are of the contrary view, I must explain why.

The broader view of ss 430 and 476(1)(a) is preferred

130 *A major reform: broad construction*: It is important to recall the extent of the innovation introduced by s 430 of the Act, and its equivalents in other federal legislation[105]. Prior to that reform, not only were many aggrieved persons left in the dark as to the reasons of the decision-makers, they were also often left without effective means of pursuing administrative or judicial review. The old approach of administrative law was often to keep things secret[106]. Persons adversely affected by federal administrative decisions would frequently be defeated by the absence of reasons, findings and reference to evidence in the "record", upon which judicial review depended.

131 In jurisdictions, including within Australia, which do not enjoy the benefit of this significant reform, an attempt has sometimes been made to enlarge, beyond its original history, the concept of the "record" at common law, so as to enhance the materials available for judicial review[107]. That attempt received a measure of discouragement from this Court[108]. One of the reasons that led to the rejection of

---

105 When introducing the Administrative Decisions (Judicial Review) Bill (1977) (Cth), the Attorney-General (Mr Ellicott) described the clause providing for written reasons (which became s 13) as one of the "principal elements" of the legislation because "[n]o longer will it be possible for the decision maker to hide behind silence": Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 April 1977 at 1395-1396.

106 See eg *R v Mayor and Aldermen of London* (1832) 3 B & Ad 255 at 273-274 [110 ER 96 at 102-103]; referred to in *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 675 per Deane J.

107 See eg *Adams v Kennick Trading (International) Ltd* (1986) 4 NSWLR 503; *Mahony v Industrial Registrar of New South Wales* (1986) 8 NSWLR 1; *Coles v Burke* (1987) 10 NSWLR 429; *Tolhurst v District Court of New South Wales* (1990) 19 NSWLR 1; *Director-General of the Attorney-General's Department v District Court of New South Wales* (1993) 32 NSWLR 409; *Kriticos v New South Wales* (1996) 40 NSWLR 297.

108 *Craig v South Australia* (1995) 184 CLR 163 at 180-183; Finn, "Jurisdictional Error: *Craig v South Australia*", (1996) 3 *Australian Journal of Administrative Law* 177 at 178, 180-181.

the notion that the common law had advanced to the point of requiring reasons to be given by administrators acting under statutory powers, was the fact that explicit legislation (of which s 430 is a good example) had been adopted by the Federal Parliament. That, it was held, was the course which the path of reform should follow[109]. It is unnecessary in the appeals to consider the continuing authority on this question although in a proper case, in my view, the matter should be reopened[110].

132 It would be inconsistent with the obvious importance of the reform enacted by provisions such as s 430, to endorse a narrow view of the section. Because of its reformatory operation, it is not a section to be given a very literal or "pedantic"[111] construction. On the contrary, it should be given an ample and beneficial construction[112].

133 *Facilitating effective judicial review*: The purpose of provisions such as s 430 is to oblige disclosure of the reasoning of the decision-maker and to provide the person affected with the essence of that reasoning in order for that person either to accept the decision as one open in the circumstances[113] or to be advised of legal rights of appeal, review or other redress[114].

---

109 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 669.

110 cf *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817; Taggart, "Administrative Law", (2000) *New Zealand Law Review* 439.

111 *Dodds v Comcare Australia* (1993) 31 ALD 690 at 691 per Burchett J; *Singh* (2000) 98 FCR 469 at 482 [55].

112 In an analogous situation, Gibbs CJ concluded that "a material fact" was one which the decision-maker was "bound to consider, and which cannot be dismissed as insignificant or insubstantial": *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 31; cf *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, 278.

113 *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507; see also *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 110.

114 *Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206; *Kandiah v Minister for Immigration & Multicultural Affairs* [1998] FCA 1145; *Addo v Minister for Immigration & Multicultural Affairs* [1999] FCA 940; *Singh* (2000) 98 FCR 469 at 479 [36]; *Iveagh (Earl of) v Minister of Housing and Local Government* [1964] 1 QB 395 at 410.

134 If s 430 were to be read as limited to requiring the setting out only of those findings related to the applicable statutory criteria[115], the facilitating purpose of the section would be undermined. The decision would not, then, ordinarily be rendered transparent. The "written statement" would often partake of the very kind of bland uncommunicative (and unchallengeable) decision which provisions such as s 430 of the Act were enacted to reform. Moreover, to secure nothing more than "findings" on facts required by the terms of legislation would, in many cases, deprive the persons adversely affected of any real foundation for securing proper advice and pursuing further remedies.

135 I cannot accept that the inclusion of s 430 of the Act (and its equivalents in so many other federal Acts) had such a shallow and limited purpose. It is not the purpose that has heretofore been attributed to such provisions. Instead, the radical nature of the reform and its remedial objects have usually been acknowledged. Its contribution to improved public administration has been widely discussed[116].

136 *Objectively material facts must be stated*: The common ground between the parties that the standard required by s 430(1) is both obligatory ("must") and objective contradicts any suggestion that it can be left to the Tribunal, unsupervised, to determine what are the "material questions of fact" that it will choose to include amongst its "findings"[117]. Its obligations are to set out findings on any fact which is objectively "material" to the decision. There is nothing in s 430(1)(c) to limit the kind of materiality there mentioned to the *ultimate* facts required by the statute. The courts should not gloss s 430. Particularly, they should not do so in a way that frustrates the achievement of the reformatory purposes of the section.

---

115 The Act, s 65.

116 *Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 205-208; *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507; *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 130 per Gummow J; *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 177; Kirby, "Accountability and the Right to Reasons", in Taggart (ed), *Judicial Review of Administrative Action in the 1980s*, (1986) 36; Bayne, "Reasons, evidence and internal review", (1991) 65 *Australian Law Journal* 101; Flick, "Administrative Adjudications and the Duty to Give Reasons – A Search for Criteria", (1978) *Public Law* 16; Ward, "Reasons for Decisions – A Way Forward?", (1993) 45 *Administrative Law Review* 283; Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, Report No 33, (1991).

117 The Act, s 430(1)(c).

137 If, objectively, a question of fact is "material" to the issues relevant to the Tribunal's decision, it must be "set out" as s 430 commands[118]. In *Singh*, the majority described the true test of materiality in terms that I would adopt[119]:

> "[I]f a decision, one way or the other, turns upon whether a particular fact does or does not exist, having regard to the process of reasoning the Tribunal has employed as the basis for its decision, then the fact is a material one. But a requirement to set out findings on material questions of fact, and refer to the material on which the findings are based, is not to be translated into a requirement that all pieces of conflicting evidence relating to a material fact be dealt with. ... A fact is material if the decision in the practical circumstances of the particular case turns upon whether that fact exists."

138 With respect, I do not consider that this construction involves substituting for the word "any" in s 430(1)(c) of the Act the word "the"[120]. The word "any" is itself a word of ample width. But it cannot mean "any" facts at all that the Tribunal alone chooses to treat as "material". Such a construction would take us back to Humpty Dumpty[121]. The word "any" emphasises the ambit of s 430(1)(c). If a question of fact is objectively immaterial, it can be ignored. If, however, it is amongst "any material questions of fact" relevant to the decision, it *must* be set out in the statement required by s 430.

139 *Disclosing the real reasons for decision*: Reinforcement for my conclusion is found in the fact that "materiality" and "relevance to statutory criteria" are two related, but different concepts[122]. The latter will necessarily be included in the former. Application of the statute is the primary task of the Tribunal. It must therefore make such findings of fact as the statute requires in the particular case. Nevertheless, as many immigration decisions demonstrate, the "material questions of fact" that explain the *real* "decision" of the Tribunal, and represent the essence

---

118 *Singh* (2000) 98 FCR 469 at 481 [48]. In *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292, Gummow J held that the Minister's delegate was required to give "proper, genuine and realistic consideration [upon each application's] merits".

119 *Singh* (2000) 98 FCR 469 at 482 [56]-[57].

120 Reasons of Gleeson CJ at [10].

121 See above at [112].

122 Kneebone, "Case Commentary: *Minister for Immigration and Multicultural Affairs v Fathia Mohammed Yusuf*", (2000) 6 *High Court Review* 3 <http://www.bond.edu.au/law/hcr/contents.htm> at [23], [35].

of its "reasons", will commonly involve no particular element of the statute at all. Nor will the related "evidence" or "other material" upon which such findings of fact were based be confined to the terms of the Act. Typically, the most "material questions of fact" in these cases relate to the credibility of the applicant and to whether allegations of events far away, and often long ago, are to be believed or disbelieved.

140 If, therefore, s 430 is to apply in the *real* context of the operations of the Tribunal it necessitates disclosure of considerations which a restriction solely to questions of fact *required* by the Act might not elicit. Furthermore, it cannot be assumed, from the fact that the Tribunal omits any reference to a "question of fact" apparently critical to the applicant's case, that it has necessarily considered and rejected that fact within its fact-finding role. Mistakes occur. Important questions of fact, which are objectively "material", can easily be overlooked. The requirement that the "written statement" set out findings on questions of fact that are objectively "material" is an assurance against such error or oversight[123]. It is a requirement that this Court should not read down. If it is so read in this case, it will necessarily have limiting and adverse consequences for the application of other like statutory provisions. This would be to the detriment of good public administration. This Court should not lend its authority to such a result.

141 In *Elliott v Southwark London Borough Council*[124], James LJ observed:

> "The duty to give reasons pursuant to statute is a responsible one and cannot be discharged by the use of vague general words which are not sufficient to bring to the mind of the recipient a clear understanding of why [his or her] request ... is being refused."

Likewise, in *Iveagh (Earl of) v Minister of Housing and Local Government*[125] Lord Denning said:

> "The whole purpose of the enactment is to enable the parties and the courts to see what matters [the decision-maker or Tribunal] has taken into consideration and what view [it] has reached on the points of fact and law which arise. If [the Tribunal] does not deal with the points that arise, [it] fails in [its] duty: and the court can order [it] to make good the omission."

---

123 *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443.

124 [1976] 1 WLR 499 at 510; [1976] 2 All ER 781 at 791.

125 [1964] 1 QB 395 at 410.

The foregoing words apply with even greater force to s 430 of the Act, given its language and history.

142 *Relevance of the international law context*: A reinforcement of this approach may also be found in consideration of the proper relationship between the Tribunal and the Federal Court, and the exclusion of the latter from consideration of the facts or merits of the case, upon which the Minister placed so much emphasis. It is precisely because the Tribunal has substantially exclusive power and jurisdiction to determine the facts of an application (and because such determination cannot be reversed on factual grounds by the Federal Court even if "so unreasonable that no reasonable person could have ... exercised the power" in such a way[126]) that the protective operation of s 430, requiring the Tribunal to set out the matters specified, should not be construed narrowly.

143 The Tribunal has onerous responsibilities. As Gummow and Hayne JJ observed in *Abebe*[127], "an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself". Moreover, the Tribunal is entrusted with the duty to apply to disputed cases Australia's international obligations under the Refugees Convention[128]. That Convention contains provisions of international law having a high humanitarian purpose[129]. At stake is not only the fate of the particular applicant but also Australia's compliance with important international obligations that it has accepted.

144 These considerations represent still further reasons why the obligations imposed by s 430 are not to be given a narrow construction. The "written statements" of the Tribunal are available not only to the persons seeking review and to their representatives. They are also available to the United Nations High Commissioner for Refugees and to the many others, in Australia and beyond, who watch the way this country conforms to international law. In such a context, it is not unreasonable to require that the Tribunal's written statement should, in the terms of s 430 of the Act, "set out the findings" on "any ... questions of fact" that are objectively "material". This is what the Parliament has enacted. The section

---

126 The Act, s 476(2)(b).

127 (1999) 197 CLR 510 at 577-578 [191].

128 Refugees Convention as amended by the Refugees Protocol: see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230, 287; the Act, s 36.

129 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 74 ALJR 775 at 783 [47]; 170 ALR 553 at 564; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 74 ALJR 1556 at 1574 [36], 1594-1595 [197]-[199]; 175 ALR 585 at 593, 639-640.

recognises the applicability, in this sensitive context, of the general federal standard observed in Australia. In the unlikely event that, for cases of applicants for refugee status and protection visas, some lesser standard were deemed appropriate by the Parliament, it would be necessary, so far as I am concerned, for the lower standard to be expressed in different, narrower statutory language.

145 *Preparing the statement is a "procedure"*: For similar reasons, I would not impose on s 476(1)(a) of the Act a construction of the word "procedures" that would take the decision-making procedures in s 430 needlessly out of the grounds of judicial review in the Federal Court. The fact that such grounds of review have been severely curtailed by the Act is not a reason for this Court, by an enthusiastic construction of s 476, to add to the curtailment. To the extent that it does so, this Court merely invites an increasing number of applications in its original jurisdiction, where such curtailment is constitutionally impossible.

146 Moreover, in my view, the Parliament has not excluded review of non-compliance with s 430 of the Act. The word "procedures" in s 476(1)(a) (which states admissible grounds of review) is broad enough to include the process of decision-making in s 430. The "procedures" required by the Act do not cease when a hearing before the Tribunal has concluded.

147 There is nothing in the steps required for the "written statement" that takes them outside the ordinary meaning of the word "procedure"[130]. According to *The Macquarie Dictionary*, that word, in its primary sense, means no more than "the act or manner of proceeding in any action or process; conduct" or "a particular course or mode of action". Or (relevantly) the "mode of conducting legal ... especially litigation and judicial proceedings". None of these definitions is inconsistent with the "procedure" of setting out the matters specified in s 430[131].

148 It is not determinative, but surely not unfair to mention, that when the Parliament enacted provisions equivalent to s 430 in other legislation, the heading to the section, obliging the preparation of a written statement of the relevant kind, explicitly described the action as a "Procedure"[132]. Many such provisions are

---

130 cf *R v Civil Service Appeal Board; Ex parte Cunningham* [1991] 4 All ER 310 at 322 per McCowan LJ; *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531 at 564.

131 *Hughes v Minister for Immigration and Multicultural Affairs* (1998) 53 ALD 607 at 612.

132 *Social Security (Administration) Act* 1999 (Cth), s 177: "Procedure following [Social Security Appeals Tribunal] decision". The same is true of *A New Tax System (Family Assistance) (Administration) Act* 1999 (Cth), s 141.

scattered throughout the federal statute book[133]. Clearly enough, many of those who drafted such federal legislative provisions, analogous to s 430 of the Act (and by inference those who have enacted such provisions), have considered the obligation as a matter of "procedure". The Minister's argument to the contrary is untenable.

149 *The statement is "connected with" the decision*: The argument advanced about the limits of s 476(1)(a) of the Act does not become any stronger by reference to the terms of that paragraph. It is true that the procedures open to review are expressed in terms of "the making of the decision" and not "the decision" as such. But the words linking the "procedures" contemplated with "making of the decision" could hardly be wider. They are "in connection with". Thus "procedures" may be "in connection with the making of the decision" although, on a reading of s 430, the decision is already made and the Tribunal has moved to the stage of preparing the "written statement" required[134]. Those words expand the ambit of the "procedures", non-observation of which gives rise to a ground of review in the Federal Court.

150 Once it is accepted that s 430 lays down "procedures" which the Act obliges the Tribunal to observe, the mere fact that those "procedures" must be observed *after* the decision is made does not render them any less *connected with* "the making of the decision". In any event, in practice, it may be contemplated that the "written statement" containing the specified matters will ordinarily be prepared immediately following the making of the decision. Common experience teaches that the process will be a continuous one. No judicial or other decision-maker, who keeps an open mind to the end of the process, has not prepared written reasons without sometimes altering his or her decision when it is found that the reasons "will not write"[135].

151 *Making the right to reasons effective*: The Explanatory Memorandum upon which the Minister relied is also not very helpful. Whilst it may well have been expected that the paragraph that was to become s 476(1)(a) would primarily apply to the "code of procedure" (being the most important "procedures that were required by this Act") the expression used is not so confined. Moreover, as was pointed out by the majority in *Singh*, at the time of the introduction of the earlier

---

133 eg *Fisheries Management Act* 1991 (Cth), s 160: "Procedure following Panel decision".

134 *Singh* (2000) 98 FCR 469 at 478 [34]-[35].

135 Kirby, "Judging: Reflections on the Moment of Decision", (1999) 18 *Australian Bar Review* 4 at 4; cf *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 at 536 [10]-[12], 540-541 [51]-[58], 546-547 [101].

equivalent of s 476(1)(a) into the Act, the giving of reasons was not thought to be required in Australia by the common law rules of natural justice[136]. This is another reason for describing the requirement to give reasons under s 430 of the Act as a statutory "procedure"[137].

152 Like the other "procedures", specifically introduced by the Act to substitute for the common law, the provisions of s 430 afford supplementary "procedures". It is not unreasonable, viewing the Act as a whole, to assume that the Parliament contemplated that those words would constitute more than a pious exhortation to the Tribunal. Where "not observed" it was intended, in the context, that they would afford a "ground" for review by the Federal Court.

153 *Minimal dangers of merits review*: This conclusion can be drawn more comfortably because the spectre of needless and unrealistic intervention of the Federal Court, intruding into matters of the merits, can easily be rejected. There are many controls to prevent it occurring. Those controls include the repeated instruction of this Court that judicial review is only concerned with lawfulness and that it exceeds the function of such review to extend it, as such, into a reconsideration of the factual merits divorced from the law[138]. This Court has also repeatedly observed that the review conducted by the Federal Court, in respect of the decisions of the Tribunal, must not become a pernickety and artificial scrutiny of the language of the Tribunal's reasons, divorced from attention to the decision itself. It is the decision that is under review. In question is the impression which the statement of reasons leaves, given the almost unrestricted ambit which the law affords to the Tribunal's fact-finding[139].

154 In addition to these controls there is the consideration particularly relevant to decisions of the Federal Court under the Act. As the terms of s 481 of the Act[140] make plain, the making of orders by the Federal Court is discretionary. In accordance with s 481, "the Court would be justified in declining to make any

---

136 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

137 *Singh* (2000) 98 FCR 469 at 476 [25].

138 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291-292; *Abebe* (1999) 197 CLR 510 at 580 [197]; Pearce, "Judicial Review of Tribunal Decisions – The Need for Restraint", (1981) 12 *Federal Law Review* 167.

139 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291-292.

140 See above at [119], n 94.

order on the basis of ... trivial and inconsequential contraventions"[141]. It is only in the exercise of its discretion, where a basis for relief is otherwise established, that the Federal Court is called upon to look at the substance of the matter, and at the decision itself which is the subject of review.

155 Unless there were substance, occasioning disquiet because of some aspect of the "statement of reasons" that appeared seriously inadequate, or because some fact objectively found to be "material" to the decision was apparently overlooked, forgotten or ignored by the Tribunal, the Federal Court would not intervene under s 481 of the Act.

156 Given the seriousness of the decisions at stake for the persons concerned, for the Australian community and for this country's compliance with international law, it is not a surprising construction of the Act to hold that the Federal Court, where it comes to a conclusion of default, should have discretionary powers (as I would hold it does) including the power to quash the flawed decision and to require that the review be conducted, and concluded, properly.

157 *Assuring lawful decision-making*: This conclusion is still further reinforced by a reflection on what the outcome of judicial review requires. This is not the substitution by the Federal Court of its own decision on the merits. It is no more than the requirement that the Tribunal re-determine the review and (subject to any directions of the Federal Court given under s 481 of the Act) provide in the re-determination a "written statement" that complies with the Act. In this way, an important principle of federal administrative law is upheld. Appropriate standards of transparent decision-making are required of the Tribunal. Vulnerable persons who claim to be refugees are entitled to have a decision of great personal importance made as the law of this country obliges. Australia's compliance with its international obligations is assured. The presence of non-citizens in Australia is regulated as the Act of Parliament has decreed. And in many cases, the Minister retains a residual power, exercised personally, to have the final say[142]. Whilst it is true that some time is lost and cost incurred, this is a necessary price of a process of decision-making regulated, as ours is, by law. Cases such as this not only dispose of the rights of particular parties. They lay down the standard for thousands of others which may never get to the Tribunal or a court.

158 It follows that I would reject the construction of ss 430 and 476(1)(a) of the Act urged by the Minister. I would uphold the meaning of those sections favoured by the majority of the Full Court in *Singh*[143]. As that was, generally speaking, the

---

141 *Singh* (2000) 98 FCR 469 at 479 [37].

142 See the Act, ss 501, 502.

143 (2000) 98 FCR 469 at 483 [60].

approach adopted by the Full Court in both Ms Yusuf's and Mr Israelian's appeals, subject to what follows, the Minister's appeals must fail.

The appeal in Yusuf fails

159 Having reached the foregoing conclusion, the outcome in Ms Yusuf's case is relatively straight-forward. It did not long detain Finn J at first instance in the Federal Court. In his *ex tempore* reasons for judgment[144], after cutting through many irrelevant and unsuccessful arguments, his Honour came to the contention that the statement of reasons prepared by the Tribunal, pursuant to s 430 of the Act, was defective and that the procedures required by the Act had not been observed within s 476(1)(a).

160 In Finn J's view an attack on Ms Yusuf's husband constituted one of the three central evidentiary facts upon which she had relied to establish the validity of her claim to refugee status. It had not been dealt with in the Tribunal's reasons[145]. This was so although Ms Yusuf "appears to have included herself in the objects of that attack" and although, obviously enough, the loss of her husband, the father of her children and the person to whom she could ordinarily look for defence against clan-based persecution, was objectively a "material fact" for the success or otherwise of her claim. Finn J pointed out that the attack was the first matter referred to in Ms Yusuf's initial statement. It had occurred at a time proximate to an attack on herself. Its consequence had been the breakup of her family unit.

161 In these circumstances, with admirable clarity, Finn J concluded[146]:

> "It can properly be said, in my view, to be a matter that was central to the events relied upon by the applicant as grounding her fear of persecution.
>
> In the circumstances, it was in my view incumbent upon the Tribunal to consider the matter and in its reasons to indicate whether or not it accepted or rejected that event in its setting as being capable of giving rise to a well-founded fear of persecution. ...
>
> [B]earing in mind the apparent centrality of the attack upon the house to the events relied upon as founding the well-founded fear of persecution, it seems to me inevitable that I must conclude that the statement of reasons of the Tribunal is deficient in its failure to address this matter".

---

144 *Yusuf v Minister for Immigration & Multicultural Affairs* [1999] FCA 1053 ("reasons of Finn J").

145 Reasons of Finn J at [25].

146 Reasons of Finn J at [26]-[27], [30].

162 The Full Court in Ms Yusuf's case, whilst correctly accepting that it was not necessary that the reasons of the Tribunal should deal with all matters raised in the proceedings[147], and that it was enough that the Tribunal's findings and reasons should deal with the substantial issues on which the case turned, unanimously affirmed the approach of Finn J[148]:

> "When assessing the relative centrality of issues raised – and hence their materiality – a specific instance of alleged maltreatment upon which the asylum-seeker's fear of persecution for a Convention reason was said, in part, to be based, would usually constitute a material question of fact. Very often the success or otherwise of a claim will turn on the credibility the [Tribunal] attaches to the asylum-seeker's account of such incidents."

163 These are unsurprising conclusions. They were open to the Federal Court. No error has been shown warranting appellate disturbance, once the construction of the Act propounded by the Minister is rejected.

164 Both before the Full Court and in this Court, the Minister finally argued grounds addressed to the relief which Finn J afforded to Ms Yusuf under s 481 of the Act. Specifically, he contended that a failure of the Tribunal to comply with obligations under s 430(1) of the Act was remediable "only by way of a mandatory order for the giving of a further and better statement of reasons". It did not, of itself, "render the decision of the Tribunal invalid or liable to be set aside".

165 In so far as some other remedy might have been available to the Federal Court, the provision of the remedy granted at first instance and confirmed on appeal was within the discretion of that Court. No basis has been shown to warrant the intervention of this Court upon such a discretionary question. The appeal having been principally argued on the footing of the Minister's construction of ss 430 and 476(1)(a) of the Act, and that construction being, in my view, erroneous, the appeal in Ms Yusuf's case fails.

166 It follows that the Tribunal must reconsider Ms Yusuf's case, address its attention as well to the first of the three main bases upon which Ms Yusuf argued her claim and, in its "written statement", include any finding on that material fact, one way or the other. That it was "material", objectively, can scarcely be denied. Unless the fact were specifically referred to, Ms Yusuf and all others who read of

---

147 *Minister for Immigration and Multicultural Affairs v Yusuf* (1999) 95 FCR 506 at 513 [29] citing *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402 at 414.

148 *Minister for Immigration and Multicultural Affairs v Yusuf* (1999) 95 FCR 506 at 514-515 [35] per Heerey, Merkel and Goldberg JJ.

her case would be entitled to conclude that the Tribunal, when it came to its reasoning and conclusions, overlooked, forgot, or ignored that fact, rather than that it considered the fact and rejected it as false or unproved. It may be that to conclude in that way would be unfair to the Tribunal's subjective reasoning. Perhaps the Tribunal did indeed give weight to, but rejected, these facts, objectively "material" to Ms Yusuf's case. But if it did so, the unfairness is of the Tribunal's own making. It failed in the "written statement" for which the Act provides to include a finding on facts so obviously "material" .

167 I would endorse the concluding words of the reasons of Finn J[149]:

> "[I]t is important if public confidence is to be maintained in the tribunal system, no less than in the system of the courts, that when a case is put to a tribunal or for that matter to a court, an unsuccessful party is entitled to an explanation as to why their case was not accepted".

168 By s 430, the Parliament has imposed the relevant obligation on the Tribunal. All that the Federal Court has done is to require that that obligation be complied with. It has expressly declined to become involved in the merits of the case. It has recognised that the evaluation of those merits is for the Tribunal alone. However, that evaluation must conform to the "procedures" that are required by the Act. That did not occur here. The Full Federal Court correctly found there was no appealable error in the decision of Finn J. The appeal to this Court should therefore be dismissed.

The appeal in Israelian fails

169 In *Israelian*, the position is a little more complicated. I agree with Callinan J that neither by the Act, nor by any provision of international law applicable in Australia, does the United Nations High Commissioner for Refugees[150] have authority to require that courts or tribunals of Australia treat a particular individual, or class of individuals, as a "refugee" or "refugees" for the purposes of the Refugees Convention.

170 For my own part, I would not put much store on the newspaper report that such an "order" was made[151]. Nor do I read the decision of the primary judge (R D Nicholson J) as reaching a different view. At most, in his Honour's reasons, this was an evidentiary element in Mr Israelian's case which the Tribunal had failed to

---

149 Reasons of Finn J at [31].

150 As established by Resolution 428(V) of the General Assembly of the United Nations, 14 December 1950. See reasons of Callinan J at [243].

151 Reasons of Callinan J at [237].

address. The evidence concerned Mr Israelian's claim that he was a member of a particular social group in Armenia, namely draft evaders who objected on moral grounds to the military actions being conducted by Armenia in the disputed territory of Nagorno-Karabakh[152].

171 Before the Tribunal and R D Nicholson J was the *Handbook on Procedures and Criteria for Determining Refugee Status* of the High Commissioner for Refugees[153]. The Handbook has been endorsed by this Court as a useful "practical guide" in considering a claim such as that of membership of a particular social group[154]. It accepts that "punishment for desertion or draft-evasion could … in itself be regarded as persecution" where "the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct"[155]. R D Nicholson J did not propose that a so-called "order" of the High Commissioner should be considered as binding on the Tribunal or the Federal Court. Instead, his Honour described the record of the High Commissioner's purported statement (which was before the Tribunal and the Court) as something which, "[i]f … factually correct ... may amount to the requisite condemnation by the International Community of the military action in [Nagorno-Karabakh] as being contrary to basic rules of human conduct"[156].

172 Beyond this, a fair reading of the reasons of R D Nicholson J makes it clear that the relevant consideration that he regarded as authorising him to intervene in Mr Israelian's case was the failure of the Tribunal to observe the procedures required by the Act. That failure arose from the omission of the Tribunal to address itself to the questions of fact raised by Mr Israelian's claim that he was a member of the "particular social group", membership of which gave rise to the "well-founded fear of persecution" required by the applicable definition of "refugee".

---

152 *Israelian v Minister for Immigration & Multicultural Affairs* [1998] FCA 447 ("reasons of R D Nicholson J").

153 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, revised ed (1992) ("the Handbook").

154 See eg *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 302.

155 Handbook at 40 [171].

156 Reasons of R D Nicholson J at 13.

173 The Tribunal said nothing about Mr Israelian's "particular social group". It confined itself to consideration of his status as a conscientious objector. But the social group which he had propounded, as part of his claim, was much more limited and particular[157]:

> "The argument would be that the particular social group was defined by the acts of desertion or draft evasion and that such characteristic unites them. The fact requires to be found whether such acts define a group."

In his Honour's view, "[t]he Tribunal failed to form a view about the crucial issues which the definition required it to examine"[158].

174 R D Nicholson J ordered that the application for review be allowed in Mr Israelian's case, "to the extent the Tribunal is required to make findings on the issue of whether the applicant had a well founded fear of being persecuted for the reason of membership of a particular social group"[159]. The formal orders made at first instance set aside the decision of the Tribunal and referred the matter back to the Tribunal to determine the question identified as having been omitted from its findings.

175 In the Full Court a difference of opinion emerged in the appeal from those orders. Emmett J, dissenting, considered that the Tribunal had committed no error that would warrant the intervention of the Federal Court. Reflecting the approach of the Tribunal, Emmett J saw no omission on the part of the Tribunal to make and record any material finding of fact[160]:

> "There is ... no material before the Court to indicate what might possibly have been ascertained by such [a further] inquiry [by the Tribunal]. On the material before the Tribunal, there is no basis for concluding that deserters and draft evaders constitute a particular social group. They are simply a particular group of law breakers, members of whom are punished, in the same way as all other citizens, for failing to comply with the requirements of the law of Armenia."

---

157 Reasons of R D Nicholson J at 12.

158 Reasons of R D Nicholson J at 13.

159 Reasons of R D Nicholson J at 16.

160 *Minister for Immigration & Multicultural Affairs v Israelian* [1999] FCA 649 at [35].

176 It is here, with respect, that I part company with Emmett J. I accept the approach of the primary judge and of the majority in the Full Court[161]. That approach is, I believe, the one required by the Act for the ascertainment of the rights of an applicant to be treated as a "refugee", both under the Convention and under Australian law.

177 The law in many countries is sadly far from just and humane. Even in Australia the law has, from time to time, involved persecution of particular social groups. The mere fact that a person, as a law-breaker, is liable to be punished "in the same way as all other citizens" does not adequately respond to a complaint of persecution in the Convention sense such as that made by Mr Israelian. Jews in Germany during the Third Reich would have had a well-founded fear of persecution, although, like all other nationals of that country at that time, they were subject to the law of Germany. "Non-white" citizens of South Africa, before its present Constitution, were also subject to persecution, although South Africa at that time was undoubtedly a state of laws, whose legislation was, at least in form, equally applicable to all citizens.

178 With respect, the mistake of Emmett J is the mistake which the Tribunal also appears to have made in determining, and making findings of material facts about, the issue of persecution in Mr Israelian's case. As the primary judge pointed out, by reference to the Handbook, the lawfulness of conduct and universal application of the law to all citizens in the matter of draft evasion, are not necessarily the end of the inquiry in refugee claims of Mr Israelian's kind[162].

179 The involvement of countries in particular wars is occasionally viewed by some of their citizens as a gross affront to basic human rights. Contemporary instances have arisen (even in Australia[163]) where this would be, or has been, so. When this happens, persons liable to conscription for military service sometimes seek refuge in other countries to avoid a serious affront to their conscience. Their susceptibility to prosecution and punishment will often reinforce their sense of identity as a group, although that identity pre-exists such reinforcement, being founded on shared values concerning the war in question.

180 Before the Tribunal, Mr Israelian relied upon an assertion that he was entitled to protection as a refugee because he was a member of a particular social

---

161 *Minister for Immigration & Multicultural Affairs v Israelian* [1999] FCA 649 at [1]-[13] ("reasons of Einfeld and North JJ").

162 Reasons of R D Nicholson J at 12.

163 cf *R v The District Court; Ex parte White* (1966) 116 CLR 644 at 654, 659-662.

group, namely deserters and/or draft evaders. The Full Court majority, like the primary judge, decided that "the Tribunal did not deal with this argument at all"[164]:

> "In order to do so it was necessary to examine whether deserters and/or draft evaders were a particular social group and, if so, whether they were persecuted by reason of their membership of that group. This exercise was not done. Even if the decision can be read as stating an express conclusion that Mr Israelian was not persecuted by reason of his membership of a group comprising deserters and/or draft evaders, there is no reasoning process or factual analysis exposed which supports the conclusion. Consequently, the Tribunal failed to comply with section 430(1)(b), (c) and (d). ... [This failure] was a failure to observe procedures required by the Act and hence gave rise to a right of review under section 476(1)(a) of the Act."

181 Although I would accept that Mr Israelian's case is at the borderline, and although the Federal Court might have concluded that the reasoning of the Tribunal, whilst defective, did not justify its intervention, no error is shown, such intervention having been decided, to warrant the disturbance by this Court of the orders which the primary judge made, and which the Full Court confirmed.

182 Once the construction of the Act urged by the Minister is rejected, the judgment of whether the "written statement" of the Tribunal meets the standard required by s 430, or warrants an order of review under s 476(1)(a) of the Act, involves the kind of evaluative decision that this Court should ordinarily leave to the Federal Court. Similarly, the form of the relief provided in the discretion of the Federal Court should not, without error in the premise, result in reversal by this Court, simply because it would have refused or granted other relief.

183 I am therefore unconvinced that error is shown in Mr Israelian's case. In so far as the basis of that suggested error was the approach which the Tribunal, Emmett J (in dissent) and now members of this Court have favoured, I respectfully disagree. Universally applicable laws, including those requiring military service, can sometimes be unjust as they fall on particular groups. The Quakers represent a long-established and respectable illustration of conscientious objection; but there are others. They have not always been afforded legal exemption[165]. The Tribunal should at least have addressed this issue in order to comply with the obligations imposed by s 430. Its omission to do so authorised the conclusion and orders which the Federal Court reached. In Mr Israelian's case, this Court should not disturb those orders. The appeal should be dismissed.

---

164 Reasons of Einfeld and North JJ at [6]-[7].

165 *R v The District Court; Ex parte White* (1966) 116 CLR 644 at 659.

The constitutional writs are unnecessary

184 The applications for the issue of constitutional writs (and associated relief) were mounted defensively by Ms Yusuf and Mr Israelian, in case the appeals were determined adversely to them. The provision of such relief is within the discretion of this Court[166]. An obvious discretionary basis for withholding relief is that, in the appeals, the orders which I favour would uphold the requirement that the Tribunal complete the review of the adverse decision of the Minister's delegate affecting, respectively, Ms Yusuf and Mr Israelian. It was not suggested that any relief, larger or different in character, would be available to either of them as would warrant exploring, additionally, their arguments about the constitutional writs. It follows that I do not need to respond to the many questions that were raised by Ms Yusuf and Mr Israelian in support of their applications for constitutional writs.

Orders

185 The Minister's appeal from the judgment of the Full Court of the Federal Court of Australia concerning Ms Yusuf should be dismissed with costs. The Minister's appeal from the judgment of the same Court concerning Mr Israelian should also be dismissed with costs. The applications brought in the original jurisdiction of this Court by Ms Yusuf and Mr Israelian should be dismissed[167].

---

166 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 54 [5], 64-65 [54], 77 [122], 81-82 [145]-[148], 86 [172], 93-94 [217]; 176 ALR 219 at 221, 236, 252, 259, 265, 275.

167 No order should be made as to costs: see *Eshetu* (1999) 197 CLR 611 at 641 [104].

CALLINAN J.

YUSUF

186 The principal questions which arise in the first of these cases are whether there was a failure on the part of the Refugee Review Tribunal ("the Tribunal") to make a finding of a material fact, and if there was, whether the decision of the Tribunal was reviewable under the *Migration Act* 1958 (Cth) ("the Act") or by way of prerogative writs issued pursuant to s 75 of the Constitution. Similar questions arise in *Minister for Immigration and Multicultural Affairs v Israelian*, which was argued at the same time as *Yusuf*.

Case history

187 The appellant appeals against a decision of the Full Court of the Federal Court of Australia, affirming a decision by a judge of that Court, that the respondent's application for a protection visa be remitted to the Tribunal for reconsideration. The respondent is also an applicant for prerogative relief under s 75 of the Constitution.

188 The respondent, who was born in Somalia, illegally entered Australia with her two children in February 1999. Before coming to this country, the respondent, who is a member of the Abaskul clan, lived in Mogadishu. She applied for a protection visa in respect of herself and her two children. The appellant's delegate refused that application. The respondent then applied under s 141 of the Act to the Tribunal for a review of the decision to refuse the application.

189 In affirming the decision of the delegate the Tribunal accepted as an account of conditions in Somalia a description provided by the Department of Foreign Affairs and Trade ("DFAT") in March 1999:

> "The Abaskul are a sub clan of the Darod. The region they are most commonly associated with is the 5th region of Ethiopia (south eastern Ethiopia) although members of the clan also live in other areas of Somalia including in the area which borders Ethiopia. Mogadishu has attracted settlers from all regions of Somalia. It can be expected that some members of the Abaskul clan would live there and this would not be unusual.
>
> An Abaskul, as a member of minority clan in Mogadishu, is at a disadvantage when it comes to securing a job or access to housing for example and would be at a disadvantage in the event of a dispute with a member of a more powerful clan such as the Hawiye. This is a situation in which all minority clan members find themselves so it is not peculiar to the Abaskul. The Abaskul are not the target of the Hawiye, or any other clan, because of their clan affiliation.

The Abaskul are traditionally nomadic herdspeople who tend flocks of camels and goats although nowadays some have moved to other occupations.

Comment

It is unlikely that the applicant would have experienced attacks from members of the Hawiye clan for the reason that the applicant is a member of the Abaskul clan. There is a complex relationship between different clans and to confuse the matter further intermarriage between clans is not unusual. In a given region, a particular clan may be higher up the social pecking order than another. This does not mean that higher ranked clan members will physically attack a member of a lower ranked clan simply because of the person's clan affiliation. To illustrate the peculiarities of Somali life the most intense fighting in Mogadishu at the moment occurs between two warlords who both belong to the same branch of the Hawiye clan.

It is worth noting that there are other areas of Somalia where the Abaskul are more prominent."

190 In order to qualify for a protection visa the respondent has to demonstrate that she is a person who[168]:

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

191 The respondent gave a written statement to the Tribunal, which in part read as follows:

"About a year and a half ago members from the Hawiye clan invaded our house and attacked my husband. My husband was able to run away with the help of a neighbor. My husband had to run away and to date I don't know if he is alive or where he is.

On one occasion I went to purchase food for my children. People from the Hawiye clan attacked me. They put a sword on my chest, near my

---

168 Article 1A(2) of the Convention relating to the Status of Refugees, 28 July 1951, as amended by the Protocol relating to the Status of Refugees, 31 January 1967.

> neck and they cut me. I still have the scar. I was lucky that my neighbors saw this attack and they came and saved me from these people. I was lucky that the neighbors who were Hawiye saved me otherwise I would have probably been killed.
>
> On another occasion a group of women from the Hawiye attacked me as I was shopping near our house. I received cuts to my head and face and I still feel the pain from the injuries. My neighbors who saw the incident once again came to my rescue as they heard me shouting and crying. They told me to go back home and I was not to leave my house again as I could get killed.
>
> …
>
> If I am returned to Somalia I would probably be killed, as there is no one in Somalia who can protect me. My clan is a small defenseless clan and as a result there is no where [sic] in Somalia where we can settle. In Somalia there is no government and there are no authorities that could protect me. If I am returned there my children and I will probably be killed. It is because of the fact that we have no one to protect us and because of the persecution we face in Somalia as members of the Abaskul clan that I am seeking protection from the Australian government."

192 It can be seen that the respondent did refer in her statement to three incidents, one being an attack upon her husband during a house invasion, an attack upon her during which a wound was inflicted, and an attack by a group of women which also resulted in injury to her.

193 The matter upon which the respondent relied in proceedings in the Federal Court and in this Court, is the absence, in the Tribunal's reasons, of any finding as to the occurrence or otherwise of the attack upon her husband.

194 In the Tribunal's reasons under the heading "background and claims", the Tribunal said this:

> "She said that she rarely ventured outside after the commencement of the civil war, but that on two particular occasions when she did so, she was soon after attacked by members of the Hawiye clan. She claims that the attacks on her occurred because the Hawiye clan was antagonistic to her own clan. She said that the first attack occurred a long time ago and that the second attack occurred about 20 months ago. She claims that she received several wounds in the attacks upon her as her assailants had swords and knives. She said that on each occasion she was assisted by neighbours who, like her attackers, were also of the Hawiye clan. She said that her husband ran away with the help of a neighbour and she does not know where he is now. She said that she would be alone and vulnerable if she were returned

to Mogadishu. She claims that her Hawiye neighbours suggested that she leave Somalia as they would be unable to protect her in the future."

195 The key reasons for the Tribunal's decision are to be found in this passage:

"In view of the aforementioned information, and bearing in mind that on the two isolated occasions the applicant encountered problems, she was assisted by persons from the same clan as her attackers, the Tribunal concludes that the attacks against her were motivated by reasons other than race. The Tribunal notes that the applicant has been generally free from any harm in Mogadishu notwithstanding the continuation of the civil war. It notes, in particular, advice from DFAT that members of the Abaskul clan are not targeted by members of the Hawiye clan. That information from DFAT and the fact that the applicant was rescued from further harm by Hawiye neighbours when she twice came under attack, leads to a conclusion that it was not the applicant's clan membership that motivated the attacks upon her."

196 The respondent sought a review by the Federal Court of the Tribunal's decision under s 476 of the Act which provides as follows:

"**Application for review**

(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

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

(c) that the decision was not authorised by this Act or the regulations;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

(f) that the decision was induced or affected by fraud or by actual bias;

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

(2) The following are not grounds upon which an application may be made under subsection (1):

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

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

(3) The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:

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

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

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

but not as including a reference to:

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

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

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

(g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).

(4) The ground specified in paragraph (1)(g) is not to be taken to have been 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 the person was entitled to take notice) from which the person 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."

197 The application for review in the Federal Court was heard by Finn J who gave *ex tempore* reasons for allowing the respondent's application and ordering that the matter be remitted to the Tribunal for further consideration according to law. The ground upon which the respondent succeeded was added during the hearing, and was, that the Tribunal, in failing to make a finding about the occurrence of an attack both on the husband and her (upon which she had enlarged to include herself as a victim of it in oral evidence to the Tribunal) had failed to make a finding on a material question of fact as required by s 430(1) of the Act which provides as follows:

"Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based."

198 With respect to the Tribunal's reasons, Finn J said this:

"It is in my view important to appreciate the significance of this matter. It is the first of the matters relied upon in her initial statement. It relates to the break-up of her own family unit and to the departure of the person under whose protection she would ordinarily be and it occurs at a time relatively close to one of the other two occasions on which a personal attack has been made upon her. It can properly be said, in my view, to be a matter that was central to the events relied upon by the applicant as grounding her fear of persecution."

199 It was his Honour's opinion that in not making a finding about the occurrence of the assault upon the respondent's husband and the respondent, the Tribunal had failed to observe the procedures required by s 430(1)(c) of the Act, being procedures in connexion with the making of the decision within the meaning of s 476(1)(a).

200 His Honour summarised his conclusion in this paragraph:

> "[B]earing in mind the apparent centrality of the attack upon the house to the events relied upon as founding the well-founded fear of persecution, it seems to me inevitable that I must conclude that the statement of reasons of the Tribunal is deficient in its failure to address this matter."

201 An appeal[169] by the appellant to the Full Court of the Federal Court (Heerey, Merkel and Goldberg JJ) was unanimously dismissed. In doing so the Full Court rejected the appellant's arguments, which were repeated in this Court, that failure to comply with s 430(1) did not constitute a failure to observe procedures required by the Act within the meaning of s 476(1)(a); or, alternatively, that the primary judge erred in holding that in the present case there was a failure to set out the findings on any material questions of fact.

202 Their Honours regarded themselves as bound to reach the conclusion that they did. They said[170]:

> "A uniform line of Full Court authority is conclusive against the Minister's argument: *Muralidharan v Minister for Immigration and Ethnic Affairs*[171]; *Paramananthan v Minister for Immigration and Multicultural Affairs*[172]; *Logenthiran v Minister for Immigration and Multicultural Affairs*[173]; *Hughes v Minister for Immigration and Multicultural Affairs*[174]; *Perampalam v Minister for Immigration and Multicultural Affairs*[175]; *Sellamuthu v Minister for Immigration and Multicultural Affairs*[176]; *V v Minister for Immigration and Multicultural Affairs*[177]; *Thevendram v Minister for Immigration and Multicultural Affairs*[178]; *Borsa v Minister for*

---

169 (1999) 95 FCR 506.

170 (1999) 95 FCR 506 at 510.

171 (1996) 62 FCR 402 at 413-416.

172 (1998) 94 FCR 28 at 31, 35-36, 42, 53, 70.

173 [1998] FCA 1691.

174 (1999) 86 FCR 567.

175 (1999) 84 FCR 274.

176 (1999) 90 FCR 287.

177 (1999) 92 FCR 355.

178 [1999] FCA 182.

> *Immigration and Multicultural Affairs*[179]; *Addo v Minister for Immigration and Multicultural Affairs*[180]. Counsel for the Minister did not argue that these authorities were distinguishable."

The appeal to this Court

203 Despite what their Honours in the Full Court said in this case, opinion in the Federal Court with respect to the meaning and application of ss 430 and 476 has not been unanimous. In *Xu v Minister for Immigration and Multicultural Affairs*[181], Whitlam and Gyles JJ expressed a contrary view to that of the Full Court here. They held that a failure to comply with s 430 of the Act did not give rise to a ground of review under s 476(1)(a). Their Honours held that the decisions of the Federal Court (including decisions of the Full Court) which have proceeded upon a different basis were wrong and should not be followed[182]. They referred to the judgment of the Full Court in this case and declined to follow it. The other member of the Court in *Xu*, R D Nicholson J, decided the case on a basis that did not require him to reach any conclusion on the matter in contention here.

204 On 30 June 2000, a Full Court of the Federal Court constituted by five judges gave judgment in *Minister for Immigration and Multicultural Affairs v Singh*[183]. The Court (Black CJ, Sundberg, Katz and Hely JJ, Kiefel J dissenting) decided that a breach of s 430(1) was a failure to observe a procedure required to be observed in connexion with the making of the decision within the meaning of s 476(1)(a) although no breach of s 430(1) had occurred in that case. Kiefel J delivered a strong dissenting opinion preferring the majority opinion in *Xu*. With respect to those decisions of the Federal Court that were relied upon by the Full Court her Honour said[184]:

> "By that process the Court became involved in identifying what was relevant or material to the questions posed for the Tribunal in a given case. Although it was explained, from time to time, that the Court was saying no more than that the reasons were deficient because of the omission, the inescapable conclusion was that they were holding the Tribunal to have

---

179 [1999] FCA 348 at [26], [27].

180 [1999] FCA 940.

181 (1999) 95 FCR 425.

182 (1999) 95 FCR 425 at 432.

183 (2000) 98 FCR 469.

184 (2000) 98 FCR 469 at 491.

been obliged to take a matter into account in its reasoning process, as the majority in *Xu* points out."

205 In my opinion the reasoning and conclusions of Whitlam and Gyles JJ in *Xu* and Kiefel J in *Singh* are correct. But before going to the former of these, I would refer to some other matters.

206 Sections 430 and 476 of the Act need to be placed in context. The first decision in this case was made under s 66 of the Act. Section 65 sets out the criteria for a decision by the Minister with respect to the grant of a visa. Section 66 sets out the obligations owed by the Minister to an applicant in notifying the applicant of a decision to grant or to refuse a visa application. Sub-section (2) of the latter section makes detailed provision for what must be communicated to an applicant if his or her application is refused:

"Notification of a decision to refuse an application for a visa must:

(a) if the grant of the visa was refused because the applicant did not satisfy a criterion for the visa – specify that criterion; and

(b) if the grant of the visa was refused because a provision of this Act or the regulations prevented the grant of the visa – specify that provision; and

(c) unless subsection (3) applies to the application – give written reasons (other than non-disclosable information) why the criterion was not satisfied or the provision prevented the grant of the visa; and

(d) if the applicant has a right to have the decision reviewed under Part 5 or 7 or section 500 – state:

(i) that the decision can be reviewed; and

(ii) the time in which the application for review may be made; and

(iii) who can apply for the review; and

(iv) where the application for review can be made."

207 In reviewing a decision made under s 65 the Tribunal may, pursuant to s 415(1), exercise all of the powers and discretions conferred upon the original decision-maker.

208 Division 4 of Pt 7 of the Act is concerned with the conduct of the review and refers, among other things, to a review "on the papers"[185], the calling of witnesses[186] and the reception of evidence[187]; in other words, to the manner of conduct of proceedings in the Tribunal, that is to say, its procedures.

209 I turn now to a consideration of the necessary content of a decision of the Tribunal. In conventional legal proceedings a primary judge is obliged to state his or her findings and reasons for judgment in order that there may be a proper understanding of the basis upon which the decision depends[188]. Not only are the parties to litigation entitled to that in order to satisfy themselves that there has been a conscientious consideration of their case, but also, they should have it so that an appeal court can satisfy itself as to the correctness or otherwise of the decision at first instance. In *Pettitt v Dunkley*[189], Asprey JA said that a failure to state the relevant findings and reasons constitutes an error of law.

210 *Pettitt* was most recently considered by this Court (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ) in *Fleming v The Queen*[190]:

> "It was held in *Pettitt v Dunkley* that the failure of the trial judge, sitting without a jury, to give reasons for his decision made it impossible for the Court of Appeal to determine whether or not the verdict was based on an error of law, and this had the consequence that the failure to give reasons itself constituted an error of law[191]. In *Public Service Board of NSW v Osmond*[192], Gibbs CJ said that the decision in *Pettitt v Dunkley* 'that the failure to give reasons was an error in law may have broken new ground'. Even if that be so, and we should not be taken as acceding to the view that

---

185 Section 424 (since repealed and substituted by *Migration Legislation Amendment Act (No 1)* 1998 (Cth)).

186 Section 426.

187 Sections 427 and 428.

188 *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 382 per Asprey JA.

189 [1971] 1 NSWLR 376 at 382; see also at 384-385 per Mahoney JA, 388 per Moffitt JA.

190 (1998) 197 CLR 250 at 260 [22].

191 [1971] 1 NSWLR 376 at 381-382, 385, 388.

192 (1986) 159 CLR 656 at 666.

> new ground was broken in *Pettitt v Dunkley*, the reasoning of the Court of Appeal … should be accepted."

It seems to me, with respect, that the opinion of the Court of Appeal of New South Wales in *Pettitt* as to the characterization of the omission (of relevant reasons) as an error of law is a correct one. The passage from *Fleming* that I have quoted is not to any different effect. Indeed, it is an approval, whether it was a new proposition or not as suggested by Gibbs CJ.

211 Let me assume at this point, however, that the reasoning of the Tribunal is defective because of an omission of a finding as to a fact claimed to be material, the asserted attack upon the respondent and her husband. Let me also assume that the omission made it difficult, or indeed even impossible for a reviewing court to satisfy itself that the Tribunal had considered that matter. If those assumptions be correct, the Tribunal's decision may arguably have involved an error of law of the kind to which Asprey JA referred. But as the Act makes clear, not all errors of law are reviewable by the Federal Court under s 476. I leave aside for present purposes s 476(1)(a). Section 476(1)(b) makes reference to an unauthorised exercise of jurisdiction, s 476(1)(c) to a decision not authorised under the Act, s 476(1)(d) to an improper exercise of power, s 476(1)(f) to a fraudulent or biased decision, and s 476(1)(g) to an absence of evidence or other material to justify the making of the decision. Any assumed error of law in this case is not one of these. Section 476(1)(e) is expressly concerned with errors of law but of legal interpretation, or application of the law only, neither of which is present here.

212 I return to s 476(1)(a). In ordinary language, the making of a factual finding would not readily answer a description of complying with a procedural requirement. Finding a fact is part of the process of reaching a decision. It is more than, and different from, complying with a procedural requirement. That is how s 476(1)(a) in my opinion should be read. So read, it may be capable of operating with respect to, for example, the procedural requirements required by s 66 and Div 4 of Pt 7 of the Act but not to the exposure of the reasoning process by which a conclusion is reached.

213 The "error of law" which I have, for present purposes assumed, is not an error of law of the kind which s 476(1)(e) or any other paragraph of the sub-section identifies. Nor is it a failure to comply with a procedural requirement of the kind contemplated by s 476(1)(a). These matters, taken with the exclusion, as a ground of review by s 476(3)(e) of a failure to take into account a relevant consideration, and the distinction which will ordinarily, and does exist here, between an error of law and the non-observance of a procedural requirement, provide a firm basis for holding that a failure to find a material fact does not give rise to a ground of review under the Act. And there is no reason to read down the words "a relevant consideration". Those words are, on their face, wide enough to include a material fact.

214 Take a different situation, one in which a tribunal has failed to make material findings to the extent that a review, even of the restricted kind for which s 476(1) makes provision, is simply not possible. Such a "decision" may not be able to be regarded as a decision in any real and practical sense. A court would be entitled to take the view that the decision-maker has in truth refused to make a decision. There will be, in such a case, a remedy, and that is the one for which s 481(2)(a) makes provision:

> "(2) On an application for a review in respect of *a failure to make a judicially-reviewable decision*, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Federal Court may make any or all of the following orders:
>
> (a) an order directing the making of the decision". (emphasis added)

215 "Material" may mean something different from "necessary" or "essential". Whether "material" does have a different meaning depends in part upon its context. A particular fact may assist, together with other facts, a decision-maker to reach a decision. The decision might still, in the circumstances have been reached absent one or more material facts which the decision-maker has relied on for the decision, or referred to in the reasons for it. But as to whether or not certain facts are material, the extent to which they are or are not material will depend upon how much weight the decision-maker thinks should be placed upon them. Weight will frequently be inextricably tied up with materiality. Different factual matters will often have a different significance for different people. I would not regard the matter that Finn J and the Full Court thought material for the purposes of s 430 of the Act to be so. Nor would I have thought it to be material in the sense that it was a necessary or substantial matter of fact without which the conclusion of the Tribunal could not have been reached.

216 In *Xu*, Whitlam and Gyles JJ said this[193]:

> "As is apparent from the reasons of R D Nicholson J, the contrast between (c) and (d) is fundamental to a proper understanding of s 430. Materiality arises in various contexts. In this context, the language of that contrast immediately calls up: '… the difference between the factum probandum (the ultimate fact in issue) and facta probantia (the facts adduced to prove or disprove that ultimate fact)' (Fullagar J in *Hayes v Commissioner of Taxation (Cth)* [194]; Bowen CJ and Fox J in *Sean*

---

193 (1999) 95 FCR 425 at 437-438.

194 (1956) 96 CLR 47 at 51.

Investments v MacKellar[195].) See also the use of the phrase 'ultimate facts' by Stephen J in *Kentucky Fried Chicken Pty Ltd v Gantidis*[196]. The same contrast is reflected in the rules of pleading, for example, O 11 r 2(a) of the *Federal Court Rules* 1979 (Cth) which distinguish between material facts, which are to be pleaded, and the evidence by which those facts are to be proved, which is not to be pleaded. Material facts are those which are necessary to constitute a cause of action or ground for relief. Gummow J has referred to the same distinction in more than one statutory context – see *Grace Brothers Pty Ltd v Magistrates, Local Courts of NSW*[197] and *Wiest v Director of Public Prosecutions*[198]. The judgment of the Court in *Zoeller v Federal Republic of Germany*[199] is to the same effect.

Applying that analysis to the present section would suggest that (c) refers to those findings of fact which are necessary to the decision, and, in that sense, ultimate facts, and (d) refers to that which proves the necessary ultimate fact. That analysis is confirmed, and, in our opinion, required when it is recognised that s 430 relates to administrative decisions made on the merits pursuant to a statute. Materiality in s 430 must be materiality to the decision to which it applies. In other words, materiality as it is understood in administrative law. A statute may expressly or impliedly contain conditions which must either exist in fact or as to which the decision-maker must be satisfied before making the decision. A statutory provision may expressly or impliedly oblige the decision-maker to take certain facts into account when making the decision, or prohibit the decision-maker from taking certain facts into account when making the decision. These facts may either have to objectively exist or may depend upon the satisfaction of the decision-maker. Where a statute does not expressly or impliedly constrain the decision-maker, the decision-maker is the sole judge of materiality and there can be no judicial review of that question, no matter how wrong or illogical the decision-maker is seen to be by a judge. In those circumstances, a fact is material only if the decision-maker considers it so.

The consequence of this reasoning is that it is quite impossible to upset a decision because a decision-maker does not take into account a fact

---

195 (1982) 42 ALR 676 at 682.

196 (1979) 140 CLR 675 at 685.

197 (1988) 84 ALR 492 at 505.

198 (1988) 23 FCR 472 at 519.

199 (1989) 23 FCR 282 at 294.

which an applicant proposes as material, but which is not made material by the Act. That being so, it would be truly anomalous to conclude that a material fact has been omitted from a statement of reasons where the Act does not make the fact material. The only conclusion open from such an omission is that the decision-maker did not consider the fact material. If a judge makes an assessment that an absent fact is material otherwise than by holding that the Act requires the fact to be considered, then that plainly involves a merits review which the High Court have emphatically said should not happen.

Furthermore, it is not permissible to elevate those facts and circumstances which are relevant to a material fact to materiality, as to do so would obliterate the distinction between (c) and (d) in s 430(1).

On this view, what should happen is those facts which the Act requires to be decided, and perhaps those facts which the Tribunal decides are material in the area committed to its discretion, should be identified in the written statement and found, one way or the other, with reasons provided under (b) referring to evidence and other material under (d).

As we have said, if there is a failure in the written statement to deal with what might be described as a mandatory fact, then a deficiency may be found. No such deficiency can be found on any other basis. To do so is to intrude into the decision, rather than supervise compliance with s 430."

217 I agree with their Honours' analysis and conclusion, a conclusion which is, in my opinion strengthened by the statutory indications pointing in that direction and to which I have earlier referred. Finn J and the Full Court thought the assault upon the husband was a material fact. The earlier decision-maker, the Tribunal, did not. That may be taken to be so because the Tribunal did not regard it as necessary to make a finding on it. It could hardly have been overlooked because the Tribunal had earlier made an express reference to it. The Tribunal was entitled neither to regard it, nor treat it as material to its decision. That was a position that was open to the Tribunal, and, even if a review were available on such a ground, the Federal Court as the reviewing court would not have been justified in merely substituting its own opinion as to its materiality for that of the Tribunal. The important matters for the Tribunal were that the respondent's attacks were made by members of the same clan as those who assisted her afterwards, and that the respondent's Abaskul clan was not targeted in the attacks by members of the Hawiye clan: therefore the attacks were not racially motivated. Hence the fact of the attack upon the husband was not a material fact, a conclusion with which I would agree.

218 I should make it clear, however, that the conclusion that I have reached depends in part at least upon the statutory context in which s 430 is found, and certainly does not foreclose debate about s 25D of the *Acts Interpretation Act* 1901 (Cth) and similar provisions in other statutes.

219 I would mention one other matter. In *Minister for Immigration and Multicultural Affairs v Ibrahim*[200], this Court warned against the distractions (from the task of applying the Convention) of applying, to conditions which were accepted in that case as existing in Somalia then, the description of civil war. Similar sorts of conditions were described in this case, similarly loosely, as civil war. Whether in these circumstances conditions of a civil war exist, or whether persons caught up in those circumstances are capable on that account of being regarded as being persecuted on grounds of race may be questionable. However, it is unnecessary to say any more about these matters because I am satisfied there was no failure, for the reasons I have stated, and applying also the tests proposed by Whitlam and Gyles JJ in *Xu*, and Kiefel J in *Singh*, which I would adopt, to find a material fact.

220 I would therefore allow the appeal by the Minister.

221 The reasons I have given also mean that the application for prerogative relief should be refused. There is no basis upon which that relief could be granted. The Tribunal made no errors of law whether on the face of the record or otherwise, it did not fail in any way to accord natural justice to the respondent, and there was no failure to exercise the jurisdiction conferred upon it. It may be that a failure to give reasons sufficient to allow a court to decide whether the decision is judicially reviewable, or the giving of manifestly deficient reasons in other respects might provide a ground for prerogative relief just as it might ground relief under s 481(2) of the Act but it is unnecessary to state any concluded opinion on this.

Orders

222 I would allow the Minister's appeal and dismiss the respondent's application for prerogative relief.

223 Consistent with the conditions upon which special leave to appeal to this Court was granted, I would not disturb any orders as to costs which have been made in the courts below and I would order that the Minister pays the respondent's costs of the appeal.

ISRAELIAN

---

200 (2000) 74 ALJR 1556 at 1583-1584 [144]-[147] per Gummow J; 175 ALR 585 at 623-624. See also 74 ALJR 1556 at 1596-1597 [205]-[206] per Hayne J, 1598-1599 [214], 1600 [219], 1600-1601 [224]-[228] per Callinan J; 175 ALR 585 at 641-642, 644, 646, 647-648.

224 This case raises the same questions as arise in *Yusuf* as to the meaning and application of ss 430 and 476 of the *Migration Act* 1958 (Cth) ("the Act").

Case history

225 Mr Israelian came to Australia from Armenia on 8 September 1992. He made application for a protection visa to the Department of Immigration and Multicultural Affairs on 29 October 1993. The application was refused on 6 May 1994. The decision to refuse him the visa sought was affirmed by the Refugee Review Tribunal ("the Tribunal") on 23 March 1995.

226 The respondent told the Tribunal that he had been called up for military service in January 1993 while he was out of the country. He said that, because of his absence from his country at the time of his call-up, he would be treated on his return as a deserter and forced to serve in the military at the front line. Another reason why that would be his fate, was that he was an active supporter of the Communist party in Armenia. He said the position would be different if he had formally migrated from Armenia, instead of failing to return to his country of birth.

227 Armenia has been in conflict with Azerbaijan over the area of Nagorno-Karabakh. The respondent is not opposed to all wars but has a particular objection to that conflict. It was, he said, a futile war. There is no resolution in sight to it unless the ethnic Armenians withdraw from Nagorno-Karabakh and relocate to Armenia. The respondent is unwilling to fight former comrades who had served with him in what was formerly the Soviet Army, in which he has already served. As a conscript he would, he said, be sent to the front and he certainly does not want to be killed in a pointless war. He claimed that the war has been condemned by the international community. And he is opposed to a war that resorts to ethnic cleansing, which he alleges this one to be.

228 The Tribunal concluded that the respondent's claims that there was a real chance that he would be persecuted upon his return to Armenia, for a reason relevant to the Convention relating to the Status of Refugees of 28 July 1951 ("the Convention"), could not be sustained.

229 The respondent sought review of the Tribunal's decision by the Federal Court of Australia. His application was heard by R D Nicholson J. His Honour said that it was arguable that deserters or draft evaders might be regarded as a particular social group. He was of the opinion that a factual finding whether that was so or not, should have been made by the Tribunal. Membership of that group, if it were a social group within the meaning of the Convention, might give rise to a well-founded fear of persecution. It followed, his Honour held, that there had been a failure to make a finding as to a material fact as required by s 430 of the Act.

230 According to his Honour that was not, however, the only material fact in respect of which a finding should have been made. His Honour said that there was

evidence before the Tribunal of a German press report that the United Nations High Commissioner for Refugees had issued an order to the effect that Armenian draft resisters should be given refugee status. If, his Honour said, that be factually correct, it might amount to a condemnation by the international community of the military actions in Nagorno-Karabakh as being contrary to basic rules of human conduct, and hence in this particular case the punishment for desertion or draft evasion could amount to persecution of the respondent as a member of a particular social group. In the result his Honour allowed the application for review, and ordered that the Tribunal's decisions be set aside and that the matter be remitted to the Tribunal to determine whether the respondent had a well-founded fear of being persecuted by reason of membership of a particular social group.

231 The appellant appealed to the Full Court of the Federal Court[201] (Einfeld and North JJ, Emmett J dissenting). In that Court, the majority took the view that the Tribunal dealt only with the respondent's fear of persecution by reason of his membership of a social group consisting of conscientious objectors and failed to consider whether he feared persecution by reason of his membership of a social group comprising deserters and draft evaders or either of them. The Full Court said that references to the respondent's claims generally, the holding by the Tribunal that these were not Convention related, and that any punishment would not be motivated by Convention reasons were formulaic only, and did not grapple with the respondent's arguments on the basis of them. As in *Yusuf* the Full Court held that there had been a failure to comply with s 430(1)(c) of the Act. Their Honours in the majority also held that here there had been a failure to comply with s 430(1)(b) and (d) which require the Tribunal, respectively, to set out its reasons for a decision, and to refer to the evidence, or any other material on which the findings of fact are based. As in the case of *Yusuf*, the Full Court held that those failures gave rise to a right of review under s 476(1)(a) of the Act. The appellant's appeal was accordingly dismissed.

The appeal to this Court

232 The appellant appeals to this Court on the grounds that the Full Court erred by:

(a) affirming R D Nicholson J's judgment allowing the respondent's application for review of the decision of the Tribunal; and

(b) finding that a failure of the Tribunal to comply with s 430(1)(b), (c) and (d) of the Act was a failure to observe procedures required by the Act to be observed in connexion with the making of the decision and hence gave rise to a right of review under s 476(1)(a) of the Act; and

---

201 [1999] FCA 649.

(c) holding that there was a failure by the Tribunal to comply with s 430(1)(b), (c) and (d) of the Act.

233 The respondent sought prerogative relief pursuant to s 75 of the Constitution in the event that the appellant's appeal were to succeed.

234 What I have said in relation to the appellant's appeal in *Yusuf* with respect to ss 430(1)(c) and 476 of the Act applies with equal force to this case. Simply because the Tribunal did not expand at length upon all of the claims made by the respondent does not mean that the Tribunal was obliged or failed to make factual findings in respect of them. The Tribunal fully appreciated that the respondent was making a number of claims and expressly held that none of his claims provided reason, within the meaning of the Convention to regard him as having a well-founded fear of persecution. Neither in the sense in which the phrase "material questions of fact" as used in the Act in s 430(1)(c) is to be understood, nor in the sense in which a question of fact is to be conventionally understood apart from statute, did the Tribunal fail to make a relevant finding, or act in such a way as to entitle the Federal Court to review the Tribunal's decision pursuant to s 476 of the Act.

235 However, additional errors were held by the Full Court to have been made by the Tribunal, being failures to set out reasons for the decision, and to refer to the evidence upon which the findings of fact were based. The failure to set out the reasons is said to be a failure to provide a reason for the rejection of an important argument by the respondent, that deserters and draft evaders were capable of constituting a social group within the meaning of the Convention. But that is, really, just another way of saying that the Tribunal failed to set out findings on a material question of fact, a view which, in my opinion, is unsustainable for the reasons I have stated. But in any event "reasons for the decision" as referred to in s 430(1)(b) do not mean reasons in detail with respect to each and every argument advanced by an applicant. "Reasons" mean reasons why the Tribunal considers that the application should be dismissed. And so long as the reasons given are sufficient for that purpose, the requirements of s 430 are satisfied. Nor was there any failure to refer to the evidence or any other material upon which the decision was based. There was no basis upon which the Tribunal's reasons could be properly characterized as formulaic. The reasons were adequate in all respects. But in any event, a failure to give reasons, or to refer to some evidence or material upon which the decision is based, would not give rise to a right of review under s 476(1)(a) any more than a failure to make a finding on a material question of fact would. These, in short, are not failures to observe procedures required by the Act.

236 A tribunal such as the Refugee Review Tribunal is not obliged to pursue every snippet of information which comes to its attention. It is certainly not obliged to follow up a second hand reference to a mere press report of a purported statement of an official, however senior, of the United Nations. There was no need

for the Tribunal to refer to that piece of material or to pursue enquiries in respect of it, as R D Nicholson J and the majority of the Full Court held it should. And, as will appear, such a pursuit would, in any event, have been an unrewarding one.

237 The reference to the press report was made in a Human Rights Watch *World Report*, published in 1995, in these terms:

> "According to a report in the influential German daily *Sueddeutsche Zeitung*, the United Nations High Commissioner for Refugees issued an order by which Armenian draft resisters should be given refugee status."

238 A reference to a report in a newspaper, neither confirmed nor otherwise verified, and not reproduced, either in the original, or in translation, and purporting to say something itself neither reproduced nor verified, and claimed to have been promulgated by one official only, no matter how senior, could not be binding on the Tribunal, assuming it did exist, and could not answer the description of a material question of fact.

239 While it may be accepted that the role of the United Nations High Commissioner for Refugees is an important one, the Commissioner does not have the authority to make "orders". He or she has no power to define, or define finally, the status of refugees. In short, no search, no matter how prolonged or exhaustive, could have unearthed a relevant "order" of the High Commissioner.

240 The preamble to the Convention refers to the High Commissioner in this way:

> "NOTING that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner".

241 Article 35 in Ch VI of the Convention refers to the obligations of the subscribing countries to the Convention:

> "1 The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.
>
> 2 In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting

> States undertake to provide them in the appropriate form with information and statistical data requested concerning:
>
> (a) the condition of refugees,
>
> (b) the implementation of this Convention, and
>
> (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees."

242 Article 1 of the Convention, which defines "refugee", does not purport to confer upon the Commissioner any power or jurisdiction, to declare or order, let alone conclusively so, a particular group or class of persons to be refugees.

243 The Statute of the Office of the United Nations High Commissioner for Refugees, as adopted by resolution 428(V) of the United Nations General Assembly on 14 December 1950, which established the office and status of the United Nations High Commissioner for Refugees, provides as follows in par 3:

> "The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council."

There is no reference in the Statute to "orders", and no power is conferred on the High Commissioner to make determinations binding upon subscribing states.

244 The Tribunal found in substance that the respondent's objections were that he did not wish to risk his life for a purpose of no benefit to ethnic Armenians and he did not wish to spend further time in military service as he had already served two years. The Tribunal held that, while it sympathised with those beliefs, they did not disclose a genuinely held conscientious objection to the war over Nagorno-Karabakh. The Tribunal placed emphasis on the fact that the respondent did not express objections to killing other people in war situations, "subject to the inference that they were not Armenians".

245 In his reasons for judgment, Emmett J (dissenting) in the Full Court said[202]:

> "There may be an element of uncertainty in the language adopted by the primary judge in criticising the Tribunal for having rejected the Respondent's claim 'without coming to a view, if it could'. It is not clear whether his Honour was referring to the possibility that the Tribunal ought to have made further enquiries because its fact finding and investigative procedure was inadequate or whether his Honour was simply saying that

---

202 [1999] FCA 649 at [32]-[36].

the Tribunal should have come to a view on the basis of the material before it.

If the latter is the correct interpretation, it is difficult to see how the Tribunal could have come to a view, on the material before it, that deserters or draft evaders constitute a particular social group. That is to say, in so far as they are persecuted by the harshness of punishment, that would be no more than the application of a law of common application to them in respect of their contravention of that law. In any event, that would be a finding of fact which would not be subject to review in the Court.

If the former is the true interpretation, however, as the Respondent contended, there was nothing to indicate what kind of material might possibly be available. The one straw in the wind was the reference to the German newspaper report that the United Nations High Commissioner for Refugees had indicated that Armenian draft resisters should be given refugee status. There was apparently nothing more in the material before the Tribunal. The argument was that, if the United Nations High Commissioner for Refugees had expressed such a view, further enquiries were called for that may have elicited information which suggested that deserters and draft evaders, in the context of the Nagorno-Karabakh conflict, were being treated in a differential manner such as would constitute them a particular social group.

The difficulty with such an argument is that it is not clear what further inquiries could or should have been made by the Tribunal. There is certainly no material before the Court to indicate what might possibly have been ascertained by such an inquiry. On the material before the Tribunal, there is no basis for concluding that deserters and draft evaders constitute a particular social group. They are simply a particular group of law breakers, members of whom are punished, in the same way as all other citizens, for failing to comply with the requirements of the law of Armenia.

In the absence of anything further before the Tribunal, and in the absence of any indication as to what might have been obtained had further enquiries been made, I do not see any basis for interfering with the determination of fact made by the Tribunal. The Tribunal considered the material before it and reached a conclusion, on the basis of that material, that deserters or draft evaders do not constitute a 'particular social group' within the meaning of that expression in the Convention. In my opinion, the learned primary judge erred in so far as he held that there was material before the Tribunal which would compel additional enquiry as to whether deserters or draft evaders could constitute a particular social group."

246 I would, with respect, adopt what his Honour said in those passages.

247 The Tribunal did not fail to do what it was required to do by s 430 of the Act. And, even if it had, for the reasons that I have stated and those that I gave in *Yusuf*, such a failure would not be reviewable pursuant to s 476 of the Act. Furthermore, both the Federal Court and the Full Court fell into error in the way in which they criticised and rejected the decision of the Tribunal for its omission of a reference to an "order" of the United Nations High Commissioner for Refugees which, even if it had been made, could have no binding or conclusive effect.

Orders

248 I would allow the Minister's appeal and dismiss the respondent's application for prerogative relief.

249 Consistent with the conditions upon which special leave to appeal to this Court was granted, I would not disturb any orders as to costs which have been made in the courts below and I would order that the Minister pays the respondent's costs of the appeal.