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Minister for Immigration and Citizenship v Li

B

[2013] HCA 18

French CJ, Hayne, Kiefel, Bell and Gageler JJ

7 February, 8 May 2013

Migration — Review of decisions — Migration Review Tribunal — Conduct of review — Powers of tribunal — Adjournment — Lawful exercise of power to adjourn — Reasonableness — Procedural fairness — Migration Act 1958 (Cth), ss 357A(3), 363(1)(b).

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Migration — Review of decisions — Judicial review — Grounds of review — Unreasonableness — Procedural fairness — Conduct of tribunal's review — Adjournment — Lawful exercise of power to adjourn — Migration Act 1958 (Cth), s 363(1)(b).

Administrative Law — Judicial review — Grounds of review — Unreasonableness — Migration Review Tribunal — Conduct of review — Powers of tribunal — Adjournment — Unreasonable refusal to adjourn.

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The first respondent had had her Skilled – Independent Overseas Student (Residence) (Class DD) visa refused by the appellant Minister's delegate, which refusal was affirmed by the Migration Review Tribunal. At issue was whether the first respondent had the requisite level of skill. Her skill level had been assessed by a relevant assessing authority however that assessment had been made on the basis of false information given about the respondent's employment history. Although she admitted that the information supplied was false, the first respondent informed the delegate that it had been provided by her former migration agent without her knowledge or consent.

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By the time her application for review came before the tribunal, the first respondent had appointed a new migration agent, and had sought a fresh skills assessment based on work experience gained since the first assessment. Although the first respondent's work experience this time satisfied the relevant criterion, the reviewing authority had made substantive errors in its review. The first respondent's migration agent promptly informed the tribunal of the problem, and requested an adjournment of the upcoming hearing until such time as the second skills assessment had been properly finalised: *Migration Act 1958* (Cth), s 363(1)(b).

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The tribunal refused the application for adjournment, giving its decision a week later. In affirming the delegate's decision, the tribunal acknowledged the migration agent's submissions about the errors in the second skills assessment, but declared that it "consider[ed] that the applicant [had] been provided with enough opportunities to present her case and [was] not prepared to delay any further".

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Both the Federal Magistrate at first instance and the Full Court of the Federal Court of Australia on appeal held that the exercise of the tribunal's discretion as to the requested adjournment was so unreasonable that its decision to affirm the delegate's decision could not stand. The Minister appealed to the High Court of Australia.

Held (dismissing the appeal; by the court): (1) (by the Court) The tribunal's exercise of its discretion under s 363(1)(b) was so unreasonable that it acted in excess of its jurisdiction in affirming the delegate's decision to refuse the respondent's visa application. [31], [85], [86], [124]

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, applied.

(2) (by French CJ) The tribunal must act according to law when conducting its review. That includes the exercise of powers and discretions conferred to aid it in that task. An essential element of lawfulness in decision-making is the rationality required by "the rules of reason", the framework of which is provided by the relevant statute. However, vitiating unreasonableness may be characterised in more than one way susceptible of judicial review. The issue is therefore not whether a decision under review is a preferable one or the correct one. Rather, the question is whether parliament intended to authorise such a decision. Any decisional freedom allowed by statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense. Given all the circumstances of this particular review, there was an arbitrariness about the tribunal's decision which rendered it unreasonable. [26], [27], [28], [31]

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, applied.

(3) (by Hayne, Kiefel and Bell JJ) The tribunal's power and discretion to grant an adjournment under s 363(1)(b) must be exercised according to law. It will be so exercised when its exercise is reasonable. That arises from a presumption of law that parliament intended that a statutorily conferred discretionary power be exercised reasonably. Reasonableness is indicated by the true construction of the statute in question. It is an inference drawn from the facts and from the matters falling for consideration in the exercise of power. An inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified. Therefore, unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification when all things are considered. [47], [63], [67], [68], [76]

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, explained.

Klein v Domus Pty Ltd (1963) 109 CLR 467; 37 ALJR 299; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 72 ALJR 841; *House v The King* (1936) 55 CLR 499, considered.

(4) (by Hayne, Kiefel and Bell JJ) The tribunal's error might be identified as giving too much weight to the fact that the first respondent had had some opportunity to present evidence and argument, and insufficient weight to her need to present further evidence. It would not appear that the tribunal had regard to the purposes for which the statutory discretion in s 363(1)(b) is provided in arriving at its decision. It is not possible to say which of those errors was made, but the result itself bespoke error. In the circumstances of the case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute. [85]

(5) (by Gageler J) Decision-making authority as conferred by statute must be exercised according to law and to reason within limits set by the subject matter, scope and purposes of the statute. Reasonableness is a default position, and absent an affirmative basis for its exclusion or modification, a condition of reasonableness is presumed. There is nothing in the Act to suggest that this default position does not apply. [90], [92], [94]

(6) (by Gageler J) The relevant touchstone is reasonableness in the performance of the duty to review. Thus, a failure to adjourn to allow a visa criterion to be met can in some instances be so unreasonable as to constitute a failure to review. It will be so where the tribunal fails to consider the exercise of its power to adjourn that review in circumstances where no reasonable tribunal could fail to do so. If an unreasonable failure to adjourn is material to the outcome, such decision as the tribunal goes on in fact to make is invalid. [97], [100], [101], [103]

Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594; 85 ALJR 327, considered.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, applied.

(7) (by Gageler J) No reasonable tribunal, seeking to act in a way that is fair and just and according to substantial justice and the merits of the case, would have refused the adjournment. What the first respondent sought was an adjournment of the review for a highly specific purpose clearly articulated by her migration agent. The tribunal identified no consideration weighing in favour of an immediate decision on the review and none was suggested by the appellant. [122], [124]

(8) (by French CJ) As well as not being unreasonable, the tribunal must accord procedural fairness. The tribunal in this instance did not do so. A reasonable opportunity to present an applicant's case with respect to a time criterion will extend to the opportunity to obtain evidence of the necessary fact or to obtain the necessary opinion or assessment. This was not a case of the respondent seeking to delay matters so that the passage of time would permit her to meet the criterion. There was good reason to expect that the criterion would be met, the respondent's migration agent having shown the tribunal that there was a proper basis for expecting a favourable outcome. There was no practical countervailing consideration disclosed in the tribunal's reasons for refusing to defer its decision. Therefore, the respondent was denied procedural fairness, which denial constituted jurisdictional error. [14], [16], [20], [21]

(9) (by Hayne, Kiefel and Bell JJ) A failure to accede to a reasonable request can constitute procedural unfairness. However, what is fair and just under s 357A(3) is to be ascertained by reading it as it applies to the actions of the tribunal in its conduct of a review. However, it was not necessary to determine what s 357A(3) required and what may have been the consequence of a breach of that provision, because s 363(1)(b) constituted a more direct route to resolution of the appeal. [48], [62]

Decision of the Full Court of the Federal Court of Australia, reported at (2012) 202 FCR 387, affirmed.

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Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245; 69 ALJR 191.

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R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228.

Refugee Review Tribunal, Re; Ex parte Aala (2000) 204 CLR 82; 75 ALJR 52.

C *Refugee Review Tribunal, Re; Ex parte H* (2001) 75 ALJR 982.

Repatriation Commission v Morris (1997) 79 FCR 455.

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Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; 84 ALJR 507.

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D *Shrimpton v Commonwealth* (1945) 69 CLR 613.

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E *Taxation, Federal Commissioner of, Re; Ex parte Australena Investments Pty Ltd* (1983) 58 ALJR 36.

Universal Camera Corporation v NLRB 340 US 474 (1951).

Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492.

Wright v Wright (1948) 77 CLR 191.

Xiujuan Li v Minister for Immigration and Citizenship [2011] FMCA 625.

F **Appeal from the Full Court of the Federal Court of Australia**

J T Gleeson SC, Acting Solicitor-General of the Commonwealth, *G R Kennett* SC and *A L Wheatley*, for the appellant.

L Boccabella and *W J Markwell*, for the first respondent.

Submitting appearance for the second respondent.

8 May 2013

G **French CJ.**

Introduction

[1] For the purpose of exercising its function of reviewing certain visa refusal decisions under the *Migration Act 1958* (Cth) (the Act), the Migration Review Tribunal (the MRT) is given a variety of powers and discretions. One such power is to adjourn the review.[1] In this case, the MRT made a decision, on 25 January 2010, adverse to the first respondent, who had been training and obtaining work experi-

1 Act, s 363(1)(b).

ence as a cook and had been refused a Skilled-Independent Overseas Student (Residence) (Class DD) visa. As was known to the MRT when it made its decision, the first respondent was awaiting the outcome of a requested review by Trades Recognition Australia (TRA) of the first respondent's unsuccessful application to that authority for a skills assessment. A favourable skills assessment was a necessary condition of the grant of the kind of visa which she sought. The MRT did not accede to a request from the first respondent's migration agent to defer its determination pending TRA's decision.

[2] The case has a history dating back to the initial application for a visa on 10 February 2007. The decision of the MRT was quashed by the Federal Magistrates Court[2] (the FMC) on 31 August 2011 by an order in the nature of certiorari and the matter remitted to the MRT by an order in the nature of mandamus. An appeal from the decision of the FMC was dismissed by the Full Court of the Federal Court on 24 May 2012.[3] The Minister for Immigration and Citizenship (the Minister) now appeals, by special leave,[4] to this Court on the basis that, contrary to the conclusions of the FMC and of the Full Court, the MRT did not act unreasonably in making its decision and did not fail to apply such requirements of procedural fairness as were imposed on it by the Act. For the reasons that follow the appeal should be dismissed.

The procedural history

[3] The events leading to this appeal are discussed in detail in the reasons for judgment of the plurality.[5] Salient features of that procedural history are:

- The first respondent applied for a Skilled-Independent Overseas Student (Residence) (Class DD) visa on 10 February 2007 which required satisfaction of a "time of decision criterion" set out in cl 880.230(1) of Sch 2 to the *Migration Regulations 1994* (Cth) (the Regulations), namely that:

> A relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and no evidence has become available that the information given or used as part of the assessment of the applicant's skills is false or misleading in a material particular.

The application was supported by a skills assessment made on 8 January 2007 by TRA, a relevant assessing authority. The assessment was found to be based on false information submitted to TRA by the first respondent's former migration agent and on 13 January 2009 the Minister's delegate refused the application for a visa.

- The first respondent, through a new migration agent, applied to the MRT for review of the delegate's decision on 30 January 2009. The migration agent submitted a fresh application to TRA for a new skills assessment on 4 November 2009.
- The MRT convened a hearing for 18 December 2009 and on 21 December 2009 wrote to the first respondent inviting comment upon allegedly untruthful answers given to departmental officers in connection with her initial application. It required a response by 18 January 2010, but advised the first respondent that she could seek an extension of time.
- On 18 January 2010, the first respondent's migration agent replied to the MRT's letter of 21 December 2009 and advised that the application for a second skills assessment had been unsuccessful. The migration agent pointed out "two fundamental errors" in TRA's assessment and said that the first respondent had applied to TRA for review of its adverse decision. The migration agent requested the MRT to "forbear from making any final decision regarding her review application until the outcome of her skills assessment application is finalised". He undertook to keep the MRT informed of the progress of the application.
- On 25 January 2010, without waiting for advice of the outcome of the migration agent's representations to TRA, the MRT affirmed the delegate's decision.[6] It ac-

2 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625.

3 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387.

4 Granted on 16 November 2012 (French CJ and Heydon J). See [2012] HCATrans 295.

5 Reasons for judgment of Hayne, Kiefel and Bell JJ at [33]-[45].

6 *Re 0900645* [2010] MRTA 151.

knowledged the agent's last letter. It did not explain its decision to proceed to a determination beyond saying:[7]

> The Tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further and in any event, considers that clause 880.230 necessarily covers each and every relevant assessing authority's assessment.

The FMC and Federal Court decisions

[4] The first respondent applied to the FMC for judicial review of the MRT decision primarily on the ground that the MRT had failed to accord her procedural fairness when it refused to defer making its decision until after the outcome of her agent's request for a review by TRA of her skills assessment.[8] However, the Federal Magistrate hearing the application decided it in favour of the first respondent on the basis that "the Tribunal's decision to proceed in [the] circumstances rendered it unreasonable such as to constitute unreasonableness in the *Wednesbury Corporation* sense".[9]

[5] In their joint judgment dismissing the Minister's appeal to the Full Court of the Federal Court, Greenwood and Logan JJ correctly described the review function conferred on the MRT as its "core function" and said:[10]

> The MRT is given power to adjourn proceedings from time to time ... An *unreasonable refusal* of an adjournment of the proceeding will not just deny a *meaningful appearance* to an applicant. It will mean that the MRT has not discharged its core statutory function of reviewing the decision. This failure constitutes jurisdictional error for the purposes of s 75(v) of the *Constitution*.

(Emphasis in original.) Their Honours also concluded that an unreasonable refusal of an adjournment would mean that the MRT had not conducted its review function in a way which was "fair", that being a requirement of ss 353 and 357A(3) of the Act.[11] In so concluding, they invoked observations in *Minister for Immigration and Citizenship v SZGUR*[12] referring to s 353 as imposing a "requirement" on the MRT.[13] As appears later in these reasons, their Honours seem to have taken more from that observation than it conveyed.

[6] Their Honours observed correctly that the migration agent's letter to the MRT of 18 January 2010 disclosed every reason to conclude that the second skills assessment was adverse because of error on the part of TRA.[14] They held that "there was no countervailing consideration on the basis of which it might be concluded that the refusal to adjourn was one reasonably open to the MRT".[15]

[7] Collier J held that the MRT had failed properly to consider the first respondent's application for an adjournment and that that failure constituted a failure to give her a proper hearing within the meaning of s 360 of the Act.[16] Her Honour, however, did not agree that issues relevant to the adjournment could be linked to Wednesbury unreasonableness.[17]

The grounds of appeal

[8] The Minister asserted in his notice of appeal that the plurality in the Full Court had erred in holding that ss 353 and 357A(3) of the Act imposed statutory requirements capable of supporting substantive grounds of review for jurisdictional error or defined the "core function" of the MRT in such a way as to include procedural requirements additional to those imposed by Div 5 of Pt 5 of the Act. The Minister also attacked the finding that principles of procedural fairness arising under the general law applied in addition to the express statutory require-

7 *Re 0900645* [2010] MRTA 151 at [35].

8 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625 at [24].

9 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625 at [49], referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

10 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [29].

11 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [30].

12 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; 85 ALJR 327.

13 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [19]; 85 ALJR 327 per French CJ and Kiefel J.

14 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [37].

15 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [38]. It was not disputed that the Regulations would not have prevented the MRT from having regard to a successful second skills assessment and it was conceded by the Minister in this Court that provided an application for a skills assessment had been lodged at the time of application it was not necessary that it be that application which was successful for the purposes of cl 880.230.

16 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [107].

17 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [109].

ments imposed on the MRT. The Minister challenged the findings of the Full Court that the relevant standard of procedural fairness had not been met in the circumstances and that the MRT's refusal of an adjournment was a decision that no reasonable tribunal could have made. The grounds of appeal direct attention to the nature of the functions conferred by the Act on the MRT.

The functions and powers of the MRT

[9] The MRT is established by Pt 6 of the Act.[18] Part 5 of the Act provides for "review" by the MRT of a range of decisions under the Act defined as "MRT-reviewable decisions".[19] They include decisions of the kind in issue in this case – that is, a decision to refuse to grant a non-citizen in the migration zone, who has made an application while in the migration zone, a visa of a kind that can be granted while the non-citizen is in the migration zone.[20]

[10] Section 348 provides that if an application for review of an MRT-reviewable decision is properly made "the Tribunal must review the decision".[21] It may, for the purposes of the review, "exercise all the powers and discretions that are conferred by this Act on the person who made the decision".[22] It is well established that the reviews that both the MRT and the Refugee Review Tribunal (the RRT) undertake (both tribunals operating under similar legislative schemes) are non-adversarial and that they involve no contradictor nor the joinder of any issue.[23] The review function of the tribunals created by the Act is sometimes called "inquisitorial".[24] That designation is a characterisation of their function which distinguishes it from adversarial proceedings.[25] The word "review" "has no settled pre-determined meaning; it takes its meaning from the context in which it appears".[26] As appears from the nature of the powers conferred on these tribunals, the review each must undertake involves a fresh consideration of the application which led to the decision under review. The review must be based on the evidence and arguments placed before the tribunal and any other relevant information which the tribunal itself obtains. Each tribunal must identify for itself the issues that arise in the application before it. It is not confined to the issues considered by the delegate.[27] There are similarities to the kind of review provided by the Administrative Appeals Tribunal (the AAT), described by Brennan J in *Bushell v Repatriation Commission*[28] as:

> an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it.

As for the AAT, so too for the MRT and the RRT, the onus of proof relevant in judicial fact-finding has no part to play in administrative proceedings.[29] There being no party to a review adverse to the applicant, no question of prejudice to a party other than the applicant can arise when the applicant asks the MRT to adjourn a review to enable additional information to be provided to the MRT. Nor can there be any prejudice to the tribunal although it is entitled to have regard to legislative objectives including timeliness in its processes.

[11] Division 4 of Pt 5 of the Act is entitled "Exercise of Tribunal's powers". It commences with s 353, which provides:

> (1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and

18 Act, s 394.

19 Act, s 338.

20 Act, s 338(2)(a), (b).

21 Act, s 348(1).

22 Act, s 349(1).

23 *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at [7] per Gleeson CJ; at [98] per McHugh J; at [208] per Kirby J; at [246] per Hayne J.

24 *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489 at [27]; 83 ALJR 1017. See also *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at [29] per Gleeson CJ, Gaudron and Gummow JJ.

25 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [18].

26 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261; 69 ALJR 191 per Mason CJ, Brennan and Toohey JJ.

27 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [35]; 81 ALJR 515.

28 *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425; 66 ALJR 753.

29 *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425; 66 ALJR 753.

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> (b) shall act according to substantial justice and the merits of the case.

The objective set out in s 353(1) is replicated, in relation to the administration of the MRT, in s 397(2)(a), which defines one of the responsibilities of the Principal Member of the tribunal as "monitoring the operations of the Tribunal to ensure that those operations are as fair, just, economical, informal and quick as practicable".

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[12] Section 420 of the Act gives the same legislative directions to the RRT as s 353 gives to the MRT. The direction in subs (1) of each provision is, as was said in *SZGUR*, a "requirement imposed on the Tribunal, in the discharge of its core function".[30] That requirement is formulated in terms of broad

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legislative objectives which are, to some degree, "inconsistent as between themselves".[31] They are not expressed in terms or in a context which would support a claim of jurisdictional error based on the non-observance of any of them. That view is well supported by observations about s 420 in the judgments of this Court in *Minister for Immigration and Multicultural Affairs v Eshetu*.[32] There was a

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focus in that case on the interaction between s 420 and the limited grounds for judicial review of *Migration Act* decisions in the Federal Court which were enumerated in s 476 as it then stood. Nevertheless, it was the broad facultative language of s 420 that supported the conclusion that it did not give rise to grounds for judicial review based on a

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failure to comply with its exhortations. Gleeson CJ and McHugh J described its function as "intended to be facultative, not restrictive" and "to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals".[33] Gaudron and Kirby JJ described s 420 as determining the general nature of review proceedings and held that there was no basis

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for concluding that it operated to mandate specific procedures to be observed by the RRT or the method by which it was to reach its decision.[34] Gummow J agreed with what Lindgren J had said, particularly about s 420(1), in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs*.[35] Lindgren J pointed to the difficulty of invoking a failure to comply with s 420(1) as a ground of non-performance of a requisite procedure for the purposes of s 476 of the Act. Although his analysis was based upon the interaction with s 476, it threw up the general difficulty of invoking s 420(1) and similarly s 353(1) as giving rise to grounds for judicial review. A complaint about alleged non-compliance with s 420(1) might require consideration of the RRT's staff and financial resources and its internal organisations and practices. His Honour said:[36]

> A mere conclusion that a mechanism of review in its operation in a particular case did not satisfy one or more of the epithets in [s] 420(1), would not necessarily establish that the [Tribunal] had not been pursuing the specified objective.

[13] The requirements of s 353(2) are in the same terms as those applied to the RRT by s 420(2) of the Act. The language is familiar. Its ancestry dates back to statutory directions to Courts of Requests in the 17th century to make such orders "as they shall find to stand with equity and good conscience".[37] That statutory formula evolved and was applied to tribunals in Australia both before and after Federation. An early example was the statute re-establishing the Court of Requests in the Colony of New South Wales in 1842,[38] which became the Small Debts Court, and was required to decide matters "in a summary way, and according to equity and good conscience".[39]

[14] The rolled-up direction to "act according to equity, good conscience and the substantial merits of

30 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [19]; 85 ALJR 327 per French CJ and Kiefel J.

31 *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324 per Lindgren J, quoted by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [109]; 73 ALJR 746.

32 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; 73 ALJR 746.

33 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [49]; 73 ALJR 746.

34 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [77]; 73 ALJR 746.

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35 *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324 cited in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [109]; 73 ALJR 746.

36 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [109]; 73 ALJR 746 per Gummow J, quoting Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324.

37 3 Jac 1 c 15 (1605).

38 6 Vict No 15.

39 *Small Debts Recovery Act 1912* (NSW), s 7(1). See generally Beale, "Equity and Good Conscience" (1937) 10 *Australian Law Journal* 349.

the case without regard to technicalities and legal forms" was considered by the Court of Appeal of New South Wales in *Qantas Airways Ltd v Gubbins*.[40] As pointed out by Gleeson CJ and Handley JA in that case, the collocation has no fixed legal meaning independent of the statutory context in which it is found.[41] So too, s 353(2) is to be understood in its statutory context. That context makes clear that it cannot operate to allow the MRT to act other than according to the law set out in the Act in the exercise of its function of review, including the exercise of the powers and discretions conferred upon it in aid of that function. The MRT is not excused from compliance with the criteria of lawfulness, fairness and rationality that lie at the heart of administrative justice albeit their content is found in the provisions of the Act and the corresponding regulations and, subject to the Act and those regulations, the common law.

[15] Section 353(2) shares with s 353(1) a facultative rather than restrictive purpose.[42] The two paragraphs of s 353(2) "describe the general nature of review proceedings and require the Tribunal to operate as an administrative body with flexible procedures and not as a body with technical rules of the kind that have sometimes been adopted by quasi-judicial tribunals".[43] Its facultative character was illustrated in *Minister for Immigration and Multicultural Affairs v Bhardwaj*.[44] Gleeson CJ observed that s 353 allowed a precursor tribunal, the Immigration Review Tribunal, to reopen its own decision when it learned that the decision was based upon an administrative error.[45]

[16] Section 353(2) does not import substantive common law requirements of procedural fairness. Nothing said in *SZGUR* supports such a conclusion. To the extent that the Full Court of the Federal Court treated the direction in s 353 as giving rise to grounds for judicial review, it was in error. A fortiori, no substantive operation applicable to individual review proceedings is to be attributed to s 397(2)(a) of the Act. On the other hand, nothing in s 353 is adverse to the application of the requirements of procedural fairness in the exercise of the MRT's functions. A limiting definition of their application in certain respects is to be found in s 357A. It is necessary now to consider the operation of that provision in relation to procedural fairness and whether in this case procedural fairness was denied.

Procedural fairness in the MRT

[17] Division 5 of Pt 5, which deals with the conduct of reviews by the MRT, includes s 357A, which provides:

> **Exhaustive statement of natural justice hearing rule**
>
> (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
>
> (2) Sections 375, 375A and 376 and Division 8A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.
>
> (3) In applying this Division, the Tribunal must act in a way that is fair and just.

Division 5 also requires the MRT to invite the applicant for review to appear before it and to present arguments relating to the issues arising in relation to the decision under review.[46] The MRT is empowered, for the purpose of a review of a decision, to do a number of things including seek "any information that it considers relevant",[47] "take evidence on oath or affirmation"[48] and "adjourn the review from time to time".[49]

[18] What are the "matters" with which Div 5 of Pt 5 of the Act deals? In *Saeed v Minister for Immigration and Citizenship*[50] the plurality held to be "plainly correct" the approach that the words "the

40 *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 at 29-31 per Gleeson CJ and Handley JA; at 41-42 per Kirby P.

41 *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 at 30.

42 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [49]; 73 ALJR 746 per Gleeson CJ and McHugh J.

43 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [75]; 73 ALJR 746 per Gaudron and Kirby JJ.

44 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; 76 ALJR 598.

45 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [14]; 76 ALJR 598.

46 Act, s 360(1).

47 Act, s 359(1).

48 Act, s 363(1)(a).

49 Act, s 363(1)(b).

50 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; 84 ALJR 507.

matters it deals with" in s 357A(1) require a search to be made of Div 5 for a provision "dealing with" a relevant "matter".[51] Division 5 of Pt 5 deals with the submission by an applicant of "a written statement in relation to any matter of fact" and "written arguments ... arising in relation to the decision under review".[52] Division 5 does not deal with the matter of an application by an applicant for an adjournment in order to provide additional material or, as in this case, the provision of a third party assessment the existence of which is a criterion for the grant of the visa. The common law hearing rule of procedural fairness applies to the process for making a decision to grant or refuse an adjournment in such cases and informs its legal consequences where a person is said to have been deprived by a refusal of a reasonable opportunity for a hearing.

[19] The decision of this Court in *Bhardwaj* pre-dated the enactment of ss 357A and 422B, which makes similar provision for RRT proceedings.[53] Nevertheless, having regard to the proper construction of those provisions, the observation in the judgment of Gaudron and Gummow JJ that "a failure to accede to a reasonable request for an adjournment can constitute procedural unfairness"[54] remains apposite to the proceedings of the MRT and the RRT. In written submissions filed on his behalf the Minister accepted that circumstances could be envisaged in which a refusal by the MRT to delay or adjourn its processes might result in a failure to provide procedural fairness.[55] The Minister submitted, however, that the present case was not really about procedural fairness at all. The request for a deferral of the MRT decision was made by the first respondent "in the hope that the passage of further time would see her meet the criterion which presently she did not meet". The failure by the MRT to accede to her request to defer its decision did not deny her a proper hearing.

[20] An application for review by the MRT may require the presentation by the applicant of material demonstrating compliance with a criterion to be satisfied at the time of the MRT's decision. The relevant criterion may involve evidence of a fact in existence. That fact may be, as in this case, the formation by a third party of an opinion or assessment on a matter of fact. It requires a fine distinction to accept that procedural fairness applies to a request for an opportunity to obtain evidence of a fact and to reject its application to a request for an opportunity to obtain a statutory assessment as to the existence of a fact. A reasonable opportunity to present an applicant's case with respect to a time of decision criterion will extend to the opportunity to obtain evidence of the necessary fact or to obtain the necessary opinion or assessment. The Minister's submission drew a distinction which might be thought antithetical to the legislative direction and facultative purpose of s 353 and indeed that of s 357A(3).

[21] The MRT's approach in this case, which does not appear to have been informed by that distinction, was captured succinctly, and apparently exhaustively, by the words "the applicant has been provided with enough opportunities to present her case". It made no reference to the probability that the first respondent would be able, within a reasonable time, to secure the requisite skills assessment. The Minister submitted, against a straw-person argument not put, that there is no general obligation upon the MRT to adjourn a decision because the applicant for review "considers" that the passage of time will allow a visa criterion to be met. That was not this case. There was good reason to expect that the criterion would be met. The MRT denied the first respondent what would have been, in the circumstances, a reasonable opportunity to acquire the TRA skills assessment which was essential to her success. The first respondent's migration agent had shown the MRT that there was a proper basis for expecting a favourable outcome in response to his request for a review by TRA. That was borne out by the event.[56] There was no practical countervailing consideration disclosed in the MRT's reasons for refusing to defer its decision. The first respondent was denied procedural fairness and that denial constituted jurisdictional error.

51 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [37]-[39]; 84 ALJR 507, approving the approach favoured by Lindgren J in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 at [83].

52 Act, s 358. Other provisions of Div 5 deal with requests by the MRT for the provision of information (see s 359), and for comments or responses by an applicant to information that could be a reason for affirming the decision (see s 359A).

53 *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth), Sch 1, Items 5, 6; *Migration Amendment (Review Provisions) Act 2007* (Cth), Sch 1, Items 1, 17.

54 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40]; 76 ALJR 598.

55 See also *NAHF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 359 at [36] per Hely J.

56 A successful assessment was provided by TRA on 12 April 2010.

[22] The refusal by the MRT to defer its decision was held by Greenwood and Logan JJ in the Full Court to be "unreasonable" amounting to a failure to discharge the "core statutory function of reviewing the decision".[57] The question of the "unreasonableness" of the MRT's decision not to adjourn the review was agitated, independently of the question of its asserted failure to accord procedural fairness to the first respondent. This aspect of the case raises the question whether the decision of the MRT was unreasonable in the sense used by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[58] that is to say so unreasonable that no reasonable tribunal could have made it. In approaching that question it is necessary to keep in mind the distinction between a decision-maker finding a jurisdictional fact and a decision-maker exercising a discretion. The distinction was made by Gummow A-CJ and Kiefel J in *Minister for Immigration and Citizenship v SZMDS*[59] when, referring to so-called "Wednesbury unreasonableness" their Honours said:[60]

> 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. Confusion of thought, with apprehension of intrusive interference with administrative decisions by judicial review will be avoided if the distinction between jurisdictional fact and other facts then taken into account in discretionary decision making is kept in view.

(Footnotes omitted.) Bearing that distinction in mind, it is appropriate to turn to the general question whether the MRT's decision not to defer its determination was so unreasonable as to constitute jurisdictional error.

Reasonableness

[23] Every statutory discretion, however broad, is constrained by law. As Dixon J said in *Shrimpton v Commonwealth*:[61]

> [C]omplete freedom from legal control, is a quality which cannot ... be given under our *Constitution* to a discretion, if, as would be the case, it is capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force.

Every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred.[62] Where the discretion is conferred on a judicial or administrative officer without definition of the grounds upon which it is to be exercised then:[63]

> the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case.

That view, however, must be reached by a process of reasoning.

[24] Every discretion has to be exercised, as Kitto J put it in *R v Anderson; Ex parte Ipec-Air Pty Ltd*,[64] according to "the rules of reason".[65] His Honour, paraphrasing *Sharp v Wakefield*,[66] said:[67]

> a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.

57 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [29].

58 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

59 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; 84 ALJR 369.

60 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [39]; 84 ALJR 369.

61 *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 629-630.

62 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49; 54 ALJR 94; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368; 56 ALJR 388 per Mason J; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; 64 ALJR 86 per Mason CJ, Brennan, Dawson and Gaudron JJ; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [31]; 72 ALJR 578 per Gaudron and Gummow JJ.

63 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; 37 ALJR 299 per Dixon CJ, McTiernan and Windeyer JJ agreeing at 473-474.

64 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177; 39 ALJR 66.

65 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189; 39 ALJR 66.

66 *Sharp v Wakefield* [1891] AC 173 at 179.

67 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189; 39 ALJR 66.

Mason J in *FAI Insurances Ltd v Winneke*[68] quoted Kitto J and linked his words to the general rule "that the extent of ... discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment".

[25] As Professor Galligan wrote in 1986 in *Discretionary Powers: A Legal Study of Official Discretion*, the requirement that officials exercising discretion comply with the canons of rationality means, inter alia, that their decisions must be reached by reasoning which is intelligible and reasonable and directed towards and related intelligibly to the purposes of the power. Those canons also attract requirements of impartiality and "a certain continuity and consistency in making decisions".[69] They were reflected in the powers of the English Court of Chancery to control public bodies "if they proceed to exercise their powers in an unreasonable manner; whether induced to do so from improper motives or from error of judgment".[70] They were acknowledged in the earliest years of this Court.[71]

[26] The rationality required by "the rules of reason" is an essential element of lawfulness in decision-making. A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power. It falls outside the framework of rationality provided by the statute. To that framework, defined by the subject matter, scope and purpose of the statute conferring the discretion, there may be added specific requirements of a procedural or substantive character. They may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions.[72] Vitiating unreasonableness may be characterised in more than one way susceptible of judicial review. A decision affected by actual bias may lead to a discretion being exercised for an improper purpose or by reference to irrelevant considerations. A failure to accord, to a person to be affected by a decision, a reasonable opportunity to be heard may contravene a statutory requirement to accord such a hearing. It may also have the consequence that relevant material which the decision-maker is bound to take into account is not taken into account.

[27] In *Wednesbury Corporation*, Lord Greene MR observed that the word "unreasonable" in administrative law was used to encompass failure by a decision-maker to obey rules requiring proper application of the law, consideration of mandatory relevant matters and exclusion from consideration of irrelevant matters:[73] "If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'." That kind of unreasonableness may be taken to encompass unreasonableness from which an undisclosed underlying error may be inferred.[74]

[28] Beyond unreasonableness expressive of particular error however, it is possible to say, as Lord Greene MR said, that although a decision-maker has kept within the four corners of the matters it ought to consider "they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it".[75] In such a case the court may interfere. That limiting case can be derived from the framework of rationality imposed by the statute. As explained by Lord Greene MR, it reflects a limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision. After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusions about the correct or preferable decision. However, the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.

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68 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368; 56 ALJR 388.

69 Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986), p 140.

70 *Vernon v Vestry of St James, Westminster* (1880) 49 LJ Ch 130 at 136.

71 *Local Board of Health of Perth v Maley* (1904) 1 CLR 702 at 712 per Griffith CJ, Barton and O'Connor JJ agreeing at 716.

72 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [11]-[13]; 84 ALJR 507 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

73 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

74 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J.

75 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234.

[29] A connection between vitiating unreasonableness and an implied legislative intention was made by Brennan CJ in *Kruger v Commonwealth*:[76]

> [W]hen a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.

(Footnote omitted.) In similar vein, Gaudron J said in *Abebe v Commonwealth*,[77] in a passage quoted by Crennan and Bell JJ in *SZMDS*:[78]

> [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.

[30] The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker. Gleeson CJ and McHugh J made the point in *Eshetu* that the characterisation of somebody's reasoning as illogical or unreasonable, as an emphatic way of expressing disagreement with it, "may have no particular legal consequence".[79] As Professor Galligan wrote:[80]

> The general point is that the canons of rational action constitute constraints on discretionary decisions, but they are in the nature of threshold constraints above which there remains room for official judgment and choice both as to substantive and procedural matters. In other words, within the bounds of such constraints, different modes of decision-making may be employed.

A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable.[81] It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts.[82] Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut,[83] may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves. That approach is an application of the principles discussed above and within the limitations they would impose on curial review of administrative discretions.

[31] The decision of the MRT to proceed to its determination was not, on the face of it, informed by any consideration other than the asserted sufficiency of the opportunities provided to the first respondent to put her case. The MRT did not in terms or by implication accept or reject the substance of the reasons for a deferment put to it by the first respondent's migration agent. It did not suggest that the first respondent's request for a deferment was due to any fault on her part or on the part of her migration agent. It did not suggest that its decision was based on any balancing of the legislative objectives set out in s 353. Its decision was fatal to the first respondent's application. There was in the circumstances, including the already long history of the matter, an arbitrariness about the decision, which rendered it unreasonable in the limiting sense explained above.

Conclusion

[32] For the preceding reasons the appeal should be dismissed with costs.

Hayne, Kiefel and Bell JJ.

[33] On 10 February 2007, the first respondent, Ms Xiujuan Li, applied for a Skilled – Independent

76 *Kruger v Commonwealth* (1997) 190 CLR 1 at 36; 71 ALJR 991. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [126]; 73 ALJR 746 per Gummow J.

77 *Abebe v Commonwealth* (1999) 197 CLR 510 at [116]; 73 ALJR 584.

78 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [123]; 84 ALJR 369.

79 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [40]; 73 ALJR 746.

80 Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986), p 140.

81 Airo-Farulla, "Reasonableness, rationality and proportionality", in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 212 at 214-215.

82 For an analogous application of reasonable proportionality as a criterion for the validity of delegated legislation see *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289.

83 Airo-Farulla, "Reasonableness, rationality and proportionality", in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 212 at 215.

Overseas Student (Residence) (Class DD) visa.[84] The relevant criterion for such a visa is that a "relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and no evidence has become available that the information given ... is false or misleading in a material particular".[85] By the date of her application, Ms Li had obtained a skills assessment from a relevant assessing authority, Trades Recognition Australia (TRA). A delegate of the Minister refused Ms Li's application[86] on the basis that some of the information she had provided was not genuine. Ms Li lodged an application for review of that decision with the Migration Review Tribunal (the Tribunal) on 30 January 2009. It is the review conducted by the Tribunal which is in issue on this appeal.

[34] TRA relied upon details of Ms Li's employment as a cook, which were provided to support the assessment of her relevant skills. She later admitted to the Minister's delegate that she had not in fact been employed at one restaurant which was specified in the information provided to TRA. However, she claimed that her former migration agent had provided that information without her knowledge. This was the background to the delegate's decision.

[35] On 21 September 2009, the Tribunal sent a letter to Ms Li in which the false information was identified as a possible reason for affirming the delegate's decision. Her comment upon the false information was invited.[87] In response, the migration agent now appointed by Ms Li confirmed the admissions Ms Li had made to the delegate but advised the Tribunal that since the date of her application, Ms Li had accumulated further work experience as a cook. The migration agent said that Ms Li was awaiting the decision of TRA with respect to her application for a fresh assessment of her skills, which, if successful, would enable the Tribunal to find that the skills assessment criterion was met.

[36] The Tribunal convened a hearing on 18 December 2009. Much of the questioning of Ms Li by the Tribunal concerned the earlier misrepresentation of her work experience and the reasons why she had given evasive answers to officers of the Department of Immigration and Citizenship when asked about it. It also appears that the Tribunal discussed the possible provision of a second skills assessment by TRA, referable to Ms Li's later employment, with her migration agent, but it left the question of whether it would consider that assessment undecided. Ms Li's migration agent was invited by the Tribunal to address it further upon the matter.

[37] Following the hearing, the Tribunal sent a further letter to Ms Li dated 21 December 2009 inviting her comments on the answers she had given to departmental officers, which were relevant to evidence she gave at the Tribunal hearing and to her admission that part of her employment history given to TRA was false. The false information was once again identified as a possible reason for affirming the delegate's decision. The Tribunal's letter advised that Ms Li's response should be received by no later than 18 January 2010, but the letter noted that if Ms Li requested an extension of time, the request would be carefully considered.

[38] Ms Li's migration agent replied within the timeframe specified. In his letter, the migration agent advised the Tribunal that the second skills assessment by TRA had been received, but that it was not favourable. However, he contended that TRA had made two fundamental errors in the assessment: it had not taken into account Ms Li's experience at one place of employment; and it had failed to follow its own procedures in contacting referees to verify the employment details Ms Li had provided. The migration agent advised the Tribunal that Ms Li had applied to TRA for a review of its assessment and conveyed her confidence that it would be successful. (While this proved to be correct, it is not relevant to a consideration of the Tribunal's decision.) The migration agent went on to say:

> Because of the unforeseen error by TRA incorrectly assessing her skills assessment application ... I am instructed to request (subject to the Tribunal accepting my below submissions regarding the ability to substitute a new skills assessment) that the Tribunal forbear from making any final decision regarding her review application until the outcome of her skills assessment application is finalised. I will keep the Tribunal informed as to the progress of that application.

[39] At the conclusion of his letter, the migration agent submitted that the purpose of the criterion[88] is

84 *Migration Regulations 1994* (Cth), Sch 1, item 1128CA, Sch 2, Subclass 880.

85 *Migration Regulations 1994*, Sch 2, cl 880.230.

86 Pursuant to the *Migration Act 1958* (Cth), s 65.

87 As required by the *Migration Act 1958*, s 359A.

88 *Migration Regulations 1994*, Sch 2, cl 880.224.

to prevent the grant of a permanent residence visa on false grounds. He emphasised that Ms Li no longer relied upon the first skills assessment, which was affected by fraud. The second skills assessment, "when finalised", would satisfy the criterion. At an earlier point in his letter, the migration agent had identified the time at which the Tribunal would make its decision as the time when the Tribunal needed to consider whether Ms Li's skills assessment was based on information which was false in a material particular.

[40] The Tribunal did not accede to the request that it delay the making of its decision and proceeded to do so on 25 January 2010. Although it accepted that there was no legislative restriction upon it receiving a second skills assessment, the Tribunal noted that none had been provided by that date. The Tribunal said that it "considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further". It found the first skills assessment to be affected by fraud and, therefore, Ms Li did not meet the criterion. The Tribunal concluded that it had "no alternative but to affirm the decision under review".

The decisions below

[41] Ms Li was successful in her application for review of the Tribunal's decision by the Federal Magistrates Court (Burnett FM)[89] and on the Minister's appeal to a Full Court of the Federal Court (Greenwood, Collier and Logan JJ).[90] Burnett FM considered that the migration agent's letter displayed good reason why the skills assessment of TRA was wrong. It did not appear to Burnett FM that the Tribunal had evaluated the agent's contentions. The Tribunal could have inferred that Ms Li was not attempting to deliberately delay a decision in her case. The review of the TRA assessment was the only outstanding matter. Whilst the decision of the Tribunal was of great significance to Ms Li, delay would not adversely affect the Commonwealth. In these circumstances, his Honour held that the Tribunal's decision to proceed was unreasonable "in the *Wednesbury Corporation* sense"[91] and constituted an improper exercise of its power which went to its jurisdiction.[92]

[42] The Full Court directed its attention to the provisions of the *Migration Act 1958* (Cth) concerning the procedures for review by the Tribunal. Section 353 appears in Div 4 of Pt 5 of the Act and provides:

> **Tribunal's way of operating**
>
> (1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) shall act according to substantial justice and the merits of the case.

[43] Division 5 of Pt 5 provides for steps which may be taken in connection with a review by the Tribunal. Section 357A appears in Div 5 and in relevant part provides:

> **Exhaustive statement of natural justice hearing rule**
>
> (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
>
> ...
>
> (3) In applying this Division, the Tribunal must act in a way that is fair and just.

[44] Particular provisions of Div 5, which were referred to in argument on this appeal, are ss 360(1) and 363(1)(b):

> **360 Tribunal must invite applicant to appear**
>
> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
>
> ...
>
> **363 Powers of the Tribunal etc**
>
> (1) For the purpose of the review of a decision, the Tribunal may:
>
> ...
>
> (b) adjourn the review from time to time.

[45] Greenwood and Logan JJ considered that the Tribunal was obliged to meet the requirement of s 353 that its review mechanism be fair and to act in

89 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625.

90 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387.

91 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625 at [49], in reference to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

92 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625 at [49].

a way which is "fair and just" pursuant to s 357A(3). These prescriptions were, in their Honours' view, more than aspirational statements and were akin to the requirements of procedural fairness,[93] which were not met in the present case.[94] Their Honours also agreed with the approach of Burnett FM, finding that there was no countervailing consideration upon which it might be concluded that the refusal to adjourn was reasonably open to the Tribunal.[95] The Tribunal's unreasonable exercise of the discretion given by s 363(1)(b) meant that it had not conducted the review as required by the *Migration Act*.[96] Collier J rested her decision on s 360, holding that the Tribunal's failure to give proper consideration to the request for an adjournment amounted to a failure by the Tribunal to give Ms Li a reasonable opportunity to give evidence and present argument within the meaning of that section.[97]

The issues on the appeal

[46] The decision of the Tribunal, to affirm the decision of the delegate, was made under s 349(2)(a) of the *Migration Act*. The jurisdiction of the Federal Magistrates Court[98] to review such a decision arises under s 476(1), which equates that jurisdiction with the jurisdiction given to this Court under s 75(v) of the *Constitution*. The remedies provided by s 75(v) are available only for jurisdictional error.[99] It is not enough for jurisdictional error, the Minister submits, that some procedural discretion has miscarried.

[47] The latter assertion understates the importance and extent of the questions surrounding the discretion under consideration. The question which arose for the Tribunal was whether its review ought to be adjourned in order to afford Ms Li the opportunity to put forward the second skills assessment once TRA's review of it was completed. The Tribunal is given the power and discretion to determine that question by s 363(1)(b). The Minister accepts that the discretion is not at large and that it must be exercised according to law. The law requires that its exercise be reasonable. How that legal standard may be tested will be discussed later in these reasons. For present purposes, it may be noted that the Minister contends that the Tribunal's decision to refuse the adjournment cannot be said to be unreasonable, but the standard of unreasonableness to which the Minister refers is limited to what is called "*Wednesbury* unreasonableness", which is to say "a decision ... so unreasonable that no reasonable authority could ever have come to it".[100]

[48] A denial of procedural fairness may result in a decision made in excess of jurisdiction to which s 75(v) of the *Constitution* will respond.[101] A failure to accede to a reasonable request for an adjournment can constitute procedural unfairness.[102] The Minister submits that, to the extent that procedural fairness might have called for the Tribunal's decision to be delayed in the circumstances of this case, s 357A(1) leaves no room for those principles to apply. Division 5 provides the content of procedural fairness which is to apply to the conduct of a review by the Tribunal.

[49] The Minister further submits that ss 353 and 357A(3), properly understood, do not contain substantive requirements regarding the conduct of a review, breach of which amounts to an error going to jurisdiction. The reference in s 353 to a review mechanism that is "fair" and "just" is to general objectives, not to an enforceable duty. Fairness and justice, in the context of s 357A(3), is a procedural, rather than substantive, concept. Even if the particular exercise of a procedural power could be challenged by reference to s 357A(3), the Minister submits that there would remain the question whether it was intended that the ultimate decision on the review was to be vitiated. A failure to comply with a procedural requirement does not always result in invalidity.[103]

[50] It is convenient to deal first with the operation of ss 353 and 357A.

93 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [28].

94 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [27], [39].

95 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [36]-[38].

96 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [34], [38].

97 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [102].

98 On 12 April 2013, the Federal Magistrates Court of Australia was renamed the Federal Circuit Court of Australia: *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth).

99 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [83]; 77 ALJR 454.

100 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

101 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [17]; 75 ALJR 52.

102 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40]; 76 ALJR 598.

103 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93]; 72 ALJR 841.

Sections 353 and 357A

[51] The Minister submits that s 353 cannot be the source of any duty enforceable by the constitutional writs for which s 75(v) of the *Constitution* provides. Section 353 may commence with the imperative "shall", but what follows, according to the Minister's submission, are statements of goals rather than any identified action required to be undertaken. The adjectives "fair, just, economical, informal and quick" are apt to apply to objectives but not to enforceable requirements, not the least because each pulls the Tribunal in a different direction. It is contended that provisions of this kind do not detract from, but nor do they add to, such obligations, limits or powers as arise from the language of the statute.

[52] The Minister's argument is supported by the reasoning in *Minister for Immigration and Multicultural Affairs v Eshetu*,[104] which concerned an analogue provision to s 353: s 420 of the *Migration Act* as it then stood. At that time, s 476(2)(b) provided that an application to the Federal Court for review of a decision of the Refugee Review Tribunal could not be made on the ground that the decision involved an exercise of power that was so unreasonable that no reasonable person could have so exercised the power. Gleeson CJ and McHugh J described s 420 as an inadequate foundation for an attempt to overcome the provisions of s 476(2).[105] Their Honours observed that provisions such as s 420 are intended to be facultative, not restrictive. Their purpose is to free tribunals, to an extent, from constraints which apply to courts. Their Honours,[106] and Gummow J,[107] agreed with what Lindgren J had said in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs*[108] respecting the relationship between ss 420 and 476. Lindgren J found it difficult to accept that the legislature intended to provide a ground of review where a mechanism of review in its application to a particular case, although "fair" and "just", was not "economical", "informal" and "quick". Gummow J endorsed Lindgren J's observation that the difficulty, if not the practical impossibility, of proving a failure to pursue a specific objective would suggest that s 420 could not have been intended to provide a ground of review.[109]

[53] It was also observed in *Eshetu*[110] that s 420 must be understood in its statutory context. The same may be said of s 353. As mentioned, it appears in Pt 5, Div 4, which is entitled "Exercise of Tribunal's powers", and the section itself is headed "Tribunal's way of operating". Section 353 is followed by provisions dealing with the constitution of the Tribunal for the purpose of the exercise of its powers. But it is Div 5 which deals with how the Tribunal is to conduct a review.

[54] Section 357A has a different statutory context. It appears at the commencement of Div 5, which is headed "Conduct of review". The language of s 357A is general. The sections which follow it detail certain entitlements which an applicant for review is to have and certain steps which are to be taken by the Tribunal leading up to and during a hearing. By way of example, an applicant for review is entitled to provide the Tribunal with written statements as to facts and written legal arguments.[111] The Tribunal may seek additional information[112] and in some cases may be bound to do so. Where it does so by giving a written invitation to a person to give additional information, or where it invites an applicant's comment on or response to certain information, particular requirements attach to the giving of the invitation.[113] By s 360(1), the Tribunal is obliged to invite an applicant to appear before it "to give evidence and present arguments relating to the issues arising in relation to the decision under review". An applicant may request that the Tribunal call a witness or obtain written material[114] and is generally entitled to have access to written material

104 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; 73 ALJR 746.

105 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [48]; 73 ALJR 746.

106 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [49]; 73 ALJR 746.

107 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [108]-[109]; 73 ALJR 746.

108 *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324.

109 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [109]; 73 ALJR 746.

110 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [50]; 73 ALJR 746 per Gleeson CJ and McHugh J.

111 *Migration Act 1958*, s 358(1).

112 *Migration Act 1958*, s 359.

113 *Migration Act 1958*, s 359B.

114 *Migration Act 1958*, ss 361, 362.

that is before the Tribunal.[115] The Tribunal is given certain powers by s 363 for "the purpose of the review of a decision" including to require investigations or medical examinations to be conducted,[116] to summon persons to appear before it[117] and, of course, by s 363(1)(b), to adjourn the review from time to time.

[55] The terms of s 357A(1) would appear to leave no room for the implication of the requirements of procedural fairness beyond what is already provided in Div 5. What then is to be understood by the requirement in s 357A(3), expressed in obligatory terms, that in "applying this Division, the Tribunal must act in a way that is fair and just"? If s 357A(1) is to be taken as exhaustive of the requirements of procedural fairness which attach to a review, does s 357A(3) nevertheless say that the Tribunal, in fulfilling those requirements and in exercising its powers, is to do so in a way which is fair and just?

[56] In *Minister for Immigration and Citizenship v SZMOK*,[118] a Full Court of the Federal Court considered an analogue to s 357A,[119] which appeared in what was Div 4 of Pt 7 of the *Migration Act*. Applied to s 357A, the reasoning[120] is that s 357A(3) cannot be taken as intended to qualify or cut down the express statement in s 357A(1). However, Div 5 provides no indication as to how the procedural powers contained in it are to be exercised. Section 357A(3) may be taken to address that omission. The Full Court considered that s 357A(3) may have been intended to restore concepts of fairness and justice to the exercise of the procedural powers for which the Division provides.

[57] On this approach, it was said that "fairness" and "justice" may usefully be compared with the content of those words in the expressions "procedural fairness" and "natural justice".[121] In drawing this conclusion, the Full Court in *SZMOK* was not equating the requirement of s 357A(3) to act in a way that is fair and just in the conduct of the review with the obligation to afford procedural fairness or natural justice. The Full Court said[122] that some other requirement of fairness is to be implied, but clearly thought that that requirement bore the hallmarks of the obligation of procedural fairness at common law. The reconciliation effected by the Full Court suggests that it considered that a breach of the requirements of s 357A(3) may not have the same consequences as a breach of the common law obligation. The Full Court did not, however, consider the role of s 75(v) of the *Constitution*. It is firmly established that the denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction, for which prohibition will go under s 75(v).[123]

[58] In any event, what is fair and just is not to be ascertained by reading s 357A(3) alone, but by reading it as it applies to the actions of the Tribunal in the conduct of a review. The act of the Tribunal in question may involve a step taken in satisfaction of a duty imposed by Div 5. The act may be the exercise of a discretion, as in the present case. What is fair and just in relation to the particular act may be discerned, to an extent, from the purpose of the provision which requires that the act be done or which gives the discretionary power to the Tribunal to perform the act, as well as from the purpose of surrounding provisions and Div 5 as a whole.

[59] A consideration of the purpose for which a duty is imposed, or a power granted, may connect an unfair action with a substantive obligation on the part of the Tribunal. Thus, whilst the characterisation of an act as unfair may not itself have consequences for the ultimate decision on the review, there may be other consequences which flow from that act.

[60] The duty cast on the Tribunal by s 360(1), to invite an applicant for review to appear before it, furnishes an example. Section 360(1) and its purpose are central to Div 5 and the conduct of the review for which the Division provides. The purpose of s 360(1) is not difficult to discern. It is to provide an applicant with the opportunity to present evidence and argument relating to the issues arising in connection with the decision under review. The subsection contemplates that such a hearing will be had before

115 *Migration Act 1958*, s 362A.

116 *Migration Act 1958*, s 363(1)(d).

117 *Migration Act 1958*, s 363(3)(a).

118 *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427 per Emmett, Kenny and Jacobson JJ.

119 *Migration Act 1958*, s 422B.

120 *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427 at [17]-[18].

121 *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427 at [18].

122 *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427 at [17].

123 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [5], [17], [142]-[143], [170]-[171]; 75 ALJR 52.

the Tribunal makes its decision. The Tribunal's duty therefore extends further than merely issuing an invitation to an applicant to appear.

[61] Section 360(1) requires that the invitation be meaningful, in the sense that it must provide the applicant for review with a real chance to present his or her case. Scheduling a hearing on a date which, to the Tribunal's knowledge, would not permit the applicant to have sufficiently recovered from an incapacity to attend would not fulfil the duty imposed by s 360(1). The invitation would be an empty gesture[124] and any decision made following the hearing would be liable to be set aside. Not only would the conduct of the Tribunal, judged by the standard set by s 357A(3), be regarded as unfair, but, relevantly, other consequences would follow because the action of the Tribunal would also amount to a failure or refusal to comply with a statutory duty in the conduct of its review. The decision could not stand and the Tribunal would be required to consider it afresh after complying with that duty.

[62] It is not necessary to determine what s 357A(3) requires and what may be the consequence of a breach of that provision. Even if s 357A(3) by itself has no consequence for the ultimate decision of the Tribunal, to affirm the delegate's decision, it might nevertheless be concluded that the purpose of s 360(1) was not met. Without Ms Li being provided an opportunity to present her further evidence, it might be concluded that the hearing contemplated did not take place. It is not necessary to determine the appeal on this basis, since there is a more direct route to its resolution, by reference to s 363(1)(b) and a requirement of the law.

An unreasonable exercise of discretion?

[63] Because s 363(1)(b) contains a statutory discretionary power, the standard to be applied to the exercise of that power is not derived only from s 357A(3), but also from a presumption of the law. The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.[125]

[64] A standard of reasonableness in the exercise of a discretionary power given by statute had been required by the law long before the first statement of "*Wednesbury* unreasonableness" in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[126] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*,[127] McHugh and Gummow JJ instanced the 1891 decision of *Sharp v Wakefield*.[128] In *Re Refugee Review Tribunal; Ex parte Aala*,[129] Gaudron and Gummow JJ said that the requirement of reasonableness represents the development of legal thought which began before federation and accommodates s 75(v) to that development.

[65] In *Sharp v Wakefield*, it was said that when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice. That is what is meant by "according to law". It is to be legal and regular, not arbitrary, vague and fanciful. The discretion must be "exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself".[130] It is pointed out in Wade and Forsyth[131] that the legal conception of discretion dates from at least the 16th century. In *Sharp v Wakefield*,[132] Lord Halsbury LC had referred to *Rooke's Case*[133] of 1598, in which it was stated that the discretion of commissioners of sewers "ought to be limited and bound with the rule of reason and law".

[66] This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness.[134] The courts are conscious

124 *NAHF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 359 at [36] per Hely J.

125 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; 64 ALJR 327; *Kruger v Commonwealth* (1997) 190 CLR 1 at 36; 71 ALJR 991; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [126]; 73 ALJR 746; *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [15].

126 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

127 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [67]-[68].

128 *Sharp v Wakefield* [1891] AC 173.

129 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [40]; 75 ALJR 52, referring to *Kruger v Commonwealth* (1997) 190 CLR 1 at 36; 71 ALJR 991.

130 *Sharp v Wakefield* [1891] AC 173 at 179.

131 Wade and Forsyth, *Administrative Law*, 10th ed (2009), pp 293-294.

132 *Sharp v Wakefield* [1891] AC 173 at 179.

133 *Rooke's Case* (1597) 5 Co Rep 99b at 100a [77 ER 209 at 210].

134 Wade and Forsyth, *Administrative Law*, 10th ed (2009), p 302.

of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power.[135] Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.

[67] In *Klein v Domus Pty Ltd*,[136] Dixon CJ said that where discretions are ill-defined (as commonly they are) it is necessary to look to the scope and purpose of the statute conferring the discretionary power and its real object. The ordinary approach to statutory construction, reiterated in *Project Blue Sky Inc v Australian Broadcasting Authority*,[137] requires nothing less. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.[138]

[68] Lord Greene MR's oft-quoted formulation of unreasonableness in *Wednesbury*[139] has been criticised for "circularity and vagueness", as have subsequent attempts to clarify it.[140] However, as has been noted, *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified. This is recognised by the principles governing the review of a judicial discretion, which, it may be observed, were settled in Australia by *House v The King*,[141] before *Wednesbury* was decided. And the same principles evidently informed what was said by Dixon J about review of an administrative decision in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*,[142] which was decided less than two years after *Wednesbury*, at a time when it was the practice of the High Court to follow decisions of the Court of Appeal in England which appeared to have settled the law in a particular area.[143]

[69] In *Wednesbury*, Lord Greene MR discussed the various grounds upon which an exercise of statutory power may be abused. His Lordship foreshadowed defining those grounds under a single head of unreasonableness, stating that it was "perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty ... unreasonableness, attention given to extraneous circumstances, disregard of public policy" were all relevant to the question of whether a statutory discretion was exercised reasonably.[144]

[70] The test proposed by Lord Russell of Killowen CJ in *Kruse v Johnson*,[145] a case which is cited chiefly in relation to the unreasonableness of the exercise of delegated law-making power,[146] may avoid some of the circularity identified in the *Wednesbury* formulation. Lord Russell considered[147] that unreasonableness was found where delegated laws were:

> partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; [or] if they involved such

135 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36-37; 64 ALJR 327.

136 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; 37 ALJR 299.

137 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 72 ALJR 841.

138 Wade and Forsyth, *Administrative Law*, 10th ed (2009), p 296.

139 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

140 See *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation* (1990) 96 ALR 153 at 166 per Gummow J, referring to Allars, *Introduction to Australian Administrative Law* (1990), p 187 [5.52].

141 *House v The King* (1936) 55 CLR 499.

142 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

143 *Wright v Wright* (1948) 77 CLR 191 at 210; *Commissioner of Stamp Duties (NSW) v Pearse* (1953) 89 CLR 51 at 63-64; [1954] AC 91 at 112.

144 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

145 *Kruse v Johnson* [1898] 2 QB 91.

146 See Allars, *Introduction to Australian Administrative Law* (1990), pp 186-187 [5.51].

147 *Kruse v Johnson* [1898] 2 QB 91 at 99-100.

oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.

[71] In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*,[148] Lord Diplock opined that unreasonableness would be shown where "no sensible authority acting with due appreciation of its responsibilities" would have so decided. This reflects the requirement of the law that a decision-maker understand his or her statutory powers and obligations. It is evident in the more specific errors, going to jurisdiction, which the law recognises and to which Lord Greene MR referred in *Wednesbury*,[149] such as misdirecting oneself as to the operation of the statute, taking into account irrelevant considerations or failing to take into account relevant considerations.

[72] The more specific errors in decision-making, to which the courts often refer,[150] may also be seen as encompassed by unreasonableness. This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that "all these things run into one another".[151] Further, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[152] Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is "manifestly unreasonable". Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

[73] In *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation*,[153] reference was made to an analysis of three paradigm cases of unreasonableness which were thought to be consistent with a view of Lord Greene MR's "doctrine", as based on the law as to the misuse of fiduciary powers. The third paradigm involved the application of a proportionality analysis by reference to the scope of the power.

[74] In the present case, regard might be had to the scope and purpose of the power to adjourn in s 363(1)(b), as connected to the purpose of s 360(1).[154] With that in mind, consideration could be given to whether the Tribunal gave excessive weight – more than was reasonably necessary – to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis.

[75] In *Peko-Wallsend*,[155] Mason J, having observed that there was considerable diversity in the application by the courts of the test of manifest unreasonableness, suggested that "guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion". *House v The King*[156] holds that it is not enough that an appellate court would have taken a different course. What must be evident is that some error has been made in exercising the discretion, such as where a judge acts on a wrong principle or takes irrelevant matters into consideration. The analogy with the approach taken in an administrative law context is apparent.

[76] As to the inferences that may be drawn by an appellate court, it was said in *House v The King*[157] that an appellate court may infer that in some way

148 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

149 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228.

150 And see *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(2).

151 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

152 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41; 60 ALJR 560, Gibbs CJ and Dawson J agreeing at 30, 71.

153 *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation* (1990) 96 ALR 153 at 167-168, referring to Allars, *Introduction to Australian Administrative Law* (1990), pp 188-191 [5.54]-[5.57].

154 See [60] above.

155 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41-42; 60 ALJR 560, referring, inter alia, to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 and *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 328; 46 ALJR 662.

156 *House v The King* (1936) 55 CLR 499 at 504-505.

157 *House v The King* (1936) 55 CLR 499 at 505.

there has been a failure properly to exercise the discretion "if upon the facts [the result] is unreasonable or plainly unjust". The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

The Tribunal's exercise of discretion

[77] The starting point is that the Tribunal, for the purposes of reviewing the delegate's decision, exercises all the powers and discretions of the Minister.[158] Further, and as the Minister concedes, in making a decision neither the delegate nor the Tribunal is confined to the material which was initially provided to support satisfaction of the relevant visa criteria. Those criteria are expressed to be satisfied at the time of the decision.[159] If a further skills assessment is completed by TRA before the Tribunal makes its decision, the Tribunal may have regard to it. It is difficult to conceive of a circumstance where the Tribunal must not do so.

[78] The Minister submits that the Tribunal may have considered that it had little by way of discretion left to apply, because all of the steps necessary to the conduct of the review had been taken and procedural fairness was provided for in the taking of each step. That submission implies that, so long as the express requirements of Div 5 are complied with and, relevantly, an invitation has been extended to an applicant for review by the Tribunal to attend a hearing and that hearing has been held, nothing further can be required of the Tribunal.

[79] The submission misapprehends the nature and purpose of the discretionary power to adjourn and the requirement of reasonableness which attaches to it. The discussion of the forthcoming second skills assessment during the hearing on 18 December 2009, and the subsequent request for an adjournment of the Tribunal's review while TRA reviewed the second skills assessment, must have conveyed to the Tribunal that Ms Li did not consider that she had presented her case. In deciding whether to adjourn, that was what the Tribunal had to consider in the context of the statutory purpose of s 360, but it does not appear that it did so.

[80] The decision to refuse the adjournment request was explained by the Tribunal on the bases that: (a) Ms Li had been provided with enough opportunities to present her case; and (b) the Tribunal was not prepared to delay the matter any further. The reference to delay was not further explained by the Tribunal. The only significant delay would appear to be attributable to the Tribunal, which took some nine months to contact Ms Li after the lodgement of her application. In any event, what pressing need for a conclusion of the review was the Tribunal adverting to, a need which would have to be weighed against the object of s 360? The position of the Tribunal cannot be equated with that of a party to litigation who may be prejudiced by the delay of another.[160] It may be accepted that the Tribunal is to act with some efficiency, as is stated in s 353(1) of the *Migration Act*, but such a consideration would again have to be weighed against the countervailing consideration of the purpose of s 360 and Div 5.

[81] The Minister appears to translate the Tribunal's reference to Ms Li having had sufficient opportunity as "enough is enough" and submits that if the Tribunal could not so determine, it would be required to hear, in effect, a series of applications which could be unending. This submission should be understood in the context that the criteria for the visa in question may be fulfilled at any time up to the point of decision.

[82] It cannot be suggested that the Tribunal is under an obligation to afford every opportunity to an applicant for review to present his or her best possible case and to improve upon the evidence. Of course it may decide, in an appropriate case, that "enough is enough", but it is not apparent how that conclusion was reached in the present case, having regard to the facts and to the statutory purpose to which the discretion to adjourn is directed.

[83] The purpose of s 360(1) has already been referred to. It is to provide an applicant for review the opportunity to present evidence and arguments "relating to the issues arising in relation to the decision under review". The question which remained in issue when the Tribunal made its decision was the satisfaction of a visa criterion by a complying skills assessment. Although the Tribunal

158 *Migration Act 1958*, s 349(1).

159 *Migration Regulations 1994*, Sch 2, Subdiv 880.22.

160 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; 83 ALJR 951.

could not be expected to assume that the second skills assessment, when reviewed, would favour Ms Li, it did not suggest that there was no prospect of the second skills assessment being obtained, or that the outcome could not be known, in the near future. In these circumstances it is not apparent why the Tribunal decided, abruptly, to conclude the review.

[84] There remains the possibility that the previous conduct of Ms Li influenced the Tribunal. It had continued to question her about the false information associated with her application despite her repeated admissions and the advice that the case she wished to put forward did not depend upon that information. If her prior conduct was influential, the Tribunal took into account an irrelevant consideration for the reason that Ms Li's conduct per se was not relevant to the visa criteria. The concern of the criteria is with the information relied upon to satisfy them, a point Ms Li's migration agent attempted to make to the Tribunal.

[85] The Tribunal's error might be identified as giving too much weight to the fact that Ms Li had had some opportunity to present evidence and argument and insufficient weight to her need to present further evidence. It would not appear that the Tribunal had regard to the purposes for which the statutory discretion in s 363(1)(b) is provided in arriving at its decision. It is not possible to say which of these errors was made, but the result itself bespeaks error. In the circumstances of this case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute. Because error must be inferred, it follows that the Tribunal did not discharge its function (of deciding whether to adjourn the review) according to law.[161] The Tribunal did not conduct the review in the manner required by the *Migration Act* and consequently acted beyond its jurisdiction.

Conclusion

[86] The Minister's submission, that an act of the Tribunal in the conduct of its review which is unfair or unjust has no consequences for its ultimate decision, is not to the point. Whatever be the consequence of a breach of s 357A(3), a matter which it is not necessary to determine, it cannot be said that the *Migration Act* evinces an intention that the requirement of the law that the discretionary power in s 363(1)(b) be exercised reasonably not apply. That presumption of law is not rebutted. The Tribunal's decision to affirm the delegate's decision cannot stand.

[87] The appeal should be dismissed with costs.

Gageler J.

Reasonableness as a statutory implication

[88] Brennan CJ cited *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[162] for the proposition that "when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised".[163] He explained the application of "*Wednesbury* unreasonableness" as a court acting on the "implied intention of the legislature that a [statutory] power be exercised reasonably" to hold invalid "a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action".[164]

[89] That explanation accords with references in earlier High Court decisions to reasonableness as a condition of the exercise of a discretionary power.[165] It has been approved in more recent decisions.[166] It is an explanation that is well-understood by legislatures and courts alike and that has "stood the test of time".[167] It explains the nature and scope of *Wednesbury* unreasonableness in Australia.

[90] Implication of reasonableness as a condition of the exercise of a discretionary power conferred by

161 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; 37 ALJR 299.

162 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234.

163 *Kruger v Commonwealth* (1997) 190 CLR 1 at 36; 71 ALJR 991.

164 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; 64 ALJR 327.

165 *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 620; *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 327; 46 ALJR 662; *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 139 CLR 449 at 466; 51 ALJR 715; *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404 at 420; 56 ALJR 89; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41-42; 60 ALJR 560.

166 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [124], [126]; 73 ALJR 746; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [40]; 75 ALJR 52; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [123]; 84 ALJR 369, quoting *Abebe v Commonwealth* (1999) 197 CLR 510 at [116]; 73 ALJR 584.

167 Cf Sales, "Rationality, proportionality and the development of the law" (2013) 129 *Law Quarterly Review* 223 at 234.

statute is no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power or performance of a statutory duty.[168] Each is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject matter, scope and purposes of the statute.[169]

[91] The implied condition of reasonableness is not confined to why a statutory decision is made; it extends to how a statutory decision is made:[170]

> Just as a power is exercised in an improper manner if it is, upon the material before the decision-maker, a decision to which no reasonable person could come, so it is exercised in an improper manner if the decision-maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course.

[92] Like procedural fairness, to which it is closely linked,[171] reasonableness is not implied as a condition of validity if inconsistent with the terms in which a power or duty is conferred or imposed or if otherwise inconsistent with the nature or statutory context of that power or duty.[172] The common law principle of construction by reference to which reasonableness is implied does not exclude implication of a different or more particular condition of an exercise of a particular statutory discretionary power or of the performance of a particular statutory duty. The principle rather establishes a condition of reasonableness as a default position. Absent an affirmative basis for its exclusion or modification, a condition of reasonableness is presumed.

Reasonableness and the Migration Review Tribunal

[93] Part 5 of the *Migration Act 1958* (Cth) (the Act), governing review of decisions by the Migration Review Tribunal (the MRT), is to be construed in light of that presumed condition of reasonableness. Part 5 provides for what is properly described as "an inquisitorial, merits-based review by an independent tribunal" and for "procedures of some solemnity".[173] Division 3 imposes an overriding duty on the MRT to "review the decision":[174] that is, "to arrive at the correct or preferable decision in the case before it according to the material before it".[175] Division 5 imposes procedural duties and confers procedural powers, including a power expressed in terms that, "[f]or the purpose of the review of a decision", the MRT "may" "adjourn the review from time to time".[176]

[94] Nothing in Pt 5, or elsewhere in the Act, excludes the implication that the MRT is to act reasonably as a condition of the performance of its overriding duty to review a decision. Nor does anything exclude the implication that the MRT is to act reasonably as a condition of the performance of its procedural duties and of the exercise of its procedural powers.

[95] The implication of reasonableness is, rather, strengthened by the inclusion of express requirements that the MRT "shall, in carrying out its functions ... pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick" and "in reviewing a decision ... shall act according to substantial justice and the

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168 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [34]; 74 ALJR 490.

169 *Sharp v Wakefield* [1891] AC 173 at 179, cited in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 431 and in *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 620. See generally *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189; 39 ALJR 66; *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 17-18; 50 ALJR 570; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [62]; 75 ALJR 679.

170 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290; 69 ALJR 423.

171 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367; 64 ALJR 462; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36-37; 64 ALJR 327.

172 Cf *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 86 ALJR 1019.

173 *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at [22]; 79 ALJR 397.

174 s 348(1).

175 *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425; 66 ALJR 753.

176 s 363(1)(b).

merits of the case",[177] and that, in applying Div 5 of Pt 5, the MRT "must act in a way that is fair and just".[178]

[96] The express requirements for the MRT to "pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick" and to "act according to substantial justice and the merits of the case" have been held not to result in invalidity merely because a conclusion can be drawn by a court that some action the MRT has taken does not objectively comply with one or more of the statutory expressions in which the requirement is couched.[179] The requirement for the MRT to "act in a way that is fair and just" is of a similar nature.[180] Both are couched in language that is broad and that is best seen to be exhortatory or aspirational. They "really describe the grounds upon which a more or less discretionary judgment must be formed" by the MRT.[181]

[97] Their combined effect is to require that the MRT, in performing its duty to review a decision, seek to act: in a way that is "fair and just"; in pursuit of the objective of providing a mechanism of review that is "fair, just, economical, informal and quick"; and according to "substantial justice and the merits of the case".[182] Their "mere erroneous application" does not amount to a failure by the MRT to comply with a requirement essential to the valid performance of its duty to review a decision; but their "neglect" does.[183] Neglect in the relevant sense need not be the product of bad faith; it can be the product of unreasonableness.

[98] The MRT does not fail to perform its statutory duty to review a decision merely because the manner of its performance of a procedural duty or its exercise or non-exercise of a procedural power might be assessed in the result not to measure up to one or more of the requisite statutory exhortations or aspirations. The MRT does fail to perform its statutory duty to review a decision where: (i) the manner of its performance of a procedural duty, or of its exercise or non-exercise of a procedural power, is so unreasonable that no reasonable tribunal heeding those exhortations or adhering to those aspirations could have done what the MRT in fact did; and (ii) that unreasonableness, or neglect, on the part of the MRT is shown to be material to the outcome of the review that the MRT has undertaken in fact.

[99] The legislative declaration that Div 5 of Pt 5 "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with"[184] gives added significance to the implied requirement for the MRT to act reasonably in the performance of its procedural duties and in the exercise or non-exercise of its procedural powers. The significance is that the implied statutory requirement for the performance of those duties and the exercise of those powers always to be reasonable results in the division providing a measure of procedural fairness sufficient to meet the statutory description of it as a statement of the requirements of the natural justice hearing rule.

[100] However, the requirement for the MRT to act reasonably is not exhausted in every case where an applicant before the MRT is given a reasonable opportunity to give evidence, provide information and present arguments in relation to the decision under review. Reasonableness can require more. Thus, while it has been held that the MRT has no general duty to make inquiries,[185] it has been accepted that "a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review".[186] The touchstone is reasonableness in the performance of the duty to review.[187]

177 s 353.

178 s 357A(3).

179 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [49], [108]-[109], [176]-[179]; 73 ALJR 746, approving *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324.

180 *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427 at [15].

181 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 243.

182 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [19]; 85 ALJR 327.

183 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 243-244.

184 s 357A(1).

185 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [20]; 85 ALJR 327.

186 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [23]; 85 ALJR 327, quoting *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [25].

187 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [20]-[21]. See also *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458 at 469.

A **[101]** The Minister for Immigration and Citizenship (the Minister) is correct to submit that the MRT has no general duty to adjourn a review because a review applicant believes that the passage of time will allow a visa criterion to be met. But a failure to adjourn to allow a visa criterion to be met can, in some circumstances, be so unreasonable as to constitute a failure to review.

B **[102]** The permissive terms in which the power to adjourn is conferred on the MRT make clear that the power itself carries no duty on the MRT to consider its exercise.[188] The overriding duty of the MRT to review a decision may nevertheless require the MRT, acting reasonably, to consider exercise of the power in a particular case.[189] The duty of the MRT to review a decision is to be performed within what, in C all the circumstances, is a reasonable time.[190] The power of the MRT to adjourn is in aid of the performance of that duty.

[103] The MRT fails to comply with a requirement essential to the valid performance of its duty to review a particular decision if it fails to consider the exercise of its power to adjourn that review in D circumstances where no reasonable tribunal could fail to do so. The MRT fails to comply with requirements essential to the valid performance of that duty and to the valid exercise of that power where, having considered the exercise of that power, the MRT fails to exercise that power so as to adjourn the review in circumstances where no reasonable tribunal could fail to adjourn the review. If an E unreasonable failure to adjourn is material to the outcome, such decision as the MRT goes on in fact to make on the review is invalid. The MRT's "ostensible determination" of the review by making the decision "is not a real performance of the duty imposed by law upon [it]".[191]

[104] In the exercise of jurisdiction under s 75(v) F of the *Constitution* or equivalent jurisdiction defined by statute under s 77(i) of the *Constitution*, a court in such a case can order mandamus to compel performance by the MRT of its unperformed duty to review and, as an ancillary order, the court can by certiorari set aside the purported legal effect of the decision the MRT made in fact.

Judging unreasonableness

[105] "It is, of course, true that, as a measure in fact of time, space, quantity and conduct, reasonableness is a concept deeply rooted in the common law: and so, in such cases, is the power of a court to say whether a particular decision of that fact is or is not within the bounds of reason."[192] Review by a court of the reasonableness of a decision made by another repository of power "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" but also with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[193]

[106] The label "*Wednesbury* unreasonableness" indicates "the special standard of unreasonableness which has become the criterion for judicial review of administrative discretion".[194] Expression of the *Wednesbury* unreasonableness standard in terms of an action or decision that no reasonable repository of power could have taken "attempts, albeit imperfectly, to convey the point that judges should not lightly interfere with official decisions on this ground".[195]

[107] Potential for legitimate disagreement in the judicial application of the standard of *Wednesbury* unreasonableness is inevitable, as it would be in the judicial application of any other standard:[196]

> A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of

188 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [22], [75]-[76]; 85 ALJR 327.

189 Cf *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 88; 69 ALJR 51 (applying *Julius v Lord Bishop of Oxford* (1880) LR 5 App Cas 214 at 222-223 and *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033-1034) and *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 17-18; 50 ALJR 570 (applying *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189; 39 ALJR 66).

190 *Lau v Calwell* (1949) 80 CLR 533 at 573-574; *Re O'Reilly; Ex parte Australena Investments Pty Ltd* (1983) 58 ALJR 36 at 36; *Repatriation Commission v Morris* (1997) 79 FCR 455 at 461.

G 191 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242.

192 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 383-384; 43 ALJR 99.

193 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at [47].

194 Wade and Forsyth, *Administrative Law*, 10th ed (2009), pp 295-296.

195 Woolf, Jowell and Le Sueur, *De Smith's Judicial Review*, 6th ed (2007) at [11-018]. See also Cane and McDonald, *Principles of Administrative Law: Legal Regulation of Governance*, 2nd ed (2012), p 168.

196 *Universal Camera Corporation v NLRB* 340 US 474 at 488-489 (1951).

> judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

[108] Judicial determination of *Wednesbury* unreasonableness is constrained by two principal considerations. One is the stringency of the test that a purported exercise of power is so unreasonable that no reasonable repository of the power could have so exercised the power. The other is the practical difficulty of a court being satisfied that the test is met where the repository is an administrator and the exercise of the power is legitimately informed by considerations of policy.

[109] The conception underlying the stringency of the test as applicable in Australia is captured by the observation made 50 years ago that:[197]

> This Court has in many and diverse connexions dealt with discretions which are given by legislation to bodies, sometimes judicial, sometimes administrative, without defining the grounds on which the discretion is to be exercised ... We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case.

[110] The same observation lends force to the suggestion that, for the purpose of applying the test, "guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion".[198] There is, in particular, a close analogy with the settled principle that an appellate court will review the exercise of a judicial discretion "if upon the facts it is unreasonable or plainly unjust",[199] or if "failure to give adequate weight to relevant considerations really amounts to a failure to exercise the discretion actually entrusted to the court".[200] It is therefore fair to say that "[i]f a discretionary power is exercised in a way in which a reasonable repository of the power might exercise it, the exercise of the power is supported by the statute which confers it, whether the discretion is judicial or administrative in nature".[201]

[111] It has nevertheless been observed that "in practice the comparative familiarity of an appellate court with judicial discretions and the usual confines of a judicial discretion make the appellate court more sensitive to an unreasonable exercise of discretion and more confident of its ability to detect error in its exercise".[202] That is because it is "harder to be satisfied that an administrative body has acted unreasonably, particularly when the administrative discretion is wide in its scope or is affected by policies of which the court has no experience".[203] Similar observations have been made as to the inability of a court "effectively" to review a state of satisfaction forming a pre-condition to an exercise of a statutory power or performance of a statutory duty "where the matter of which the [repository] is required to be satisfied is a matter of opinion or policy or taste".[204]

[112] There is no such practical difficulty in a court applying the test of *Wednesbury* unreasonableness to a refusal by the MRT to adjourn a review. The aspirations required to inform the performance of the MRT's duty to review – sufficiently captured in the repeated statutory references to what is fair and just – are aspirations at the core of the judicial function. The MRT is to some degree free from "constraints otherwise applicable to courts of law",[205] and a court

197 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; 37 ALJR 299, quoted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [69].

198 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42; 60 ALJR 560.

199 *House v The King* (1936) 55 CLR 499 at 505. See *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [68].

200 *Lovell v Lovell* (1950) 81 CLR 513 at 519, citing *Sharp v Wakefield* [1891] AC 173 at 179.

201 *Norbis v Norbis* (1986) 161 CLR 513 at 540; 60 ALJR 335.

202 *Norbis v Norbis* (1986) 161 CLR 513 at 540-541; 60 ALJR 335.

203 *Norbis v Norbis* (1986) 161 CLR 513 at 541; 60 ALJR 335.

204 *Buck v Bavone* (1976) 135 CLR 110 at 118-119; 50 ALJR 648, quoted in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 276; 70 ALJR 568.

205 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [49]; 73 ALJR 746.

must be careful not to "draw too closely upon analogies in the conduct and determination of civil litigation".[206] But a refusal by the MRT to adjourn a review will rarely, if ever, be legitimately affected by policies of which the court has no experience.

[113] Yet the stringency of the test remains. Judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare. Nothing in these reasons should be taken as encouragement to greater frequency. This is a rare case.

Unreasonableness in this case

[114] The decision of the delegate under review by the MRT was a decision to refuse Ms Li a visa. The decision was based on the delegate's lack of satisfaction that Ms Li met criteria for the grant of a visa. The criteria required, at the time of decision, both that "[a] relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation", and that "no evidence has become available that the information given or used as part of the assessment of the applicant's skills is false or misleading in a material particular".[207]

[115] Ms Li's nominated skilled occupation was that of "cook". Trades Recognition Australia (TRA), a relevant assessing authority, had assessed her skills to be suitable for that occupation. TRA did so applying a standard criterion of suitability that an applicant worked more than 900 hours in that occupation. However, evidence before the delegate showed that information used by TRA to make the assessment was false: a letter of reference to the effect that Ms Li had worked as a cook for a particular employer for more than 900 hours was not genuine.

[116] In correspondence with the Minister's department, and before the MRT, Ms Li admitted that the letter of reference was not genuine. She explained that the letter was given to TRA by her former migration agent without her knowledge or consent. She nevertheless sought to satisfy the MRT that the criterion was satisfied at the time of the decision on review by obtaining a second assessment from TRA based on genuine letters of reference from two other employers for whom she had in combination by then in fact worked the requisite 900 hours as a cook.

[117] The problem Ms Li encountered was that TRA decided during the course of the review by the MRT to refuse her application for a second skills assessment, apparently for reasons that one of the two letters of reference on which Ms Li relied did not set out in detail her duties as a cook and was signed on behalf of that employer by a person who did not state his or her position.

[118] Ms Li's new migration agent promptly informed the MRT of the problem. The migration agent submitted to the MRT that TRA was in error for reasons he detailed. He explained that Ms Li had applied for review of TRA's decision and that she was relying for that purpose on new reference letters from the same two employers supported by taxation statements and payroll summaries. The migration agent asked the MRT to "forbear from making any final decision" on the review "until the outcome of her skills assessment application is finalised".

[119] The MRT did not accede to that request. The MRT gave its decision a week later. The MRT stated in its reasons for decision that it had regard to the migration agent's submission that the decision of TRA "has been affected by errors and is the subject of review" but that it considered that Ms Li "has been provided with enough opportunities to present her case and is not prepared to delay any further".[208]

[120] In holding the MRT's refusal to adjourn the review to be "unreasonable in the *Wednesbury Corporation* sense",[209] Burnett FM said:[210]

> Ultimately what appears absent in the [MRT's] decision in this instance is a consideration of the relative merits of the competing interests. [Ms Li's] agent informed the [MRT] of the outcome of the second skills assessment when he received it and of [Ms Li's] concerns about its efficacy. [Ms Li's] agent set out in detail why the decision was in error. On a plain reading of [Ms Li's] agent's letter there appeared good reason to be cautious of the assessing authority's original decision. [Ms Li's] detailed explanation of the reasons why the decision was wrong ought to have put the [MRT] on notice that this was not merely a stalling tactic on the part of [Ms Li]. That matter was the only item outstanding in what otherwise ought to have been a successful application. When considered together with the significance of the impact of that wrong decision, I consider the [MRT's] decision to proceed in these

206 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282; 70 ALJR 568.

207 Clause 880.230(1) of Sch 2 to *Migration Regulations 1994* (Cth).

208 *Re 0900645* [2010] MRTA 151 at [35].

209 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625 at [25], [49], [51].

210 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625 at [49].

> circumstances rendered it unreasonable such as to constitute it unreasonableness in the *Wednesbury Corporation* sense. That is to say it constituted an improper exercise of the power and it went to the very jurisdiction.

[121] On appeal to the Full Court of the Federal Court, Greenwood and Logan JJ found that analysis to be "unremarkable", pointing out that there was in the circumstances "no countervailing consideration on the basis of which it might be concluded that the refusal to adjourn was one reasonably open to the MRT".[211]

[122] It is difficult to disagree. Ms Li had been in Australia for some years. The review by the MRT had been on foot for nearly a year without any delay on her part. What she sought was an adjournment of the review for a highly specific purpose clearly articulated by her migration agent: to await the outcome of the review she had already sought of TRA's second skills assessment, which she contended to have been erroneous for reasons the migration agent explained to the MRT. Those reasons were, as the Minister concedes, "coherent on their face and might well have justified an expectation that a favourable skills assessment would be obtained". Indeed, the evidence before Burnett FM showed that a favourable skills assessment did in fact eventuate, three months later.[212] Nothing in the MRT's reasons for decision suggests that the MRT took a different view of Ms Li's prospects and there was no reason to infer that the MRT considered that the adjournment would be likely to have been unduly protracted. The MRT identified no consideration weighing in favour of an immediate decision on the review and none is suggested by the Minister.

[123] The Minister argues that Ms Li was "entitled to expect a decision according to law, but not further indulgence in putting off the day of reckoning". Ms Li was certainly entitled to expect a decision according to law. She was also entitled to expect a decision according to reason. She was entitled to expect the MRT to be reasonable.

[124] No reasonable tribunal, seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case, would have refused the adjournment.

Conclusion

[125] The appeal should be dismissed.

Appeal dismissed with costs

Solicitors for the appellant: *Clayton Utz Lawyers.*

Solicitors for the first respondent: *AJ Torbey & Associates.*

SARAH-JANE GREENAWAY

211 *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 at [34], [38].

212 *Xiujuan Li v Minister for Immigration and Citizenship* [2011] FMCA 625 at [28].