HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

SZMDS & ANOR RESPONDENTS

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16
26 May 2010
S193/2009

ORDER

1. *The appeal be allowed.*

2. *Orders 3, 4 and 5 made by the Federal Court of Australia on 10 March 2009 be set aside.*

3. *In place of those orders:*

   (a) the appeal to the Federal Court of Australia be dismissed; and

   (b) Order 2 made by the Federal Magistrates Court of Australia on 8 July 2008 be set aside.

4. *The appellant pay the reasonable costs of the first respondent of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

S J Gageler SC Solicitor-General of the Commonwealth of Australia with G T Johnson for the appellant (instructed by DLA Phillips Fox Lawyers)

T A Game SC with T Baw for the first respondent (instructed by Sarom Solicitors)

Submitting appearance for the second respondent

1 GUMMOW ACJ AND KIEFEL J. A criterion for the issue of a protection visa under the *Migration Act* 1958 (Cth) ("the Act") is that the applicant be a non-citizen of Australia to whom the Minister "is satisfied" that Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Section 36(2)(a) of the Act so provides[1]. If the Minister "is satisfied" that this and other criteria "have been satisfied" then the Minister "is to grant the visa"; if "not satisfied", then the visa must be refused (s 65(1)).

2 The term "satisfy" has various shades of meaning. Two of them are involved in the collocation presented by ss 36 and 65 of the Act. One is that the applicant for a protection visa answers or meets the requirement or condition that Australia has protection obligations to the applicant. The second is that the decision maker accepts or is content that the applicant answers or meets that requirement or condition.

3 Upon review by the Refugee Review Tribunal ("the RRT") of a refusal by the Minister (or the delegate of the Minister), the RRT exercises all the powers and discretions conferred by the Act upon the Minister (s 415(1)).

4 The reiteration in ss 36 and 65 of the Act of the term "satisfied" is significant for the issues on this appeal by the Minister from the decision of the Federal Court (Moore J)[2]. The Federal Court allowed an appeal from the Federal Magistrates Court (Scarlett FM)[3] and quashed the decision of the RRT (the second respondent). Moore J held that the RRT had fallen into jurisdictional error because its determination that the first respondent was not a refugee was based on illogical or irrational findings or inferences of fact[4] and remitted the matter to the RRT to be heard and determined according to law. The RRT had affirmed the decision of a delegate of the Minister to refuse the grant of a protection visa to the first respondent. In this Court the RRT entered a submitting appearance.

The avenue of judicial review

5 It is important for an understanding of the issues in this case to appreciate that it does not arise under one of the systems of review of administrative decisions which are established by laws of the Commonwealth and under which

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1 The appropriate text of the Act appears in Reprint No 11.

2 (2009) 107 ALD 361.

3 [2008] FMCA 1064.

4 (2009) 107 ALD 361 at 370-371.

the grounds of review are not limited to those involving jurisdictional error. In particular, the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") includes as grounds of review that the decision "involved an error of law" (s 5(1)(f)) and that there was no evidence or other material to justify the decision (ss 5(1)(h) and 5(3)). However, the ADJR Act does not apply to the class of decisions with which this case is concerned[5].

6 This was not always so. Important decisions of this Court, including *Chan v Minister for Immigration and Ethnic Affairs*[6] and *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[7], were given in appeals where the jurisdiction of the Federal Court was conferred by the ADJR Act. In these cases the grounds of review principally in contention were that the decision "involved an error of law" (ADJR Act, s 5(1)(f))[8], or was so unreasonable that no reasonable person could have exercised the power (ss 5(1)(e) and 5(2)(g))[9]. The broader focus of the ADJR Act meant that on the one hand the Court was not concerned with the finding of jurisdictional facts and on the other there was an apprehension that an overbroad review of fact-finding would lead to impermissible "merits review".

7 As will appear, the only avenue of judicial review in the present case was that rooted in s 75(v) of the Constitution itself and that required jurisdictional error to quash the administrative decision in question. This is because the privative clause provision found in s 474 of the Act, as interpreted in *Plaintiff S157/2002 v The Commonwealth*[10], was ineffective to exclude judicial review by the Federal Magistrates Court and on appeal to the Federal Court on the ground of jurisdictional error.

The facts

8 The first respondent is a citizen of Pakistan, born there in 1965. He is a Sunni Muslim. His first language is Urdu and he gave evidence before the RRT through an interpreter. On 3 July 2007 he arrived in Australia on a visitor visa valid for three months and on 16 August lodged his application for a protection

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5 The exclusion is made by Sched 1, pars (da) and (db).

6 (1989) 169 CLR 379; [1989] HCA 62.

7 (1996) 185 CLR 259; [1996] HCA 6.

8 (1996) 185 CLR 259 at 274-275.

9 See (1989) 169 CLR 379 at 418, 431.

10 (2003) 211 CLR 476; [2003] HCA 2.

visa. In that application he said that he sought a protection visa "on the basis of my [belief] and practice of homosexuality".

9 That application presented several issues respecting the Convention definition of refugee. One was whether the first respondent was a member of "a particular social group", another was whether, if so, he had a "well-founded fear" of persecution for reason of membership of that social group. There had to be both a state of mind, the fear of persecution, and a well-founded basis, in an objective sense, for that fear.

10 None of this is controversial and the RRT recognised the existence of these issues. The dispute concerns the manner in which the RRT dealt, or failed to deal, with them.

11 The RRT held that it did "not accept that the [first respondent] will engage in [homosexual activities] or intercourse in the future, and therefore [it did not accept] that he will face persecution due to his membership of a particular social group (being a homosexual), whether actual or perceived". The RRT concluded that there was no real chance that the first respondent would face persecution due to any Convention reason if he were to return to Pakistan now or in the reasonably foreseeable future. Accordingly, the RRT decided that it was satisfied that the first respondent did not satisfy the criterion for the issue of a protection visa.

12 In essence, the RRT appears to have accepted that male homosexuals in Pakistan comprised a particular social group[11], but to have rejected the claim of the first respondent to membership of that group and thus his claim of a well-founded fear of persecution.

13 The dispute concerns the adverse inferences which the RRT drew from its rejection of the account given by the first respondent of his personal history. These inferences led the RRT to the conclusion that he would not act in a certain way in the future and was not a member of the relevant social group. From this conclusion the RRT derived satisfaction that the first respondent was not a person to whom Australia owed protection obligations.

14 The account given by the first respondent of his personal history was summarised by Moore J as follows[12]:

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11 Cf *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71.

12 (2009) 107 ALD 361 at 362.

> "In 1991 he married his wife, and had four children from that relationship. In 1995 he travelled from Pakistan to the United Arab Emirates (UAE) where he worked in a factory. He returned to Pakistan in 1998. He remained in Pakistan until 2004 when he returned to the UAE. He finally left the UAE in July 2007 when he travelled to Australia. During the period October 2005 to July 2007 he developed an attraction to members of the same sex. In July 2006 [while in the UAE] he commenced a homosexual relationship with a man called Mr R. By the end of 2006 they were living together. At some point the applicant and Mr R commenced a sexual relationship with a third person, Mr H. Mr R had earlier been in a sexual relationship with Mr H (who was Mr R's boss). The applicant travelled to the United Kingdom in October 2006, returning to the UAE in December 2006. While in the UK he did not apply for a protection visa. In January 2007 the applicant discovered that Mr H was addicted to illicit drugs and was having unprotected sex with others. In March 2007 the applicant spoke to Mr H about this matter and Mr H became very angry and the applicant was bashed and threatened. The applicant and Mr R ran away from Mr H and went into hiding. In May 2007 the applicant returned briefly to Pakistan, and left again in June 2007 to return to the UAE. Shortly after, he travelled to Australia."

15 As Moore J noted, it was central to the reasoning of the RRT that the first respondent was not a homosexual[13]. Before turning to consider what his Honour held were the defects, fatal to the exercise by the RRT of its jurisdiction, in the inferential reasoning to that conclusion, something should be said of the importance for this case of the doctrine of jurisdictional error, and its constitutional under-pinning. It is the operation of that doctrine which marks this case off from those in which judicial review is attempted for alleged factual error not going to jurisdiction.

Jurisdictional error

16 Of the distinction between jurisdictional and non-jurisdictional error in the setting of the Australian Constitution, Justice Selway, writing extrajudicially, said[14]:

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13 (2009) 107 ALD 361 at 363.

14 "The Principle Behind Common Law Judicial Review of Administrative Action – The Search continues" (2002) 30 *Federal Law Review* 217, at 234. See also the treatment of the review of legality of administrative action as appurtenant to the judicial branch of government by Mr Pat Keane QC "Judicial Power and the Limits

(Footnote continues on next page)

> "Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles."

17 In *Plaintiff S157/2002*[15], Gaudron, McHugh, Gummow, Hayne and Kirby JJ said:

> "Because, as this Court has held, the constitutional writs of prohibition and mandamus are available only for jurisdictional error and because s 474 of the Act does not protect decisions involving jurisdictional error, s 474 does not, in that regard conflict with s 75(v) of the Constitution and, thus, is valid in its application to the proceedings which the plaintiff would initiate."

18 The constitutional jurisdiction has its origins in the control exercised by the English courts to prevent administrative authorities exceeding their authority or neglecting their duties. The execution of the laws made by the Parliament was seen as an aspect of the executive power[16]. There was no distinct concept of public administration as developed in some civilian systems[17]. In the English system the "jurisdictional fact" was an appropriate marker for the enforcement of legality; how much further the field for judicial review of administrative action extended remained a matter of debate.

19 It is in this setting that the statement of general principle by Brennan J in *Attorney-General (NSW) v Quin*[18] is to be understood. His Honour said:

> "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

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of Judicial Control", in Cane (ed), *Centenary Essays for the High Court of Australia*, (2004) 295 at 298-301.

15 (2003) 211 CLR 476 at 508 [83].

16 Cf Constitution, s 61.

17 See Schwarze, *European Administrative Law*, (1992) at 11-20.

18 (1990) 170 CLR 1 at 35-36; [1990] HCA 21.

> 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."

20 In his work *Administrative Law*, Professor Paul Craig describes jurisdictional facts as those relating to the existence of the power of a public body over the relevant area and continues[19]:

> "The statutory conditions thus laid down may be factual, legal or discretionary in nature. A classic factual precondition is that a person should be of a particular age to qualify for a benefit; a simple legal stipulation is provided by the meaning of the term employee; a discretionary precondition is where the statute provides that if a minister has reasonable grounds to believe that a person is a terrorist then he may be detained. Claims of factual error can arise in all three types of case. It might be argued that the agency simply got the applicant's age wrong because it confused the applicant with a different person. It might be claimed that the agency misapplied the legal meaning of the term employee to the facts of the applicant's case. It might be contended that the minister did not on the facts have sufficient material to sustain a reasonable ground for believing that the applicant was a terrorist."

The criterion for attraction of the jurisdiction of the decision maker in deciding an application under the Act for a protection visa is not expressed in terms of "fact" as simply understood. Rather, as explained earlier in these reasons, the Act fixes upon a criterion of "satisfaction" as to the existence of a certain state of affairs respecting the status of the applicant.

21 In that regard, a statement of principle by Lord Wilberforce made in 1976, before the tectonic shifts in English public law which occurred in later decades, is of first importance. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[20], his Lordship said of a provision conditioning the power of the Secretary of State to act upon satisfaction as to a certain state of affairs:

> "The section is framed in a 'subjective' form – if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of

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19 6th ed (2008) at 478-479.

20 [1977] AC 1014 at 1047.

> pure judgment. But I do not think that they go further than that. If a judgment requires, *before it can be made*, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, *whether the judgment has been made upon a proper self-direction as to those facts*, [and] whether the judgment has not been made upon other facts which ought not to have been taken into account." (emphasis added)

22 The essence of the case upon which the first respondent succeeded in the Federal Court was that in attaining the satisfaction required by the Act, the RRT did not make its judgment upon a proper self direction as to the inferences to be drawn from its rejection of the factual account given by the first respondent.

23 In Australia, as Basten JA recently observed[21], the principles applicable where the jurisdictional fact is a state of satisfaction or opinion are traced back to the use by Latham CJ in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* of the terms "arbitrary, capricious, irrational" as well as "not bona fide" to stigmatise the formation of an opinion upon which a statutory power was enlivened[22]. Subsequently, for the Supreme Court of Canada, Iacobucci J spoke of decision making upon an assumption which had no basis in the evidentiary material or which was contrary to the overwhelming weight of that material, and also of decisions based upon a contradiction in the processes by which conclusions were reached or upon the drawing of inferences which were not properly open[23].

24 A decision upon jurisdictional fact which has these characteristics is treated as a failure to exercise jurisdiction[24]. There has been a purported exercise of public power in the absence of the necessary jurisdictional fact[25].

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21 *Commissioner of Police v Ryan* (2007) 70 NSWLR 73 at 85.

22 (1944) 69 CLR 407 at 432; [1944] HCA 42.

23 *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at 776-777.

24 See the authorities collected in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 419-420 [82], 453 [189]; [2001] HCA 51.

25 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 205, cited in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1176 [59]; 198 ALR 59 at 73; [2003] HCA 30.

25 These considerations have added significance where the law in question is made by a legislature of limited powers. Thus, in Australia a jurisdictional fact may also be or include a constitutional fact. An example would be a criterion of liability that required the satisfaction of a non-curial decision maker that a propositus answer the description of a trading or financial corporation formed within the limits of the Commonwealth. If that satisfaction were not examinable on judicial review, the result, as the *Australian Communist Party v The Commonwealth*[26] teaches, would be that the legislation could rise higher than its constitutional source. These considerations apply in the present case. No doubt, the first respondent being an alien, a Pakistani national, the Act applies to him as a law with respect to that alienage. But the answer to the question posed by ss 36 and 65 as to the application of the definition of "refugee" determines whether in its operation upon the first respondent the Act also is supported as a law with respect to external affairs.

26 In England the distinction between jurisdictional and non-jurisdictional facts has fallen into deep disfavour and broader notions of the scope of judicial review have been developed and applied by the English courts. The submissions for the Minister by the Commonwealth Solicitor-General in significant measure sought to discourage any such development by this Court in applying s 75(v) of the Constitution.

27 In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[27] there was some consideration of the difficulties in Australia with the recent English authorities respecting review on the ground of "abuse of power" through the alteration of policy to frustrate unfairly the "legitimate" expectations of the individuals seeking review. No such ground was relied on by the first respondent. Nor does the present case require consideration of a doctrine of proportionality to review the exercise of a discretion where there is lacking an appropriate relationship between ends and means[28].

28 Still less is this the occasion to consider the development in Canada of a doctrine of "substantive review" applied to determinations of law, of fact, and of

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26 (1951) 83 CLR 1 at 262-263; [1951] HCA 5. See also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 614-615; [1986] HCA 60.

27 (2003) 214 CLR 1 at 9-10 [28], 22-24 [68]-[74], 37 [118]; [2003] HCA 6.

28 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547-548.

mixed law and fact made by administrative tribunals. Of substantive review, the Supreme Court of Canada recently said[29]:

> "The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review – correctness and reasonableness."

It may, however, be noted that the Supreme Court was not dealing with a system of judicial review created by statute, such as a counterpart of the ADJR Act. Rather, in Canada "the inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss 96 to 101 of the *Constitution Act* 1867"[30].

29 The determination of this appeal turns on the application of the doctrine of jurisdictional error, implicit in s 75(v) of the Constitution, to a legislative criterion expressed in terms of the satisfaction of the RRT.

30 Writing after the decision in *Tameside*, Professor Craig said[31]:

> "The general approach now is for the courts to require that a minister produce reasonable grounds for his action, even where the jurisdictional fact is subjectively framed."

31 In *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*[32], Wilcox J carefully, and with respect correctly, distinguished a "no evidence" ground respecting the existence of a jurisdictional fact, from the more debatable question (which does not arise in this appeal, as counsel for the first respondent

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29 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 214.

30 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 213.

31 *Administrative Law*, 3rd ed (1994) at 370. See also the authorities collected by Gleeson CJ, Gummow, Kirby and Hayne JJ in *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; [2000] HCA 5.

32 (1986) 13 FCR 511 at 514, 519-520.

stressed) of defective fact finding as an independent ground of judicial review, or as indicative of an "error of law" within the meaning of the ADJR Act.

The importance of reasons

32 Professor Wade wrote that a system of judicial review which cannot cope with crucial questions of fact necessarily is seriously defective[33]. In Australia that deficiency is alleviated by requirements in various laws, notably s 13 of the ADJR Act and its progeny in State legislation[34], for the obtaining of reasons for the decision. Section 430(1) of the Act is such a provision. Its operation in the present dispute is to lay out, more clearly than otherwise would be the case, the field upon which these operate the considerations mentioned, for example, by Lord Wilberforce in *Tameside* and Latham CJ in *Connell*.

33 Section 430(1) obliged the RRT, in making its decision, to prepare a written statement setting out its decision (par (a)), its reasons for the decision (par (b)), the findings on any material questions of fact (par (c)) and referring to the evidence or any other material on which those findings of fact were based (par (d)). The obligation is to set out the findings on what the RRT considers to be material questions of fact; this focuses upon the thought processes of the decision maker, and may disclose jurisdictional error[35].

34 Many of the leading authorities in this Court in which administrative decisions were challenged concerned legislative regimes in which there was no counterpart of s 430 of the Act. The decisions at stake in those cases presented an inscrutable face. Thus, in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[36], s 80(5) of the *Income Tax Assessment Act* 1936 (Cth) required the taxpayer company, if prior losses were to be allowed deductions, to satisfy the Commissioner of the state of its voting power on the last day of the year of income. No reasons were given by the Commissioner for the disallowance of the taxpayer's objections to its assessment. In that context Dixon J explained[37] the circumstances in which the conclusion of the Commissioner was liable to review

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33 *Administrative Law*, 7th ed (1994) at 297.

34 See Aronson and Dyer, *Judicial Review of Administrative Action*, 4th ed (2009) §8.485.

35 *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at 331-332 [10], 338 [34], 346 [68]; [2001] HCA 30.

36 (1949) 78 CLR 353; [1949] HCA 26.

37 (1949) 78 CLR 353 at 360.

by the court. Likewise, the inadequacy of the material before the decision maker may support an inference that the decision maker has applied the wrong test or was not "in reality" satisfied of the requisite matters[38] or from the absence of reasons the court may infer the absence of any good reason[39].

35 On the other hand, of provisions such as s 430, it was said in *Wu Shan Liang*[40] that the reasons are meant to inform and, upon judicial review, are not to be scrutinised in an over-zealous fashion. In that case, where the refugee status of the respondent was at stake, the Court said of the use by the decision maker of the term "speculative"[41]:

> "The word 'speculative' in the context in which it appears need not amount to a denial of the delegates' function of assessment of future chances of persecution. Rather, the word might equally have been used to refer to the probative force of the material before the delegate."

36 Here the RRT did give reasons in response to the requirement of s 430(1). The issue is whether, having regard to those reasons and without the necessity for a process of divination undertaken in the earlier authorities dealing with other legislation, the RRT fell into jurisdictional error to attract the remedy provided by the Federal Court.

SGLB

37 The ascertainment of the relevant jurisdictional error, if there be one, must fix upon the treatment of the requirement mandated by s 65 of the Act that the decision maker be "satisfied" that there is "satisfied" the criterion that the applicant is one to whom the decision maker is satisfied under s 36(2)(a) that Australia owes protection obligations.

38 In dealing with that question two distinctions must be made. They are foreshadowed in what has been said earlier in these reasons. The first is that the first respondent does not assert any general ground of jurisdictional error of the

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38 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120; [1953] HCA 22.

39 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 663-664; [1986] HCA 7.

40 (1996) 185 CLR 259.

41 (1996) 185 CLR 259 at 277.

kind disfavoured by Mason CJ[42] where there were alleged deficiencies in what might be called "intra-mural" fact finding by the decision maker in the course of the exercise of the jurisdiction to make a decision. The apprehensions respecting "merits review" assume that there was jurisdiction to embark upon determination of the merits. But the same degree of caution as to the scope of judicial review does not apply when the issue is whether the jurisdictional threshold has been crossed. There the imperatives are the separation of powers considerations to which Justice Selway referred.

39 The second distinction concerns attacks upon the exercises of discretionary power which are said to be unreasonable in the sense attributed to *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation*[43]. The concern here is with abuse of power in the exercise of discretion, again on the assumption that the occasion for the exercise of discretion had arisen upon the existence of any necessary jurisdictional facts[44]. Confusion of thought, with apprehension of intrusive interference with administrative decisions by judicial review[45] will be avoided if the distinction between jurisdictional fact and other facts then taken into account in discretionary decision making is kept in view.

40 It was against this background that, when considering s 65 of the Act in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[46], Gummow and Hayne JJ said:

> "The satisfaction of the Minister is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a 'jurisdictional fact' or criterion upon which the exercise of that authority is conditioned[47]. The delegate was in the same position as would have been the Minister

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42 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356-357; [1990] HCA 33.

43 [1948] 1 KB 223.

44 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1169-1170 [20], 1177-1178 [67]-[69], 1194 [174]; 198 ALR 59 at 64, 75-76, 98-99.

45 See, in particular, the remarks of Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37-38.

46 (2004) 78 ALJR 992 at 998 [37]-[38]; 207 ALR 12 at 20-21; [2004] HCA 32.

47 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 609 [183]; [2002] HCA 54.

(s 496) and the Tribunal exercised all the powers and discretions conferred on the decision-maker (s 415).

The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds[48]. If the decision did display these defects, it will be no answer that the determination was reached in good faith."

However, it should be remarked that what is characterized as the "critical question" should not receive an affirmative answer that is lightly given. It may be noted that the outcome in *SGLB* and in *Applicant S20/2002* was to deny the presence of jurisdictional error. This reflected the approach upon judicial review earlier expressed in *Wu Shan Liang* to which earlier reference has been made.

41 Similar reasoning to that found in *SGLB* has been applied by the Full Court of the Federal Court in *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs*[49], which in turn was followed in authorities including the decision of Gordon J in *SZLGP v Minister for Immigration and Citizenship*[50], upon which Moore J particularly relied in the present case.

42 The Minister submitted that there was no occasion for a redetermination by the RRT, as ordered by the Federal Court. This was because the above line of authority should be disowned, essentially for the apprehended fear of "merits review". But, as indicated in these reasons, that submission should be rejected. It gives insufficient weight to the importance of s 75(v) of the Constitution in ensuring that the legislative expression of jurisdictional facts in terms of satisfaction or opinion of a decision maker does not rise higher than its source.

Conclusions

43 The RRT fixed upon two matters as "inconsistent" with the first respondent's claimed fear of persecution and founding its refusal to accept "that the [first respondent] had engaged in homosexual activities in the UAE".

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48 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1172 [37], 1175 [52], 1194 [173]; cf at 1168 [9]; 198 ALR 59 at 67, 71, 98; cf at 62.

49 (2004) 80 ALD 568 at 573-574.

50 [2008] FCA 1198.

44 The first was his visit to Pakistan for three weeks in May-June 2007, to spend time with his children and to finalise his relations with his wife, before he returned to the UAE and then to Australia. The RRT reasoned that if genuinely fearful of serious harm upon disclosure in Pakistan of his homosexuality, the first respondent would not have travelled there even for a short time.

45 The second matter was that the first respondent had failed to seek protection when he visited the United Kingdom in 2006. His evidence was that, given what were then his favourable personal circumstances in the UAE, there was no reason to seek protection in the UK. The RRT said that the first respondent had been "unable to explain [to its satisfaction] why he preferred at the time to hide his homosexuality for years to come rather than to seek protection".

46 This process of reasoning is based on two assumptions: that an applicant for a protection visa would not return, albeit briefly, to a country in which persecution is feared, and that a claimant fearful of persecution would seek asylum elsewhere at the first available opportunity. It was these assumptions which led the RRT to the conclusion that the conduct of the first respondent was inconsistent with his claim to fear persecution. The assumptions may be logical or rational if the person claims to fear persecution on the grounds of a physical feature such as race or some other feature that is known or likely to be apparent to others within the country. However, the same cannot be assumed where the claimed fear is based on such grounds as those of sexual identity or political opinion or religious belief in the absence of circumstances that may indicate otherwise.

47 The reasoning of the RRT appears to have proceeded on the basis that a person outside Pakistan but with a real fear of persecution as a homosexual in Pakistan would not go there at all and would seek protection as a refugee at the first opportunity. Reasoning of this nature insufficiently appreciates a point made by Gummow and Hayne JJ in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[51]. This is that in considering whether a particular applicant for a protection visa has a well-founded fear of persecution by reasons of membership of a social group identified in terms of sexual identity:

> "Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity."

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51 (2003) 216 CLR 473 at 500-501 [81] per Gummow and Hayne JJ.

48 Further, counsel for the first respondent correctly emphasised that there is essentially an individual character to "membership" of a particular social group. As McHugh and Kirby JJ put it in *Appellant S395/2002*[52], a claimant to refugee status is asserting an individual right not merely undifferentiated membership of a group, and as Gummow and Hayne JJ put it[53]:

> "The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how *this* applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made[54]." (original emphasis)

49 So it is that, for example, a person may engage in sexual activity (and, indeed, in religious worship or political activity) in one country rather than another without necessarily denying a claim to protection under the Convention.

50 With respect to the first matter relied upon by the RRT, the return to Pakistan in May-June 2007, the evidence of the first respondent was that he had kept a low profile during the visit to avoid trouble with anyone. The social group of which he asserted membership had the characteristic that membership would not be perceived unless disclosed. The RRT acted on an assumption that if the first respondent had the sexual identity he claimed there was a very real prospect that this would be disclosed by some means during his short visit, that he would have had that apprehension and would not have visited his family before going to Australia.

51 The RRT gave no attention to the question of how it could have become known to the family of the first respondent or to anyone else in Pakistan that he was a homosexual, and made no findings upon it. The absence of the logical connection between the evidence and the reasons of the RRT's decision became apparent when the RRT assumed that a homosexual would be fearful of returning to Pakistan without there being any basis in the material to found this assumption or to counter the possibility that the sexuality of such a person could be concealed from others in the short period of return to the country. Indeed, the first respondent said that he had made other short visits to his family in Pakistan

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52 (2003) 216 CLR 473 at 495 [59].

53 (2003) 216 CLR 473 at 500 [78].

54 *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840 at 841 [2]; [2003] 2 All ER 1097 at 1099, per Lord Bingham of Cornhill; at 843 [7]; 1101, per Lord Steyn; at 854 [42]; 1112, per Lord Rodger of Earlsferry.

from the UAE before that of May-June 2007. These visits had not led to any adverse disclosure.

52 With respect to the second matter, the visit to the United Kingdom in 2006, there was nothing before the RRT which provided any ground for rejecting the explanation given for failure to seek protection at that time. The desire of the first respondent to continue to reside in the UAE, where "at the time he did not have any problems" and had "a good relationship", instead of seeking to reside in a country far removed from his then good relationship, says nothing as to the credibility of the first respondent's claim to fear persecution in Pakistan. It should also be noted that the RRT did not express its conclusion upon any view as to the manner in which the first respondent had given his evidence before the RRT. Rather it gave a lengthy summary of his evidence and then reasoned from the two deficiencies it saw in his account.

53 To decide by reasoning from the circumstances of the visits to the United Kingdom and Pakistan that the first respondent was not to be believed in his account of the life he had led while residing in the UAE was to make a critical finding by inference not supported on logical grounds. The finding was critical because from it the RRT concluded that the first respondent was not a member of the social group in question and could not have the necessary well-founded fear of persecution.

54 The Federal Court was correct to quash the decision and to order a redetermination by the RRT.

Orders

55 The appeal should be dismissed with costs.

56 HEYDON J. I adopt the statement of facts made and the abbreviations employed by Crennan and Bell JJ.

57 The question is whether the Federal Court was wrong to respond to a point taken for the first time in that court by characterising the reasoning of the Tribunal as having "simply no basis", as being "completely unsustainable as a piece of logical analysis", and as "based squarely on an illogical process of reasoning".

58 The conclusion urged by the Solicitor-General of the Commonwealth on behalf of the appellant is that the Tribunal's fact-finding was not, on any view, open to these characterisations. That submission is correct, substantially for the reasons that he advanced.

59 It is desirable to consider the nature of the persecution that the first respondent claimed to fear, and the reactions of the Tribunal member to the first respondent's claims in respects other than the two particular issues on which the appeal turns, before going to those two issues.

Persecution

60 *The nature of the persecution.* The first respondent contended that he had good explanations for deciding to return to Pakistan for three weeks in 2007 and for not seeking asylum in the United Kingdom in 2006. In assessing those explanations it is important to bear in mind what his claim for a Protection (Class XA) Visa entailed. That is because the greater the harm he believed would flow from people in Pakistan coming to know of his conduct, the less likely it is that he would return to Pakistan or fail to seek asylum in the United Kingdom.

61 The first respondent claimed to have a well-founded fear of being persecuted for reasons of membership of a particular social group. Section 91R(1) of the Act provides that persecution must involve "serious harm" to the first respondent and "systematic and discriminatory conduct". Section 91R(2) provides:

> "Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of *serious harm* for the purposes of that paragraph:
>
> (a) a threat to the person's life or liberty;
>
> (b) significant physical harassment of the person;
>
> (c) significant physical ill-treatment of the person;

> (d) significant economic hardship that threatens the person's capacity to subsist;
>
> (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
>
> (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist."

62 While s 91R(2) does not provide an exhaustive definition of "serious harm", the circumstances it sets out do powerfully illustrate the gravity of the kinds of harm which that expression captures.

63 *The persecution claimed by the first respondent: the Department*. The first respondent's solicitor informed the appellant's Department in writing that in Pakistan homosexuality was punishable by a seven year jail sentence, that society discriminated against homosexuals to an extreme degree, that homosexuality was a matter of shame and embarrassment for the person involved and his or her family, and that the Government of Pakistan did not provide protection to homosexuals.

64 *The persecution claimed by the first respondent: the Tribunal*. Before the Tribunal, in oral evidence, the first respondent said that the only harm he feared was that, if he returned to Pakistan and his family came to know about the way of life he was living in Australia, he, his daughters and his family (including his brothers and sisters) would feel ashamed and they would all "die of shame".

65 *The persecution claimed by the first respondent: the Federal Magistrates Court*. Before the Federal Magistrates Court, the first respondent contended, in writing, that if he returned to Pakistan he could not survive there, that there are severe punishments there for the practice of homosexuality, and that persons accused of that practice could be put to death by stoning. He also contended that it was impossible to live as a homosexual in Pakistan because homosexual conduct was deemed to be very shameful and those practising it were boycotted in all fields of life: he would die unless he were allowed to lead a homosexual lifestyle. These contentions were put somewhat more strongly than they had been earlier, but, accepting them as sincere, it may be inferred from them and from the earlier forms in which he put his claim that the first respondent had an extremely strong fear of, antipathy against and revulsion to the conditions in Pakistan of which he spoke[55].

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55 The Solicitor-General in passing questioned whether these conditions amounted to persecution. In another case that question may have to be examined. But in this appeal it can be assumed that those conditions did amount to persecution.

66 *Bases for the Tribunal's ultimate conclusion.* The ultimate conclusion at which the Tribunal member arrived was that there was no real chance that, if the first respondent were to return to Pakistan, he would face persecution in the reasonably foreseeable future. The reasons for arriving at that ultimate conclusion may be divided into categories. The first two categories are related to the Tribunal's reasoning about the first respondent's visits to Pakistan in 2007 and the United Kingdom in 2006. But they were not the only categories into which the Tribunal's reasoning fell. There were four others.

67 The third category related to the Tribunal's inability to accept that the first respondent had engaged in homosexual activities in Australia in the seven and a half months between his arrival and the oral hearing in the Tribunal. The first respondent claimed that, because of the need to be cautious about disease, he had limited those activities to a one night stand with a person whose name he did not ask. But he also claimed to have searched websites with a view to establishing relationships. The Tribunal said:

> "The Tribunal finds the [first respondent's] explanation about his very limited involvement in homosexual activities in Australia to be implausible as, despite the apparent fear of disease, the [first respondent] claimed to have engaged in a relationship with an unknown partner. The Tribunal also finds that visiting websites without indicating one's preferences does not indicate that the [first respondent] was looking for same sex partners or that he would be perceived as having done that. The Tribunal does not accept that the [first respondent] had engaged in homosexual activities in Australia."

68 The fourth category related to the first respondent's claim to have engaged in homosexual activities at school. The Tribunal did not accept that this conduct, if it took place, was indicative of the first respondent's desire to repeat it as an adult.

69 The fifth category concerned newspaper articles and reports which the first respondent provided to the Tribunal about homosexuality in Islam. The Tribunal said: "[t]hese are not specifically about the [first respondent] and the Tribunal does not view these as supporting the [first respondent's] claims that he is a homosexual."

70 The sixth category concerned a report from a doctor. Apart from the Tribunal member's reference to some inconsequential spelling errors, she gave the report no weight because its conclusions were based primarily on the history which the first respondent had given.

71 In this Court the first respondent made no complaint about the Tribunal's reasoning in relation to the third, fourth, fifth and sixth categories. While the Tribunal member's specific comments in relation to the fourth, fifth and sixth

categories were not critical of the first respondent's credibility, this was not the case for her comments in relation to the third category. She completely disbelieved him.

72 It is necessary now to turn to the two parts of the Tribunal's reasoning which the Federal Court attacked.

The visit to Pakistan in 2007

73 The key part of the Tribunal's reasoning about the first respondent's visit to Pakistan in 2007 is quoted by Crennan and Bell JJ[56]. So is the material part of the Federal Court's reasoning[57].

74 The reasoning of the Tribunal member may be summarised as follows. Although she did not say so in terms, it is plain that she selected as her major premise the proposition that persons who claim to fear serious harm arising from their conduct if it becomes known in their country of origin – including death through shame to themselves, their wives, their daughters, their brothers and their sisters – are likely to have so strong a revulsion to the conditions and dangers in their country of origin which made these outcomes likely that they will not return to it. The minor premise was that the first respondent did return to his country of origin. The conclusion was that he probably did not in fact fear serious harm of the kind claimed. The Tribunal's reasoning rested on the idea that there was an inconsistency between the first respondent fearing certain perils if his application for a protection visa were rejected and he returned to Pakistan, and his failure to fear those perils when he went there voluntarily in 2007.

75 The Federal Court's criticism was that the Tribunal's reasoning did not explain how the first respondent's conduct would have become known in Pakistan. The answer to the criticism is that the case put by the first respondent makes it necessary to assume that it will become known.

76 It was for the first respondent to establish his claim, not for the Tribunal to disprove it. He had the opportunity to establish his claim without being trammelled by the requirements of the rules of evidence. He invited the Tribunal to reach a conclusion based on what he said were the probabilities of ordinary life in Pakistan. A necessary integer of success in the first respondent's claim of persecution was the proposition that it would be discovered that the first respondent was a practising homosexual. The first respondent did not explain in support of his own case how that proposition would be made good, any more

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56 See below at [108]-[109].

57 See below at [112].

than he explained in answer to the Tribunal's questioning why the proposition was not true in relation to his visit in 2007. However, as the Tribunal was asked to accept the proposition in order to uphold the first respondent's claim that he was in peril of persecution in Pakistan, it was not illogical for the Tribunal also to accept the proposition in order to test the first respondent's apparent position that his visit to Pakistan in 2007 carried no peril of persecution.

77 The Federal Court reasoned that the illogicality lay in assuming that others would discover that the first respondent was a practising homosexual during "the brief period of his visit". But for the Tribunal to assume, in the first respondent's favour, that if he returned to Pakistan for an indefinite period that fact would become known is not inconsistent with assuming that it would become known during a briefer period. It cannot be said that there is any illogicality. And it cannot be said, as the Federal Court did, that there "was simply no basis" for the Tribunal's conclusion. If the only relevant factor were the duration of the visit to Pakistan, the longer the period of the visit to Pakistan, the more likely it was that the fact would become known. The shorter the period, the less likely it was that the fact would become known. But that does not establish that there was no basis for the Tribunal's conclusion.

78 The issue was one on which minds might differ. The Federal Court evidently operated on one assumption or conclusion about that issue. The Tribunal operated on another. The difference was one of degree, impression and empirical judgment. It did not stem from an error in logic by the Tribunal member. The difference could not be said to reveal an absence of any basis whatsoever for her conclusion.

79 There is a further difficulty in relation to the Federal Court's attacks on the reasoning of the Tribunal member. The means by which the first respondent's family or anyone else in Pakistan would discover facts about the first respondent which he claimed he wished to conceal were not limited to those flowing from his physical presence in Pakistan. If the facts were discovered, the impact would be felt in Pakistan. But the facts could be discovered independently of the first respondent's presence in Pakistan. The facts could be discovered, for example, through messages out of the United Arab Emirates via correspondence, telephone or other electronic means, or through reports of Pakistanis coming home from the United Arab Emirates. That diminishes the significance of the length of the first respondent's trip: for even if its brevity reduced the chance of the facts being discovered from the first respondent's mere presence in Pakistan, it did not reduce the chance of persecution taking place as a result of communications during the previous 20 months.

80 On one reading of the Tribunal's reasons, it was dealing only with the three week visit to Pakistan in 2007. That was the reading advanced by the first

respondent. But before the passage quoted by Crennan and Bell JJ[58], the Tribunal did state: "A copy of the [first respondent's] passport … indicates that the [first respondent] had travelled to UAE on numerous occasions and that he returned to Pakistan." The first respondent confirmed this in his evidence, and said that during the period October 2005 - July 2007, in which he claimed to have developed an attraction to people of his own sex, he went to Pakistan many times. On one view, the more numerous the visits the stronger the Tribunal's point; but since this aspect of the controversy was not fully developed in argument it is better not to deal with it.

The visit to the United Kingdom in 2006

81 The difference between the Tribunal and the Federal Court in relation to the first respondent's visit to the United Kingdom in 2006 centred on his explanation for not claiming asylum in the United Kingdom. In view of a dispute between the parties as to the construction of the Tribunal's reasons, it is desirable to set the relevant part out:

> "the [first respondent] had indicated that he had travelled to the [United Kingdom] in 2006 but did not seek protection there because he had a good life in the [United Arab Emirates] and was in a good relationship with [R]. However, the [first respondent's] claims are directed at Pakistan where he claims to have feared persecution due to his homosexuality. The [first respondent] was unable to explain to the satisfaction of the Tribunal why, if he was fearful of his homosexuality becoming apparent to his family or to others in Pakistan, he would take no action to seek protection despite having a good relationship with [R]. The [first respondent] appeared to suggest that he had nothing to fear until his relationship with [H] deteriorated. However, *this* appears to be *inconsistent with* his claim that he was fearful of being perceived, or of being found to be, a homosexual upon his return to Pakistan, not of being discovered as being in a relationship with [H]. The [first respondent] was unable to explain to the satisfaction of the Tribunal why he preferred at the time to hide his homosexuality for years to come rather than seek protection." (emphasis added)

82 The material parts of the Federal Court's comments about this passage are quoted by Crennan and Bell JJ[59].

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58 See below at [109].

59 See below at [112].

83 The first respondent's explanation was offered in order to explain his failure to seek asylum in the United Kingdom. What he claimed to fear was persecution in Pakistan on certain grounds. The likelihood or unlikelihood of persecution on those grounds in Pakistan is the same whether the first respondent had a good or a bad life in the United Arab Emirates, whether the first respondent's relationship with R was good or bad, and whether his relationship with H moved from being good to being bad. The question is whether knowledge in Pakistan that the first respondent was a practising homosexual would create a risk of persecution. The greatness or smallness of that risk did not necessarily depend on the particular identities of the persons with whom the first respondent had his relationships or the quality of those relationships.

84 The point made in the last sentence quoted above from the Tribunal was put by the Tribunal member more vividly when she asked the first respondent:

> "Why not apply for the protection visa when you had the opportunity instead of trying to keep something that is so central to your life secret for years and years to come?"

The Tribunal plainly thought that the first respondent's explanation for his failure to apply for a protection visa in the United Kingdom was damaging to his credibility. Whether or not all minds would share that thinking, it is not thinking which is illogical.

85 Another criticism which the Federal Court made of the Tribunal's logic arose in relation to the second last sentence in the Tribunal passage quoted above, commencing "However"[60]. In that passage the words "inconsistent with" do not mean "logically contradictory of". They mean only that whatever "this" is points against or renders less probable the first respondent's claim. What is "this"? The Federal Court considered that the word "this" in that sentence referred to the previous sentence. If so, it was open to the Tribunal to see a logical connection – in the sense of a connection relating to probabilities – between the two sentences for reasons already given: the risk of persecution in Pakistan did not depend on the deterioration of the first respondent's relationship with H, but rather on

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60 The Federal Court bore in mind and the appellant urged the precept that the reasons of the Tribunal should not be construed minutely and finely "with an eye keenly attuned to the perception of error". The origins of the quoted expression can be traced at least as far back as Lockhart J's use of it in *Politis v Federal Commissioner of Taxation* (1988) 16 ALD 707 at 708. With respect to Lockhart J and the many judges who have since repeated his salutary warning, it is necessary to substitute for his warning a warning against construing the words of non-judicial decision-makers minutely and finely either with an eye keenly focussed on the perception of error, or with an ear keenly attuned to the perception of error.

information being received in Pakistan that the first respondent was a practising homosexual. On the other hand, the word "this" may refer not to the preceding sentence, but to the topic dealt with in the entire paragraph, namely the first respondent's failure to seek asylum in the United Kingdom. So read, the second last sentence is stating that the first respondent's failure to seek asylum pointed as a matter of probability against a fear of persecution on returning to Pakistan.

86 The difference between the Federal Court and the Tribunal may be put thus. The Federal Court thought that the first respondent's explanation for not seeking asylum in the United Kingdom was "perfectly plausible". There are pejorative meanings of the word "plausible", but they are not the meanings which the Federal Court was conveying. The Federal Court was saying that the explanation was "capable of being believed" or "apparently believable". The Tribunal, however, did not believe it. Something can be capable of being believed without actually being believed. For the Tribunal member to withhold belief from something which is "perfectly plausible" but which she did not find to have been satisfactorily explained and which she found not to be probable is not illogical.

Other issues

87 As the Tribunal's reasoning was not illogical, it is not necessary to determine any of the questions of law about which the parties were in controversy.

Orders

88 The orders sought by the appellant and not opposed in form by the first respondent correspond with the substance of the condition imposed when special leave was granted. Subject to one point, they are the orders which ought to be made. The effect of order 2 in this Court is to leave standing order 6 in the Federal Court of Australia. That order was that the appellant in this Court pay the costs of the first respondent in this Court of the proceedings before the Federal Magistrates Court and the Federal Court. To avoid doubt, it is necessary to set aside order 2 made by the Federal Magistrates Court, which ordered the first respondent in this Court to pay the costs in that Court of the appellant in this Court.

89 The orders are:

1. The appeal be allowed.

2. Orders 3, 4 and 5 made by the Federal Court of Australia on 10 March 2009 be set aside.

3. In place of those orders:

a) the appeal to the Federal Court of Australia be dismissed; and

b) Order 2 made by the Federal Magistrates Court of Australia on 8 July 2008 be set aside.

4. The appellant pay the reasonable costs of the first respondent of the appeal to this Court.

90 CRENNAN AND BELL JJ. The first respondent is a 44 year old male citizen of Pakistan. He is married to a Pakistani woman who lives in Pakistan with their four children born in 1991, 1993, 1995 and 2003 respectively. The first respondent gave evidence that between 1995 and 1998 he lived in, and moved between, the United Arab Emirates ("the UAE") where he worked, and Pakistan. He stated that from 1998 to 2004 he settled in Pakistan with his family. He subsequently resided in the UAE from 2004 until 2007. In 2006 he travelled to the United Kingdom and remained there from October until December 2006.

91 On 3 July 2007, the first respondent arrived in Australia on a visitor visa and on 16 August 2007 he applied for a Protection (Class XA) visa on the grounds that he feared persecution in Pakistan because of his "belie[f] [in] and practice of homosexuality". After that application was refused by a delegate of the Minister on 8 November 2007, the first respondent sought review under s 476 of the *Migration Act* 1958 (Cth) ("the Act") in the Refugee Review Tribunal ("the Tribunal") which affirmed the delegate's decision. It can be noted that the Tribunal has filed a submitting appearance in subsequent proceedings, and is the second respondent here.

92 An application by the first respondent to the Federal Magistrates Court was dismissed but a subsequent appeal to the Federal Court of Australia (Moore J)[61] ("the Federal Court") was allowed on the basis that "the Tribunal's conclusion that the first respondent was not a homosexual was based squarely on an illogical process of reasoning" with the result that the Tribunal "fell into jurisdictional error having regard to the way it reached the conclusion that the applicant was not a homosexual"[62].

93 Special leave to appeal was granted on the basis that the Minister would not seek to disturb the costs order made below and that the Minister would pay the first respondent's reasonable costs of the appeal and the special leave application.

The questions

94 The main question arising on the appeal is whether "illogicality", "irrationality", or "lack of articulation" in a finding of jurisdictional fact can amount to jurisdictional error.

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61 Moore J was exercising the appellate jurisdiction of the Federal Court pursuant to s 25(1AA)(a) of the *Federal Court of Australia Act* 1976 (Cth).

62 *SZMDS v Minister for Immigration and Citizenship* (2009) 107 ALD 361 at 370-371 [29]-[30].

95 The second question to be determined is whether the findings of fact impugned by the Federal Court were findings of jurisdictional fact.

96 These questions arise in the context of judicial review under the Act and the settled principle of limitation that such review is limited to jurisdictional error[63] although, as recognised in *Re Refugee Review Tribunal; Ex parte Aala*[64], there is difficulty in drawing a bright line between jurisdictional error and error in the exercise of jurisdiction. In the reasons which follow the availability and scope of "illogicality" and "irrationality", as a basis for judicial review, of a decision as to a jurisdictional fact, will be explained. The appeal should be allowed on the basis that the Tribunal's decision was not illogical or irrational in the requisite sense. Nothing said in these reasons sanctions the deployment of "illogicality" or "irrationality" to achieve what is sometimes called merits review.

First respondent's claim for protection

97 The first respondent states that during the period October 2005 to July 2007, while in the UAE, he developed an attraction to members of the same sex and commenced a relationship with an Indian boy "R". About the end of 2006 he said he and R started living together and had a sexual relationship. He gave evidence that R introduced him to R's boss, H, and the three had sexual relations for about a year. Then the first respondent discovered H had a drug problem and had engaged in unprotected sex with other men. The first respondent says that when confronted about this, H bashed him and R, and threatened them with cancellation of their visas as a result of which the first respondent and R went into hiding. During the period October 2005 to July 2007 the first respondent states that he "went to Pakistan many times". In May 2007, after obtaining a visitor visa to Australia in the UAE, the first respondent went to Pakistan for three weeks before returning to the UAE on 25 June 2007, then flew to Australia, arriving on 3 July 2007.

98 In his application for protection the first respondent states that homosexuals are discriminated against in Pakistan and prison sentences apply to sodomy. It appears homosexuality is prohibited in his culture and by his religion and is the subject of social taboo. According to country information considered by the appellant, Pakistan "is one of the few countries in the world where homosexuality is punishable by death". However, the country information also

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63 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

64 (2000) 204 CLR 82 at 141 [163]; [2000] HCA 57; see also *Craig v South Australia* (1995) 184 CLR 163 at 177-178; [1995] HCA 58.

included a statement that prosecutions under the laws are rare[65]. In essence, the first respondent claims he is a practising homosexual, and he fears persecution because homosexuals face discrimination in Pakistani society and are subject to penalties under Pakistani law and also because he does not wish to bring shame upon his family. It appears to have been accepted in the Tribunal's decision that homosexuality is a common and unifying characteristic[66] of a social group in Pakistan. However, the Tribunal did not accept the first respondent's claim to be a member of that group.

Relevant legislation

99 Section 65 of the Act relevantly provides[67]:

"(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied;

…

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa

…"

100 Section 430 relevantly provides:

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

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

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65 United States, Department of State, *Country Reports on Human Rights Practices 2006: Pakistan*, March 2007.

66 As to which see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; [1997] HCA 4, the authority of which has never been doubted.

67 Reprint No 11 is the applicable reprint.

(b) sets out the reasons for the decision; … "

101 Section 65(1)(a) obliged the Tribunal to determine whether or not it was satisfied that the first respondent met the criteria prescribed by the Act for the grant of a protection visa: that is, that as a member of a particular social group he had a well-founded fear of persecution. That required the Tribunal to determine the first respondent's essential claim that he was a member of the particular social group, homosexuals in Pakistan, as a result of which he claimed to suffer a well-founded fear of persecution.

102 In considering s 65(1)(a)(ii) in *Minister for Immigration and Multicultural Affairs v SGLB* ("*SGLB*")[68], Gummow and Hayne JJ said:

> "The satisfaction of the Minister is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a 'jurisdictional fact' or criterion upon which the exercise of that authority is conditioned … The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was *irrational, illogical and not based on findings or inferences of fact supported by logical grounds*. If the decision did display these defects, it will be no answer that the determination was reached in good faith." (emphasis added and footnotes omitted)

The decision here in relation to s 65(1)(a)(ii) was a decision as to a jurisdictional fact.

103 The approach to be derived from the emphasised statement had been foreshadowed in *Minister for Immigration v Eshetu* ("*Eshetu*") where Gummow J referred to "findings or inferences of fact which were not supported by some probative material or logical grounds"[69]. The approach was also anticipated in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* ("*S20*") where Gleeson CJ noted that one of the grounds of challenge to the Tribunal's decision was that it "was illogical, irrational, or was not based on findings or inferences of fact supported by logical grounds"[70]. It was said by the appellant that since *S20* a range of views had emerged in the Federal Court as to

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68 (2004) 78 ALJR 992 at 998 [37]-[38]; 207 ALR 12 at 20; [2004] HCA 32.

69 (1999) 197 CLR 611 at 657 [147]; [1999] HCA 21.

70 (2003) 77 ALJR 1165 at 1167 [4]; 198 ALR 59 at 61; [2003] HCA 30.

whether an illogical process of reasoning in the course of reaching a conclusion of fact amounts to a jurisdictional error[71].

104 In *Avon Downs Pty Ltd v Commissioner of Taxation* ("*Avon Downs*")[72] Dixon J had said of a decision maker empowered to act when "satisfied" of a state of affairs:

> "If he does not address himself to the question which the [statute] formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review … If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

105 In *Avon Downs* there was no requirement for the giving of reasons as exists here under s 430. This appeal involves the possible application of the approach signalled in *SGLB* to a decision involving a state of satisfaction which was specified in the Act.

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71 See for example, *Minister for Immigration & Multicultural & Indigenous Affairs v W306/01A* [2003] FCAFC 208; *NACB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 235; *W404/01A of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 255; *NATC v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 52; *VWST v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 286; *SZDFO v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1192; *Applicant A169 of 2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 8; *WAJQ v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 79; *SZEEO v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 546; *VWFP and VWFQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 231; *SZCZN v Minister for Immigration & Citizenship* [2008] FCA 173; *NAOX v Minister for Immigration and Citizenship* (2009) 112 ALD 54.

72 (1949) 78 CLR 353 at 360; [1949] HCA 26; see also *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 651 [130]-[131] per Gummow J.

The Tribunal's decision

106 The Tribunal refused to accept the first respondent's claim that he was in a homosexual relationship with R in the UAE between 2005 until 2007 and that he feared that if his homosexuality became known on his return to Pakistan he would face persecution and his family would be ashamed.

107 The Tribunal relied on two aspects of the first respondent's conduct as a basis for rejecting that claim. It considered that the first respondent's conduct, first, in returning to Pakistan for three weeks in 2007 before coming to Australia and, secondly, in failing to seek asylum in the United Kingdom in 2006, was conduct which was inconsistent with his claimed fears of persecution arising as a result of his homosexuality.

Returning to Pakistan

108 The first respondent returned to Pakistan for three weeks after he obtained a visitor visa for Australia and before leaving for Australia from the UAE. His explanation for doing so was described by the Tribunal as follows:

> "He states that the reasons he went to Pakistan after receiving a visitor visa for Australia were because he was living in the UAE for a while without his children. … He decided not to come back from Australia for ever and therefore he wanted to spend time with his children before leaving Pakistan permanently and he also wanted to finalise his relations with his wife, which he did …
>
> [H]e wanted to spend time with his children because he did not know when he would see them again."

109 Of this, the Tribunal said:

> "[I]f the applicant was genuinely fearful of serious harm as a result that his homosexuality may become known in Pakistan, he would not have travelled to Pakistan, even for a short period, after his claimed homosexual relationship in UAE."

Position in the United Kingdom in 2006

110 When asked why he did not apply for asylum when he was in the United Kingdom in 2006, the first respondent said "he did not have any problem at the time". This referred apparently to the fact that the first respondent had a good life in the UAE and was in a good relationship with R. As to this, the Tribunal took the view that it was unreasonable to "keep something that was so central to

his life a secret for years and years to come" rather than apply for asylum. The Tribunal concluded that:

> "[T]he applicant's conduct in returning to Pakistan and in failing to seek protection in 2006 is inconsistent with the claimed fear of persecution arising as a result of his homosexuality. The Tribunal does not accept that the applicant had engaged in homosexual activities in the UAE or that he was fearful as a result of such activities or his homosexuality."

Federal Court decision

111 The appeal to the Federal Court followed a Federal Magistrate's determination[73] that the Tribunal decision contained no jurisdictional error. In an amended notice of appeal the first respondent claimed that the Tribunal's decision was "unsupported by probative material, and the inference of fact upon which it based its decision could not reasonably be drawn, when it concluded that the appellant's short visit to Pakistan before travelling to Australia cast doubt on whether he engaged in homosexual conduct in the UAE, or that he was genuinely fearful of persecution in Pakistan"[74].

112 The Federal Court's reasoning and findings on what was headed "[i]rrational and illogical fact finding" included the following[75]:

> "The Tribunal made no finding about how, during the applicant's brief return to Pakistan, it might conceivably have become known to his family or anyone else that he had become, on his account, a practising homosexual. His claimed fear was based on his apprehension that his family and others in Pakistan might come to know of his homosexuality. However, the Tribunal does not say how that might have emerged during a brief visit when he was the custodian of the information. His fear was predicated on others knowing. Unless others came to know, the basis of his fear did not exist. The Tribunal does not make a finding that he revealed the information. It does not make a finding that, during the brief period the applicant was in Pakistan, he sought out men for homosexual sex and for that reason others might come to know of his homosexuality. It does not otherwise make a finding explaining how his family and others

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73 *SZMDS v Minister for Immigration* [2008] FMCA 1064.

74 *SZMDS v Minister for Immigration and Citizenship* (2009) 107 ALD 361 at 367 [21].

75 *SZMDS v Minister for Immigration and Citizenship* (2009) 107 ALD 361 at 369-370 [26]-[29].

might have come to know of his homosexuality during this period. Without findings of this type, or at least in the absence of an explanation as to how there was any risk that his homosexuality would become known during the brief period of his visit, I simply fail to see how the fact that the applicant briefly returned to Pakistan undermined his claim that he had become an active homosexual in the UAE in the preceding two years. There was simply no basis, in my opinion, for the Tribunal to have concluded that the fact that the applicant returned briefly to Pakistan was inconsistent with him having a fear of harm based, on his case, on his family and others in Pakistan coming to know he was a homosexual.

Similarly, the applicant's explanation as to why he did not claim asylum in the UK was perfectly plausible. Putting it slightly differently, the Tribunal's conclusion about the consequences of not claiming asylum in the UK is, in my opinion, completely unsustainable as a piece of logical analysis. In essence what the applicant had said was that he did not claim asylum in the UK because he could return to the UAE where he had a good life and was in a good relationship. His circumstances in the UAE changed after he fell out, as he claimed, with Mr H, which occurred after his return from the UK.

I simply fail to understand what the Tribunal meant when it said the following:

> *However, this appears to be inconsistent with his claim that he was fearful of being perceived, or of being found to be, a homosexual upon his return to Pakistan, not of being discovered as being in a relationship with [Mr H]*.

Even bringing to bear the generosity of analysis that the authorities demand: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang*, there is no logical connection between what is asserted in the sentence and what preceded it.

…

The Tribunal's conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning."

Submissions

113 It is contended for the Minister that jurisdictional error would not be established by mere "illogicality", "irrationality" or lack of "articulation" in fact finding or alternatively, if that were enough, the illogicality or irrationality must be so extreme as to show that the opinion formed could not possibly be formed by a Tribunal acting in good faith. In the context of the *Administrative Decisions*

(Judicial Review) Act 1977 (Cth), it has been accepted that a detectable instance of want of logic will not necessarily constitute an error of law[76]. The Minister drew an analogy from that although here under s 476 of the Act review is necessarily limited to the transgression of jurisdictional limits express or implied in the Act.

114 It was further contended that in any event there was no illogicality or irrationality in the Tribunal's finding that the first respondent's return to Pakistan before coming to Australia undermined his account of his homosexual conduct in the UAE or his claim that he feared he would suffer harm in Pakistan as a result of his family or others discovering that he was a homosexual. Similarly, it was contended that there was no illogicality or irrationality in the Tribunal's findings that the first respondent's failure to claim asylum in the United Kingdom also undermined his claims.

115 Four reasons were advanced in support of the proposition that a want of reason (or logic or rationality) in a decision subject to review must be such as to show that the Tribunal has transgressed what French CJ described in *K-Generation Pty Ltd v Liquor Licensing Court*[77] as "the minimum constraint applicable to the exercise of any statutory power namely that it must be exercised in good faith and within the scope and for the purposes of the statute."

116 The first reason was that the nature of and scope of judicial review under s 75(v) of the Constitution militates strongly against any implication which would blur the demarcation between legality and merits. The second reason was that the implication of a separate judicial requirement that an opinion or a state of satisfaction must be reasonable (or logical or rational) except where it emerges from the text and structure of a statutory scheme would need to be grounded in some general common law principle of statutory construction guiding the construction of the statutory scheme. The third reason was that although the words "unreasonable", "illogical" and "irrational" are frequently used to describe a process of reasoning with which there is strong disagreement, as in *Minister for Immigration v Eshetu*[78], their precise content often remains unexplained. The

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76 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ; [1990] HCA 33. As an example of a similar approach in the context of migration law see *Minister for Immigration and Multicultural Affairs v Epeabaka* (1998) 84 FCR 411 at 415-417 [5]-[9] per Black CJ, von Doussa and Carr JJ.

77 (2009) 237 CLR 501 at 523 [59]; [2009] HCA 4. See also *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon CJ; [1947] HCA 21.

78 (1999) 197 CLR 611 at 626 [40] per Gleeson CJ and McHugh J.

fourth reason was that a form of curial descent into broader questions of the "reasonableness" and "rationality" of an administrative decision does not sit comfortably with the limitation on judicial review as explained in *Attorney-General (NSW) v Quin*[79].

117 The Minister also relied on the added consideration that a Tribunal is subject to the express obligation under s 430 of the Act to give reasons which statutory requirement does not impose or imply any standard of "articulation".

118 The first respondent contended that there was no evidence and no rational grounds to support the Tribunal's inference that if the first respondent was genuinely fearful of serious harm as a result that his homosexuality may become known in Pakistan he would not have travelled to Pakistan even for a short period after his claimed homosexual relationship in the UAE. As to the visit to the United Kingdom, it was submitted that the Tribunal misconceived the task of determining membership of a particular social group by disregarding the significance of the first respondent's own perceptions, conduct and behaviour as a member of the particular social group in question.

119 Whilst the first respondent accepted that not every instance of illogicality or irrationality in reasoning could give rise to jurisdictional error, it was contended that if illogicality or irrationality occurs at the point of satisfaction (for the purposes of s 65 of the Act) then this is a jurisdictional fact and a jurisdictional error is established. This submission should be accepted. The Minister's counter submission that illogicality or irrationality in fact finding could not without more establish jurisdictional error evokes the familiar distinction between errors of law and errors of fact, or between jurisdictional error and error in the exercise of jurisdiction. The distinction between errors of law and errors of fact is subject to an important qualification in respect of jurisdictional facts[80]. In *S20*[81], Gummow and McHugh JJ rejected the view that all review grounds must amount to an error of law not fact as they noted that a "'jurisdictional fact' which supplies the hinge upon which a particular statutory

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79 (1990) 170 CLR 1 at 37 per Brennan J; [1990] HCA 21.

80 There is a further qualification, not presently relevant, which is that an error of law may occur within jurisdiction: *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966; 190 ALR 601; [2002] HCA 30.

81 (2003) 77 ALJR 1165; 198 ALR 59.

regime turns may be so identified in the relevant law as to be purely factual in context."[82]

120 An erroneously determined jurisdictional fact may give rise to jurisdictional error. The decision maker might, for example, have asked the wrong question[83] or may have mistaken or exceeded the statutory specification or prescription in relation to the relevant jurisdictional fact. Equally, entertaining a matter in the absence of a jurisdictional fact will constitute jurisdictional error[84].

Development and scope of "illogicality" and "irrationality"

121 In *House v The King*[85] Starke J stated that even wide discretions "must be exercised judicially, according to rules of reason and justice, and not arbitrarily or capriciously …" The plurality recognised that a sentence of imprisonment which was notably severe was not thereby "unreasonable or clearly unjust"[86]. Setting a test or formula for isolating the implied category of discretionary decisions which are "unreasonable or clearly unjust" has not proved simple.

122 Just as the unreasonableness of a result was referred to in *Avon Downs*, correspondingly, the "reasonableness" of a decision has often been considered in circumstances where a public officer must be "satisfied" of some fact or circumstance. In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*, it was not suggested that such an officer must prove his or her satisfaction. However it was found that a requirement that a public officer be "satisfied" of certain facts or have "reasonable cause" to believe facts imports a requirement that the opinion is one that could be formed by a reasonable person[87]. The Chief Justice went on to state:

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82 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1175 [54]; 198 ALR 59 at 71-72. See also *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 651 [130] per Gummow J.

83 *Minister for Immigration v Yusuf* (2001) 206 CLR 323; [2001] HCA 30.

84 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574 [72]; [2010] HCA 1.

85 (1936) 55 CLR 499 at 503; [1936] HCA 40.

86 *House v The King* (1936) 55 CLR 499 at 507 per Dixon, Evatt and McTiernan JJ.

87 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 per Latham CJ; [1944] HCA 42; see also *Liversidge v Anderson* [1942] AC 206 at 224-225 per Viscount Maugham, 228 per Lord Atkin.

> "If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide."[88]

Further, satisfaction of the existence of facts must amount in point of law to what an empowering provision prescribes or specifies[89]. As explicated subsequently by Gibbs J in *Buck v Bavone*[90], this means a decision-making authority which must be satisfied of certain facts "must act in good faith; it cannot act merely arbitrarily or capriciously." His Honour went on to say that even if certain specified errors could not be established "the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it"[91]. Such formulations convey the idea that a court should not lightly interfere with administrative decision-making.

123 Judicial review has commonly been relied on to set aside a discretionary decision which "is so unreasonable that no reasonable authority could ever have come to it"[92] or decisions "which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise unlawful"[93]. As remarked by Gaudron J in *Abebe v The Commonwealth*[94]:

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88 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432.

89 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 117 per Dixon CJ, Williams, Webb and Fullagar JJ; [1953] HCA 22.

90 (1976) 135 CLR 110 at 118; [1976] HCA 24.

91 *Buck v Bavone* (1976) 135 CLR 110 at 118.

92 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR ("*Wednesbury*").

93 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 per Brennan J; see also *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 250 [80] per Gummow and Hayne JJ; [2007] HCA 44.

94 (1999) 197 CLR 510 at 554 [116]; [1999] HCA 14.

> "[I]t is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition of the exercise of that power that it be exercised reasonably, at least in the sense that it not be exercised in a way that no reasonable person could exercise it."

This Court has observed with reference to s 75(v) of the Constitution and jurisdictional error that where a statutory power is conferred the legislature is taken to intend that the discretion is to be exercised reasonably[95] and justly[96].

124 More recently it has been suggested that statutory tribunals must not only act reasonably as intended by the legislature, they must also act rationally[97]. If rationality is a separate freestanding common law standard for good administrative decision-making it seems at least related to the implied standard of reasonableness following the articulation by Lord Greene MR of what has come to be known as "*Wednesbury* unreasonableness"[98]. It appears closely allied also to the requirement in *Avon Downs* that extraneous reasons should not be taken into consideration but relevant considerations must be. It appears to be allied as well to the principle that fact finding must be based on probative material, one correlative of which is that a decision based on no evidence displays jurisdictional error. Accepting rationality, as a freestanding common law requirement in decision-making, with the consequence that irrationality may attract judicial review, is complicated by three considerations. First, describing reasoning as "illogical or unreasonable, or irrational" may merely be an emphatic way of expressing disagreement with it[99], and to describe a conclusion that a

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95 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [15] and fn 16; 259 ALR 429 at 433; [2009] HCA 39.

96 See *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36 per Brennan CJ; [1997] HCA 27.

97 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367 per Deane J; see also *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820 per Lord Diplock; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410-411 per Lord Diplock.

98 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 233 per Lord Greene MR.

99 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1167 [5] per Gleeson CJ; 198 ALR 59 at 61; see also *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 626 per Gleeson CJ and McHugh J.

decision maker is not satisfied as "irrational" might mean no more than that, on the material before the decision maker, the court would have reached the required state of satisfaction[100].

125 Secondly, the word "irrationality" is conventionally defined as "the quality of being devoid of reason"[101], "illogicality" is conventionally defined as "unreasonableness"[102] and "unreasonableness" is conventionally defined as "irrationality"[103].

126 In reliance on a statement made by Sir Thomas Bingham MR in *R v Secretary of State for the Home Department; Ex parte Onibiyo*[104] the authors of *de Smith's Judicial Review*[105] have remarked:

> "Although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness."

127 Thirdly, in England "irrationality" as a basis for judicial review appeared to emerge first as a redefinition of *Wednesbury* unreasonableness[106]. Whilst not material to this appeal, further developments in England have included reference to the principle of proportionality in administrative decision-making, being a component of administrative law in a number of European countries. The principles of reasonableness (as derived from *Wednesbury*) and proportionality are now said to "cover a great deal of common ground"[107].

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100 *Re Minster for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1168 [9] per Gleeson CJ; 198 ALR 59 at 62.

101 *Oxford English Dictionary*, 2nd ed, vol VIII at 89.

102 *Oxford English Dictionary*, 2nd ed, vol VII at 657.

103 *Oxford English Dictionary*, 2nd ed, vol XIX at 160.

104 [1996] QB 768 at 785.

105 Woolf, Jowell and Le Sueur, *de Smith's Judicial Review*, 6th ed (2007) at 559 [11-036].

106 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 410 per Lord Diplock; see also, Woolf, Jowell and Le Sueur, *de Smith's Judicial Review*, 6th ed (2007) at 543 [11-002].

107 Wade and Forsyth, *Administrative Law*, 10th ed (2009) at 312.

128 If, despite the undeniable semantic overlap between "irrationality", "illogicality" and "unreasonableness", "*Wednesbury* unreasonableness" is confined to the exercise of a discretion[108] in circumstances where no reasons are required, then the approach articulated in *SGLB* emphasised above can be seen as occupying somewhat different ground. On the other hand, to the extent that a standard of reasonableness, of wide application to decision-making, has emerged from *Wednesbury*, there will be inevitable overlap with that standard and a standard of rationality.

129 It can be acknowledged that the contemporary invocation of "illogicality" or "irrationality" as a basis for judicial review may well have first emerged in Australia, as intimated by Gleeson CJ in *S20*[109], as a reaction to the ouster of the review ground of "*Wednesbury* unreasonableness" in immigration law. Equally it may be that the development of "irrationality" as a basis for judicial review in England grew out of dissatisfaction with the inherent circularity of the *Wednesbury* test and the implicit suggestion in *Wednesbury* that there were degrees or grades of unreasonableness[110]. Be that as it may, accepting that an allegation of "illogicality" or "irrationality" must mean something other than emphatic disagreement as explained above by reference to *Eshetu* and *S20*, and also accepting that a demonstration of *bona fides* will not save an illogical or irrational decision or finding on a jurisdictional fact as stated in *SGLB*[111], how do "illogicality" and "irrationality" fit with the clearly related body of law concerned

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108 *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 626 [40] per Gleeson CJ, 649 [124] per Gummow J.

109 (2003) 77 ALJR 1165 at 1170 [20]; 198 ALR 59 at 64. At the time of the decision, s 476(2)(b) of the *Migration Act* 1958, as it then stood, ousted review on the ground "that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."

110 Woolf, Jowell and Le Sueur, *de Smith's Judicial Review*, 6th ed (2007) at 543-544 [11-002] and at 551-554 [11-019]-[11-024]; see also Airo-Farulla, "Rationality and Judicial Review of Administrative Action", (2000) 24 *Melbourne University Law Review* 543 at 572.

111 (2004) 78 ALJR 992 at 998 [37]-[38]; 207 ALR 12 at 20-21.

with error, particularly jurisdictional error, in respect of reasoning which is "clearly unjust"[112], "arbitrary", "capricious"[113] or "*Wednesbury* unreasonable"[114]?

130 In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

131 What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

Was the Tribunal's fact finding "illogical" or "irrational"?

132 Because illogicality or irrationality may constitute a basis for judicial review in the context of jurisdictional fact finding as explained above, it becomes

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112 *House v The King* (1936) 55 CLR 499 at 507 per Dixon, Evatt and McTiernan JJ.

113 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 per Latham CJ; *Buck v Bavone* (1976) 135 CLR 110 at 118 per Gibbs J.

114 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 233 per Lord Greene MR.

necessary to decide whether the Tribunal's conclusion about the state of satisfaction required by s 65 and its findings on the way to that conclusion revealed illogicality or irrationality amounting to jurisdictional error. It is clear, from the extracts from the Federal Court decision set out above, that the Federal Court emphatically disagreed with the Tribunal's finding that the first respondent's return to Pakistan and failure to seek asylum in the United Kingdom was conduct which was inconsistent with the claimed fear of persecution arising as a result of homosexuality. It also seems clear that the Federal Court, acting on the same material or evidence on which the decision was based, would have been satisfied that the first respondent feared persecution as alleged.

133 However, the correct approach is to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it. There was evidence that the first respondent was married with four children and that he regularly visited Pakistan to see his family after the time at which he said he commenced, as he put it, "the practice of homosexuality" in the UAE. In particular, he visited his family for three weeks before coming to Australia. During the time when he said he engaged in the "practice of homosexuality" in the UAE, and when he visited the United Kingdom, the evidence was that under both civil law and Shari'a in the UAE homosexual activity was criminalised[115]. The first respondent also gave comprehensive evidence of homosexual activity in the UAE which was uncorroborated. The Tribunal saw the first respondent give evidence and sought answers and explanations from him. Such was the evidentiary context in which the Tribunal determined that the first respondent's conduct, first in returning to Pakistan and secondly in failing to seek asylum in the United Kingdom, was conduct which was inconsistent with his claimed fears of persecution as a result of homosexuality.

134 The process of reasoning followed by the Tribunal, which needs to be considered in the light of all of the evidence set out above, was as follows: the Tribunal appeared to accept that homosexuals as a social group in Pakistan were the subject of persecution. It also appeared to assume that a person with a genuine fear of persecution as a homosexual in Pakistan would not go back to Pakistan and that a person with such a fear would seek asylum at the first available opportunity. The Tribunal then examined the first respondent's conduct in the United Kingdom in 2006 and in returning to Pakistan for three weeks in 2007. The Tribunal asked whether that conduct was consistent with a fear of persecution based on the practice of homosexuality said to have occurred in the UAE. The Tribunal then concluded that the conduct was not consistent with the

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115 United States, Department of State, *Country Report on Human Rights Practices 2006: United Arab Emirates*, March 2007.

claims of homosexual conduct said to form the basis for the fear of persecution. The Tribunal essentially found that it was improbable that the first respondent feared persecution because of homosexuality as claimed. It is that conclusion which the Federal Court found illogical and irrational; it would have come to a different conclusion which appears to be largely based on the view that no-one in Pakistan would necessarily discover that the first respondent had, as claimed, engaged in the practice of homosexuality. The Federal Court differed from the Tribunal in finding that the first respondent's fear of persecution as a result of homosexuality was plausible whereas the Tribunal had found it improbable.

135 On the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal. Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here. It could not be said that the reasons under consideration were unintelligible or that there was an absence of logical connection between the evidence as a whole and the reasons for the decision. Nor could it be said that there was no probative material which contradicted the first respondent's claims. There was. The Tribunal did not believe the first respondent's claim that he had engaged in the "practice of homosexuality" in the UAE and accordingly it was not satisfied that he feared persecution if he returned to Pakistan.

136 There is no sense in which the decision that the first respondent did not fear persecution, or the findings upon which that decision was based, could be said to be "clearly unjust", "arbitrary", "capricious", "not *bona fide*" or "*Wednesbury* unreasonable". Whilst these analogous categories were not relied on, they serve to confirm the want of jurisdictional error by reference to the closely related complaints of illogicality and irrationality. Neither the decision that the Tribunal was not satisfied that the first respondent feared persecution nor the findings on the way to that conclusion were "irrational" or "illogical" in the sense explained in these reasons. The Tribunal's decision did not show any jurisdictional error.

Order

137 The appeal should be allowed. There should be orders as proposed by Heydon J.