FEDERAL COURT OF AUSTRALIA

Aye v Minister for Immigration and Citizenship [2010] FCAFC 69

Citation:	Aye v Minister for Immigration and Citizenship [2010] FCAFC 69
Appeal from:	Aye v Minister for Immigration and Citizenship [2009] FCA 978
Parties:	**ZIN MON AYE v MINISTER FOR IMMIGRATION AND CITIZENSHIP, MIGRATION REVIEW TRIBUNAL and MINISTER FOR FOREIGN AFFAIRS**
File number:	NSD 1031 of 2009
Judges:	**SPENDER, LANDER AND MCKERRACHER JJ**
Date of judgment:	11 June 2010
Catchwords:	**MIGRATION** – appeal from an order of a judge of this Court – application to review a decision of the Minister for Foreign Affairs and the Migration Review Tribunal (the Tribunal) was dismissed – the Tribunal affirmed decision to cancel visa on the ground that the Minister determined the appellant was a person whose presence in Australia is or would be contrary to Australia's foreign policy interests – Minister for Foreign Affairs' decision made under the *Migration Regulations 1994*(Cth) – decision is a privative or purported privative clause decision and therefore cannot be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) – if decision was made pursuant to a prerogative power it still cannot be reviewed under the ADJR Act – whether the decision is justiciable pursuant to s 39B of the *Judiciary Act 1903* (Cth) – decision is susceptible to review depending upon the character and nature of the decision and not upon whether the decision was made under a legislative instrument or prerogative – if the matter was remitted to the Minister for Foreign Affairs the Minister would make the same decision
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3 *Judiciary Act 1903* (Cth) s 39B *Migration Act 1958* (Cth) ss 5E, 116, 189, 196, 198, 199, 474, 477 *Migration Regulations 1994* (Cth) r 2.43

Cases cited:	*Attorney-General of the Commonwealth v Oates* (1999) 198 CLR 162, applied *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, cited *Aye v Minister for Immigration and Citizenship* (2009) 111 ALD 546, referred to *Barton v The Queen* (1980) 147 CLR 75, referred to *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, applied *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, referred to *Laker Airways Ltd v Department of Trade* [1977] QB 643, cited *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, referred to *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290, applied *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354, cited *Re Ditfort* (1988) 19 FCR 347, cited *Re Refugee Tribunal; Ex parte AALA* (2000) 204 CLR 82, referred to *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, cited *Stead v State Government Insurance Commission* (1986) 161 CLR 141, cited *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, referred to *The Queen v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, referred to
Date of hearing:	25 November 2009
Place:	Adelaide (heard in Sydney)
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	128
Counsel for the Appellant:	Mr T Silva
Solicitor for the Appellant:	Silva Solicitors
Counsel for the First, Second and Third Respondents:	Mr G Kennett
Solicitor for the First, Second and Third	Australian Government Solicitor

Respondents:

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1031 of 2009**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**ZIN MON AYE** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	MIGRATION REVIEW TRIBUNAL **Second Respondent**
	MINISTER FOR FOREIGN AFFAIRS **Third Respondent**

JUDGES:	**SPENDER, LANDER AND MCKERRACHER JJ**
DATE OF ORDER:	**11 JUNE 2010**
WHERE MADE:	**ADELAIDE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first and third respondents' costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	MIGRATION REVIEW TRIBUNAL **Second Respondent**
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JUDGES:	**SPENDER, LANDER AND MCKERRACHER JJ**
DATE:	**11 JUNE 2010**
PLACE:	**ADELAIDE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

SPENDER J

1 I have had the benefit of reading in draft form the reasons of judgment of both Lander J and McKerracher J. I agree that the appeal should be dismissed, and I agree also with the reasons of Lander J for that conclusion, with one exception. I share the opinion of McKerracher J that the decision made by the Minister for Foreign Affairs on 14 July 2008 was not justiciable.

2 On 14 July 2008, the Minister for Foreign Affairs made the following determination:

> I, Stephen Smith, Minister for Foreign Affairs, determine in accordance with Migration Regulations 2.43, that Zin Mon Aye, date of birth 26 March 1985, is a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests.

3 On 24 October 2007, a financial sanctions list of 418 sanctioned individuals was introduced. The travel restrictions targeted senior members of the Burmese regime and their associates, including close family members. The list included the appellant's father and

mother, but did not include the appellant. In submissions prior to the making of the determination on 14 July 2008, officers of the Department of Foreign Affairs and Trade advised "our intention to compiling the sanctions list in October 2007 was to include spouses and adult children of senior regime figures and military officers in the scope of the sanctions."

4 That submission later said, "… since October 2007, our sanctions policy has been expanded to include children of regime figures, and we have become aware of her presence here."

5 The submission had earlier noted that "as the child of the next in line for the position of Chief of Airforce, she fits within the definition of those targeted by our sanctions."

6 The submission said: "Now that we are aware of the presence of Ms Aye in Australia, we have recommended that you (Mr Smith) exercise your discretion of the Migration Regulations to determine that she is a person whose presence here is contrary to Australia's foreign policy interests."

7 Lander J, at [108], expresses the view that:

> The decision which the Minister for Foreign Affairs made on 14 July 2008 did not involve any policy considerations. It was a decision which implemented a previous decision which had been made prior to 24 October 2007, which was based upon policy considerations. The decision which was made on 14 July 2008 was whether the previous decision should be extended to include the appellant. In my opinion, the decision of 14 July 2008 is justiciable because it directly affects the appellant by depriving her of a right to continue to reside in Australia in accordance with the terms of her existing visa. The decision does not become non-justiciable because the decision is made as a consequence of a previous decision which was made on policy grounds. …

8 I respectfully disagree.

9 The decision, on its proper characterisation, gave effect to an assessment by the Minister of where Australia's foreign policy interests lay. The decision was simply that the appellant was within a class of persons whose continued presence in Australia was inimical to Australia's foreign policy interests. That is a political matter, and is not justiciable.

10 It is not competent for a Court to enquire into the correctness of the policy targeting senior regime figures and military officers in Burma, their spouses and adult children, or the merits or wisdom of that policy.

11 The essence of the appellant's complaint is that the policy should not apply to adult children of senior Burmese regime figures, who are not supporters of the regime. The particulars of the appellant's complaints to the primary judge included:

(i) The foreign minister took into account an irrelevant consideration, namely, that the applicant is the daughter of someone subject to sanctions.

(ii) The foreign minister failed to take into account a relevant consideration, namely, the fact that he did not have anything adverse whatsoever against the applicant herself.

(iii) The foreign minister asked the wrong question in that he asked whether the applicant was the child of a senior member of the Burmese regime when he should have asked whether the applicant, being a child of a senior member of the Burmese regime, associated herself with her father in support of the regime by any of her actions or in any other way supported the Burmese regime.

12 These contentions demonstrate that the appellant was seeking to challenge the correctness of the content of the policy adopted by the Executive, which involved sanctions against Burmese Military Officers and their immediate families.

13 If the Executive, in wartime, made a decision to intern the nationals of countries with which Australia was at war, that decision, in my opinion, could not be justiciable. A person interned as a result of the application of that policy would be able to challenge the decision to intern, but only on the ground that the person was not a national of a country with which Australia was at war.

14 Here, there was no suggestion that Zin Mon Aye was not the daughter of Brigadier General Zin Yaw, and as such, was within the sanctions policy of the Executive.

15 The decision of the Minister for Foreign Affairs of 14 July 2008 was the application of foreign policy and was not justiciable.

16 If, contrary to that view, the decision is justiciable as Lander J concludes, the content of the duty to accord procedural fairness was limited to making submissions as to whether she was the daughter of Brigadier General Zin Yaw, and thus caught by the policy which embraced the immediate family members of senior Burmese officials.

17 That was never in issue, and the decision of 14 July 2008 was not therefore vitiated by any denial of procedural justice.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender.

Associate:

Dated: 11 June 2010

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1031 of 2009**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**ZIN MON AYE** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	MIGRATION REVIEW TRIBUNAL **Second Respondent**
	MINISTER FOR FOREIGN AFFAIRS **Third Respondent**
JUDGES:	**SPENDER, LANDER AND MCKERRACHER JJ**
DATE:	**11 JUNE 2010**
PLACE:	**ADELAIDE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

LANDER J

18 This is an appeal from an order of a judge of this Court dismissing an application brought by the appellant for the review of a decision made by the Minister for Foreign Affairs on 14 July 2008 and a decision of the Migration Review Tribunal (the Tribunal) made on 4 February 2009. The proceeding was brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) and s 39B of the *Judiciary Act 1903* (Cth) (the Judiciary Act). The Tribunal had affirmed a decision of a delegate of the first respondent to cancel the appellant's Student (Subclass 573) visa under s 116(1) of the *Migration Act 1958* (Cth) (the Act) on the ground that the Minister for Foreign Affairs had determined on 14 July 2008 that the appellant was a person whose presence in Australia is or would be contrary to Australia's foreign policy interests.

19 The appellant's proceeding was commenced in the Federal Magistrates Court but was transferred by Cameron FM to the Federal Court of Australia.

20 The appellant is a citizen of Myanmar. Her parents reside in that country. Her father is a Brigadier General in the Myanmar Air Force. The appellant entered Australia on 19 July 2007 on a Student (Subclass 573) visa. On 15 August 2007 she was granted a further Student (Subclass 573) visa. She is studying for a Masters degree in Accountancy at the University of Western Sydney. She said she was encouraged to come to Australia by her uncle, Mr Chander Mohan Khanna, who is a permanent resident in Australia. Prior to coming to Australia she had completed a Bachelor of Arts degree majoring in Business Administration at the Yangon University of Distance Education and a Bachelor of Science (Engineering) degree majoring in Biotechnology. She said she was estranged from her parents because of her father's association with the brutal Burmese military dictatorship and because of a lack of warmth in his personal relations with her.

21 Whilst in Australia she has worked part-time for a company which has offered her full-time employment upon completion of her Masters degree. She is not in any way dependent on her parents for any financial support.

22 On 24 October 2007 the then Minister for Foreign Affairs issued a media release which relevantly provided:

> The Government has implemented bilateral financial sanctions targeted against members of the Burmese regime and their associates and supporters, following the announcement by the Prime Minister on 27 September. Financial sanctions have been imposed against 418 individuals, including members of the State Peace and Development Council, Cabinet Ministers and senior military figures.
>
> Australia's bilateral financial measures have the effect of prohibiting transactions involving in the transfer of funds or payments to, by the order of, or on behalf of specified Burmese regime figures and supporters without the specific approval of the Reserve Bank of Australia (RBA). …
>
> Details of the sanctioned individuals are available at the Reserve Bank of Australia and Department of Foreign Affairs and Trade websites.

23 Apparently 418 Burmese individuals including the appellant's parents were included on that list.

24 In May 2008 it came to the attention of the officers of the Department of Foreign Affairs and Trade that the appellant was the daughter of a senior Burmese military officer, Brigadier General Zin Yaw who was the Commander of Mingalardon Air Force Base in Rangoon and next in line for the position of Chief of the Burmese Air Force. Brigadier

General Zin Yaw was on the travel restrictions list. Those officers recommended to the Minister for Foreign Affairs to exercise his discretion to determine that the appellant's presence in Australia was contrary to Australia's foreign policy interests.

25 In that submission to the Minister for Foreign Affairs, the First Assistant Secretary wrote:

> 4. Australia's travel restrictions are targeted against senior members of the Burmese regime and their associates, including close family members. Now that we are aware of Ms Aye's presence in Australia, it would appear inconsistent with our sanctions policy to allow her to stay. We therefore recommend that you (Mr Smith) exercise your discretion under regulation 2.43 of the *Migration Regulations 1994* to issue a determination (attached) to the effect that Ms Aye's presence here is contrary to Australia's foreign policy interests. Your determination would mandate the cancellation of Ms Aye's visa by DIAC. Given privacy concerns, you (Mr Smith) would not be able to discuss details of this individual's case publicly.

26 The Minister for Foreign Affairs declined to make the suggested decision or sign the determination until such time as the Department for Foreign Affairs and Trade had reviewed the operation and effectiveness of the Burma sanctions list which he requested be attended to urgently.

27 Some time prior to 14 July 2008 the Department for Foreign Affairs and Trade made a further submission to the Minister setting out the history of financial sanctions which had been taken against Burma since 24 October 2007. It said:

> 2. On 24 October 2007, the financial sanctions **list of 418 sanctioned individuals** was introduced. The list includes members of the SPDC, Cabinet Ministers and Deputy Ministers, senior military officers, regime business associates, and immediate family members (spouses and children) of these people. The list is publicly available on the DFAT and RBA websites.

28 It identified the numbers of individuals on the list of 418 by way of category which included, relevantly, 97 names of senior military officers at the rank of Brigadier General and above in Burma's Army, Navy and Air Force. The submission described the difficulties in compiling such a list in Burma because of the secretiveness of the Burmese regime and military establishment. It recommended to the Minister for Foreign Affairs that he agree to a review of the list by the end of October 2008. The list included family members, including spouses and children. The Minister for Foreign Affairs was advised that the list did not by itself mean that anyone on the list was automatically banned from travelling to Australia. He

was advised the decision to prevent travel is a policy decision that is to be made on a case by case basis once the Government becomes aware of a person on the list having made a visa application.

29 The Minister for Foreign Affairs was advised that he had the authority under the *Migration Regulations 1994* (Cth) (the Migration Regulations) to make a determination that a person's presence in Australia would be contrary to Australia's foreign policy interests. He was advised that such a determination is made under Public Interest Criterion (PIC4003(a)) or reg 2.43 of the Migration Regulations and results in the Minister for Immigration and Citizenship refusing or cancelling a visa as appropriate. He was advised:

> This system gives you (Mr Smith) the flexibility to consider potentially controversial visa applications on a case by case basis.

30 The Minister for Foreign Affairs was advised that officers of the Department of Foreign Affairs and Trade were not aware of the appellant's existence until May 2008 because she was not included on any list and her name therefore did not produce any matches. The submission continued:

> 27. Our intention in compiling the sanctions lists in October 2007 was to include spouses and adult children of senior regime figures and military officers in the scope of the sanctions. Where we were aware of these family members, they have been listed. However, given the lack of information available to us on the Burmese leadership, it is possible that many of our listed individuals, particularly the senior military figures, have spouses and children not known to us. Zin Mon Aye is an example of this.
>
> 28. Now that we are aware of the presence of Ms Aye in Australia, we have recommended that you (Mr Smith) exercise your discretion under the *Migration Regulations* to determine that she is a person whose presence here is contrary to Australia's foreign policy interests (submission 08-1230). We advised that, as the child of the next-in-line for the position of Chief of Air Force, she fits within the definition of those targeted by our sanctions. Should you agree to this recommendation, her visa would be cancelled by DIAC and she would be listed on MAL. We would also include her in the October revision of the financial sanctions list. She would have the right to review of the decision to cancel her visa by both the Migration Review Tribunal (MRT) and the courts.
>
> 29. In response to submission 08-1230, you (Mr Smith) asked a further question about whether consideration should be given to the fact that, from the visa recipient's point of view, there has been no material change in the facts since October 2007. While from Zin Mon Aye's point of view her personal circumstances may not have changed, since October 2007 our sanctions policy has been expanded to include children of regime figures, and we have become aware of her presence here.
>
> …

> 31. We appreciate that Zin Mon Aye's case raises difficult issues of retrospectivity. If you (Mr Smith) do not agree to issue a determination against Ms Aye's presence in Australia, her visa status will be unaffected. Under these circumstances, we would not advise including her on the financial sanctions list because … such a listing would create significant difficulties for the conduct of her life here. The inclusion of her parents on the financial sanctions list curtails their ability to transfer funds to her in any case.

31 On 14 July 2008 the Minister for Foreign Affairs decided, despite what was called the "retrospective aspects", to make the determination that had been recommended and sought by the officers of the Department of Foreign Affairs and Trade. He relevantly wrote on the Ministerial Submission: "Recdn to intervene to cancel visa, despite retrospective aspects, agreed. Determination signed and dated." The determination which he signed was in the following form:

> I, Stephen Smith, Minister for Foreign Affairs, determine in accordance with Migration Regulations 2.43, that Zin Mon Aye, date of birth 26 March 1985, is a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests.

32 On 1 August 2008 an officer of the New South Wales Deputy State Director of the Department of Immigration and Citizenship wrote to the appellant advising her that it had come to the Department's attention that there might be grounds for cancellation of the appellant's Student (Temporary) (Class TU) visa (Subclass 573) under s 116 of the Act, because on 14 July 2008 the Minister for Foreign Affairs determined that the appellant was a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests. A copy of the determination was provided to the appellant with that letter.

33 The letter explained that the Australian Government maintained sanctions targeting members of the Burmese regime and their associates and supporters. Those sanctions, she was told, include financial sanctions against specified persons on Australia's financial sanctions list including travel restrictions. She was told that her parents, Brigadier General Zin Yaw and her mother, Khin Thiri, were included on the financial sanctions list and as an immediate family member she was "captured by the same sanctions as those individuals". The effect of s 116 of the Act was explained in the letter and copies of the Act and relevant regulations were provided.

34 She was invited before a decision was made in relation to the visa to show why the ground for cancellation of her visa did not exist and to give reasons why the visa should not be cancelled. She was advised:

> However, please note, as it is the case that the Minister for Foreign Affairs has personally determined that you are a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests then the Minister for Immigration and Citizenship has **no** power to consider whether there is a reason that your visa should not be cancelled. The Minister for Immigration and Citizenship must cancel the visa (subsection 116(3) of the Act refers).

35 On 22 August 2008 the appellant's lawyers and migration agents wrote to the officer of the New South Wales Deputy State Director of the Department of Immigration and Citizenship setting out the reasons why the visa should not be cancelled. It was asserted in that letter that the Minister of Foreign Affairs made his determination under reg 2.43 "in error and without completing the requirements for procedural fairness and must be reconsidered". It was further asserted that even if the determination had been made lawfully the Act did not require the first respondent to cancel the visa compulsorily. It was contended that the first respondent was left with a discretion to decide whether or not the visa should be cancelled.

36 On 19 September 2008 the Minister for Foreign Affairs was advised that the appellant had responded on 22 August 2008 through her advisers and it was recommended that the Minister for Foreign Affairs affirm his determination. On that day he agreed that the determination on 14 July 2008 in respect of the appellant should remain in place.

37 On 3 October 2008 a delegate of the first respondent decided to cancel the visa on the ground that the determination made on 14 July 2008 by the Minister for Foreign Affairs made the cancellation mandatory.

38 On 10 October 2008 the appellant applied to the Tribunal for a review of that decision. On 14 November 2008 the appellant, by her lawyers and migration agents, made submissions to the Tribunal contending that reg 2.43(2)(a) had been wrongly construed by the delegate and that cancellation was not mandatory, but that the first respondent had to consider if there has been a determination by the Minister for Foreign Affairs that the applicant's presence in Australia would be contrary to Australia's foreign policy interests and whether she has been "directly or indirectly associated with the proliferation of weapons of mass destruction". Moreover, it was contended that the decision of the Minister for Foreign

Affairs made on 14 July 2008 involved a breach of procedural fairness and, as a consequence, "the Foreign Minister's action is ultra vires and any cancellation based thereupon is also vitiated".

39 On 11 December 2008 the appellant's solicitors wrote to the Minister for Foreign Affairs requesting a revocation of the Gazette notification that was made by the Minister on 14 July 2008 declaring that the appellant's presence in Australia would be contrary to Australia's foreign policy interests. Submissions were made in support of the decision sought. On the same day, those solicitors wrote to the Tribunal advising the Tribunal that submissions had been made to the Minister for Foreign Affairs seeking the revocation of the Gazette notification made on 14 July 2008 and requesting that the Tribunal not proceed with the decision until the Minister for Foreign Affairs' response was known.

40 On 12 December 2008 the Tribunal responded advising the appellant's migration advisers that the Tribunal was prepared to wait until 2 February 2009 before it proceeded to a decision.

41 On 29 January 2009 an Assistant Secretary in the Department of Foreign Affairs and Trade wrote to the appellant's migration advisers advising that the Minister for Foreign Affairs had decided that the claims made in the advisers' letter of 11 December 2008 did not provide a basis to revoke the determination that the appellant's presence in Australia is contrary to Australia's foreign policy interests. On 30 January 2009 the appellant's migration advisers advised the Tribunal that the Minister for Foreign Affairs had declined to revoke the Gazette notification.

42 On 4 February 2009 the Tribunal decided to affirm the decision made by the Minister of Immigration and Citizenship's delegate to cancel the appellant's Subclass 573 Higher Education Sector visa. It held:

> 58. The Tribunal finds that the Foreign Minister has personally determined on 14 July 2008 that in the case of a visa other than a relevant visa the holder of the visa is a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests.
>
> 59. The applicant's visa was cancelled on the ground that that (sic) the Foreign Minister has personally determined that the applicant is a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests. That is a prescribed ground for cancellation under s.116(1)(g).

> 60. Section 116(3) of the Act provides that if the Minister may cancel a visa under s.116(1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.
>
> 61. Regulation 2.43(2)(a)(i) states that for s.116(3) of the Act, the circumstances in which the Minister must cancel a visa are, in the case of a visa other than a relevant visa, each of the circumstances comprising the grounds set out in sub-subparagraphs (1)(a)(i)(A) and (B) of r.2.43. The Tribunal finds that the circumstances comprising the ground set out in r.2.43(1)(a)(i)(A) exist. Regulation 2.43(2)(a)(i) states that in these circumstances the Minister must cancel the visa.
>
> 62. The Tribunal has considered the submissions and the case law referred to by the applicant's representative. The Tribunal does not accept the submission that both the circumstances in r.2.43(2)(a)(i) must exist for the cancellation to take place. This would mean that it would be necessary for the Foreign Minister to personally determine that, in the case of a visa other than a relevant visa, the holder of the visa is a person whose presence in Australia is, or would be, contrary to Australia's foreign policy interests and may be directly or indirectly associated with the proliferation of weapons of mass destruction. The Tribunal does not accept that the words 'each of the circumstances comprising the grounds set out in sub-subparagraphs (1)(a)(i)(A) and (B)' of r.2.43 means both the circumstances.

43 The appellant sought five different orders and declarations before the primary judge:

(1) An order quashing the determination made by the Minister for Foreign Affairs on 14 July 2008.

(2) Alternatively a declaration that the determination made by the Minister for Foreign Affairs on 14 July 2008 is void.

(3) An order quashing the Tribunal's decision to affirm the cancellation of the applicant's visa.

(4) An order that the Minister for Immigration and Citizenship be prohibited from acting upon or giving effect to or proceeding further upon the decision of the Tribunal.

(5) An order remitting the matter to the Tribunal to determine the matter according to law.

44 The appellant put three alternative submissions for impugning the Minister for Foreign Affairs' determination being:

1. The Minister exceeded his executive powers authorised by s 61 of the Constitution by making the determination.

2. The Minister committed jurisdictional error in making the determination.

3. The Minister made errors of law constituting grounds of review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in making the determination.

45 The appellant contended that because the Minister for Foreign Affairs' decision was infected with error the determination was a nullity and had to be treated as never having existed in law.

46 The primary judge identified in *Aye v Minister for Immigration and Citizenship* (2009) 111 ALD 546 at [34], the particulars which were said to support the claim that the determination was void and ought to be quashed which constituted the first two grounds for relief:

> (a) The foreign minister denied the applicant procedural fairness by not inviting comment from her before making the determination.
>
> (b) The foreign minister took into account an irrelevant consideration, namely, that the applicant is the daughter of someone subject to sanctions.
>
> (c) The foreign minister failed to take into account a relevant consideration, namely, the fact that he did not have anything adverse whatsoever against the applicant herself.
>
> (d) The foreign minister asked the wrong question in that he asked whether the applicant was the child of a senior member of the Burmese regime when he should have asked whether the applicant, being a child of a senior member of the Burmese regime, associated herself with her father in support of the regime by any of her actions or in any other way supported the Burmese regime.
>
> (e) The foreign minister exercised a discretionary power in accordance with a policy without regard to the merits of the particular case.
>
> (f) The foreign minister misinterpreted the words "associate" and "supporter" to mean a child of a senior member of the Burmese regime whereas, contextually, the true meaning of the words is someone retrospectively associated with or supporting whatever activities of the Burmese regime that had brought about the sanctions.

47 The primary judge concluded that the Minister for Foreign Affairs' determination could be categorised as involving Australia's foreign policy interests and that, accordingly, it was within a field of decision making that is the exclusive province of the Executive. Because the determination raised questions of foreign policy interests and whether the

appellant's presence in Australia is inimical to those interests which are themselves political issues, the determination was not justiciable by a court.

48 Moreover he found that even if the determination was made under reg 2.43 the determination was not justiciable because of the subject matter of the power which was exercised.

49 Lastly, in relation to the Minister for Foreign Affairs' decision, he found that the appellant did not have standing to challenge the determination.

50 As to the complaint of procedural fairness, his Honour concluded that even if the Minister's determination of 14 July 2008 lacked legal effect because it involved a denial of procedural fairness, the failure to accord procedural fairness had been remedied by the time of the Tribunal's decision on 4 February 2009. It had been remedied by the Minister for Foreign Affairs affirming the determination on 19 September 2008 and deciding not to revoke the determination on 27 January 2009. His Honour said at [57]:

> As a result of the decision of 27 January 2009, if not the decision of 19 September 2008, the foreign minister had made a valid determination that satisfies reg 2.43(1)(a), being a determination that involved no denial of procedural fairness. Even if the determination of 14 July 2008 was not a determination pursuant to reg 2.43(1)(a), because of denial of procedural fairness, as the applicant contends, by the time the tribunal made its decision, a determination that was not affected by denial of procedural fairness had been made by the foreign minister.

51 The primary judge rejected the contention that the Minister for Foreign Affairs took into account irrelevant considerations or failed to take into account relevant considerations because the Minister had applied a policy which involved sanctions against Burmese military officers and their immediate families. That policy was not, his Honour said, capable of review by the Court.

52 Because his Honour was of the view that the Minister for Foreign Affairs' decision could not be impugned, he dismissed the proceeding insofar as the proceeding also sought relief in respect to the decision of the Tribunal.

53 The parties disagreed as to whether the determination of the Minister for Foreign Affairs was made under an enactment or made as an act of Executive power. It was

contended by the first respondent and the Minister for Foreign Affairs that the determination was made under reg 2.43(1)(a) and (2)(a) of the Migration Regulations. Regulation 2.43(1)(a) reads:

> (1) For the purposes of paragraph 116(1)(g) of the Act (which deals with circumstances in which the Minister may cancel a visa), the grounds prescribed are:
>
> (a) that the Foreign Minister has personally determined that:
>
> (i) in the case of a visa other than a relevant visa — the holder of the visa is a person whose presence in Australia:
>
> (A) is, or would be, contrary to Australia's foreign policy interests; or
>
> (B) may be directly or indirectly associated with the proliferation of weapons of mass destruction; or
>
> (ii) in the case of a relevant visa — the holder of the visa is a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction;

There was no contest that reg 2.43(2) could apply to the appellant. Regulation 2.43(2)(a) reads:

> (2) For subsection 116(3) of the Act, the circumstances in which the Minister must cancel a visa are:
>
> (a) in the case of a visa other than a relevant visa — each of the circumstances comprising the grounds set out in:
>
> (i) sub-subparagraphs (1)(a)(i)(A) and (B); and
>
> (ii) paragraph (1)(b); …

Regulation 2.43(3) defines a "relevant visa".

54 Those subregulations must be considered in light of s 116 of the Migration Act. Section 116(1) empowers the first respondent to cancel a visa if the first respondent is satisfied that subsection (1)(g) applies to the holder. Section 116(1)(g) provides:

> (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:
>
> …

(g) a prescribed ground for cancelling a visa applies to the holder.

55 Regulation 2.43(1) prescribes the grounds to which s 116(1)(g) applies. Section 116(3) provides:

> If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.

56 Regulation 2.43(2)(a) provides for the circumstances in which the first respondent must cancel a visa and they include the circumstances in reg 2.43(1)(a)(i)(A) and (B). Relevantly, for this appeal, the first respondent is obliged because of the provisions of s 116(3) to have regard to the prescribed circumstances in reg 2.43(2)(a) and reg 2.43(1)(a)(i)(A), and to cancel a visa if the Minister for Foreign Affairs has personally determined that the holder is a person whose presence in Australia is or would be contrary to Australia's foreign policy interests.

57 Regulation 2.43 does not expressly empower the Minister for Foreign Affairs to make a personal determination but recognises that the Minister for Foreign Affairs may do so. It was contended by the first respondent that even though reg 2.43 does not expressly empower the Minister for Foreign Affairs to make the determination, that power may be implied from the provisions itself. In *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 301, the Court was called upon to consider whether s 6A(1)(c) of the Act empowered the Minister to determine that a person has the status of a refugee. Section 6A(1)(c) of that Act then provided:

> An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say —
>
> (c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of a refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967.

58 In that case the applicant applied to the Minister for the Minister to make a determination in favour of the applicant, but the Minister refused. The applicant, relying upon the ADJR Act, requested the Minister to provide a statement of his reasons for that decision. The Minister refused to comply with that request on the ground that the Minister's

decision was not a decision to which the ADJR Act applied because it was not made under an enactment. There was no other statutory provision or instrument which conferred upon the Minister the authority to make the determination referred to in s 6A(1)(c).

59 Justices Mason, Deane and Dawson said in *Minister for Immigration and Ethnic Affairs v Mayer* 157 CLR 290 at 301:

> In the absence thereof, the Minister's argument involves the proposition that it was the intention of the Parliament to leave the function of determining "status of refugee" without any statutory basis whatever notwithstanding that the performance of that function is the foundation upon which s. 6A(1)(c) is structured. One implication of that proposition, if it were to be accepted, would be that, notwithstanding the statutory consequences of such a determination, the Minister would be under no statutory obligation even to consider wether a determination of the kind referred to in s. 6A(1)(c) should be made. Another would be that the effectiveness of a decision, under the administrative arrangements, for the purposes of s. 6A(1)(c) would depend upon whether it happened to comply with the statutory requirement that it be a determination "by instrument in writing". Yet another would be that the statutory provisions of par. (c) could be deprived of any effective content by mere administrative decision discontinuing current administrative arrangements or allocating the function of determining whether a person was a refugee to someone other than the Minister. It would seem more likely that it was the intention of the Parliament that the provision of s. 6A(1)(c) attaching statutory consequences to a determination by the Minister that the holder of a temporary entry permit has the "status of refugee" within the meaning of the Convention or Protocol be construed as impliedly conferring upon the Minister statutory authority to make that determination.

60 Chief Justice Gibbs on the other hand said at 295:

> The Minister needs no statutory authority to execute an instrument in writing by which he determines that someone has the status of a refugee. If he does execute such an instrument, it will not have the force of law, although it may operate as sufficient (although it is not a necessary) direction to the Minister's department to treat the person named as having the status of a refugee. Section 6A(1)(c) does not authorize the Minister to make any determination of the kind to which it refers, and does not give the determination any legal effect. The existence of the instrument in writing is an objective fact which, if the person in question is the holder of a temporary entry permit which is in force, will satisfy condition (c) of s. 6A(1), …

61 That decision was considered in the *Attorney-General of the Commonwealth v Oates* (1999) 198 CLR 162 where the Court referred to the dicta of Gibbs CJ mentioned above and said at [16]:

> However, the preferable approach is to construe the provision in question as impliedly conferring upon the Minister statutory authority to make the determination or give the consent which satisfies a condition imposed by the statute. That was the

> interpretation of s 6A(1)(c) given by Mason, Deane and Dawson JJ in *Mayer*, and we would apply it to s 1316.

62 There is no other statutory instrument which empowers the Minister for Foreign Affairs to make a determination referred to in reg 2.43(1)(a). In those circumstances, in conformity with the approach taken by the High Court in *Minister for Immigration and Ethnic Affairs v Mayer* 157 CLR 290, I hold that reg 2.43(1)(a) impliedly authorises the Minister for Foreign Affairs to make the personal determinations referred to in the regulation. It would follow then that the Minister's determination of 14 July 2008 was a determination made under an enactment which means that it is either a privative clause decision (s 474(2) of the Act) or a purported privative clause decision (s 5E of the Act). Whether it is a privative clause decision or a purported privative clause decision, it is a migration decision within the meaning of the definition of "migration decision" in s 5 of the Act. The appellant needed to seek to invoke the jurisdiction of the Federal Magistrates Court within 28 days of the actual notification of the decision because the decision was a migration decision: s 477 of the Act. The proceeding was brought on 3 March 2009 well outside the time prescribed in that section and time has not been extended under s 477(2) of the Act. However, the appellant's failure to comply with s 477 does not need to be addressed because the application to review the decision of the Tribunal was brought within time and both Ministers conceded (rightly in my opinion) that the validity of the Minister for Foreign Affairs' decision made on 14 July 2008 could be examined in the application to review the decision of the Tribunal.

63 A finding that the Foreign Minister's decision is a decision made under reg 2.43(1)(a) has a further consequence. The ADJR Act does not apply because the determination is either a privative clause decision or a purported privative clause decision within the meaning of the Act. That follows because of the definition of "decision to which this Act applies" in s 3 of the ADJR Act which provides:

> ***decision to which this Act applies*** means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):
>
> (a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of ***enactment***; or
>
> (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of ***enactment***;

other than:

(c) a decision by the Governor-General; or

(d) a decision included in any of the classes of decisions set out in Schedule 1.

Note: Regulations for the purposes of section 19 can declare that decisions that are covered by this definition are not subject to judicial review under this Act.

64 Items (da) and (db) of Schedule 1 identify privative clause decisions and purported privative clause decisions as decisions that are not decisions to which the ADJR Act applies.

65 Insofar as the application was brought in the Federal Magistrates Court under the ADJR Act, then it had to be dismissed.

66 That conclusion follows even if I am wrong about the decision of 14 July 2008 having been made under reg 2.43(1)(a). If the decision was made under the prerogative power, then the same result would flow. It would not be a decision under an enactment and therefore not be reviewable under the ADJR Act. The primary judge was right to conclude that insofar as the proceeding sought orders under the ADJR Act it had to be dismissed.

67 However, the appellant was entitled to rely on s 39B(1) of the Judiciary Act to have the decision of the Tribunal and the decision of the Minister for Foreign Affairs judicially reviewed.

68 The only attack upon the Tribunal's conclusion and decision is that the Minister for Foreign Affairs' 14 July 2008 decision is a nullity, and therefore cannot form the basis for a decision under s 116 to cancel the appellant's visa. If the Minister for Foreign Affairs' decision was validly made, then there is no argument but that the first respondent had to cancel the appellant's visa.

69 The appellant contended that the Minister for Foreign Affairs' decision was a nullity because the Minister for Foreign Affairs failed to accord the appellant procedural fairness, in that the decision was made without the appellant's knowledge and therefore without the appellant being heard.

70 The Ministers argued that the question of procedural fairness does not arise because the Minister for Foreign Affairs' decision is not justiciable. The primary judge agreed with the Minister's contention and dismissed the application.

71 The Ministers argued that the decision lies within a field of decision making which is the exclusive province of the Executive. They contended:

> Where Australia's foreign policy interests lie, and whether the Appellant's presence in Australia is inimical to those interests, are intractably political issues which are not justiciable, even by way of judicial review – at least where, as in the present case, the issues sought to be raised go to the methods and criteria by which the decision has been made rather than the scope of the relevant decision making power. This is so whether the basis for the decision's legal effect under domestic law lies in statute or (as the Appellant argues) in the executive power of the Commonwealth. It is a result of the subject-matter of the power and the issues the Minister must consider, rather than the source of the power or the possible effects of its exercise. (Footnotes omitted.)

They contended that the determination does not give rise to or form part of a matter capable of attracting federal jurisdiction: *Re Ditfort* (1988) 19 FCR 347; *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354.

72 If an issue is not justiciable, it is not a matter upon which the Commonwealth Parliament might confer jurisdiction upon this Court pursuant to Chapter III of the Constitution: *Petrotimor Companhia de Petroleos SARL v Commonwealth* 126 FCR 354. Whether this Court has jurisdiction to review the decision will depend upon the decision being justiciable. If the decision is justiciable, the Court can review the decision in the exercise of power given by s 39B of the Judiciary Act.

73 The Ministers accepted that the courts may review a decision of a Minister made under a statute in the sense that the courts may enquire into whether the Minister has complied with all processes with which the Minister must comply in making the decision. That inquiry does not include a review of the merits of the decision: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36. However, they submitted not all decisions made under a statute are justiciable. This was, the Ministers contended, such a decision. The Ministers argued that because it was made in furtherance of Australia's foreign policy interests it was therefore a political matter involving policy and not justiciable. Alternatively, it was contended that if the decision were made in exercise of the prerogative it was thereby not justiciable and for the same reason.

74 Although the Minister's primary argument was that this decision was made under an enactment and not under the exercise of the prerogative or common law power, they did not thereby contend that if it were made under the prerogative it was for that reason not reviewable. Their argument was that the impugned decision was not justiciable because it was a political matter involving matters of policy. Rather the Ministers contended that the courts were not equipped to adjudicate upon decisions which are made in furtherance of government policy, especially those decisions which seek to advance Australia's foreign policy. It was submitted that courts neither have access to the relevant facts nor experience within the field in which the decision is made. Those who make these policy decisions which are political in nature are answerable to the Parliament and to the electorate.

75 The appeal proceeded thereby upon the assumption that this Court could embark upon a judicial review of a decision of a Minister whether made under an enactment or pursuant to the power of the prerogative. The question for determination on this appeal was whether the particular decision made by the Minister for Foreign Affairs on 14 July 2008 was such that it was not susceptible to review and not justiciable. The Ministers were right in my opinion to concede that the question whether a Court may review a decision of a Minister does not depend upon whether the particular decision was made under an enactment or at common law under the prerogative.

76 In *The Queen v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, the High Court was concerned with the validity of a regulation made by the Administrator of the Northern Territory under Planning Legislation and in that regard the Administrator was exercising a statutory power. One question for the Court was whether the Crown has exercised a power granted to it for a purpose not authorised by the statute. Members of the Court observed that it was well settled that the courts could review the exercise of discretionary powers vested in Ministers of the Crown including the reasons for the exercise or non-exercise of those powers: Stephen J at 202, Mason J at 223 and Aickin J at 234.

77 In *Barton v The Queen* (1980) 147 CLR 75 at 90-91, Mason J discussed earlier decisions which suggested that decisions made in the exercise of the prerogative were not amenable to review. He said in *Toohey* 151 CLR 170 at 220:

> The foundations of the old rule have been undermined. Procedural reforms have overcome the Sovereign's immunity from suit which in turn was the source of the

> principle that the King can do no wrong. Appropriate as it is that this principle should apply to personal acts of the Sovereign, it is at least questionable whether it should now apply to acts affecting the rights of the citizen which, though undertaken in the name of the Sovereign or his representative, are in reality decisions of the executive government. In the exercise of the prerogative as in other matters the Sovereign and her representatives act in accordance with the advice of her Ministers. This has been one of the important elements in our constitutional development. The continued application of the Crown immunity rule to the exercise of prerogative power is a legal fiction.
>
> An examination of the cases in which the courts have refused to examine the exercise of prerogative powers reveals that most, if not all, of the decisions, can be justified on the ground that the prerogative power in question was not, owing to its nature and subject matter, open to challenge for the reason put forward.

78 Justice Mason referred with approval to Lord Denning's observation in *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 705 where his Lordship said that the exercise of a discretionary prerogative power "can be examined by the courts just as any other discretionary power which is vested in the executive". He said at 221:

> The question would then remain whether the exercise of a particular prerogative power is susceptible to review and on what grounds.

He said at 222:

> The purpose of preventing unnecessary judicial intervention is better achieved, and achieved with greater fairness to the citizen, by denying review in those cases in which the particular exercise of power is not susceptible of the review sought.

79 Justice Mason's reasons suggest that a decision of the Governor-General or a Minister made under a statute or in the exercise of the prerogative may be reviewable by the Court if it is a decision of a kind that the courts are equipped to review. A decision which involves political and policy considerations is not one of those kind. Whether a decision is susceptible to review will depend upon the character and nature of the decision, and does not depend upon whether the decision was made under a legislative instrument or the prerogative: *Toohey* 151 CLR 170 per Mason J at 220.

80 In *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, the appellant sought the renewal of approval to act as a workers' compensation insurer. The relevant Minister advised the appellant that he had decided to recommend to the Governor in Council that the application be not approved. The Minister advised the appellant of the reasons why the application had been refused. The appellant's solicitors wrote to the Minister and to the

Clerk to the Executive Council asking for an opportunity to answer the matters raised by the Minister, but no opportunity was given. The Governor in Council, by order in Council, refused to approve the appellant as an insurer. The appellant instituted proceedings in the Supreme Court of Victoria against the Governor of Victoria and the Minister seeking judicial review of the decision to not approve the appellant's application.

81 The Court held that the Governor in Council in considering an application of the kind made by the appellant was subject to the requirements of natural justice and should give the applicant an opportunity to be heard before a decision not to renew the approval was made. The hearing could be afforded by the Minister or, in the opinion of Gibbs CJ and Stephen J, by the Head of the Department who in fact makes the decision and recommendation to the Minister, and to the Governor in Council.

82 Justice Mason said at 366:

> Whether a particular exercise of discretion by the Governor in Council is subject to a judicial review is a question of construction the answer to which will depend on a variety of considerations including the nature, width and subject matter of the discretion and the peculiar character of the Governor in Council as the chosen repository of it.

83 Justice Aickin said at 380:

> In the *Northern Land Council Case* I examined a number of authorities from various common law jurisdictions on the position of the Governor in Council in relation to the extent to which the decisions of that body or its equivalent were subject to challenge. I do not need to go over that examination again. For present purposes it is important to note the decision of this Court in *Murphyores Incorporated Pty. Ltd. v. The Commonwealth* (1976) 136 C.L.R. 1 in which the Court proceeded upon the footing that it may investigate the exercise of statutory powers by Ministers of the Crown in order to determine whether such exercise of power was authorized by statute or was otherwise within the lawful scope of the powers of the Minister. The Court was unanimous in expressing the view, either explicitly or implicitly, that the Court could investigate acts done by Ministers pursuant to statutory powers for the purpose of ascertaining whether or not they had been done for improper purposes, as distinct from being outside the boundaries of the power itself in the sense of being ultra vires. The House of Lords had arrived at a similar conclusion in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997. The position of a Minister of the Crown acting pursuant to statutory authority was thus clear and the purposes which had actuated the Minister in arriving at a particular decision may be examined to see whether they were improper in the sense that the power was exercised for some purpose foreign to the grant of the power.

84 In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, the House of Lords held that some executive decisions, depending on the subject matter, made in the absence of statutory power but pursuant to a power derived from the prerogative, were subject to judicial review. The decision under consideration in that appeal related to the membership by staff of national trade unions. The Government Communication Headquarters (GCHQ) had the responsibility of ensuring the security of military and official communications and to provide the Government with signals intelligence and secret information relating to national security. The staff of GCHQ had been permitted since 1947 to belong to national trade unions and most had been members. GCHQ had involved itself in a practice of consultation between its management and trade unions about important alterations to the terms and conditions of service of the staff.

85 On 22 December 1983 the Minister for Civil Service gave an instruction under a Civil Service Order in Council for the immediate variation of the terms and conditions of service of the staff so that they would no longer be permitted to belong to national trade unions. The decision and the order were made without consultation with the trade unions or with the staff at GCHQ. The decision, so it was said, was made without consultation because GCHQ had formed the opinion that if it consulted with the trade unions, the unions would have precipitated further disruption which would have affected vulnerable areas of GCHQ's operations.

86 The majority of the House of Lords was of the opinion that a decision of a Minister or the Executive was capable of judicial review, notwithstanding the decision was made in pursuance of a power derived from the prerogative or the common law rather than under a statute. A Minister whilst acting under a prerogative power could have the same duty to act fairly as he or she would have if that Minister were acting under a statutory power. Lord Scarman said after a short discussion on the development of the law in relation to the review of the exercise of prerogative power (at 407):

> Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.

87 Lord Diplock identified the subject matter of a decision which is susceptible to review. He said at 408:

> Judicial review, now regulated by R.S.C., Ord. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision.
>
> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences.

88 Lord Diplock identified the decisions that were susceptible to judicial review, which were decisions by a decision maker empowered by public law which will lead to administrative action by an authority authorised by executive power. He noted that usually the decision making power was sourced from a statute or subordinate legislation but he said "in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e. that part of the common law that is given by lawyers the label of 'the prerogative'": *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 409.

89 He noted that usually the source of a decision making power which is derived from the prerogative is usually exercised by a Minister of the Crown.

90 He said at 410:

> My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review.

91 His Lordship identified the three separate grounds as "illegality", "irrationality" and "procedural impropriety". Lord Diplock said that there was authority for the proposition that a decision made under the prerogative was subject to review for illegality. He doubted whether such a decision could be reviewed for "irrationality" but left that question open. Importantly, he saw no reason why "procedural impropriety" should not be a ground for judicial review when the decision is made under the prerogative. He said of this aspect at 411:

> But in any event what procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made.

92 Lord Roskill noted that in most cases the power exercised by the executive is derived from statute, but in some cases it may be derived from the prerogative. In other cases the power to make the decision may have as its source in both the statute and the prerogative. He said at 417:

> If the executive in pursuance of a statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries.

93 He said at 418:

> But I do not think that the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the maker of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

94 That decision was followed by the Full Court of this Court in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274. In that case, the decision under consideration was a Cabinet decision to nominate Stage 2 of the Kakadu National Park for inclusion on the World Heritage list under the World Heritage Convention. Inclusion on that list would affect various mining interests held by the respondents. The respondents had prior to the Cabinet decision made extensive submissions to Ministers of the Crown concerning the need for the preservation of those mining interests. The respondents sought an injunction to restrain the appellants from taking further steps in the nomination process. The primary judge declared that the decision to nominate Stage 2 for inclusion on the list was void. The question was whether the courts could review a Cabinet decision.

95 Chief Justice Bowen was of the opinion that the particular Cabinet decision was not amenable to review. Shepherd J was inclined to the view that the application should fail because it was a decision of Cabinet. However, he was of the opinion that in any event the respondents had been given adequate opportunity to be heard and had made extensive submissions and that nothing more could be said to assist their case. All members of this Court, Bowen CJ at 278, Shepherd J at 280 and Wilcox J at 302-303, were of the opinion that the Court should follow *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, but that the particular decision sought to be impugned was not one that was justiciable under s 39B of the Judiciary Act. They reached that conclusion because the decision involved complex policy considerations and was arrived at as a consequence of Australia's international obligations.

96 Justice Wilcox was of the opinion that it was not possible to exclude judicial review because the decision was made by Cabinet even in the exercise of prerogative power. He said at 304:

> The critical matter is the nature and effect of the relevant decision. Nature and effect involves two elements; justiciability in the sense described by Lord Diplock in *CCSU* and, if the relevant decision is justiciable, whether it contains some feature – for example, a relationship to national security or to international relations – which makes the judicial review inappropriate in the particular case.

97 However, Wilcox J was of the opinion that the decision made was not one "having the characteristics of justiciability identified by Lord Diplock and, secondly that it did not attract the obligation to accord natural justice to affected persons, within the test postulated by

Mason J": *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* 15 FCR 274 at 307.

98 A decision of a Minister of the Crown, whether made in the exercise of a power given by statute or under the common law (i.e. the prerogative), may be subject to judicial review. Indeed, a decision of the Cabinet or the representative of the Queen, the Governor-General of Australia, or the Governor of a State may also be subject to judicial review. Whether the decision is subject to judicial review does not depend upon the source of the power, but the nature and subject matter of the decision which is sought to be impugned. The decision as Lord Diplock described it must have the consequences of which he spoke in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, in the sense that the decision will alter enforceable rights or obligations which the person affected possesses at private law or deprive that person of some benefit or advantage which before the decision he or she was entitled to enjoy and which he or she could expect to continue to enjoy unless, before a decision is made, the person is given a reason why that benefit or advantage may be withdrawn and an opportunity to contend to the decision maker that the benefit or advantage should not be withdrawn.

99 The Government or the Cabinet or perhaps the then Minister for Foreign Affairs made a decision some time prior to 24 October 2007 to implement bilateral financial sanctions against members of the Burmese regime and their associates and supporters. The financial sanctions were imposed upon 418 individuals which had the effect of prohibiting transactions involving the transfer of funds by those Burmese regime individuals. That decision is not sought to be challenged but it is a decision which, in my opinion, is not justiciable for two reasons. First, it involves policy decisions relating to Australia's international relations. Apparently the Government then decided that the imposition of sanctions might discourage the continuation of the Burmese regime or at least a change in the Burmese regime's attitude to its own citizens and in its international relations. Those policy decisions are not, in my opinion, justiciable. A court is not equipped to determine whether those policy decisions should or should not have been made. The policy decisions are clearly political and are decisions of a kind which a government must answer to the electorate in due course. Secondly, the decision does not affect any private or public right of any citizen or resident in Australia. That decision is of a kind which is not justiciable in the Court.

100 The decision made by the Minister for Foreign Affairs on 14 July 2008 was made in furtherance of the power given the Minister by reg 2.43. In making a personal determination under reg 2.43(1)(a)(i)(A), the Minister for Foreign Affairs must take into account Australia's foreign policy interests to determine whether the visa holder is a person whose presence in Australia is contrary to those interests.

101 It was contended by the Ministers that because the Minister for Foreign Affairs had to have regard to these foreign policy interests, that decision was also not justiciable whether it was made under the regulation or whether it was made in the exercise of the prerogative. It was contended that the Court could not inquire into those foreign policy interests which are peculiarly the province of the Executive and the Minister for Foreign Affairs.

102 Regulation 2.43(1)(a)(i)(B) also impliedly empowers the Minister for Foreign Affairs to make a personal determination that a visa holder is a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction. That determination would be a factual determination which relates directly to the visa holder. The question for the Minister for Foreign Affairs would be whether the Minister for Foreign Affairs should determine that a particular person is associated with the proliferation of weapons of mass destruction. It would be difficult to think that a determination of that kind would not be justiciable at the request of the visa holder, who it was determined may be directly or indirectly associated with the proliferation of weapons of mass destruction. If that be the case, it would be surprising that a determination under reg 2.43(1)(a)(i)(A) was not also justiciable.

103 However, it is right as the Ministers contended that historically the courts have eschewed any right to review executive decisions made in relation to the country's foreign affairs. Such decisions are notoriously based on policies into which the courts are not equipped to enquire. But simply because the decision involves a consideration of foreign policy does not take this decision out of the reach of the review by the courts. There may be some decisions which relate to foreign affairs that are subject to review.

104 Section 116(1) provides the circumstances in which the Minister for Immigration and Citizenship may cancel a visa. One of these grounds is if a prescribed ground for cancelling

applies to the holder: s 116(1)(g). Where circumstances are prescribed the Minister for Immigration and Citizenship must cancel the visa: s 116(3).

105 Regulation 2.43(1) prescribes the grounds for the purposes of s 116(1)(g) of the Act. The only ground relevant to the appellant is reg 2.43(1)(a)(A). Numerous other grounds are prescribed in reg 2.43. All of the grounds, including the relevant ground, require a consideration of circumstances peculiar to the visa holder. That is natural enough because under s 116 of the Act the Minister for Immigration and Citizenship is called upon to cancel that visa holder's visa.

106 The relevant ground for this appellant requires an anterior decision to be made before the first respondent makes his or her decision under s 116(3) of the Act. That anterior decision is to be made by the Minister for Foreign Affairs and the decision is made for one purpose only, and that is to empower the first respondent to cancel the visa holder's visa under s 116(3). The Minister for Foreign Affairs' decision empowers the first respondent to cancel the visa which would then require the former visa holder to leave Australia or otherwise become an unlawful non-citizen and liable to the processes relating to unlawful non-citizens; detention under s 189 of the Act which will continue until the unlawful non-citizen is removed from Australia under s 198 or s 199 of the Act or granted a visa: s 196(1).

107 The Minister for Foreign Affairs' decision under reg 2.43(1)(a)(A) has no other consequence other than for the visa holder. No-one else is affected. It does not have any practical effect for security purposes. The decision is simply that the visa holder's presence in Australia is inimical to Australia's foreign policy interests. It does not empower the Executive to do anything else in relation to the visa holder apart from the first respondent exercising the power under s 116(3) of the Act.

108 The decision which the Minister for Foreign Affairs made on 14 July 2008 did not involve any policy considerations. It was a decision which implemented a previous decision which had been made prior to 24 October 2007, which was based upon policy considerations. The decision which was made on 14 July 2008 was whether the previous decision should be extended to include the appellant. In my opinion, the decision of 14 July 2008 is justiciable because it directly affects the appellant by depriving her of a right to continue to reside in Australia in accordance with the terms of her existing visa. The decision does not become

non-justiciable because the decision is made as a consequence of a previous decision which was made on policy grounds. There are no policy considerations within the decision of 14 July 2008 into which the Court is not equipped to inquire.

109 Because the decision is justiciable in my opinion, the Minister for Foreign Affairs was under an obligation to advise the appellant that he was considering making that decision and to allow her to provide reasons or arguments why the decision should not be made. The Minister was in my opinion obliged to accord the appellant procedural fairness. The Minister did not do so and in that regard failed to accord the appellant procedural fairness.

110 That said however, does not necessarily mean that the decision must be quashed even though the Minister for Foreign Affairs did not provide the appellant procedural fairness. The content of the obligation to provide procedural fairness must be first addressed to determine whether the failure to accord procedural fairness would have had any effect upon the decision which was ultimately made.

111 In *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* 15 FCR 274 at 281, Shepherd J said in speaking of the obligation to give procedural fairness in that case:

> When one speaks of according natural justice or procedural fairness to a party affected by a decision, one must always have in mind the circumstance of the case at hand. The content of the duty imposed on the decision maker will vary with the circumstances. One of the circumstances here is that the decision-making body is the Cabinet which is a body of the nature described in the judgment of Murphy J and Blackburn CJ in the *Winneke* and *Whitlam* cases earlier referred to. That is the starting point.

112 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, the Court (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) said at [26]:

> It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case. As Kitto J said in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504:
>
> > "[T]he books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity ['to correct or contradict any relevant statement prejudicial to their view' *Local Government Board v Arlidge* [1915] AC 120 at 133] *in the infinite variety of circumstances that may exist, and the necessity of allowing*

> *full effect in every case to the particular statutory framework within which the proceeding takes place*." (Emphasis added.)

113 In *Re Refugee Tribunal; Ex parte AALA* (2000) 204 CLR 82, Gaudron and Gummow JJ said at 109:

> In particular, it is trite that, where the obligation to afford procedural fairness exists, its precise or practical content is controlled by any relevant statutory provisions and, within the relevant legislative framework, this will vary according to the circumstances of the particular case. The point is developed in particular in the judgments of Deane J in *Kioa v West* (1985) 159 CLR 550 at 632-633 and *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652-653.

114 The content of the procedural fairness which the Minister for Foreign Affairs was obliged to accord this appellant is to be identified by reference to the statutory regime which empowers the Minister to make the decision. The decision to impose financial sanctions and travel restrictions upon the Burmese regime was made prior to 24 October 2007. The decision included a decision to apply the restrictions to the members of the Burmese regime's family.

115 In my opinion, the content of the procedural fairness which the Minister for Foreign Affairs was obliged to show the appellant prior to making the impugned decision, which affected only the appellant, was to allow the appellant to make representations as to whether she was a member of Brigadier General Zin Yaw's family and whether, in particular, she was a daughter of Brigadier General Zin Yaw. The Minister for Foreign Affairs was not obliged to allow the appellant to make any further representations apart from that. The effect of his decision was, when made, to determine no more than she was a member of Brigadier General Zin Yaw's family. That decision meant that the decision made prior to 24 October 2007 would apply to her.

116 There are two reasons why this appeal should be dismissed, notwithstanding that the Minister for Foreign Affairs failed to accord the appellant procedural fairness before making his decision on 14 July 2008.

117 First, because after the decision was made the Minister for Foreign Affairs allowed the appellant to make representations in respect to that decision and on 19 September 2008 decided that his decision should remain in place. He also allowed the appellant to put further

submissions after that date before deciding on 29 January 2009 that there was no basis to revoke his decision. By considering the appellant's arguments and submissions on those two later dates, the Minister for Foreign Affairs remedied his earlier failure to accord the appellant procedural fairness.

118 Secondly, if I am wrong about that, the limited content of the duty meant that the Minister for Foreign Affairs needed only to consider whether the appellant is Brigadier General Zin Yaw's daughter and therefore a close family member, and a member of the Burmese regime. There is no argument about that. The failure therefore of the Minister for Foreign Affairs to accord the appellant natural justice could not have led to the Minister making any other decision apart from the one made. In those circumstances, even if there has been a breach by the Minister for Foreign Affairs of his obligations to accord the appellant natural justice, there is no point in quashing the decision to allow the appellant to make representations which could not affect any future decision. The appellant would suffer no injustice because the statute and the previous decision compelled the outcome: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 per McHugh J at [80]; *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

119 This is one of those rare cases where the writs should not issue because, if the matter was remitted to the Minister for Foreign Affairs, the Minister would inevitably make the same decision.

120 The appeal should be dismissed.

I certify that the preceding one hundred and three (103) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander.

Associate:

Dated: 11 June 2010

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1031 of 2009**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**ZIN MON AYE** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	MIGRATION REVIEW TRIBUNAL **Second Respondent**
	MINISTER FOR FOREIGN AFFAIRS **Third Respondent**
JUDGES:	**SPENDER, LANDER AND MCKERRACHER JJ**
DATE:	**11 JUNE 2010**
PLACE:	**ADELAIDE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

MCKERRACHER J

121 On one aspect only of this appeal I would respectfully take a different view from the view expressed in the reasons of Lander J. It is an aspect which does not affect the outcome, but is, nevertheless the focal point of the appellant's complaint, namely the making of the 14 July 2008 decision (**the Decision**). The Decision, for reasons set out below, (at [125] to [128]) is, in my view not justiciable.

122 Before coming to that point, I make clear that I gratefully adopt the factual summary appearing in the judgment of Lander J. I also agree with the orders proposed by his Honour and, in particular, agree with the two bases upon which his Honour concludes that no breach of procedural fairness could be sustained. I also respectfully adopt and agree with the very helpful analysis (at [76]-[97]) of those cases making good the point in Lander J's reasons (at [75]) that judicial review is open regardless of whether a Minister's decision is made under an enactment or at common law pursuant to the power of the prerogative.

123 As Lander J observes (at [98]), whether the Decision is subject to judicial review does not depend upon the source of the power, but the nature and subject matter of the Decision which it is sought to impugn.

124 In particular, I also expressly agree with the conclusion his Honour reaches and the reasoning for it (at [99]) that the original policy decision to implement bilateral financial sanctions against members of the Burmese regime and their associates and supporters is not justiciable.

125 The only topic on which I would take a different view is on the characterisation of the actual Decision.

126 A primary consideration in the making of the Decision is reflected in an argument raised by the appellant. The appellant argues that 'associates' in the policy should not or does not extend to her as she does not philosophically support her father's views and also because she has become estranged from him. However any decision as to whether the primary unjusticiable policy extends to include her would necessarily require knowledge of the factors driving the creation of the policy. There is no or no sufficient information on which the Court might determine whether her argument is correct or whether the Minister's advisors are correct. A court is not well placed to decide, in the absence of the unknown underlying information, whether extending the sanctions, including financial sanctions, to close family members regardless of their political views or actual closeness was intended to or should be embraced within the expression 'associates' as applied by the Government.

127 The main thrust of the appellant's challenge is that it would be wrong for the policy to extend on an indiscriminate basis to all associates or close family members of those who are senior members of the Burmese regime. In the present circumstances, the true gravamen of the complaint by the appellant is the content of the policy itself rather than its application. Although the appellant goes on in her argument to illustrate why, in her case, that is particularly so (given the strain in personal familial relationships and her opposition to her Father's views), the essence of the complaint is the inclusion within the policy or treatment of 'associates' without capacity for determining whether those particular associates (including close family members) pose any risk of the nature to which the regulation is directed. There may be a good argument that use of a general expression such as associates is unfair,

inappropriate or imprecise. There may also be good arguments to the contrary. But to explore those arguments would require, in my view, venturing into the area of the politically created formulation of and justification for the foreign policy and its sanctions. That is an area that is not justiciable.

128 As has been observed by the learned primary judge, not every decision which depends upon such a power would be non justiciable. If the application of the policy was flawed in some way – for example the wrong person was identified, or if the statute giving rise to the power or the nature of the executive power were misconstrued or misapplied or perhaps, hypothetically, the exercise of power were so manifestly irrational on its face, then it may be that a challenge to a decision based on a policy could be a justiciable 'matter'. Generally speaking, such circumstances would be those in which a court would have access to all the relevant information to enable review.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 11 June 2010