HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

AMIRA SAEED APPELLANT

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP RESPONDENT

Saeed v Minister for Immigration and Citizenship [2010] HCA 23
23 June 2010
S305/2009

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Federal Court of Australia made on 1 April 2009 and in its place order that:*

   (a) Appeal allowed with costs.

   (b) Set aside Orders 2 and 3 of the orders of the Federal Magistrates Court of Australia made on 2 December 2008 and in their place order that:

      (i) a writ of certiorari issue directed to the delegate of the respondent, quashing the decision dated 16 July 2008;

      (ii) a writ of prohibition issue directed to the respondent, prohibiting the respondent from giving effect to the delegate's decision dated 16 July 2008;

      (iii) a writ of mandamus issue to the respondent requiring the respondent to consider and determine the applicant's application for a Skilled – Independent Visa (Subclass 175) according to law; and

      (iv) the respondent pay the applicant's costs.

On appeal from the Federal Court of Australia

Representation

S B Lloyd SC with L J Karp for the appellant (instructed by Christopher Levingston & Associates)

S J Gageler SC, Solicitor-General of the Commonwealth with L A Clegg for the respondent and intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with C L Conley intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

M G Hinton QC, Solicitor-General for the State of South Australia with C Jacobi intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

CATCHWORDS

Saeed v Minister for Immigration and Citizenship

Immigration – Visa – Visa applications made outside migration zone – Where applicant not afforded opportunity to comment upon information which supported inference that essential aspect of application was false or misleading – Where Minster's delegate not satisfied about necessary criterion for visa on basis of such information – Whether ss 51A(1) or 57(3) of *Migration Act* 1958 (Cth) ("Act") excluded requirements of natural justice hearing rule in relation to visa applications made outside migration zone – Whether provision of information to visa applicants outside migration zone was a "matter" which Pt 2 Div 3 subdiv AB of Act "deals with" – Whether requirements of natural justice a condition of statutory power to grant or refuse visa – Where statutory requirement of actual satisfaction as to facts – Whether obligation to take into account all factors which may affect determination – Whether state of non-satisfaction about criterion can be reached if Minister fails to consider whether any answer to information was put forward by applicant.

Statutory interpretation – Where amendments to Act respond to High Court decision – Relevance and permissible use of extrinsic material.

Words and phrases – "natural justice hearing rule", "satisfied", "the matters it deals with".

Migration Act 1958 (Cth), ss 51A(1), 56, 57, 65(1).

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND KIEFEL JJ. Division 3 of Pt 2 the *Migration Act* 1958 (Cth) ("the Act") contains provisions with respect to the grant or refusal of visas for non-citizens. Subdivision AB of that Division is directed to the Minister's dealing with an application for a visa and information relating to it. At issue in this appeal is whether an amendment to subdiv AB, effected by the insertion of s 51A[1], has the effect of excluding the requirements of the natural justice hearing rule and whether it may validly do so. In the circumstances of this case the rule would have required the Minister's delegate to afford the appellant an opportunity to comment upon information which had been provided to the delegate and which supported an inference that an essential aspect of the appellant's case for a visa was false.

2 The terms of s 51A are not directed to all requirements of natural justice. They are expressed to apply to the requirements of the natural justice hearing rule. The concern of that rule is that procedural fairness be applied in the process of decision-making in circumstances where a person's rights or interests may be affected by the decision. Applied to a case such as this, the rule requires that an opportunity be given to a person to deal with adverse information that is credible, relevant and significant to the decision to be made[2]. It reflects a fundamental principle of natural justice.

3 Section 51A provides:

> "**Exhaustive statement of natural justice hearing rule**
>
> (1) This Subdivision 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 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with."

The focus of this appeal is upon s 51A(1).

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1 *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth).

2 *Kioa v West* (1985) 159 CLR 550 at 629 per Brennan J; see also 569 per Gibbs CJ, 582 per Mason J, 602 per Wilson J, 633 per Deane J; [1985] HCA 81.

Background and curial history

4 The appellant is a citizen of Pakistan. In November 2007 she applied for a Skilled – Independent Visa (Subclass 175). A visa of this kind can only be granted if the visa applicant is outside Australia when the visa is granted[3]. A criterion for the visa required the appellant to have been employed in a skilled occupation for at least 12 months in the period of 24 months ending immediately before the day on which her application was made[4]. The appellant provided documents to demonstrate that she had been employed as a cook from March 2006 until November 2007 at a restaurant in Rawalpindi.

5 Australian immigration officers in Pakistan investigated the appellant's claims and discovered that no employee records were kept on the premises of the restaurant. They were advised that no woman had ever worked in the kitchen. On the basis of this information the Minister's delegate advised the appellant that she considered the evidence the appellant had supplied as to her employment to have been false or misleading. As the delegate then considered she could not be satisfied about a criterion necessary to grant the visa, the appellant's application was refused.

6 The delegate's decision was not subject to review by the Migration Review Tribunal. Such review is limited to the case of visas which can be granted whilst an applicant is in the Australian migration zone[5]. The appellant sought a declaration and an order for mandamus against the Minister under s 39B of the *Judiciary Act* 1903 (Cth). The ground upon which she relied was that the delegate failed to afford her what would be required under the natural justice hearing rule.

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3 *Migration Act* 1958 (Cth), s 40(1) and (2)(a); Migration Regulations 1994 (Cth), reg 2.04(1)(a) and Sched 2, item 175.412.

4 Migration Regulations, Sched 2, item 175.211(2)(a).

5 *Migration Act*, s 338(1) and (2).

7 In the Federal Magistrates Court[6] and on the appeal to a Full Court of the Federal Court[7] the decision in *Minister for Immigration and Multicultural and Indigenous Affairs v Lat*[8] ("*Lay Lat*") was followed. The appellant's application and her appeal were dismissed with costs. In *Lay Lat* a Full Court of the Federal Court held that it was intended, by s 51A(1), to exclude the common law natural justice hearing rule and that subdiv AB was to provide a comprehensive procedural code[9].

8 The appellant's principal argument on the appeal to this Court had regard to the construction of subdiv AB of the Act and the operation of s 51A(1) with respect to provisions of that subdivision. If that argument is accepted it will be unnecessary to consider the alternative argument, that s 51A is invalid. This argument was put on two bases. It was put that some fundamental principles are impliedly protected by s 75(v) of the Constitution and a law cannot validly prevent recourse to that provision. Further, s 51A may be seen to direct courts and interfere with their application of principles of statutory construction and thereby undermine their ability to exercise the judicial power granted by Ch III of the Constitution.

The power to grant or refuse a visa and subdivision AB

9 The power to grant a visa to a non-citizen to travel to, enter and remain in Australia is given to the Minister by s 29 of the Act. Section 47(1) requires the Minister to consider a valid application for a visa. That obligation continues until the visa is either granted or refused[10]. Section 65(1) provides that after considering a valid application for a visa, the Minister, if satisfied that the criteria for the visa have been satisfied, is to grant the visa; and if not so satisfied, is to refuse to grant the visa.

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6 *Saeed v Minister for Immigration and Citizenship* [2008] FMCA 1619 per Emmett FM.

7 *Saeed v Minister for Immigration and Citizenship* (2009) 176 FCR 53 per Spender, Buchanan and Logan JJ.

8 (2006) 151 FCR 214.

9 *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214 at 225-226 [66].

10 *Migration Act*, s 47(2)(b).

10 Subdivision AB concerns how an application for a visa is dealt with after it is lodged and before a decision is made. Section 52 provides for the way in which a visa applicant may communicate with the Minister after lodging an application. Sections 54 and 55 require the Minister to have regard to information forming part of the application, or which is provided subsequently, but prior to a decision being made. Sections 56 and 57, which assume importance on the appeal and are set out below, provide, respectively, that further information may be sought from a visa applicant and that certain information received by the Minister must be provided to a visa applicant for comment. Section 58 makes provision for how the additional information, invited under s 56, or the comment on relevant information, invited under s 57, may be given. Section 63 provides for the time when a decision may be made, having regard to whether invitations for information or comment are outstanding.

A condition on the power to refuse

11 In *Annetts v McCann*[11] it was said that it could now be taken as settled that when a statute confers power to destroy or prejudice a person's rights or interests, principles of natural justice regulate the exercise of that power[12]. Brennan J in *Kioa v West*[13] explained that all statutes are construed against a background of common law notions of justice and fairness. His Honour said:

> "[W]hen the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that 'the justice of the common law will supply the omission of the legislature'. The true intention of the legislation is thus ascertained."

12 The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that

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11 (1990) 170 CLR 596; [1990] HCA 57.

12 *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

13 (1985) 159 CLR 550 at 609 (citation omitted).

they apply to the exercise of a power of the kind referred to in *Annetts v McCann*[14].

13 Observance of the principles of natural justice is a condition attached to such a statutory power and governs its exercise, as Brennan J further explained in *Kioa v West*[15]. A failure to fulfil that condition means that the exercise of the power is inefficacious[16]. A decision arrived at without fulfilling the condition cannot be said to be authorised by the statute and for that reason is invalid[17].

14 In *Annetts v McCann* Mason CJ, Deane and McHugh JJ said that the principles of natural justice could be excluded only by "plain words of necessary intendment"[18]. And in *The Commissioner of Police v Tanos*[19] Dixon CJ and Webb J said that an intention to exclude was not to be assumed or spelled out from "indirect references, uncertain inferences or equivocal considerations." Their Honours in *Annetts v McCann* added that such an intention was not to be inferred from the mere presence in the statute of rights consistent with some natural justice principles.

15 The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness[20], derives from the principle of legality which, as Gleeson CJ observed in *Electrolux Home Products*

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14 *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 401 per Barwick CJ, 451 per Jacobs J; [1977] HCA 26.

15 (1985) 159 CLR 550 at 609.

16 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 409 per Brennan J; [1982] HCA 26.

17 *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 401 per Barwick CJ.

18 (1990) 170 CLR 596 at 598.

19 (1958) 98 CLR 383 at 396; [1958] HCA 6.

20 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63.

Pty Ltd v Australian Workers' Union[21], "governs the relations between Parliament, the executive and the courts."[22] His Honour said[23]:

> "The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

Sections 56 and 57

16 Sections 56 and 57 are the only provisions in subdiv AB containing powers by which a visa applicant may be given an opportunity, after lodging their application, to provide further information (s 56) or comment on information provided to the Minister (s 57). Section 57 requires certain procedures to be followed to that end. Those sections provide:

> "**56 Further information may be sought**
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> (1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.
>
> (2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.

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21 (2004) 221 CLR 309 at 329 [21]; [2004] HCA 40.

22 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21], referring to *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587, 589.

23 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21].

57 Certain information must be given to applicant

(1) In this section, ***relevant information*** means information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for refusing to grant a visa; and

(b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and

(c) was not given by the applicant for the purpose of the application.

(2) Subject to subsection (3), the Minister must:

(a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and

(c) invite the applicant to comment on it.

(3) This section does not apply in relation to an application for a visa unless:

(a) the visa can be granted when the applicant is in the migration zone; and

(b) this Act provides, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa."

17 Some observations are necessary at this point with respect to these provisions.

18 Section 57(1) and (2) invite comparison with what might ordinarily be required by the hearing rule. It is necessary to bear in mind, in that regard, that what is required to provide procedural fairness according to the rule will vary.

Natural justice is flexible and adaptable to the circumstances of the particular case[24].

19 Brennan J in *Kioa v West*[25] said that, in the ordinary case, an opportunity should be given to a person affected by a decision to deal with any adverse information that is "credible, relevant and significant". That approach has more recently been confirmed in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[26]. Mason J in *Kioa v West*[27] went further. In his Honour's view the common law would require the decision-maker to bring the critical issue or factor on which the decision was likely to turn to the attention of the person. Brennan J's approach would not deny that this may be necessary in a particular case.

20 The requirements of s 57(1)(a) and (2)(b) are similar to those referred to by Mason J. When the Minister considers that certain information would be the reason, or part of the reason, for refusing to grant a visa, the Minister is to provide particulars of it in order that the visa applicant understands its relevance. The requirement in s 57(2)(b), that the Minister *ensure*, as far as reasonably practicable, that the visa applicant understands why certain information is relevant, may go further. It would require that the importance of the information and its potential impact upon the applicant's case for a visa be identified and the information be communicated in a way which promotes that understanding as far as is possible. It would also require that consideration be given to the means by which particulars of the information should be provided, as most suitable to that purpose. Section 58 lists the alternatives of writing, telephone or an interview. It is not difficult to envisage that in some cases an interview may be necessary.

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24 *Kioa v West* (1985) 159 CLR 550 at 612 per Brennan J.

25 (1985) 159 CLR 550 at 629.

26 (2006) 228 CLR 152 at 162 [32] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; [2006] HCA 63, referring to *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591 per Northrop, Miles and French JJ.

27 (1985) 159 CLR 550 at 587; and see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 311 per McHugh J; [1995] HCA 20; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 27 [81] per McHugh and Gummow JJ, 49 [150] per Callinan J; [2003] HCA 6.

21 Not all information adverse to a visa applicant, and which may be influential to a decision to refuse to grant a visa, qualifies as "relevant information", particulars of which must be provided by the Minister. Section 57(1)(b) limits the information to that which is specific to the visa applicant or another person, rather than a class of persons. More general information, such as country information, is unlikely to fall within this description.

22 It is a matter of some significance to the application of s 51A(1) to s 57, that s 57 does not apply to all visa applicants. It requires only that "relevant information" be given to visa applicants who are in the migration zone[28]. This follows from sub-s (3)(a). Sub-section (3)(b) further provides that the requirements of sub-s (2) do not apply to a visa which does not carry with it a right of review. Neither condition for the application of s 57 was present with respect to the visa for which the appellant applied.

23 It remains to mention the procedures provided by s 56. It may be observed that an invitation under s 56(2) might allow for a response to adverse information by the exercise of the power to obtain additional information. The power given by s 56 is not expressed in terms which would oblige its exercise by the Minister in order that an opportunity for comment could be provided to a visa applicant. Nevertheless, as Gaudron J observed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[29], where the Minister has regard to information other than that provided by an applicant, a question may arise whether procedural fairness requires that the powers in s 56(2) must be exercised to permit an applicant to put submissions or provide further information.

The decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*

24 The provisions of subdiv AB, prior to the insertion of s 51A, were considered in *Ex parte Miah*. The application for a protection visa was made by the applicant after he had entered Australia[30]. The fact the application was made

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28 In the balance of these reasons they will be referred to as "onshore visa applicants" and persons such as the appellant as "offshore visa applicants".

29 (2001) 206 CLR 57 at 86 [97]; [2001] HCA 22.

30 (2001) 206 CLR 57 at 60 [1], 79 [71], 89 [110].

onshore rather than, as in the present case, offshore, is a distinction to which further reference will be made in these reasons.

25 Section 57(2) did not apply in *Ex parte Miah* as the information in question was not "relevant information" within the meaning of sub-s (1). The issue was whether natural justice nonetheless operated to require the provision of the information. It was argued for the Minister that subdiv AB was a code, as its heading ("Code of procedure for dealing fairly, efficiently and quickly with visa applications") suggested. It therefore excluded natural justice principles. The argument was not accepted by a majority of the Court[31]. McHugh J observed that the use of the word "fairly" in the heading made it difficult to extrapolate a manifestly clear intention to exclude natural justice principles[32]. Gaudron J considered that the heading imparted notions of procedural fairness[33]. Moreover, as her Honour pointed out, the correct question is not whether subdiv AB constitutes a code; it is whether, on its proper construction, it relevantly (and validly) limits or extinguishes the obligation to accord procedural fairness[34]. For it to do so requires a clear expression of intention. No member of the majority[35] found such an expression present in the subdivision.

Section 51A and its operation

26 Section 51A appeared as item 1 to the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth). That Act also introduced virtually identical sections to s 51A in other parts of the Act, including s 357A in Pt 5 and s 422B in Pt 7, which concern the conduct of reviews by the Migration Review

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31 Gaudron, McHugh and Kirby JJ.

32 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 95 [131].

33 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 85 [95]-[96].

34 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 83-84 [90], referring to *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [41] per Gaudron and Gummow JJ; [2000] HCA 57.

35 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 85 [95] per Gaudron J, 94 [128] per McHugh J and 113 [181] per Kirby J.

Tribunal and the Refugee Review Tribunal respectively. The insertion of s 51A was plainly a response to the decision in *Ex parte Miah*.

27 The language of the section and its analogues, and in particular the phrase "in relation to the matters it deals with" in sub-s (1), has been considered in judgments of single judges and Full Courts of the Federal Court. The phrase has been described as difficult to construe[36] and apply[37]. In *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs*[38] and in *Lay Lat*[39] it was described as ambiguous or obscure.

28 The difficulty in the meaning of the phrase "in relation to the matters it deals with" was resolved in *VXDC* and then subsequently in *Lay Lat*, by resort to extrinsic materials. In *Lay Lat* the Full Court considered that the Explanatory Memorandum to the 2002 amending legislation and the second reading speech of the Minister made it plain that the terms of sections such as s 51A(1) were intended to overcome the effect of the decision in *Ex parte Miah*[40]. The Full Court said[41]:

> "We agree with the observation … in *VXDC* that the drafters of the Explanatory Statement and the Minister could hardly have made the intention of the 2002 amendments any clearer."

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36 *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 170 at 178 [28].

37 *WAID v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 220 at [57].

38 (2005) 146 FCR 562 at 568 [22].

39 (2006) 151 FCR 214 at 225 [64].

40 *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214 at 225 [64], [66].

41 *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214 at 225 [65].

29 The Full Court in this case held *Lay Lat* to be correct in its approach[42]. Neither Full Court considered competing views about the operation of s 51A(1) or its analogues. They did not determine what were "the matters" to which it was intended to refer. In *Moradian v Minister for Immigration and Multicultural and Indigenous Affairs* Gray J observed that, even if regard were to be had to extrinsic materials, they did not resolve the questions to which the section gave rise[43].

30 In the Explanatory Memorandum it was said that it had been the original intention of subdiv AB to provide a "code of procedure" and to exhaustively replace common law natural justice requirements, other than the rule against bias[44]. It was observed that the majority in *Ex parte Miah* considered that the exclusion of common law natural justice requirements required a clear legislative intention and that no such clear intention was present in the Act[45]. The following statement was then made[46]:

> "The purpose of this amendment, and the amendments in items 2 to 6, is to provide a clear legislative statement that certain 'codes of procedure' in the Act are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with."

In his second reading speech the Minister, after discussing the same background, said[47]:

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42 *Saeed v Minister for Immigration and Citizenship* (2009) 176 FCR 53 at 55 [1], 65 [46].

43 (2004) 142 FCR 170 at 180 [35].

44 Australia, House of Representatives, Migration Legislation Amendment (Procedural Fairness) Bill 2002, Explanatory Memorandum at 5 [6].

45 Australia, House of Representatives, Migration Legislation Amendment (Procedural Fairness) Bill 2002, Explanatory Memorandum at 2 [3].

46 Australia, House of Representatives, Migration Legislation Amendment (Procedural Fairness) Bill 2002, Explanatory Memorandum at 5 [10].

47 Australia, House of Representatives, *Parliamentary Debates*, (Hansard), 13 March 2002 at 1106-1107.

> "Therefore, the purpose of this [B]ill is to make it expressly clear that particular codes in the Migration Act do exhaustively state the requirements of the natural justice or procedural fairness hearing rule.
>
> This will have the effect that common law requirements relating to the natural justice or procedural fairness hearing rule are effectively excluded, as was originally intended."

And[48]:

> "In conclusion, these amendments are necessary to restore the [P]arliament's original intention that the Migration Act should contain codes of procedure that allow fair, efficient and legally certain decision making processes that do replace the common law requirement of the natural justice hearing rule."

31 As Gummow J observed in *Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative "intention" is to be ascertained, "what is involved is the 'intention *manifested*' by the legislation."[49] Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

32 In *Re Bolton; Ex Parte Beane*[50] the question was whether a statutory provision concerned with "visiting forces" applied to deserters from the armed forces of the United States. Mason CJ, Wilson and Dawson JJ said[51]:

> "[T]he second reading speech of the Minister … quite unambiguously asserts that Pt III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to

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48 Australia, House of Representatives, *Parliamentary Debates*, (Hansard), 13 March 2002 at 1107.

49 (1996) 187 CLR 1 at 168-169 (emphasis added) (footnote omitted); [1996] HCA 40.

50 (1987) 162 CLR 514; [1987] HCA 12.

51 *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514 at 518.

> interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."[52]

33 Regard was had by the Full Court in this case to what was said in *Re Bolton; Ex Parte Beane*. Nevertheless, it is apparent that the Court did not consider the actual terms of s 51A and its application to the provisions of the subdivision. As was pointed out in *Catlow v Accident Compensation Commission*[53] it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.

34 It may be accepted that the context for the enactment of s 51A was provided by the decision in *Ex parte Miah* and that s 51A was an attempt to address the shortcomings identified in that decision. Resort to the extrinsic materials may be warranted to ascertain that context and that objective, although it is hardly necessary to do so. But that objective cannot be equated with the statutory intention as revealed by the terms of the subdivision. The question whether s 51A in its operation has the effect contended for, of excluding the natural justice hearing rule, is to be answered by having regard, in the first place, to the text of s 51A and the provisions with which it interacts. The questions which, in turn, are raised about the operation of s 51A, it will be seen, are not answered by anything said in the extrinsic materials. This is explicable. The decision in *Ex parte Miah*, which s 51A addressed, was not concerned with the application of s 57 of the subdivision to offshore visa applicants.

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52 See also *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J; [1967] HCA 31; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459 per McHugh and Gummow JJ; [1995] HCA 24; *Purvis v New South Wales* (2003) 217 CLR 92 at 122-123 [92] per McHugh and Kirby JJ; [2003] HCA 62; and *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 at 573 [29] per Gummow and Hayne JJ; [2007] HCA 52.

53 (1989) 167 CLR 543 at 550 per Brennan and Gaudron JJ; [1989] HCA 43.

35 The declaration in s 51A(1), that the subdivision is to be taken as an exhaustive statement of the requirements of the natural justice hearing rule, is qualified by the words "in relation to the matters it deals with".

36 The importance of the question about what "matters" are to be seen as dealt with in the subdivision was identified by French J in *WAID v Minister for Immigration and Multicultural and Indigenous Affairs*[54], with respect to s 422B of the Act. In *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs*[55] Lindgren J considered that two approaches to the question were open with respect to s 357A(1). If the general question was posed, "What is the subject matter of Div 5 of Pt 5?", the answer would likely be, "The conduct of reviews by the MRT". Translated to subdiv AB of Div 3 of Pt 2, the answer to the question would be, "The procedure for dealing with visa applications". This approach, which looks to the totality of the matters dealt with by the subdivision, was submitted by the Minister to be correct.

37 The Minister's argument laid stress on the word "it" in s 51A(1) as referable to the subdivision. Consistently, where s 51A(2) refers to the matters "they" deal with, it refers to the group of ss 494A to 494D, which deal with the giving of notice. So much may be accepted. However, a consideration of all the words "the matters it deals with" directs attention to provisions within the subdivision or the group of sections which are operative.

38 The alternative inquiry considered by Lindgren J in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* was, "What are the matters Div 5 of Pt 5 deals with?" The answer to that question would require a search of the sections within the Division for a provision "dealing with" a relevant "matter"[56]. And, as his Honour observed, the plural form of "matters" suggests that the inquiry might be directed to a number of such provisions.

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54 [2003] FCA 220 at [57]-[58].

55 (2003) 130 FCR 456 at 468 [58].

56 *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 at 468 [58] and 475 [83].

39 It was not necessary for Lindgren J to reach a conclusion as to which was the correct approach, but his Honour said that he favoured the latter[57], as did French J, implicitly, in *WAID v Minister for Immigration and Multicultural and Indigenous Affairs*[58]. Such an approach is plainly correct. The presumption is that words are used in a statute for a reason; they should be given their meaning and effect[59].

40 Necessarily, provisions which "deal with" "matters", for the purposes of s 51A, will contain some procedural requirements which go some way towards satisfying the fundamental requirements of the natural justice hearing rule. Some such procedural requirements are necessary if s 51A is to operate and the procedures provided for are to be taken as exhaustive of the rule. Section 57 contains such procedures. The power given in s 56, to invite an applicant to give further information, may be used to further procedural fairness but it does not mandate procedures which may be taken as a substitute for the requirements of the rule. Section 51A is not addressed to s 56.

41 A point made by Lindgren J in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* is that the "matters" "dealt with" in the subdivision cannot be simply equated with the procedural requirements of its operative provisions[60], for s 51A(1) would then be largely otiose. Thus, if the matter dealt with by s 57 was the giving of information fulfilling the description of "relevant information" to a visa applicant for comment, s 51A would operate so that it was exhaustive of the requirements of the natural justice hearing rule so far as concerned the giving of information only of that kind. A limited purpose would then be achieved by s 51A(1). The rule would continue to apply to the

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57 *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 at 475 [83].

58 [2003] FCA 220 at [58].

59 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; [1905] HCA 11; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12-13 per Mason CJ; [1992] HCA 64; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

60 *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 at 469 [59].

provision of other information. The search, as his Honour said, is for a larger subject matter or matters[61].

42 In order to give s 51A operation it is necessary to refer to the subject of the "matter" with which s 57 deals as the provision of information, more generally relevant and adverse, for comment. But there is a qualification to the description of the "matter", which arises from the persons to whom the information is to be provided. The terms of the section limit such persons to onshore visa applicants. The "matter" with which s 57 deals, is the provision of such information to onshore visa applicants. The provision of information to offshore visa applicants, such as the appellant, is not a "matter" dealt with by the sub-section. It follows that the application of the hearing rule in dealings with the appellant's application is not excluded by subdiv AB.

The Notice of Contention

43 On the hearing of the appeal the Minister was granted leave to file a Notice of Contention to the effect that s 57(3) dispenses both with the statutory duty to provide information and any common law duty to provide natural justice. It was submitted for the Minister that it could not have been intended to provide that onshore visa applicants have only the procedural rights provided by s 57(1) and (2), whilst offshore visa applicants were to be afforded all that the natural justice hearing rule would require. This was the view expressed in *Lay Lat*[62].

44 The question whether the natural justice hearing rule is not to apply to dealings with offshore visa applicants is not answered by pointing to the particular procedures provided by s 57(2) with respect to onshore visa applicants and proceeding from the premise that what was there provided was the most that any visa applicant could expect by way of procedural fairness. All that may fairly be deduced from the terms of s 57 is that it was considered to be appropriate to onshore, but not offshore, visa applicants.

45 The reason for the differential operation of s 57, to onshore and offshore visa applicants, is not mentioned in the Act. The Minister submitted that that

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61 *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456 at 469 [60].

62 *Minister for Immigration and Multicultural Affairs v Lat* (2006) 151 FCR 214 at 225-226 [68].

operation must be understood in the wider scheme of the Act which may be taken to reflect policy choices about matters such as administrative convenience. Onshore visa applicants are entitled to reasons for refusal; offshore visa applicants are not[63]. There is no strict limitation upon offshore visa applicants reapplying, as there is with respect to onshore visa applicants[64].

46 The feature of onshore visa applications which explains these provisions is the right of review of the Minister's decision which is extended to them, but not to offshore visa applications. Onshore visa applicants need reasons for refusal for that purpose. The fact that their ability to reapply is limited may be explained because they have been provided with a right of review of the decision on their initial application. Further, it may be observed that the Act does not deny offshore visa applicants reasons; it simply does not oblige the giving of them in every case. In this case reasons were given.

47 The Minister's submissions acknowledged that the content of natural justice might vary with respect to individual cases of offshore visa applicants. It was submitted that factors such as administrative convenience and difficulties in communication would be weighed and that in some cases nothing, or practically nothing, might be seen as required. But the proposition that natural justice may, in some cases, require less does not lead to the conclusion that none is intended to be provided and that no consideration is to be given to what could and should be provided in an individual case.

48 The factors pointed to by the Minister may well explain why the procedures in s 57(2) were not considered to be appropriate with respect to offshore visa applicants. The obligation of the Minister, to "ensure" that a visa applicant understands the relevance of the adverse information, highlights the potential for practical difficulties. Section 58 recognises that it may be necessary to conduct an interview to fulfil this obligation. This is unlikely to be practicable with respect to offshore visa applicants. It may therefore have been considered necessary to exclude offshore visa applicants from the operation of s 57, leaving considerations of what natural justice required to be determined by reference to the circumstances of a given case. Nothing is said in subdiv AB about the exclusion of the hearing rule so far as concerns offshore visa applicants. Section 57(3) excludes only the procedural requirements of s 57(2).

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63 *Migration Act*, s 66(2)(c) and (3).

64 *Migration Act*, s 48.

Exercise of the power to refuse

49 At the outset of the appellant's argument as to the validity of s 51A it was submitted that there may be limits to the extent to which procedural fairness might be excluded by a law of the Commonwealth. The focus of the submission was constitutional powers or protections. It may more directly raise questions as to the conditions necessary to the exercise of the relevant powers under the Act and the limits which those conditions may effect.

50 The powers given by s 56(2) put the issue in context. As was observed earlier in these reasons[65], questions about the exercise of that power in accordance with natural justice principles may well arise where relevant, adverse, information is received by the Minister. Although s 56(2) is cast in terms that the Minister "may" invite the giving of additional information, where information is received which is adverse to an applicant, perhaps critically so, the circumstances may be such as to call for the exercise of the power[66]. But if s 57 applies to offshore visa applicants, a question arises as to whether the power to request additional information is to be exercised by the Minister. The answer to this question may be provided by a consideration of the ultimate power to be exercised, to grant or refuse a visa, and of the conditions attaching to the exercise of that power.

51 Section 65(1), excluding requirements not here relevant, provides that:

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

(a) if satisfied that:

…

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

…

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65 At [23].

66 *Macdougall v Paterson* (1851) 11 CB 755 at 766 per Jervis CJ [138 ER 672 at 677]; *Leach v The Queen* (2007) 230 CLR 1 at 17-18 [38] per Gummow, Hayne, Heydon and Crennan JJ; [2007] HCA 3.

is to grant the visa; or

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

52 The Act thereby imposes a duty upon the Minister to have regard to the criteria necessary to the grant of a visa and an obligation to consider prior to coming to a decision[67]. Here the Minister was obliged to consider the appellant's employment history. The facts about which the Minister had to be satisfied, or not satisfied, was whether she had been employed in a skilled occupation for the requisite period prior to her application being made.

53 It was said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*[68] that the Act requires more than a bona fide attempt to be satisfied; it requires actual satisfaction. And in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*[69] Latham CJ said that where the exercise of statutory power is conditional upon the existence of a particular opinion, an inquiry for the Court may be whether the opinion has really been formed.

54 The question which arises, by reference to s 65(1), is whether the Minister can reach a state of non-satisfaction about the criteria if the Minister puts out of consideration whether there was an answer to the information contradicting the employment history put forward by the appellant. An analogy may be drawn with material, or relevant, considerations. In *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[70] the Commissioner was required to be satisfied as to the state of voting power at the end of the year of income in question. Dixon J said that the Commissioner's decision was subject to review, inter alia, if he "excludes from consideration some factor which should affect his

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67 *Migration Act*, s 65; and see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 467-468 [75]; [2003] HCA 1.

68 (2003) 211 CLR 441 at 471 [85].

69 (1944) 69 CLR 407 at 430, 432; [1944] HCA 42.

70 (1949) 78 CLR 353 at 360; [1949] HCA 26.

determination"[71]. Where a decision-maker is bound to take a factor into account but does not, the requisite state of satisfaction is not reached[72].

55 If such consideration is necessary before the Minister can be satisfied, or not, there may be limits to the extent to which restrictions placed upon the exercise of the power to refuse a visa can operate consistent with it. The question therefore is whether the Act requires that consideration. It is not necessary to conclude that question, given the conclusion available as to the construction and operation of s 51A, nor is it desirable since the argument on the appeal did not proceed to that point.

Conclusion on construction

56 Assuming, for present purposes, that s 51A as it applies to s 57, is valid and effective to exclude the natural justice hearing rule, it is excluded only so far as concerns onshore visa applicants. This follows from the terms of s 57(3), which plainly exclude offshore visas from the operation of s 57. The position of offshore visas is not addressed in subdiv AB. The provision of particulars of information to them for comment is not a "matter" "dealt with" by s 57 or the subdivision.

57 Section 51A(1) was addressed to provisions such as s 57(2). So much may be inferred from it being a response to the decision in *Ex parte Miah* and from the extrinsic materials. Nothing in those materials is addressed to the question of construction which arises and which concerns the identification of the matter dealt with. The statement in the Explanatory Memorandum did little more than repeat the words of s 51A(1), which themselves were expressed in general terms.

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

72 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J; *Buck v Bavone* (1976) 135 CLR 110 at 118-119 per Gibbs J; [1976] HCA 24; *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 447 [7]-[8] per Gleeson CJ and McHugh J; [2000] HCA 38; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 471 [85].

58 In *Coco v The Queen*[73] it was said, with respect to fundamental rights, that "[t]he courts should not impute to the legislature an intention to interfere with fundamental rights."[74] The same may be said as to the displacement of fundamental principles of the common law. In *Coco v The Queen* Mason CJ, Brennan, Gaudron and McHugh JJ said[75]:

> "Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."

59 It follows that the implication of the natural justice hearing rule with respect to offshore visa applicants was maintained. The Minister was obliged to provide the appellant with an opportunity to answer the adverse material.

Orders

60 The appeal should be allowed with costs. The orders of the Full Court of the Federal Court and of the Federal Magistrates Court should be set aside and the respondent should pay the appellant's costs of these proceedings. The decision of the delegate of the Minister dated 16 July 2008 should be quashed and a writ of mandamus issue requiring the Minister to consider and determine the appellant's application for a Skilled – Independent Visa (Subclass 175) according to law.

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73 (1994) 179 CLR 427; [1994] HCA 15.

74 *Coco v The Queen* (1994) 179 CLR 427 at 437.

75 (1994) 179 CLR 427 at 437 (footnote omitted).

61 HEYDON J. I agree with the orders proposed in the joint judgment, and adopt the account of the background, the description of the legislation and the abbreviations employed in it.

62 On no few occasions when an injustice may result if an appellant's appeal fails, the present respondent chooses to consent to the appeal being allowed. This appeal concerns a scheme created by the Parliament under which non-citizens may make applications for visas while offshore. The Parliament did not have to create this scheme. The parties did not point to any treaty entered into by the Executive which compelled the Parliament to do so if Australia were not to be in breach of international law. But once the scheme was created, and once the appellant applied for a visa, she had a right to due process according to law. She had an interest in that process being pursued, and a legitimate expectation that it would be pursued. If the appellant is in due course able to explain satisfactorily the adverse material on which the respondent's delegate relied, the failure of the delegate to inform the appellant of the adverse material before deciding against her could then be said to have harmed her interests in a way amounting to a great injustice. Whether it would in fact have generated that harm is something that only the future will tell. But in those circumstances it may be thought to be surprising that the respondent chose to resist the present appeal. Whether or not the respondent's resistance to the appeal is surprising, the weapons to hand are too feeble and the resistance fails. The appeal must be allowed for the following reasons.

A simple form of reasoning

63 The appellant's case can be stated in the following way.

(a) Section 51A(1) renders Pt 2 Div 3 subdiv AB "an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with."

(b) The expression "the requirements of the natural justice hearing rule" means the general law requirements of the natural justice hearing rule.

(c) Therefore s 51A(1) does not render Pt 2 Div 3 subdiv AB an exhaustive statement of the general law requirements of the natural justice hearing rule in relation to the matters it does not deal with.

(d) One matter which Pt 2 Div 3 subdiv AB deals with is the matter dealt with in s 57 – the possibilities for the respondent's obligations concerning the treatment of "relevant information", or information of a more general kind, in relation to onshore visa applicants.

(e) Section 57 does not deal with the possibilities for the respondent's obligations concerning the treatment of "relevant information", or

information of a more general kind, in relation to offshore visa applicants: s 57(3).

(f) It is impossible to read ss 51A and 57 together as taking away the application of the general law requirements of the natural justice hearing rule to the subject of "relevant information" in relation to offshore visa applicants. Section 57(3) expressly provides that s 57 does not apply to a class to which the appellant belongs.

(g) Without the aid to be found in the sharp stimulus of a particular controversy, it may be difficult to state fully the general law requirements of the natural justice hearing rule. But those requirements in their application to the present circumstances did create a duty on the respondent's delegate to give the appellant "a fair opportunity to correct or contradict any relevant material prejudicial to [her]"[76]. Hence the delegate had a duty to bring to the appellant's attention the information which the Australian immigration officers had discovered in Pakistan before reaching an adverse decision, so that the appellant might comment on it with a view to qualifying it, explaining it or refuting it.

(h) The delegate advised the appellant of that information in the decision record, but did not do so before the decision was reached.

(i) Therefore the delegate failed to afford the appellant natural justice and the respondent's decision was void.

The respondent's preliminary point

64 Unless that reasoning is open to valid criticism, it must be accepted. The respondent launched several attacks on steps (d) and (f). Before going to them, it is desirable to note a preliminary point which the respondent made. Section 51A was introduced in 2002, but it was not introduced alone[77]. At the same time equivalent provisions were introduced into other parts of the Act – s 97A into Pt 2 Div 3 subdiv C, s 118A into Pt 2 Div 3 subdiv E, s 127A into Pt 2 Div 3 subdiv F, s 357A into Pt 5 Div 5 and s 422B into Pt 7 Div 4. Counsel for the respondent submitted that these amendments to the Act were to be seen as part of a unified attempt to ensure that the particular "codes", as he called them, in each of those divisions or subdivisions exhaustively stated the requirements of the "procedural fairness hearing rule". Consistently with that submission, in putting

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76 *Kioa v West* (1985) 159 CLR 550 at 569 per Gibbs CJ; [1985] HCA 81.

77 *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth).

arguments about the construction of s 51A the respondent relied on authorities on equivalent provisions, for example ss 357A[78] and 422B(1)[79].

The "single subject matter construction"

65 The first of the respondent's attacks on steps (d) and (f) of the above reasoning was a submission that the expression in s 51A(1) "the matters it [ie Pt 2 Div 3 subdiv AB] deals with" was a reference to a single subject matter to be found in the subdivision as a whole. It was not a reference to the separate subject matters which each section of the subdivision, one by one, dealt with. The single subject matter was that described in the heading to the subdivision as the "procedure for dealing … with visa applications". If the submission were sound, Pt 2 Div 3 subdiv AB would completely exclude the general law requirements of the natural justice hearing rule. The respondent submitted that this "single subject matter construction" was supportable for five reasons.

66 *The respondent's first reason: singular number.* The first reason was said to be that "textually it best fits the use of the singular in subsection (1)" ("[t]his Subdivision" and "it deals"). A similar idea was referred to by Lindgren J in relation to s 357A in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs*[80]. He said that there were two textual considerations "which may be thought to support"[81] the "single subject matter construction". One was "the contrast between the singular form of s 357A(1) ('This Division is taken to be … it deals with') and the plural form of s 357A(2) ('Sections 375, 375A and 376 and Div 8A … are taken to be … they deal with')."[82] Transferred to s 51A, the argument contrasts the words in s 51A(1) "is taken" and "it deals with" with the words in s 51A(2) "are taken" and "they deal with". The argument would only work if in s 51A(1) "matters" read "matter" and if s 51A(2) concluded "matters each of them dealt with"[83]. But the legislation does not take this form. As Lindgren J suggested in relation to another section, the use of the word "matters" in s 51A(1) directs the inquiry to more than one matter, and includes

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78 *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456.

79 *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 562.

80 (2003) 130 FCR 456 at 469 [62].

81 (2003) 130 FCR 456 at 469 [61].

82 (2003) 130 FCR 456 at 469 [62].

83 For the text of s 51A see [3] above.

the possibility that the matters may be diverse[84]. The central difficulty with the respondent's argument is that the word "matters" is in the plural. The fact that the subject of the word "deals" is in the singular is of no significance in working out what is dealt with; the fact that the object of the word "deals" is in the plural, not the singular, is annihilating. And while the question in this Court is one of principle, not judicial reputation or curial authority, it cannot be said that any part of Lindgren J's judgment lends any strength to the respondent's argument. In particular, although Lindgren J recorded the point, he also found it uncompelling and unpersuasive[85].

67 *The respondent's second reason: related provisions.* The second reason advanced by the respondent for the "single subject matter construction" was the identical use of language in ss 97A, 118A, 127A, 357A and 422B. It was submitted that each section introduces a division or subdivision dealing with a different procedural code. It was submitted that the words "in relation to the matters it deals with" was a repeated formula – "a not inappropriate generic formula for distinguishing between the subject matters of those six different sets of provisions, not for singling out matters within each of those six sets." The respondent said that the point had been "very well made" by Lindgren J in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs*[86].

68 The answer is that, while the formula performs the function ascribed to it by the respondent, it does not perform only that function. If it performed only that function, the word "matter" would have been used, not "matters". The respondent's citation of *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* has a Pyrrhic character. Lindgren J did make the point, but only very tentatively. The tentativeness is seen in the words to which emphasis has been added in the following passages. Lindgren J said: "The drafter *may have invoked* the expression 'in relation to the matters they deal with' as a universally applicable general formula for distinguishing between the six contexts."[87] By the "six contexts" he meant ss 51A, 97A, 118A, 127A, 357A and 422B. Lindgren J also said that, taking s 357A[88]:

> "as an illustration, the drafter *may well have been attempting* to say that [Pt 5] Div 5 is taken to be an exhaustive statement of the requirements of

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84 (2003) 130 FCR 456 at 468 [58].

85 (2003) 130 FCR 456 at 470 [65].

86 (2003) 130 FCR 456 at 469-470 [63]-[64].

87 (2003) 130 FCR 456 at 470 [64].

88 (2003) 130 FCR 456 at 470 [64].

> the natural justice hearing rule in relation to the subject matter of [Pt 5] Div 5 as distinct from the subject matter of the respective Divisions and Subdivisions in which the other five sections were to be inserted."

Lindgren J did make the point very well. But, as those tentative words foreshadow, he also rejected it very firmly. He reached the conclusion that the second argument, like the first, was uncompelling and unpersuasive[89].

69 *The respondent's third reason: context.* The third reason advanced by the respondent was that s 51A had to be read in context. One aspect of the context was said to be set by the heading of the subdivision: "Code of procedure for dealing fairly, efficiently and quickly with visa applications". Another aspect of the context was said to lie in the location of s 51A at the start of a series of provisions setting out detailed steps in a procedure for dealing with visa applications. This, the respondent argued, suggested that the words "in relation to the matters [the subdivision] deals with" referred to the totality of what the respondent called a "code for integrated procedure".

70 Again the submission founders on the legislative use of the word "matters", not "matter". And so far as the submission relies on the heading, it faces the following difficulty. Part 2 Div 3 subdiv C, Pt 2 Div 3 subdiv E, Pt 2 Div 3 subdiv F, Pt 5 Div 5 and Pt 7 Div 4 contain equivalents to s 51A. But the headings to those divisions and subdivisions do not contain language equivalent to that used in the heading to Pt 2 Div 3 subdiv AB. They are not directed expressly to any "code of procedure".

71 *The respondent's fourth reason: responding to Miah's case.* The respondent also submitted that s 51A was a direct response to *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[90]. In that case Gaudron J said, and McHugh and Kirby JJ held, that the Act, particularly Pt 2 Div 3 subdiv AB as it then was, did not exclude the application of the general law rules of procedural fairness. The respondent pointed to McHugh J's statement that subdiv AB did not declare that the formal procedures set out in the subdivision "exhaustively" defined the content of fair procedure[91]. The respondent also pointed to Kirby J's use of the words "exhaust" and "exhaustive" to make the same point[92]. And the respondent submitted that it was no coincidence that the Parliament had used the words "exhaustive statement" in s 51A(1) and (2). There

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89 (2003) 130 FCR 456 at 470 [65].

90 (2001) 206 CLR 57; [2001] HCA 22.

91 (2001) 206 CLR 57 at 94 [128].

92 (2001) 206 CLR 57 at 113 [181] and [183].

are similar statements in the Explanatory Memorandum and the Second Reading Speech. The Explanatory Memorandum stated that it was proposed to amend the Act "to provide a clear legislative statement that specified 'codes of procedure' in the Act are an exhaustive statement of the requirements of the natural justice hearing rule."[93] The Second Reading Speech described *Miah's* case, attributed certain consequences to it, and said the purpose of s 51A and its counterparts was to make it "expressly clear" that particular codes in the Act do "exhaustively state the requirements of the … procedural fairness hearing rule"[94].

72 But what did these statements mean? Not surprisingly the Explanatory Memorandum and the Second Reading Speech reveal some discontent with the majority view in *Miah's* case. They proceed on the view that s 51A was "necessary to restore the [Parliament's] original intention that the … Act should contain codes … that do replace the common law requirement of the natural justice hearing rule."[95] The preference of the government appears to have been for the minority approach of Gleeson CJ and Hayne J in *Miah's* case. That approach was summarised by Gleeson CJ and Hayne J, after they had analysed various provisions in Pt 2 Div 3 subdiv AB, as follows[96]:

> "These provisions, read in the context of legislation which *requires the decision-maker to give reasons*, and entitles *an unsuccessful applicant to a full review of the decision on the merits*, evince an intention on the part of the legislature to prescribe comprehensively the extent to which, and the circumstances in which, the Minister or delegate is to give an applicant an opportunity to make comments or submissions, or provide information, in addition to the information in the original application or any supplementary information furnished by the applicant before a decision is made." (emphasis added)

The respondent submitted that the Parliament was clearly seeking to invoke that view. The respondent submitted that the above sentence expresses "in quite

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93 Australia, House of Representatives, Migration Legislation Amendment (Procedural Fairness) Bill 2002, Explanatory Memorandum at 2 [1]. See also at 2 [4], 3 [7] and 5-10 (Sched 1).

94 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 March 2002 at 1106-1107.

95 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 March 2002 at 1107.

96 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 74 [49].

precise terms what it is that should be taken to be the legal effect of section 51A." There are grave difficulties with these submissions.

73 Mr Miah was an onshore visa applicant, and their Honours were speaking of onshore visa applicants. The present context is different from the context their Honours described. The present context concerns the impact of the Act on offshore visa applicants. Section 66 of the Act does *not* require "the decision-maker to give reasons" and s 338 does *not* entitle "an unsuccessful applicant to a full review of the decision on the merits". It is not sufficiently clear that the Parliament was seeking to invoke a view stated in relation to onshore visa applicants with certain significant statutory rights and apply it to offshore visa applicants without those rights. The right of onshore visa applicants to review on the merits may not diminish whatever rights to procedural fairness they otherwise have. But the absence of any right in offshore visa applicants to review on the merits strengthens the unlikelihood that the Act excludes their right to procedural fairness. It also strengthens the need for clear language if a construction to that effect is to be adopted. Further, the extrinsic materials do not direct attention to one question, crucial to the present appeal: is the "single subject matter construction" correct? And they do not discuss the meaning of the vital words "in relation to the matters it deals with".

74 In short, as is very common, reading the Explanatory Memorandum and the Second Reading Speech is much less helpful than reading the legislation itself. No doubt, as the respondent submitted, those materials establish that the government had the "intention" of overturning the "result" of *Miah's* case. Perhaps the respondent is right to call the indications of this intention "overwhelming". Perhaps the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* was right to say that the intention could not have been made "any clearer"[97]. But what was the content of that "intention"? What was the "result" of *Miah's* case which the government intended to overturn? *Miah's* case established the position for onshore visa applicants to whom s 57 applies. An intention to overturn, or an actual overturning of, that result is one thing. But it does not say anything decisive about any intention to legislate in relation to the position for offshore visa applicants to whom s 57 does not apply. In any event, the ultimate question is not what the Parliament intended to do, but what it actually did.

75 What the Parliament actually did turns on the meaning of the controversial expression "in relation to the matters it deals with". That expression has no parallel in *Miah's* case. On the occasions when the respondent's submissions gave that phrase attention, they read "matters" as "matter". There is no warrant for this. However, commonly the respondent's submissions did not attach

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97 (2006) 151 FCR 214 at 225 [65].

significance to the phrase at all. Yet it is a vital expression. That is because it has a limiting character. It gives s 51A(1) a narrower effect than it would have if it were not there. And the narrowing effect stems from the word "matters". That word means that the fourth argument of the respondent for the "single subject matter construction", like the first three, must fail.

76 *The respondent's fifth reason: does rejection of the "single subject matter construction" give s 51A work to do?* The respondent's fifth reason for supporting the "single subject matter construction" of s 51A was that to reject it and adopt a multiple subject matter approach would give s 51A no work to do. The respondent submitted that the expression "the matters it deals with" in s 51A(1) must refer to something wider than the exact text of the enacted procedural requirements, otherwise s 51A(1) would be superfluous. The respondent submitted that the legislation cannot be construed so that the displacement of the natural justice hearing rule is co-extensive with, but does not go beyond, the text of the enacted procedural requirements. The respondent submitted that if that were the case, the result would be that the general law requirements of the natural justice hearing rule would continue to exist as potential grounds for relief in areas outside those specifically dealt with. In effect, the respondent's contention was that s 51A(1) would have achieved nothing beyond that which the specific provisions did, and would be wholly otiose – which points to error in the construction which leads to that result. The respondent's submission adopted certain reasoning stated by Lindgren J in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs*[98]. Lindgren J gave an illustration in relation to s 357A(1) (which corresponds with s 51A(1))[99]:

> "For example, within [Pt 5] Div 5, s 360(1) provides as follows:
>
> > '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.'
>
> If s 357A(1) signified that the natural justice hearing rule was excluded only to the precise extent that it would have required the Tribunal to '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' … and no further, s 357A(1) would have achieved nothing in the present respect: the rule would survive as a ground for relief outside the parameters of s 360(1)."

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98 (2003) 130 FCR 456 at 468-469 [59].

99 (2003) 130 FCR 456 at 469 [59].

The corresponding example in relation to s 57 is that the natural justice hearing rule is excluded only to the precise extent that it would have required the respondent to give particulars of the "relevant information" in an appropriate way, to ensure that the applicant understood why it is relevant, and to invite the applicant to comment on it.

77 Assuming but not deciding that the respondent's submission is correct in terms, and accepting that it is supported by Lindgren J, it must be noted that Lindgren J nonetheless went on to indicate an inclination against the "single subject matter construction"[100]. He also said that the expression "the matters it dealt with" referred to "larger subject matters than the exact text of the procedural fairness requirements"[101].

78 The word "matter" when applied to s 57 can have a meaning which does not render s 51A(1) superfluous or otiose. And there is no reason why a given provision cannot be said to deal with more than one matter. The matter of the precise rule enacted by s 57 is one matter, but another matter is the subject or subjects to which the rule applies. The subject (or subjects) to which the rule applies is wider than the content of the rule. In s 57, one subject is the range of possibilities for the respondent's obligations to onshore visa applicants concerning the treatment of "relevant information". That is a matter wider than the precise text of s 57(2) because it extends to other possible steps the respondent might be obliged to take pursuant to the general law requirements of the natural justice hearing rule. A yet wider subject, and hence "matter", is the subject of the possibilities for the respondent's obligations concerning the treatment of information which the respondent considers would be a reason, or part of a reason, for refusing to grant a visa and which was not given by the applicant for the purpose of the application (ie "relevant information" as defined in s 57(1) but without par (b)).

79 On either of these wider meanings, it cannot be said that s 51A(1) is otiose. It is true that, on either view, s 51A does less work than it would on the respondent's preferred "single subject matter construction", but it does do some work. Although it is not necessary to decide the point, s 51A very probably reverses *Miah's* case in the sense that, leaving aside the present appellant's constitutional arguments, if the facts of that case now arose, the point on which Mr Miah had majority support would be decided adversely to him.

80 A further illustration of the work done by s 51A is this. A construction abolishing the general law requirements of the natural justice hearing rule is not

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100 (2003) 130 FCR 456 at 475 [83].

101 (2003) 130 FCR 456 at 469 [60].

to be inferred "from the presence in the statute of rights which are commensurate with some of the rules of natural justice"[102]. It follows that the enactment of s 57 did not abolish any additional general law requirements of the natural justice hearing rule. Other provisions in the subdivision providing elements corresponding functionally to parts of the general law requirements of the natural justice hearing rule did not by themselves abolish any additional general law requirements. To ensure that, in the area to which it applied, s 57 was exhaustive of the rules of natural justice, it was necessary to enact s 51A.

81 Secondly, let it be accepted that that rejection of the respondent's submissions means that the work which s 51A is to do is limited. That does not point against the approach involved in either of the two characterisations of "matter" in relation to s 57 just postulated. That is because the more widely s 51A is construed and the less scope it leaves for the general law requirements of the natural justice hearing rule, the clearer the language needed to achieve this result would have to be. The language is insufficiently clear. The legislative scheme does not give unequivocal emphasis to s 51A as having a wide application. Nor, indeed, do the extrinsic materials on which the respondent placed much stress.

82 Both the Act and the extrinsic materials are compatible with s 51A having a narrow application. Section 51A was introduced in 2002, the year after s 474 in a new form had been inserted into the Act, and the year before this Court decided the construction of s 474[103]. Section 474 was an "ouster clause" or "privative clause" which on one view prevented any court granting relief with respect to most decisions under the Act. It was a view underpinning the Second Reading Speech relating to s 51A. That Speech treated s 474 not as having a narrow meaning, but as being a section which "greatly expands the legal validity of acts done and decisions made by decision-makers"[104]. The construction actually arrived at by this Court was that s 474 did not protect decisions involving a jurisdictional error from judicial review. In the cases in which this Court decided that that was the correct construction, the Commonwealth had submitted that it had a wider meaning. One aspect of the wider meaning it urged was that s 474 should be construed as excluding any implied obligation of

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102 *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; [1990] HCA 57. They cited *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338 at 344-345, 347 and 349.

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

104 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 March 2002 at 1106.

procedural fairness[105]. If that submission as to the correct construction of s 474 had been correct, it would have left no work for s 51A to do when it was enacted in the following year. And if the broad construction of s 474 underlying what was said in the Second Reading Speech when s 51A was introduced were correct, very little work would have been left for s 51A to do. Here, as elsewhere, the extrinsic materials do not go far enough to achieve the respondent's goals.

The subject matter of s 57

83 For those reasons the respondent's five arguments in favour of the "single subject matter construction" must be rejected. On that basis, the respondent submitted in the alternative that the subject matter of s 57 was "the provision of information known to the Minister which would be adverse to an applicant's application". It is inherent in that submission that the following words should be added at the end: "whether the applicant is an onshore visa applicant or an offshore visa applicant". That is, the submission rejected the limitation of "matter" to onshore visa applicants which was found in the two versions of "matter" discussed under the previous heading. But the respondent did not explain why that limitation should be abandoned and why so wide a subject matter should be found to exist in view of the limits set by s 57(3) to the scope of s 57. Because s 57(3) expressly provides that s 57(2) "does not apply" in relation to relevant information received by the respondent in respect of certain applications involving offshore visa applicants, that matter is not a matter dealt with by the subdivision. Hence s 51A(1) has no application to it.

The appeal to anomaly

84 Another obstacle which the respondent raised to the appellant's case was an appeal to anomaly. The supposed anomaly was put thus in *Minister for Immigration and Multicultural and Indigenous Affairs v Lat*[106]:

> "The Legislature could hardly have intended to provide the full panoply of common law natural justice to visa applicants who are required to be outside Australia when the visa is granted, while conferring a more limited form of statutory protection upon onshore applicants."

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105 That was argued in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S134/2002* (2003) 211 CLR 441 at 447; [2003] HCA 1. The same argument was put in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476: see at 479.

106 (2006) 151 FCR 214 at 225-226 [68].

If the language of "intention" is abandoned and replaced by the language of construction, the argument is that a construction which leads to offshore visa applicants having better rights than onshore visa applicants is so absurd or unreasonable that it cannot be preferred. However it is put, this appeal to anomaly is unconvincing. The construction advanced by the appellant is not absurd or unreasonable. Even if it were unreasonable, it is far more reasonable than the respondent's construction. The respondent's construction would give substantial natural justice to onshore visa applicants in relation to "relevant information", but none at all to offshore visa applicants. Further, the process of judging whether it is anomalous or unreasonable that the general law requirements of the natural justice hearing rule may offer better protection to offshore visa applicants than s 57 offers to onshore visa applicants has to be carried out bearing in mind a key contrast. Applicants in the former class, unlike the latter, have no right to reasons and no right of merits review before the Migration Review Tribunal.

85 In assessing the argument from anomaly it is also necessary to bear in mind that the authoritative construction of certain parts of the Act has flowed from two principles. One is that legislation is not lightly to be construed as abolishing the natural justice hearing rule. The second is that legislation should be construed so that it operates within constitutional power, not outside it[107]. The consequence of these principles is that the judicial construction of some parts of the legislation may diverge from that which its framers may subjectively have intended. A further consequence is that those parts, so construed, may not fit perfectly with other parts, which can be construed in accordance with the framers' intentions. This is simply an illustration of how the search for the intent of legislators rather than the meaning of legislation can be both delusive and lacking in utility. That is not sufficient to characterise the lack of "fit" as an "anomaly" which is so absurd or irrational that it points away from a particular construction.

Notice of contention

86 *The respondent's argument.* The respondent's argument in relation to the notice of contention rested on the terms of s 57 by itself, read quite independently of s 51A. The argument was that, if it is correct that the natural justice hearing rule applies by virtue of an implication into the relevant statute, one should not make an implication that would render an express provision of the statute redundant. Section 57, it was submitted, ought not to be read by implication as requiring relevant information to be given to applicants of the class described in

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107 For example, *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476. See also *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28]; [2000] HCA 33.

s 57(3) where s 57 expressly provides that they are not to be given that information.

87 *The impact of s 51A.* That submission must be rejected. It does what the respondent accepted must not be done, namely, to read s 57 as if s 51A were not there, when s 51A is there "and demands by its terms that it be taken into account". Section 57(2) gives to onshore visa applicants the rights described in s 57(2), but ss 51A and 57(2) in combination deny them any further rights. On the other hand, s 57(3) causes the specific obligations contained in s 57(2) not to be imposed: thus s 57(3) prevents the class described in it from enjoying the advantages given by s 57(2) and from suffering the disadvantages created by s 51A. There is thus no repugnancy in finding an implication in the Act, if that is the correct approach, that persons in the excluded s 57(3) class are to be accorded the benefits of the natural justice hearing rule, while also construing s 57 when read with s 51A as giving onshore visa applicants some of those benefits but not necessarily all of them.

88 *The argument considered independently of s 51A.* Even if s 51A is left out of account, the respondent's submission rests on drawing an inference from the grant of some elements of natural justice to one class of applicants that natural justice to another class is excluded. It would be wrong to infer from the legislative grant of some elements of natural justice to one class that all other elements are excluded in relation to that class by the legislation[108]. It is even more plainly wrong to infer from the grant of some elements of natural justice to one class of applicants that natural justice to another class is excluded.

89 In short, s 57 does not remove the advantages of procedural fairness from the classes of persons described in s 57(3). It simply fails to impose a s 57(2) obligation in relation to that class, while leaving applicable to it whatever general law requirements of the natural justice hearing rule apply.

90 *"Policy choices".* The respondent, perhaps sensing that a construction of the legislation which left offshore visa applicants without any right to deal with "relevant information" lacked attractiveness, submitted that that consequence was but part of a wider scheme to be discerned within the Act, pursuant to which offshore visa applicants received differential treatment compared to onshore visa applicants. Onshore visa applicants are entitled to reasons and merits review, but can only apply once (ss 48-48A). Offshore visa applicants are not entitled to reasons and merits review, but can apply more than once. These differences were said by the respondent to be "the result of policy choices by Parliament, reflecting matters of administrative convenience, including distance, and

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108 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 93 [126] and 96 [139].

budgetary and workload considerations." Where the language of the Act establishes differential treatment, it must be given effect whatever the matters underlying the legislative judgment. But the language of s 57 does not create differential treatment in relation to natural justice as extreme as the respondent's submission suggests.

91 The respondent's submission about the factors underlying the legislative policy choices suggested that the general law requirements of the natural justice hearing rule "would reduce to nothing, or practically nothing, in the case of many [offshore] visa applicants." Even if that is so in some instances, it does not follow that it is necessarily so in others. It does not follow from the limited protection given by the general law requirements of the natural justice hearing rule in the case of some s 57(3) persons that there is no protection at all.

Matters which it is not necessary to deal with

92 All the respondent's challenges to the appellant's case as set out at the commencement of this judgment fail. It is therefore not necessary to consider various other matters in controversy. Among them are the following. It is not necessary to consider whether the natural justice hearing rule applies because of a presumption that it will not readily be abolished or, as the respondent put it, because of "an implication into the statute". It is not necessary to determine the precise test for ascertaining what language is needed to limit or remove the duty of procedural fairness – whether language of "irresistible clearness" is needed, or whether language of "a high degree of certainty" suffices. And it is not necessary to consider the three constitutional arguments which the appellant advanced.