Federal Court of Australia

Re Bineshri Prasad v Minister of Immigration and Ethnic Affairs [1985] FCA 47; (1985) 6 FCR 155 (26 February 1985)

FEDERAL COURT OF AUSTRALIA

Re: BINESHRI **PRASAD**
And: **MINISTER FOR IMMIGRATION** AND **ETHNIC AFFAIRS**
No. G302 of 1984
Administrative Law
[1985] FCA 47; (1985) 6 FCR 155

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Wilcox J.(1)

CATCHWORDS

Administrative Law - Judicial review - Migration - Application for permanent residence in Australia by spouse of person having permanent resident status - Validity of decision to refuse application - Failure of Minister to take into account relevant material - Unreasonableness of decision - Ambit of material relevant for consideration in determining reasonableness.

Migration Act 1958 ss. 6, 6A

Administrative Decisions (Judicial Review) Act 1977 s.5

Administrative Law - Judicial review - Immigration and aliens - Review of Minister's decision refusing an application for a permanent entry permit to Australia, spouse having permanent resident status - Whether Minister had failed to take into account relevant considerations - Whether exercise of power was so unreasonable that no reasonable person could have so exercised the power - Taking of further evidence to adduce facts not before the Minister - Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 5(1)(e), 5(2), 5(2)(a), 5(2)(b), 5(2)(f), 5(2)(g), 6(2), 13 - Migration Act 1958 (Cth), ss 6, 6A. In an application for review of a decision of the **Minister for Immigration** and **Ethnic Affairs** made in 1984 refusing an application for a permanent entry permit to an applicant who was the spouse of a permanent resident on the basis that the applicant's marriage had been assessed as being one

where the parties did not genuinely intend to continue living as a married couple in Australia, it being the Minister's policy to refuse permanent entry permits in such cases.

Held: (1) That relevant considerations which should have been taken into account were not, thus making the Minister's decision invalid pursuant to s 5(2)(b) of the Administrative Decisions (Judicial Review) Act 1977 (the Act), such considerations being:

(i) A report made in 1981 by an interviewing officer in Suva expressing an opinion that the marriage relationship was genuine, such report being part of the history of the relationship, all of which was relevant in determining the quality of the marriage as at the date of the Minister deciding the application. Although the report was not presented to the Minister, it was on the departmental file and was accordingly to be regarded as being constructively before him.

Peko-Wallsend Ltd v. Minister for Aboriginal Affairs (1985) 59 ALR 51, referred to.

(ii) Statutory declarations of neighbours and acquaintances as to the applicant leading a normal married life and a letter of a social worker as to the applicant's wife living at home with the applicant, such documents being available to the Minister, but there being nothing to indicate that he had taken any account of them.

(2) That in determining whether an administrative decision made under statutory authority falls within 5(2)(g) of the Act -

(a) the court should construe that paragraph in the light of the common law principle of which that paragraph is a legislative enactment, that principle being stated by Lord Diplock in Bromley London Borough City Council v. Greater London Council (1983) 1 AC 768 to be the invalidation of administrative decisions "that looked at objectively are so devoid of any plausible justification that no reasonable body of persons could have reached them" and by Menzies J in Parramatta City Council v. Pestell [1972] HCA 59; (1972) 128 CLR 305 to be the invalidation of an administrative decision "based on an opinion which could not be justified on any reasonable grounds".

Perkins v. Cuthill (1981) 34 ALR 669; Plegas v. McCabe (unreported, Federal Court of Australia, Lockhart J, 3 August 1984; Willara Pty Ltd v. McVeigh (1984) 54 ALR 65; Re W (an Infant) (1971) AC 682; Associated Provincial Picture Houses v. Wednesbury Corporation (1948) 1 KB 223; Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1976] UKHL 6; (1977) AC 1014; Borkovic v. **Minister for Immigration** and **Ethnic Affairs** (1981) 39 ALR 186; Hamblin v. Duffy [1981] FCA 38; (1981) 50 FLR 308; Mixnam's Properties Ltd v. Chertsey Urban District Council (1964) 1 QB 214, referred to.

(b) The court is entitled to consider those facts which were known to the decision-maker actually or constructively together only with such additional facts as the decision-maker would have learned but for any unreasonable conduct by him where such facts are obtainable from material that is readily available.

(3) That, having taken further evidence relating to the matters arising out of the interviews by the departmental officer, and having reviewed and analysed the evidence and the manner in which the decision was reached by the Minister, and bearing in mind the strength of the case required before it may be said that a decision falls within s 5(2)(g) of the Act, the Minister's decision was "devoid of any plausible justification" and that it accordingly be set aside pursuant to that paragraph of the Act and the matter remitted to the Minister for further consideration. In reaching this decision the court took into account, inter alia, the following matters:

(i) The existence of the statutory declarations and the social worker's letter asserting that there was a normal marriage relationship, the declarants and writer thereof being apparently credible and independent and such documents asserting a conclusion contrary to that formed by the Minister and the fact that the Minister had not further investigated the statements contained in those documents as he ought to have done.

(ii) That the only matters tending to show lack of intention to live together were the circumstances of the marriage four years earlier and more importantly, interviews by a departmental officer of the applicant and his wife, such interviews containing inconsistencies in their recollection of details in their daily lives, the Minister believing that such inconsistencies indicated that the wife did not live with her husband. The interviewing officer should have given the applicant an opportunity to deal with those matters which excited an adverse reaction in the officer before permitting those matters to be used in a manner adverse to the applicant in the decision-making process.

(iii) The interviews which were relied upon by the Minister as the primary method of determining the genuineness of the relationship were rushed and short and in any case, neither a verbatim record nor at least contemporaneous notes of the interviews were made and kept, as ought to have been done.

HEARING

Sydney, 1985, February 5-6, 26.
26:2:1985
APPLICATION

Application for judicial review under the Administrative Decisions (Judicial Review) Act 1977 of a decision of the respondent refusing an application for a permanent entry permit to Australia made pursuant to the Migration Act 1958 (Cth).

A L Hill, for the applicant.

J A Farmer, for the respondent.
Cur adv vult

Solicitors for the applicant: Gray Bettens.

Solicitor for the respondent: Australian Government Solicitor.
GFV

ORDER

1. The application for review to be allowed.

2. The decision of the respondent dated 9 April 1984 refusing the application of the applicant for a permanent entry permit (permanent resident status) be set aside and that such application be remitted to the Minister for further consideration according to law.

3. The respondent pay to the applicant his costs of this Application.

4. The exhibits be released after the expiration of 21 days, unless in the meantime a Notice of Appeal has been filed.

Orders accordingly

DECISION

Bineshri **Prasad** applies for judicial review, under the Administrative Decisions (Judicial Review) Act 1977, of a decision of the respondent refusing his application for a permanent entry permit allowing him to reside indefinitely in Australia. He is a citizen of Fiji. In February 1979 the applicant, then aged 25 years, entered Australia as a visitor pursuant to a temporary entry permit valid for three weeks. He stayed with his brother, Sarda **Prasad**, who has resided in Sydney, since 1973. He made application for a further temporary permit but this was refused. Nevertheless he remained in Australia until May 1979, when he was detained as a prohibited immigrant. A few days later he departed voluntarily and returned to Fiji.

2. Prior to his visit to Australia the applicant had known a young lady - she was only 16 in early 1979 - named Agnes **Prasad**. They had kept company from about July 1978 and had discussed the possibility of marriage on a couple of occasions but nothing had been settled. Miss **Prasad** was also a Fijian citizen but she had been granted a permanent entry permit into Australia, apparently because her mother was a permanent resident of this country. After his return from Australia the applicant renewed his association with Miss **Prasad** and eventually they decided to marry. According to Mrs **Prasad**, their intention at that time had been to make their home in Fiji. On 18 July 1980 they were married in Suva, Fiji. Upon the same day, but after the ceremony, Mrs **Prasad** - according to her - informed her husband that she wished to live in Australia. It was agreed that she would forthwith come to Sydney and live with her husband's brother and his wife whilst arranging an entry permit for her husband. Arrangements were speedily made and she in fact departed Fiji for Sydney upon the following day. Upon arrival in Australia Mrs **Prasad** went to live with the applicant's brother and sister-in-law. She lodged with the Department of Immigration and **Ethnic Affairs** a spouse sponsorship application for an entry permit for her husband. The application was referred to an officer of the Department in Suva who, on 30 December 1980, wrote to Mr **Prasad** to inform him of the grant of "a temporary entry permit for eighteen (18) months in the first instance". He added that the "question of granting you resident status will be considered in Australia at the end of that period". The officer notified the Regional Director of the Department in Sydney of his decision, commenting: "We do not believe the **Prasads**' marriage will stand the test of time but we are reluctant to oppose his entry any longer".

3. In March 1981 Mr **Prasad** arrived in Sydney. He went to his brother's two bedroom flat at 27 Dover Road, Botany. There, according to the evidence given before me by each of the applicant, his wife and his brother, he shared a room with his wife. The applicant commenced to work in his brother's panel beating business, conducted in premises a couple of blocks from the flat. The applicant and his wife, under cross-examination before me, each asserted that since the applicant's arrival in Australia they had lived a normal married life together, sharing each other's company during leisure hours and having a continuing sexual relationship. The brother, Sarda **Prasad**, confirmed that the applicant and his wife had lived together, sharing a bedroom in his flat from the time of the applicant's arrival in Australia until a few months ago when they moved to their own flat at Burwood. During the whole of his period in Australia the applicant has worked in the panel beating business. Mrs **Prasad** worked for some time in factories at Petersham and at Auburn but then obtained employment, which she still has, as a nurse at Burwood.

4. After his arrival in Australia the applicant made application to the Department, pursuant to s.6 of the Migration Act 1958, for a permanent entry permit. He was qualified to make such an application

because of his wife's right of residence in Australia: see Migration Act s.6A(1)(b). The applicant and his wife were interviewed by departmental officers on a number of occasions. The first interview revealed by the evidence took place on 17 December 1981. A report of that interview was admitted into evidence. It sets out various matters relating to the relationship of Mr and Mrs **Prasad**, their living and working arrangements and their family relationships before concluding:

> "Couple seem a little vague in answering questions but relationship seems genuine. Process for PR ("permanent residence")once extent of processing already complete in Fiji has been established."

5. However, no permanent entry permit was issued. On 17 May 1983 - the delay is not explained by the evidence - Mr and Mrs **Prasad** were interviewed once again, this time separately. The interviewing officer was Mr M D Berry. According to Mr Berry, the interview with each of the **Prasads** occupied about 20 minutes. No transcript or verbatim record was kept. Mr Berry's notes were not placed on file. They have been destroyed. The only record of this interview - which turned out to be crucial to the ultimate decision to refuse a permit - is the report of Mr Berry. After recording relevant personal particulars, including the address of the applicant at Botany, Mr Berry commented:

> "Spouse of a P/R Agnes **Prasad**. Evidence sighted. This is the couples third I/V.
> * Claims to have resided at the above address for 2 yrs spouse approx 3 yrs. 6 persons resident. Rent is 70 p.w. 2 bedroom unit.
> * Earns $220 p.w 8 am - 4 or 5. Spouse 2-11 Mon to Friday at Auburn. She travels by train or is given a lift with a cousin. Employed at Auburn Old Peoples home. Spouse earns $180 p.w.
> * Claims to have stayed at home last night, A/Named bought Kentucky Chicken for the family. Spent Sunday watching a video (cannot remember the name) around Midday then stayed at home for the rest of the day.
> * Claims that his wife got on very well with her brother - no conflicts whatsoever.
> * These stories were totally different - She was obviously away for the weekend at her mothers place in the country (Oak Flats).
> * Her story re employment wages and workings hrs differed to his. Mr P did not know the name of the old persons home or earnings.
>
> SUMMARY
>
> The couple were interviewed together on the 17th of Dec '81 where the I/viewing officer recommended approval. It may be noted as at folio 42 & 43 that doubts existed re the bona

fides of this marriage. It has clearly not stood the test of time, and I am quite convinced that the marriage is one of convenience.

They appear totally unsuited but would not admit not living together which I believe is the case.

Recommend Rejection."

6. The reference to Mrs **Prasad** working at Auburn is clearly a mistake for Burwood but nothing turns on that. At these interviews each of the **Prasads** was asked to draw a sketch of the internal lay-out of their bedroom. The matters mentioned by Mr Berry, and certain discrepancies in the sketches, are critical to one issue arising in this Application, the reasonableness of the decision, and I will return to them.

7. Mr Berry's report went to another officer who commented that it was "a marriage case which cannot on the information be conclusively resolved." That officer suggested a visit to the flat at Botany outside the working hours of Mr and Mrs **Prasad** but this suggestion was over-ruled by a superior officer who suggested that Mr Berry should "expand on the points of difference in their stories" or alternatively that a further officer, Mr R J Collins, interview the applicant and his wife. In fact both these things happened. On 26 May 1983 Mr Berry wrote this further report:

"Further to my interview report, I will clarify the discrepancies.

1 Mrs **Prasad** claimed that she travelled to Auburn by train or is given a lift by her cousin who works in the same area. Mr **Prasad** claimed that his brother gave his wife a lift to work or drove her to the station (Redfern). The brothers are supposedly in a Spray Painting business, leaving for work at 8 am and not returning till 6 pm. Her shift hours are 2 pm - 11 pm.

2 Mr **Prasad** claimed that the family had Kentucky Fried Chicken for dinner, his wife claimed they had Indian Curry and rice, then claimed that she ate out.

3 Mrs **Prasad** admitted that they spend little time together because she preferred to be with her mother who resides at Oaks Flats. It appears that she spends most weekends with her family.

4 As per folio 98 & 99 the description of their bedroom is totally different. Mr

Prasad had claimed there were chairs in the room and the cupboard was up against a wall. Mrs **Prasad** had a wardrobe in the middle of the room and no chairs.

5 Mr **Prasad** had no idea as to where his wife worked other than the fact that it was in Auburn. Quote 'In an old Peoples home or something'. "

8. Mr Collins interviewed Mr and Mrs **Prasad** on 3 June 1983. On 7 June he reported:

"The couple were interviewed separately and aspects of their previous interview conducted 17.5.83 and their social life were discussed.

Their comments on subjects raised at their previous interview were quite similar which was in direct contrast to the answers and descriptions of aspects conveyed to Mr. Berry.

At folios 98 and 99 Mr. Berry sought a description of their living quarters from both parties. His comments at folio 104 (point 4) indicate how different their descriptions were. Their comments now were almost identical. Mr. Berry during the course of his interview questioned the couple on meals taken and at folio 104 point 2 a further discrepancy is outlined. The couple were again questioned on family meals over the previous weekend. Mrs. **Prasad** advised the following with Mr. **Prasad**'s comments in brackets. Saturday Lunch - Roast Lamb (Roast Lamb). Saturday Dinner - Curried Fish (Fish). Sunday Lunch - Roast Chicken (Roast Lamb) and Sunday Dinner - Meat Curry (Chicken Curry).

The line of questioning at Mr. Berry's interview had obviously been discussed, their answers to my questions on living quarters and meals were ones of anticipated replies.

Further discussions resulted in conflicting comment by Mr. and Mrs. **Prasad** on their home, economic and social life.

On employment, **Prasad** advised he is still

employed with his brother an aspect confirmed by Mrs. **Prasad**. On the question of Mrs. **Prasad**'s employment conflicting comments were obtained.

Mrs. **Prasad** advised she is presently employed at Lynburn Nursing Home at 27 Grantham Street, Burwood as a "nurse". She commenced in February 1983 and travels by train to this employment from Redfern station. Her spouse she states drives her to and from Redfern station daily. **Prasad** confirmed these transport arrangements. Mrs. **Prasad** further advised she had been employed on a casual basis for Liley plastics at Auburn in January 1983. Mrs. **Prasad** then advised she was unemployed for all of 1982 as the result of a broken ankle. Mr. **Prasad** when questioned on his wife's employment commented she was employed by 'Burwood Old Peoples Home'. He could not elaborate further. Mr. **Prasad** then advised his wife's previous employment was with a 'spring factory in Livingstone Rd.', a position he claims she held until November 1982. He could not advise the exact location of the factory but did confirm she was unemployed between this employment and her present position. He made no comment about casual employment during January 1983.

On their financial situation Mrs. **Prasad** commented they now had a joint Westpac Savings account (Botany Branch). She advised the account was opened about 3 weeks ago and had a balance of $1000. Mrs. **Prasad** stated she had deposited sums of $950 and then $50 into this account.

Mr. **Prasad** on the other hand stated they had no joint account. He has an account in his name with Westpac (Botany Branch) with a balance of $1000. He claims his wife had deposited $100 into the account but had not deposited money for some two months.

Their social life was discussed and further discrepancies were encountered. Mr. **Prasad** commented they had a very quiet social life with very few outings, preferring to watch

television. She claimed the last occasion they went out together was for a Sunday drive a couple of months ago around Botany. Mr. **Prasad** could not recall this outing and stated they had not been out together this year.

In view of Mr. Berry's comments folios 101 and 104 the questions of visits by Mrs. **Prasad** to her mother was put to both parties.

Mrs. **Prasad** commented she last visited her mother at 'The Oak' (near Camden) in early May 1983. This has been the only visit this year. As a point of interest Mrs. **Prasad** was asked whether her mother had a telephone and advised no phone was connected.

Mr. **Prasad** confirmed his wife visited her mother 3 or 4 weeks ago but added she had visited her mother on at least 5 or 6 occasions this year. On the matter of his mother-in-law having a telephone number he advised he did not know the number but his wife would have it.

Mr. Berry's recommendation (folio 100) has been totally substantiated following my further discussions with this couple.

At the interview with Mr. Berry on 17 May 1983 conflict was evident in comments on present employment, living quarters and meals. The latest discussion with this couple resulted in continued discrepancy on their part in relation to aspects of his spouse's employment history, their financial situation and their social life in particular his spouse's visits to her mother.

It is inconceivable to accept a genuine relationship exists when continual discrepancies are unearthed at interview.

I support Mr Berry's comments at folio 100 and recommend refusal of Bineshri **Prasad**'s application for the grant of resident status."

9. That recommendation was accepted. On 19 August 1983 Mr **Prasad** was notified that his

application had been refused by the Director Operations, a person apparently authorized to act on behalf of the Minister. The letter proffered this explanation:

> "Permanent residence may not be granted to a visitor where it has been judged that he contracted a marriage for the purpose of claiming residence in Australia and where a genuine on-going marriage relationship does not exist. Information available to him has caused him to assess your marriage in those terms and it constitutes the reason for the refusal of your application."

10. Mr **Prasad** sought the assistance of the Marrickville Legal Centre which organisation, by letter dated August 1983, sought review within the Department of the decision. The letter, which was written by Ms Betty Hounslow, a Community Worker, contained a denial, by both Mr and Mrs **Prasad**, that their marriage was other than genuine. It put arguments against trhe view formed by the departmental officers and concluded with a "personal observation" of Ms Hounslow:

> "I have had occasion over the past two months to ring the **Prasad** household at odd, unannounced times. I have spoken to the **Prasads** as well as to Mr. **Prasad**'s sister-in-law. I have no doubt that Mrs. Agnes **Prasad** is indeed living with her husband's family. Given that she has family of her own here and hence other sources of support and accommodation, it would be strange for her to be living with her husband's family if this was purely a 'marriage of convenience'."

11. At about the date of that letter the Marrickville Legal Centre submitted other documents. They included a copy of the Marriage Certificate of Mr and Mrs **Prasad** and eight Statutory Declarations. The declarations each dealt with the nature of the assocation between the applicant and his wife. Their contents may be summarized thus:

> Mr J Sinclair, flat 19, 27 Dover Road, Botany, the caretaker of the flats - Mr and Mrs **Prasad** "come to pay their rent together".
>
> Mrs Clarita Bareto, flat 9, 27 Dover Road, "I knew Mr. Bineshri **Prasad** and Mrs Agnes **Prasad** two years ago. I see them all the time because they mind my son. They show up happiness in home. They live in 8/27 Dover Road, Botany."
>
> Mr Donald Tullock, flat 12, 27 Dover Road

"I knew Mr Bineshri **Prasad** and Mrs Agnes **Prasad** two years ago. I see them together happy and go together in the shop. I know they are happy and see them shopping in the shop."

Mr Ljubomir Stankovski of Brighton said that he had known Mr and Mrs **Prasad** for two years, that they had visited each other's houses and gone out together and that "they live together at 8/27 Dover Road, Botany."

Mr Vigay Singh of 39 Banksia Street, Botany said that he had known Mr and Mrs **Prasad** for approximately two years, that he often visited their house and they visited him and that "I have always seen them as a very happy married couple."

Mr J Lemparelli of 1306 Botany Road, Botany said that he had known Mr and Mrs **Prasad** for approximately two and a half years - he did not say in what circumstances - and that "during this time, as far as I know, they have always apparently been a happily married couple."

Mr George Navaro of Petersham said that he had known Mr and Mrs **Prasad** for two and a half years, having seen them "on many occasions when they come to see soccer, when I play at Berala Park, Botany" and that he knew them "as a happily married couple".

Mr George Dimitrijevic of Kogarah said that he had worked with Mr **Prasad** for two and a half years, having known him for five years and Mrs **Prasad** for three years. "During that time we visited each other and shared social activities . . . I know them as a happily married couple for two and a half years."

12. On 7 March 1984 an Immigration Review Panel, consisting of three officers of the Department, considered the case. The Panel had before it all of the material to which I have referred. The course of proceedings before the Panel, and their conclusions, are each referred to in their report to the Minister dated 9 March 1984, as follows:

"14 The Panel met first to agree upon its conduct of this appeal, We then called in the DIEA case officers (Messrs Collins and Berry) to

re-capitulate the reasons why they had concluded that the marriage was not bona fide. Having accepted that the reasons given were prima facie relevant, the Panel then called in the appellants, who were accompanied by Ms Betty Houslow of the Marrickville Legal Centre, and had the DIEA officers re-state their reasons. Our purpose was:

(1) to ensure that the appellants were aware of the reasons for rejection

(2) to give them an opportunity to respond and

(3) to enable the DIEA officers to consider whether, in the light of the appellants statements, they still considered the reasons which they had previously given to be fair and reasonable.

15 In all but one respect, the DIEA officers maintained their original position. The exception concerned Mr **Prasad**'s statement that his wife was working at a time when she stated she was at home with a broken ankle. Because she was 'on compo' and being paid by her employer, Ms Houslow suggested that the question could have been misunderstood. The DIA (sic) officers was not convinced but, in the Panel's view, generously and correctly gave "the benefit of the doubt" to the appellant.

16 The Panel then met in camera to consider its recommendations. It transpired that all three of us had separately concluded that the department's reasons for rejection were still relevant and that nothing suggested by the appellants cast significant doubt upon them.

17 We were particularly, but not solely, influenced by the appellants' total failure to explain why they had given significantly different descriptions of the marital bedroom. Ms. Houslow's reference to 'problems of spatial perception' did not convince us to set aside this significant fact.

18 The Panel wishes to express its appreciation to Messrs Collins and Berry, who impressed us with their professionalism and objectivity. They

were most helpful.

19 We are also grateful to Ms Betty Houslow for ensuring that the appellants' case was presented to us as fully and as favourably as possible. We see an important role for competent cousellors of her calibre.

20 The Panel unanimously finds that the legislation, policy and criteria relevant to this appeal have been correctly applied and recommends that the departmental decision be maintained and explained."

13. On 9 April 1984 the Minister approved the Panel's recommendation. His decision was notified to Ms Houslow in a letter dated 2 May 1984 which stated, in part:

"The Minister has decided that the departmental decision of refusal is to stand on the grounds that, whilst the legal requirement of marriage to a citizen or resident of Australia has been fulfilled, the marriage has been assessed, through the course of a number of interviews, as being one of convenience, contracted only to enable Mr **Prasad** to be permitted to remain in Australia. You will appreciate that persons in Mr **Prasad**'s situation should not be granted advantages which would not otherwise be available. It is expected that a marriage be assessed as genuine and ongoing. All the information available to the Minister indicated that this was not so in this case."

14. The applicant requested a statement, under s.13 of the Administrative Decisions (Judicial Review) Act 1977, of the Minister's findings on material questions of fact and reasons for decision. The findings of fact referred to the matters already summarised by me. The reasons were shortly stated. I quote them in full:

"C THE REASONS FOR MY DECISION

9 The applicant, being the spouse of a permanent resident of Australia, satisfies the condition of section 6A(1)(b) of the Act and his application may therefore be considered.

10 In considering whether the applicant should be granted a permanent entry permit, I had regard to the policy expressed in para

> 5.2.22 of the Migrant Entry Handbook: 'The basic test of a marriage is whether the parties genuinely intend to continue living as a married couple in Australia.' I considered that the applicant's marriage had been entered into for the purpose of securing resident status in Australia. I accordingly decided to refuse the application."

15. The applicant seeks review of the decision of the Minister to refuse his application for a permanent entry permit upon the basis that the making of the decision was an improper exercise of the power conferred by the Migration Act. He refers to s.5(1)(e) of the (Administrative Decisions (Judicial Review) Act. In particular, he relies upon four of the heads of improper exercise referred to in s.5(2) of that Act: taking into account an irrelevant consideration (s.5(2)(a)), failing to take into account a relevant consideration (s.5(2)(b)), the exercise of the power, being a discretionary power, in accordance with a rule or policy without regard to the merits of the particular case (s.5(2)(f)) and the exercise of the power in such a manner that no reasonable person could have exercised it (s.5(2)(g)).

16. The first and third objections, under paras (a) and (f) respectively, are without foundation. They may be disposed of shortly. In relation to taking into account irrelevant considerations it is said that the Minister erred in taking into account the circumstances surrounding the applicants visit to Australia in 1979. I remark, firstly, that it is not clear that the 1979 visit played any part in the decision making process. The fact and circumstances of the visit were known to the relevant departmental officers and to the Minister but neither Mr Berry nor Mr Collins referred to that visit in his reasons for recommending rejection of the application. The Panel did not include any reference to the visit in its conclusions. It was not referred to in the letter conveying to the applicant the reasons for rejection of either his original application or his request for review. Although the Minister referred to the visit as a material fact in his s.13 statement he did not include it as a reason for his decision. Secondly, and in any event, I do not agree that the 1979 visit would have been an irrelevant consideration. The circumstances surrounding that visit indicate that Mr **Prasad**, at that time, desired to remain in Australia and that he was prepared to contravene the terms of his temporary entry permit, and the restrictions imposed upon him by the Migration Act, in order to do so. Those facts were not irrelevant to the consideration by the departmental officers and by the Minister of the genuineness of a marriage contracted by the applicant, only 14 months after his reluctant departure from Australia, to a person who was entitled to reside in Australia and therefore to be able to qualify him to apply for a permanent entry permit. The events of 1979 gave a colour to subsequent events which they might otherwise have lacked. They could not, in themselves, justify an adverse conclusion about the marriage but they did entitle the decision makers to approach that subject with some scepticism.

17. I admitted into evidence, over the objection of the applicant, two extracts (paras 5.1.1 and 5.2.21 to 5.2.24) from the document referred to in the Minister's statement of reasons: a departmental publication entitled "Migrant Entry Handbook". I regarded them as relevant to an understanding of those reasons. The document appears to be a manual for guidance of officers of the department. Chapter 5 deals with marriage, dependency and the family unit. The relevant extracts read as follows:

> "5.1.1 The spouses and dependants of principal applicants and Australian resident sponsors receive significant migration concessions under migration policy. For this reason claims of marriage, dependency, and other family relationships are to be

thoroughly investigated. This Chapter sets out the requirements that must be satisfied for migration purposes.

. . .

5.2.21 Assessment of relationships (including marriages) as genuine: Ideally, the quality of a personal relationship should not be of concern in administering migration policy. Nevertheless, it is fact that marriages are entered into by some people for the sole purpose of gaining residence in Australia and circumventing the more stringent requirements applying in other categories. Parties to these marriages of convenience have no intention of maintaining the relationship once they have arrived in Australia. Concern most often arises where the relationship is of recent origin.

5.2.22 The basic test is whether the parties genuinely intend to continue living as a married couple in Australia.

5.2.23 In assessing the genuineness of a marriage attention needs to be given to cases where there has been a history of previous applications, attempts to circumvent immigration policy, indications of financial or other material gain from the marriage, evidence of collusion, or evidence that the marriage is solely one of convenience.

5.2.24 Final determination of a marriage as one of convenience is not to be taken below Class 10 level. Where so determined the application will be refused."

18. Counsel for the applicant sought to turn the tender to his own advantage. He argued that the decision of the respondent represented a mere application to this case of the policy set out in those extracts, without reference to the circumstances of this case, so as to bring the matter within para (f) of s.5(2) of the Administrative Decisions (Judicial Review) Act. There is no substance in that submission. I find it difficult to see how para (f) could have any application to provisions such as those extracted from the handbook. They do not specify any rule or policy but rather state a test to be applied in the determination of a matter of fact which may fall for consideration in relation to a particular application. However, in fairness to the officers concerned, the submission having been made, I should say that whatever view may be taken about the manner in which the investigation was carried out or the reasonableness of the conclusion which was ultimately reached in relation to the genuineness of the marriage it is clear that the department was engaged in a real and sincere attempt to resolve that question. There is no basis for any suggestion of a blanket application of a pre-determined policy

without reference to the facts of the case.

19. Four matters are mentioned by the respondent in support of the ground mentioned in s.5(2)(b) of the Administrative Decisions (Judicial Review) Act: failing to take into account a relevant consideration. First, that the Minister failed to have regard to the report of the interviewing officer in Suva who, in December 1981, expressed the opinion that the marriage relationship was genuine. That this report was not taken into account appears from the s.13 statement. It was not listed by the Minister as being amongst the documents before him when he made his decision and it was not otherwise referred to by him. The report was on the departmental file and must be regarded as being constructively before the Minister: see Peko-Wallsend Limited v Minister for Aboriginal Affairs (Full Court, 15 February 1985). It was conceded that the relevant question for the Minister was the quality of the relationship, and the intentions of the parties, at the time of his decision in April 1984 and that that quality, and those intentions, might have been very different in December 1981 but it was argued that, in a context where the whole history of the relationship was being examined to determine its quality in April 1984, it was erroneous to ignore the assessment of that relationship made by a competent officer in December 1981. I think that this submission is correct. The weight to be given to the December 1981 assessment was a matter for the Minister but he was bound, in my opinion, to take it into account.

20. Secondly, it is said that the Minister failed to take into account the claim of the applicant that the marriage was genuine. There is no basis for that submission. It was abundantly clear to both the departmental officers and to the Minister that both the applicant and his wife - truthfully or otherwise - were asserting that the marriage was genuine.

21. The third matter relied upon in support of this ground is the failure of the Minister to have regard to the contents of the eight statutory declarations which were furnished to the department in support of the application for internal review. The evidence indicates that the declarations were available both to the Panel and to the Minister but there is nothing to indicate that either decision maker took any notice of them. They are not mentioned in the reasons for either decision. Although the members of the Panel questioned Mr Berry and Mr Collins, they did not seek comment on this new material. The members of the Panel appear not to have posed for themselves the obvious question whether the content of the declarations called in question the reliability of the officers' views. The declarations were, certainly, couched in general terms. Had they been drafted by a lawyer they would, no doubt, have descended to greater particularity. But they dealt with a matter of central relevance: whether - as claimed by them - Mr and Mrs **Prasad** were living a normal married life together or whether - as Mr Berry thought - they were "not living together". Three of the deponents claimed to live in the same block of flats as Mr and Mrs **Prasad**; prima facie they would have an excellent opportunity to know whether Mr and Mrs **Prasad** usually lived together. Three other deponents claimed to have visited the **Prasads** in their flat and to have received them, visiting together, in their own home. One deponent claimed to have seen them together, on a recurring basis, at the football. On its face this material provided substantial support to the applicant's case. Subject to reasonableness, the Minister was not bound to accept the assertions in the declarations but he was bound to take them into account.

22. Finally, the applicant refers to the failure of both the Panel and the Minister to have regard to the assertion by Ms Houslow, in the passage from the letter from the Marrickville Legal Centre which I have quoted, that she had over the previous two months telephoned the **Prasad** household "at odd unannounced times" at which she had succeeded in contacting both Mr and Mrs **Prasad**. She expressed her own opinion that Mrs **Prasad** "is indeed living with her husband's family". These statements were not made upon instructions; they were matters as to which Ms Houslow pledged her own reputation. They were, prima facie at least, reliable statements supportive of the applicant's case. They came from a person whose competence was praised by the Panel, who met her. Yet, as with the

statutory declarations, both the Panel and the Minister appear to have completely ignored what she had said.

23. The applicant has made good his contention that the Minister failed to take into account relevant matters in respect of the report of the December 1981 interview, the statutory declarations and Ms Houslow's "personal observation". The consequence is that the decision is bad in law. It must be set aside and the matter remitted to the Minister for re-consideration in the light of the whole of the available relevant material.

24. That conclusion makes it strictly unnecessary, for the purposes of this Application, for me to deal with the final ground of invalidity argued by the applicant: "the exercise of a power that is so unreasonable that no reasonable person could have so exercised the power" (s.5(2)(g) of the Administrative Decisions (Judicial Review) Act). However, the ground has been fully argued; matters being put which are relevant to the Minister's reconsideration of the matter. Under those circumstances it is, I think, desirable for me to indicate the conclusions I have formed in relation to that ground.

25. There is a paucity of judicial exigesis upon para (g) of s.5(2) - or of s.6(2) which is in similar terms - of the Administrative Decisions (Judicial Review) Act. Perhaps this is because other grounds of invalidity will usually be available in those cases to which it has arguable application. In only three decisions of this Court, so far as I am aware, has the paragraph been separately referred to. In the first decision, Perkins v Cuthill (2 July 1981, not reported), Keely J accepted - without discussing the meaning or extent of operation of the paragraph - its application as an answer to a suggested justification of a decision held invalid on other grounds. In Plegas v McCabe (3 August 1984, not reported) Lockhart J rejected a submission that a decision to seize bank notes being taken aboard an aeroplane, in apparent contravention of the Banking (Foreign Exchange) Regulations, was unreasonable. His Honour did not find it necessary to discuss the operation of the paragraph. In Willara Pty Limited v McVeigh (1984) 54 ALR 65 at pp 106-110, McGregor J held that a ground of objection to the Minister's decision, based on para (g), had been made out. His Honour at pp 106-110 emphasised the comment made by Lord Hailsham LC in Re W (an infant) (1971) AC 682 at p 700:

> "Not every reasonable exercise of judgement is right, and not every mistaken exercise of judgement is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgement with his own."

26. The view has been expressed by text-writers that the paragraph is intended to apply to applicants under the Act the principle developed by the common law that an administrative decision, made under statutory authority, is legally invalid if the decision is one which no reasonable person could have reached: see Pearce, "Administrative Law Service" para 426, Flick, "Federal Administrative Law" para 3180. That view is consistent with the approach of McGregor J in Willara. I agree with it; so that it is desirable to have regard to judicial authority in relation to the common law rule in considering the facts of this case.

27. The common law position was summarized, in a famous passage, by Lord Greene MR in Associated Provincial Picture Houses v Wednesbury Corporation (1948) 1 KB 223 at p 230 when he said: "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere". He added a caution: "to prove a case of that kind would require something overwhelming".

28. In Secretary of State for Education and Science v Tameside Metropolitan Borough Council(1977) AC 1014 at p 1064 Lord Diplock explained the meaning, in this context, of "unreasonable": "To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt". More recently, in Bromley London Borough City Council v Greater London Council (1983) AC 768 at p 821 his Lordship re-stated the principle in language which avoided altogether the use of the emotive word "unreasonable", referring to "decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them." It is, I think, in that sense that para (g) of our Act is to be understood.

29. There may be some question, in the light of more recent authority, as to the correctness of Lord Greene's view that, to make out this ground of invalidity, the case must be "overwhelming": see Griffiths "Legislative Reform of Judicial Review of Commonwealth Administrative Action" (1978) 9 Federal Law Review 42 at pp 57-58, although noting that many of the cases there mentioned relate to the different question whether there is a sufficient nexus between the condition and the power. The circumstances in which the ground will be established is indicated by the judgements in the High Court of Australia in Parramatta City Council v Pestell [1972] HCA 59; (1972) 128 CLR 305. That case involved the determination by a local council of the portion of its area which would be specially benefited by works in respect of which a local rate was to be levied and which might therefore lawfully be made subject to that rate. Menzies, Gibbs and Stephen JJ each applied to the council's decision the usual rules relating to judicial control of administrative actions. At p 323 Menzies J said:

> "The definition of the land that may be subjected to a local rate is determined by the council's justifiable opinion of special benefit so that, if the so-called opinion could not be justified on any reasonable ground, then, the requisite opinion is lacking. There is, however, a world of difference between justifiable opinion and sound opinion. The former one is open to a reasonable man; the latter is one that is not merely defensible - it is right. The validity of a local rule does not depend upon the soundness of a council's opinion; it is sufficient if the opinion expressed is one reasonably open to the council. Whether it is sound or not is not a question for decision by a court.
>
> A court may interfere only when it appears that the portion defined is so obviously not the land which the execution of the works benefits specially that the court can say that the council's professed opinion that it is, is one that is not in keeping with the section so that the making and levying of a rate on the basis of that opinion is outside its power."

30. See also per Gibbs J at p 327 and per Stephen J at p 332.

31. The distinction made by Menzies J between a justifiable opinion and a sound opinion is, of course, fundamental to the distinction between judicial review of an administrative decision and review of that same decision upon its merits by a body such as the Administrative Appeals Tribunal. In Borkovic v **Minister for Immigration** and **Ethnic Affairs** (1981) 39 ALR 186 at p 188 Fox J pointed out the limitations of judicial review; in particular that the Court "does not have power to make a decision on the merits of the factual position for itself". It is confined to considering whether the case comes within any of the grounds of invalidity specified in the Administrative Decisions (Judicial Review) Act. In Hamblin v Duffy (1981) 34 ALR 333 at p 335 Lockhart J spelt this out more fully, commenting that, in an application for judicial review, "the question for the court generally is whether the action is lawful in the sense that it is within the power conferred on the relevant Minister, official or statutory body; or that the prescribed procedures have been followed; or that the general rules of law, including adherence to the principles of natural justice, have been observed". His Honour might have added a reference to the making of a decision which might have been made by a reasonable person, whether or not others might regard it as sound. A decision which fails to meet that test is unlawful - not merely liable to be set aside upon administrative review on the merits - because the law imputes to the legislature an intention to limit the exercise of the discretion which it confers to the making of decisions free of arbitrariness or partiality; see Mixnam's Properties Limited v Chertsey Urban District Council (1964) 1 QB 214 at pp 237 and the discussion in De Smith "Judicial Review of Administrative Action" 4th Edition pp 350-354.

32. A question arose, during the hearing of the evidence, as to the relevance to the issue of reasonableness of material which was not before the Minister, actually or constructively. There are at least three possible views. The most restrictive view is that para (g) applies only to a case in which the Court is able to hold that, upon the material actually or constructively before the decision maker, the decision was unreasonable. At the opposite extreme it is arguable that the question is whether, upon the evidence before the Court as to the facts at the date of decision, and whether or not all of those facts were known to, or reasonably ascertainable by, the decision maker, his decision, objectively considered, was unreasonable. An intermediate position is that the Court is entitled to consider those facts which were known to the decision maker, actually or constructively, together only with such additional facts as the decision maker would have learned but for any unreasonable conduct by him.

33. I have been unable to find any discussion in the authorities of this question, possibly because the facts will often be clear. Consequently, I express no more than a tentative view. But in principle, as it seems to me, the intermediate position is correct. Under s.5(1)(e) and s.5(2)(g) the Court is concerned with the manner of exercise of the power. A power is exercised in an improper manner if, upon the material before the decision maker, it is a decision to which no reasonable person could come. Equally, it is exercised in an improper manner if the decision maker makes his decision - which perhaps in itself, reasonably reflects the material before him - in a manner so devoid of any plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew to be readily available to him. The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision maker to make the applicant's case for him. It is not enough that the Court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision making power in a manner so unreasonable that no reasonable person would have so exercised it. It would follow that the Court, on judicial review, should receive evidence as to the existence and nature of that information.

34. The view that evidence may be adduced of facts available to the decision maker, though not necessarily before him at the time of decision, is consistent with the actual course of proceedings in

Pestell, where the plaintiff was allowed to prove that the basis upon which the council had acted in selecting the land to be rated was erroneous in fact - see the summary of facts by Street J quoted by Menzies J at p 324. It may also derive some support from the comment made by his Honour at p 322:

> "If it could be shown that the portion defined included land about which the Council concerned could not in reason hold the opinion that it would be specially benefited by the execution of the works, the section would not authorize the making and levying of a local rate. Thus, for instance, if the works to be executed were the drainage of low-lying land, a council could not, in reason, be of the opinion that high land from which water flowed freely down to low-lying land would be specially benefited by the execution of the works."

35. It seems that Menzies J envisaged that the person challenging validity could succeed by evidence establishing the true position - being in respect of a matter in relation to which it would be unreasonable for a council not to have ascertained the facts - whether or not he could show that the council had actual or constructive knowledge of the correct facts.

36. It remains for me to apply the principles I have discussed to the facts of the present case and to consider whether the decision reached by the Minister to refuse Mr **Prasad**'s application on the ground that he and his wife did not genuinely intend to continue living as a married couple in Australia and that the marriage "had been entered into for the purpose of seeking resident status in Australia" was one which, to apply the words of Menzies J, was justifiable - whether or not it was also sound - or whether by contrast, and in Lord Diplock's words, it was so devoid of plausible justification that no reasonable person could have made it. I start with the material actually before the Minister. This consisted - according to the s.13 statement - of the report of the Immigration Review Panel, a Statement of Policy and Reasons prepared by the Department, which shortly set out the history of the matter and which commented upon the submission of the Marrickville Legal Centre, and the various documents submitted by the applicant in support of his request for review. The test the Minister chose to apply to his decision was that stated in para 5.2.22 of the Migrant Entry Handbook, namely "whether the parties genuinely intend to continue living as a married couple in Australia". The Minister, rightly in my opinion, thought it relevant to the determination of that question to have regard to the whole history of the marriage. It was obviously relevant to the present intention of the parties to consider the circumstances under which the marriage had been contracted but, as I believe the Minister and the Department recognized, those circumstances could not conclude the matter. A marriage contracted for convenience may ripen into a full relationship in which the parties, at the time of the decision, genuinely intend to continue living together as a married couple. Moreover, human motives are often mixed. There may be cases in which parties hold each other in real affection but in which some other factor provides the catalyst for the decision to marry. In such a case the marriage may be genuine enough, applying the test of intending to live together as a married couple, notwithstanding that, absent the other factor, the parties would not have married in the first place. I have the impression that, in the present case, Mr **Prasad** may have had a mixture of motives. He had wished to stay in Australia in 1979 but was obliged to leave. The evidence before me revealed that, some three months before his wedding, he had written to his brother informing him of his intention to marry and of his hope of returning to live in Australia with his bride. It may be that one of the attractions to him of the then Miss **Prasad** was

her capacity to qualify him to seek residence in Australia. Mr **Prasad**'s acquiesence in the decision of his bride to come to Australia immediately after the wedding strongly suggests that, at the time of the marriage, he wished to take advantage of that capacity as soon as possible. But it does not follow that, even at that time, the couple lacked the intention to live together as a normal married couple. Still less do those facts conclude the inquiry as to their intention when, nearly four years later, the Minister came to make his decision.

37. The most significant material before the Minister, arguably adverse to the applicant, was the report of Mr Berry. Mr Collins was strongly influenced by that report in making his own report, which was adopted. The Panel, in turn, was persuaded by the reports of Mr Berry and Mr Collins - no new "adverse" material having been placed before it - in recommending adherence to the prior decision. From the terms of the letter of 2 May 1984, conveying the Minister's decision, it is apparent that the Minister accepted the Panel's assessment of the situation. So Mr Berry's report is crucial.

38. Mr Berry explained in evidence before me that the course he followed at the interview was to see the applicant alone and to take him through a series of questions, noting the answers. He then saw Mrs **Prasad**, alone, and asked her the same questions. The items in his first report which are marked with an asterisk (as more fully explained in the second report) are matters in relation to which he found such a degree of inconsistency as, considering them together, to conclude that Mr and Mrs **Prasad** were not living together.

39. It seems to me that, upon analysis, the "inconsistencies" amount to very little indeed. The first item is the claim by the applicant to have resided at the flat at Botany for two years, contrasted with the claim of Mrs **Prasad** to have resided there for three years. But Mr Berry had not known, or had overlooked, the fact that Mrs **Prasad** came from Fiji to Sydney - according to her to the flat - eight months before her husband. As at the date of the interview she had resided there for two years and ten months, he for two years and two months. It would be not unnatural for them to round out the period to "three years" and "two years" respectively. When the position was pointed out to Mr Berry in his evidence he agreed that there was no inconsistency in relation to this matter.

40. The second "inconsistency" is more fully explained in Mr Berry's second report. He could not see how, if Mr **Prasad**'s brother worked from 8 am to 4 or 5 pm, the brother could give Mrs **Prasad** a lift to the station to commence work at 2 pm. He did not realise that the brother's panel beating business was within easy walking distance of the flat. He also noted that Mrs **Prasad** referred to her cousin giving the lift, whereas Mr **Prasad** mentioned his brother. The evidence of Mrs **Prasad** in this Court was that she used to walk from the flat to the panel beating shop when she was ready for work. Someone at the shop, usually her brother-in-law, would drive her to Redfern station. This evidence was corroborated both by her husband and brother-in-law. The reference to a "cousin" is unexplained. The evidence does not reveal the existence of such a person. It may be an error in comprehension. However, on the critical matter - how Mrs **Prasad** came to be driven to the station by people who had already gone to work - the position is clear. Unfortunately, Mr Berry did not put the "inconsistency" to the applicant. So he deprived himself of the explanation which, when it was put to him in Court, caused him to agree that it resolved any inconsistency.

41. Thirdly, Mr Berry noted that Mr **Prasad** said that, on the previous night, the family had eaten Kentucky chicken whereas Mrs **Prasad** said Indian curry and then changed her story and said that she had eaten out; it is not stated whether on Kentucky chicken, Indian curry or some other dish. On the face of it there is some inconsistency in the statements of husband and wife in relation to this meal but the weight of such an inconsistency is another matter. I venture to suggest that it is not unknown for

people - especially husbands - to fail accurately to recall the content of a previous night's meal.

42. The next asterisk appears to be an error. The reference was apparently to the husband's brother not, as it reads, to "her brother". It was not, however, suggested that there was any inconsistency between Mr and Mrs **Prasad** in respect of the relationship between Mrs **Prasad** and her husband's brother.

43. The next matter remains unexplained, even after Mr Berry's evidence. He sets out a conclusion: "She was obviously away for the week-end at her mother's in the country (Oak Flats)". In his second report this conclusion is expanded to a statement that "it appears that she spends most week-ends with her family". Mr Berry, understandably, has little independent recollection of the interview and was not able to state the basis of these conclusions. I note that Mr Collins reported a comment from Mrs **Prasad** that "she last visited her mother at 'The Oak' (near Camden) in early May 1983" - a date consistent with her being there at the week-end before the interview with Mr Berry - and that Mr **Prasad** had confirmed this.

44. Finally, there was said to be an inconsistency in relation to Mrs **Prasad**'s employment because Mr **Prasad** did not know the name of the old persons' home or the amount of her earnings. There is, of course, no inconsistency here; and, in evidence, Mr Berry conceded as much. The question is what weight may be given to ignorance by Mr **Prasad** of the name of a home, which he had not visited and had no reason to visit and where his wife had worked for only three months, and the fact that he did not know the amount of her earnings.

45. During his evidence before me Mr Berry agreed that the only real inconsistency detected by him related to the layout of the matrimonial bedroom at Botany. Each spouse drew a sketch, although the notations were added by Mr Berry. They were tendered in evidence before me. Each sketch shows a similar relationship between the doorway, the bed and a prayer mat; the couple are Hindu. Mrs **Prasad** shows a window beside the bed. Mr **Prasad**, if Mr Berry understood him correctly, said that there was no window in the room; a most unlikely situation. It seems to me highly probable that Mr **Prasad**, who on any view lives in the flat, was wrong about this whereas Mrs **Prasad**, who was thought by Mr Berry not to live there, was right.Mrs **Prasad** shows, between the bed and the prayer mat, a further "cupboard". She said in her evidence that this referred to a prayer cupboard which is "like a wardrobe but . . . it is open and there is all the prayer articles there". Later she said that the cupboard and the mat are "almost the same thing", by which I think she meant that they were attached or at least juxtaposed. Mr **Prasad** was not asked, either by Mr Berry or in his evidence, to describe the "prayer mat" so I do not know whether he would disagree with this or whether the sketched mat was intended to refer to the composite mat-cupboard. The latter position is quite possible.

46. Mr **Prasad**'s sketch shows a "cupboard" against the right hand wall, as one enters the room. He explained that this was a wardrobe. There is no such item in Mrs **Prasad**'s sketch but, when asked in cross-examination to itemise the furniture, she mentioned a wardrobe "on the right hand side of the sketch", that is the same position as on the sketch of her husband which I believe she had not seen. Finally, Mr **Prasad** sketched three small circles against which Mr Berry wrote "chairs". Mrs **Prasad** said that there were no chairs. I do not know who is right about this.

47. The discrepancies in the sketches weighed heavily with Mr Berry - see para 4 of his second report - and with Mr Collins. The members of the Panel stated that they had been "particularly . . . influenced by the appellant's total failure to explain why they had given significantly different descriptions of the marital bedroom". The sketches are poorly executed. They are roughly drawn and out of scale but

properly understood, as it seems to me, they do not exhibit significant differences. But there is a more fundamental objection to this approach. It was accepted by the departmental officers that Mr **Prasad** did live in the flat at the time of the interview. The theory that the parties were living apart therefore involves the assumption that Mrs **Prasad** did not live there. As a matter of logic, discrepancies between the two descriptions of the bedroom can only support that assumption if it is first established that he is right and that she is wrong. If Mrs **Prasad** is correct, the discrepancies establish no more than deficiencies in the powers of observation, memory or communication of her husband. At no stage did the departmental officers establish who was correct. In relation to the window Mrs **Prasad** was almost certainly correct; and I suspect that she was correct in relation to the prayer cupboard. This only leaves the chairs which may have been moved around from time to time.

48. Finally, the suggestion of Mr Berry was that Mrs **Prasad** "spends most week-ends with her family". He did not suggest at any stage that she lived at Oak Flats during the week and commuted from there to Burwood each day. Nor did he, or any other officer, suggest either to Mr or Mrs **Prasad** or in their reports that Mrs **Prasad** lived elsewhere in Sydney. It seems to have been accepted by everyone connected with the case that Mrs **Prasad** stayed in the flat at least on week-nights. It was a two bedroom flat. The brother, his wife and their child also lived in the flat. It would be inevitable that Mr and Mrs **Prasad** would have to share, however formally, the remaining bedroom and the only bed it contained. If that be so, both spouses - whatever the warmth of their relationship - would have had ample opportunity to observe the layout of the room. Any discrepancies between them must therefore be ascribed to the type of infirmities - of one or both - which I have mentioned. The discrepancies would say nothing about the nature of their relationship.

49. I do not wish to be unduly critical of the task performed by Mr Berry. He gave his evidence very candidly before me, volunteering the comment that "the interview I conducted on that particular day was not up to my usual standard, again because of the time factor". On several occasions he mentioned the time constraint under which he had worked. On his evidence, he was placed in an invidious position. It is not possible to carry out a proper investigation of such a complex question as the nature and future prospects of a marriage relationship by conducting one 20 minute interview with each party to the marriage. For most interviewees an interview of this kind represents a considerable ordeal. It involves discussing with a complete stranger, an official in whose hands one's future is thought to lie, personal - even intimate - matters. Most people take some time to relax, and to talk freely, in such a situation. Sufficient time has to be allowed for this to occur; the more especially where one or both of the parties is young - Mrs **Prasad** was still only 20 - or timid. I note in this connection that when Mr Berry was asked whether Mrs **Prasad** had said that the nursing home was at Auburn rather than Burwood, he replied: "she was very nervous at the time and may have confused the two suburbs herself". I regard it as simply unacceptable that an investigating officer should be asked to form a judgement relating to the genuineness of a marriage by assessing the answers given by nervous and possibly confused people to a rushed quiz.

50. A number of matters which excited the suspicion of Mr Berry - not unnaturally on the information he had - were readily explained when raised at the hearing before me. No doubt the same explanations would have been given had the suspected inconsistencies been put to Mr **Prasad**. If a fair judgement is to be made it is essential to adopt a procedure whereby an applicant is informed of matters which have excited an adverse reaction in the investigating officers, and is given an opportunity to deal with them, before those matters are used adversely to him in the decision making process.

51. The procedural inadequacies did not end with the interview. Those who had subsequently to assess the significance of the interview lacked any verbatim record, or even Mr Berry's contemporaneous

notes, of what was said. Nobody can be certain about the existence of a discrepancy on matters of domestic detail without knowledge of the context of what was said, and, indeed, even of the tone in which the "inconsistent" answer was given. If the Department is to continue to rely upon interviews of the parties as the primary method of determining the genuineness of relationships - a course the wisdom of which is open to serious question - it seems most desirable that it arrange for those interviews to be tape recorded and for the tapes to be made available to those who have to evaluate the answers.

52. The report of Mr Collins adds little to the picture presented by Mr Berry. He found little inconsistency in their descriptions of meals. He ascribed this to collusion but, if so, the collusion was skilful because they disagreed over Sunday lunch. The finding of conflict over Mrs **Prasad**'s employment was abandoned before the Panel. Mr Collins noted that whereas Mrs **Prasad** said that the bank account was in their joint names Mr **Prasad** said it was in his name alone. (Oddly enough, in their evidence before me, the position was reversed). Mr Collins seemed to think that this was a significant inconsistency but I suspect that many long and genuinely married partners would be uncertain or would contradict each other if asked in whose name particular property was held. There is a real danger, in tests such as this, of applying an artificially high standard of awareness; and, in particular, a standard which fails to have proper regard for the social, cultural and educational background of the interviewee and which will ordinarily differ markedly from that of the interviewer. Mr Collins does not seem to have thought it significant that both spouses told him that the account, however styled, was with the Botany branch of Westpac and had a balance of $1,000.

53. There were some discrepancies noted by Mr Collins: the Sunday drive round Botany, the frequency of visits to mother, but it is hard to see that, as Mr Collins thought, such matters as those disprove the existence of a "genuine relationship". In the absence of any suggestion that Mrs **Prasad** resides elsewhere than with her husband during the week, a relationship of some sort must be taken to exist. As Ms Hounslow pointed out, Mrs **Prasad** was not forced to maintain any relationship with her husband or to live in his brother's lat. No reason is apparent, or has been suggested, why she should do either of those things if the marriage were merely one of convenience. She had members of her own family in Australia. She was not dependent upon Mr **Prasad** for her entitlement to reside in Australia. She was employed and apparently financially independent.

54. I have previously referred to the statutory declarations and the "personal observation" in Ms Hounslow's letter. On their face, these documents furnished considerable support for the assertions of Mr and Mrs **Prasad**. Their apparent weight might have been reduced, or altogether lost, upon further investigation but the Minister chose not to investigate. He was left with statements from nine people, apparently credible and independent of the applicant, who asserted facts suggestive of a normal married relationship. It seems to me that only in a case where the contrary evidence was persuasive virtually to the point of certainty would a decision maker be justified in rejecting, without investigation, such material. In this case the only matters which could be put against the statements were the circumstances surrounding the marriage and the minor discrepancies which survive a proper analysis of the interview reports - last night's dinner, frequency of visits to mother etc. I bear in mind the strength of the case required before it may be said that a decision is legally invalid on the ground of unreasonableness, but I conclude that the material before the Minister when he made his decision, properly analysed, was such that a decision to refuse the application on the ground that Mr and Mrs **Prasad** did not genuinely intend to live together as a married couple in Australia was, to use Lord Diplock's phrase "devoid of any plausible justification".

55. I have already expressed the view that, in evaluating the decision, it is open to the Court to have regard to any information which was not in fact before the Minister, but which is proved in evidence and in relation to which the Minister acted unreasonably in not making inquiries. In this case little new

material emerged at the hearing before me; some further information about the contraction of the marriage and the lay-out of the matrimonial bedroom, which I have already summarized, explanations of some of the "inconsistencies" and the sworn evidence of the applicant's brother, Sarda **Prasad**, corroborating the assertions which the applicant and his wife had put before the Department. All of this would have been available to the Minister had he enquired. Having regard to my finding in relation to the material actually before him, it is not strictly necessary for me to decide whether the Minister acted unreasonably in not enquiring. I do think that it was unreasonable not to seek explanations of the inconsistencies. I doubt that it was unreasonable for him not to seek out the brother's information; this was for the applicant to provide. In any event, the new material does not significantly alter the position.

56. It follows from my findings that the decision to refuse the applicant's application for a permanent entry permit must be set aside and the matter remitted to the Minister for further consideration. It does not follow that the application must, upon re-consideration, be granted. The duty of the Minister will be to reconsider the matter upon the basis of the facts as at the date of his decision. The situation may have changed by then. Further inquiry may show that the material currently supportive of the applicant's position is unreliable or in need of significant qualification. The matter must be judged in the light of the whole of the information then available.
