Judicial Review and Part 8 of the Migration Act: *Necessary Reform or Overkill?*

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1. *Introduction*[1]

While we often celebrate our nation's multicultural identity in food, dance and song, many Australians remain profoundly ambivalent about the government's immigration program.[2] This disquiet is given voice by rather extreme groups such as Australians Against Further Immigration and various maverick members of Parliament. It is apparent also, however, in the Federal Parliament's virtual fixation with immigration control, and the increasingly extreme measures that have been taken to ensure that the Government has the last say in who may or may not enter or remain in the country.

This article examines one aspect of the struggle to control immigration: the conflict that has arisen between the Government and the courts over the judicial review of migration decisions. During the 1980s, the courts' scrutiny of decisions made under the *Migration Act* 1958 ("the Act") put migration cases at the cutting edge of administrative law jurisprudence. In September 1994, the tradition of innovation was continued with the creation of a special regime for the judicial review of migration decisions. This paper explores the forces leading to the introduction of what is now Part 8 of the Act and attempts to evaluate the merits and effectiveness of the changes made.

After providing a brief description of the package of reforms which included the Part 8 provisions, the article looks at the problems that were generated for the Government by the courts' use of curial review to strike at

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1 Throughout this paper the terms "Department" and "Minister" are used to denote the Department and Minister of Immigration and Ethnic Affairs, respectively, although case references reveal a former incarnation as "Minister/Department of Immigration, Local Government and Ethnic Affairs". With the election of the Coalition Government in March 1996, this branch of the Federal administration became known as the "Department of Immigration and Multicultural Affairs".

2 See McAllister, I, "Immigration, Bipartisanship and Public Opinion" in Jupp, J and Kabala, M, *The Politics of Australian Immigration* (1993) Australian Government Publishing Service, Canberra at 161; and Kingston, M, "Politics and Public Opinion" in Crock, M (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993) at 8.

both the form and substance of migration decision making during the 1980s. The paper then examines the extent to which major amendments to the migration legislation in December 1989 did and did not meet the concerns that had been raised. The argument is made that while the codification of decision making was sufficient to halt undue curial activism in general immigration cases, disquiet continued over the judiciary's review of decisions refusing refugee status. These concerns are evident in the battle royal that developed between the Government and the courts between 1989 and 1992 over the detention of the so-called "boat people".

The concluding parts of the article examine the statistical data concerning the number of applications now being made to the courts and the success and failure rates of the respective parties. The object of the exercise is to determine whether the Part 8 reforms were necessary or, indeed, whether they are misconceived. On the basis of the figures collected, the jurisprudential trends identified in the earlier part of the paper; and other developments, I suggest some causes for the rise in popularity of curial review observed. Without a proper longitudinal study of judicial review applicants, the arguments made about cause and effect can be tentative at best. However, it is possible to make some observations about the forces at work and about the assumptions that appear to be being made about the courts' responsibility for the judicial review phenomena.

It is my view that the Part 8 changes are not justified by the available (hard) evidence. Whether or not my opinion is correct, the outstanding question is what the reforms will achieve. Is the Part 8 regime likely to reduce the number of applications made and/or the rate at which the courts continue to intervene in the review of cases? This aspect of the inquiry involves a practical examination of what the courts do when they review administrative action, but it requires also an analysis of the theoretical bases of judicial review. On one hand there is the view that the courts' role is to enforce the correct application of rules set down by the Parliament. On the other hand there is the notion that judicial review involves the protection and advancement of a more complex "rule of law" — a body of principles fixed in the notion that judges are there to defend the rights of the individual to equal and fair treatment before the law.

Chronology of Events

1 October 1980:	*Administrative Decisions (Judicial Review) Act* 1977 (Cth) comes into force
December 1985:	*Kioa v West* (1985) 159 CLR 550 decided by the High Court
June 1989 and following:	Pro-democracy movement in the Peoples' Republic of China (PRC) crushed
	Thousands of PRC students seek refuge in Australia and are assured by Prime Minister Hawke that they will not have to return to China
September 1989:	*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 decided by the High Court

November 1989:	First boats from Cambodia and PRC begin to arrive
19 December 1989:	*Migration Act* 1958 (Cth) ("the Act") amended
	Migration Regulations 1989 made
	Immigration Review Tribunal ("IRT") created but does not hear its first case until June 1990
March 1991:	The system for determining refugee claims in Australia is overhauled and the Refugee Status Review Committee is established to replace the Determination of Refugee Status Committee. The "paper" hearing and determination of claims is maintained.
October 1991:	Port Hedland Detention Centre established; other boat people detained in Melbourne before being transferred to Villawood in Sydney
5 May 1992:	First court action seeking the release of Cambodian boat people in detention prompts Government to amend the Act so as to provide for the mandatory detention of persons arriving at the border by boat without a visa
November 1992:	*Migration Reform Act* 1992 (Cth) ("the Reform Act") passed but not proclaimed
8 December 1992:	*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 decided by the High Court
14 December 1992:	Compensation claims lodged by persons detained prior to the introduction of the May 1992 amendments to the Act
16 December 1992:	The Act is amended to cap compensation for wrongful imprisonment at a rate of one dollar a day
1 February 1993:	Migration Regulations 1989 repealed and Migration (1993) Regulations come into operation
1 June 1993:	Part 7 of the Act proclaimed: Refugee Review Tribunal commences operation, allowing oral hearing of refugee claims
1 September 1994:	Balance of the *Reform Act* proclaimed
	Migration (1993) Regulations repealed and replaced by the Migration (1994) Regulations

2. *The Nature of the Reforms*

The changes made to the Act on 1 September 1994 with the proclamation of the remaining parts of the *Migration Reform Act* 1992[3] (the "*Reform Act*") represented the second stage of a radical overhaul of Australia's migration legislation. The revision began in December 1989 with the move away from Ministerial discretion towards codified or regulated decision making.[4] The

3 See Act No 184 of 1992 (Cth).

4 See Cooney, S, *The Transformation of Migration Law* (1995) Australian Government

Reform Act continued this trend by introducing a universal visa system whereby the possession of a valid visa became the sole determinant of a non-citizen's legal status in Australia. Without such a document — real or imputed — unlawful non-citizens in Australia must be detained and removed from the country.[5] The legislation expanded the jurisdiction of the generalist review body — the Immigration Review Tribunal ("IRT") — to include most decisions relating to visa refusals concerning non-citizens who are either in Australia or who are sponsored from overseas by an Australian citizen or resident.[6] It also created the Refugee Review Tribunal ("RRT") to hear and determine appeals against refusals to grant refugee status.[7]

Significantly, for present purposes, the legislation introduced some very specific provisions detailing when visa applications must be made and the procedures that must be followed in reaching a decision. These provisions are sometimes referred to as the Act's "natural justice" provisions as they establish a code of conduct that must be followed to reach a "legal" decision.[8] Finally, the *Reform Act* created a special regime for the judicial review of migration decisions by the Federal Court.

For "judicially reviewable" migration decisions made after 1 September 1994,[9] neither the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (the "*ADJR Act*") nor section 39B of the *Judiciary Act* 1903 (Cth) is available to persons wishing to challenge an adverse ruling. The guarantees of section 75(v) of the Constitution ensure continued access to the High Court. However, should the High Court decide to remit an immigration matter back to the Federal Court under section 44 of the *Judiciary Act* 1903 (Cth), the Federal Court remains subject to the limitations of Part 8 of the Act.[10]

A. *"Judicially Reviewable Decisions"*

The present Part 8 of the Act quite literally brings together the law governing all curial review of migration decisions. There are no longer separate provisions allowing appeals from migration tribunals on points of law. There is simply one system for the judicial review of decisions which encompasses both appeals on points of law and general applications for judicial review.

The migration decisions that can be reviewed by the Federal Court are specified in section 475(1) of the Act as final decisions of the administrative review bodies — namely the IRT; the RRT and the Administrative Appeals Tribunal ("AAT") — and other decisions made under the Act or the regulations relating to

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Publishing Service, Canberra at ch4; and Cooney, S, "The Codification of Migration Policy: Excess Rules?" (1994) 1 *Aust J Admin L* 125 (Pt I) and 181 (Pt II).

5 See ss189 and 198 of the Act. Note that provision is made for "deeming" certain non-citizens to be the holders of a visa.

6 See the definition of "Part 5 reviewable decision" in s337 of the Act.

7 The provisions relating to the establishment of the RRT were proclaimed on 1 June 1993. See Pt 7 of the Act.

8 See Pt 2, Subdiv 3AB of the Act (s5264).

9 Note that while the legislation does not specify that the reforms are restricted to decisions made after 1 September 1994, the Minister has taken the view that Pt 8 should not be used to restrict judicial review of decisions made before this date. On this point, see *Amaydayin v Minister for Immigration and Ethnic Affairs*, Unreported, Jenkinson J, December 1995.

10 See s485 of the Act.

visas. Paragraph 475(2) of the Act expressly excludes from judicial review any decisions made prior to a final determination, that is, rulings from which an appeal lies to any of the above administrative review authorities. It also bars from curial review decisions by the Minister not to exercise or consider the exercise of the various "non-compellable" discretions conferred by the Act. The strict time limits for appeals to the administrative review authorities are significant because in most instances[11] there is also a non-extendable time limit on applications for judicial review of 28 days following notification of an adverse decision (see section 478(2)).

The scheme is designed to force people to exercise their rights to administrative review. While a right of appeal lies on the merits of a decision, applicants are barred from seeking judicial review. If, on the other hand, they do not exercise their right to appeal at first instance within the time specified, they risk losing their right to Federal Court review where the time limits on administrative appeals are equal to or greater than those applicable to judicial review. This is because the time for applying for judicial review of the original decision will expire at or before the expiry of the period allowed for merits review.

These Part 8 provisions stand in contrast to section 3 of the *ADJR Act* which permits judicial review of all decisions "of an administrative character" that are "made under an enactment", together with conduct engaged in for the purpose of reaching a decision. Although section 10(2)(b)(ii) of the *ADJR Act* gives the Federal Court a discretion not to hear applications where a person has not exhausted her or his appeal avenues, section 475 of the Act is different because it places an absolute ban on the court entertaining applications from persons who have a right to tribunal review. Although the *ADJR Act* requires applications for judicial review to be lodged within 28 days of a decision being made, the Federal Court has discretion to hear applications made out of time.

B. The Grounds for Review

The grounds on which a "judicially reviewable" decision can be reviewed by the Federal Court under Part 8 of the Act are set out in section 476 so as to allow challenges on the basis of:

(a) failure to follow prescribed procedures;
(b) lack of jurisdiction in the decision maker;
(c) decision not authorised by the Act or the regulations;
(d) improper exercise of power;
(e) error of law, being an incorrect interpretation or application of the law;
(f) fraud or actual bias in the decision maker; and
(g) no evidence.

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11 See ss339 and 347 of the Act (in respect of the IRT and the RRT respectively). Pursuant to s202(5) of the Act, appeals to the AAT are subject to a non-extendable 28 day period in the case of adverse security assessments under s202(1). However, the more flexible s29(7) of the *Administrative Appeals Tribunal Act* 1975 applies to other migration decisions in relation to which AAT review is available under s500 of the Act.

Improper exercise of power under section 476(1)(d) is defined in subsection (3) as:

(a) the exercise of power for purpose other than that for which it was conferred;

(b) acting under dictation; and

(c) the exercise of a discretionary power without regards to the merits of a case.

In addition, review can be sought where there is a failure to make a decision (section 477).

Subsections 476(2) and (3)(d)–(g) then set out the grounds on which decisions cannot be reviewed. These are: denial of natural justice; unreasonableness; taking an irrelevant consideration into account; failure to take into account a relevant consideration; bad faith; and any other abuse of power. The omissions are significant because of the body of common law attached to phrases such as "natural justice" and "unreasonableness". As is explored below, the heads of review inserted in place of these grounds are considerably narrower in their reach.

The scope of the "no evidence" head in section 476(1)(g) is restricted in a way that replicates section 5(3) of the *ADJR Act* (see section 476(4)).

In some respects, the excluded grounds appear to go to the very heart of the *ADJR Act* and of the common law which this Act essentially codifies. According to Lord Diplock in *Council of Civil Service Union v Minister for Civil Service*,[12] judicial review has three key functions. The role of the courts is to:

(i) oversee the application of the law by ensuring that all and only relevant matters are taken into account in making a decision;

(ii) ensure that fair procedures are followed; and

(iii) ensure that the decision made is rational and reasonable in all the circumstances.

In practice, the Federal (and High) Courts still perform a tripartite function in the review of migration decisions. In the case of the Federal Court, however, it is not the common law that determines matters of procedural fairness, relevancy and reasonableness, but the terms of Part 8 of the Act. Decisions can be reviewed on the ground of procedural ultra vires where the prescribed procedures have not been followed: the common law rules of natural justice no longer apply. While the heads of relevance and reasonableness have been excluded, review is still available where the terms of the Act and the Regulations have been wrongly interpreted or applied. In this respect, Part 8 reflects a narrow view of judicial review, with the role of the courts restricted to ensuring adherence to rules laid down by Parliament.

12 [1985] 1 AC 374 at 407.

C. *Standing to Seek Review, Statements of Reasons and the Powers of the Federal Court*

Under section 479 of the Act, standing to seek Part 8 review is limited to people who are either the subject of a decision or who are the applicants for review before a review tribunal. This contrasts with the definition of "person aggrieved" in section 3(4) of the *ADJR Act* which extends standing to all persons whose interests are adversely affected by a decision.[13] Examples of people who no longer have standing in migration cases are the dependents of people who are directly affected by a visa decision.[14]

Under section 13 of the *ADJR Act*, most persons with standing to seek review also have a right to obtain reasons for the decision in question.[15] The migration legislation contains no equivalent provision unless an applicant has appealed to the IRT or the RRT, both of which are required to publish "to the world" the reasons for their rulings. Where an applicant exercises her or his right to seek review by these bodies, reasons will follow as a matter of course on the determination of the appeal. Persons who do not exercise their right to appeal within time; and those who have no right or standing to seek tribunal review are not able to obtain reasons.[16] The absence of a general right to reasons underscores the inferior legal status of those who cannot or do not have access to merits review.

Once a matter is before the Federal Court, the Court's powers are much the same as those conferred on the Court by the *ADJR Act*. The one exception is the absence of any power in the migration legislation to make orders in respect of conduct engaged in for the purpose of reaching a decision. Such conduct is no longer reviewable by the Federal Court in migration cases.[17] This means that applicants must wait for a final determination of their claim before they can seek curial intervention, even where a legal flaw in the procedures or reasoning being followed becomes apparent before an actual decision is made.

D. *Other Provisions Limiting Review by the Federal Court*

Throughout the Act and Regulations there are other provisions that appear to be designed to limit curial review of migration decisions. A case in point is section 183, which purports to prevent any court from ordering the release of

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13 The provision has been interpreted broadly by the courts. See, for example, *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64; Allars, M, *An Introduction to Australian Administrative Law* (1990) at 308; and Cane, P, "The Function of Standing Rules in Administrative Law" (1980) *Public Law* 303.

14 See, for example, *Bedro v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 131.

15 Decisions excluded from the requirements of s13 are set out in Schedule 2 of that Act. The list includes "visa" decisions which now precludes most migration applicants from s13 reasons.

16 For example, overseas applicants for a visa who have no sponsor or nominator in Australia.

17 The power to review conduct was most significant in migration cases when decision making involved the consideration of rulings by recommendatory bodies such as the old Immigration Review Panels or Determination of Refugee Status Committee (later the Refugee Status Review Committee). The present administrative review authorities have determinative powers which makes their decisions reviewable in their own right.

a "designated person".[18] Another is the device known as the non-compellable Ministerial discretion. Such discretions are conferred on the Minister as a safety net that allows exceptions to be made in certain cases of compelling hardship or other necessitous circumstance.[19] For example, the Minister has a general power to override an adverse decision of either the IRT or the RRT. The Minister may also consider the grant of a visa to a person subject to an application bar and mandatory removal under section 91C–91E of the Act (see section 91F). In each instance, the Act spells out the Minister's power but stipulates that the Minister is under no duty to exercise the discretion conferred. Section 475(1)(e) of the Act provides that the exercise or non-exercise of such discretions is not "judicially reviewable".

In practice, the device works as a system of ministerial noblesse oblige. The Minister cannot be compelled to exercise her or his discretion. When minded not to act, the Minister simply declines to consider using the discretion. The only time the discretion is exercised is when the Minister is minded to intervene in an applicant's favour.

3. *The Genesis of the Problem: The Judicial Review of Migration Decisions During the 1980s*

To understand Part 8 of the Act, it is necessary to go back to the 1980s and early 1990s to examine some of the jurisprudence that evolved in the Federal and High Courts over this period in the review of migration decisions. Without making any value judgment of what occurred, the decisions of the courts created specific problems for the Government, and at the same time generated a climate of conflict with the administration. What is interesting is the nature and timing of the Government's response to the intervention and occasional creativity of the courts. When the Act was amended in December 1989, the reformulated legislation made no direct reference to the courts or to judicial review. It was not until December 1992 that express moves were made to curb the grounds on which the courts could review migration decisions.

The following section explores the apparent nexus between the courts' review of migration decisions under the *ADJR Act* and the form and content of the amendments made to the Act in December 1989. The article turns then to the more complex forces that appear to have led to the *Migration Reform Act* 1992. Over the three year period between 1989 and 1992, the Government's concern about judicial activism intensified, with outbursts from the politicians becoming increasingly strident and explicit. This change in mood cannot be explained solely by the jurisprudence emerging from the courts. Of equal importance were other developments that had an impact on the conduct of the government's immigration program — in particular the so-called refugee crises that featured so prominently in the media and in politics over this period.

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18 Note, however, that the High Court has read down this provision so that it cannot be used to prevent a court from ordering the release of a person whose detention is not justified at law. See *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1 at 35–7 per Brennan, Deane and Dawson JJ, and 53 and 58 per Gaudron J.

19 See ss345, 351, 391, 417 and 454 of the Act.

A. The Courts and the 1989 Amendments to the Act

For immigration lawyers, the 1980s were years of revolution in the curial review of migration decisions. Over the space of 10 years migration went from being one of the last bastions of closed government to the largest source of judicial review applications outside of taxation.[20] The key to the revolution was the package of reforms once described as the "vision splendid" of the new administrative law:[21] the creation of the Federal Court in 1976; legislation establishing the AAT; Freedom of Information; and the *ADJR Act,* which came into force on 1 October 1980. For the first time, disgruntled applicants had an affordable mechanism for seeking judicial review of adverse migration decisions. In the absence of a creditable system for reviewing the merits of such decisions, more and more people took this option as the decade wore on.

The reason immigration proved so vulnerable to judicial review lay in the nature of the Act before 1989 and the change that occurred in the judiciary's approach to open-ended discretions. The "old" Act reflected an age when the admission or expulsion of non-citizens was regarded as a matter of ministerial prerogative and an inappropriate subject for judicial review. It was dominated by sweeping powers conferred on the Minister to grant or refuse entry to non-citizens and to deport the same.[22] The Act gave no hint as to how the various discretions would be exercised in individual cases. Such detail was confined to policy statements contained in various manuals and circulars that changed frequently and did not have the force of law. Of equal importance when considering the growth in the number of applications made to the Federal Court was the absence of an efficient and effective avenue for reviewing the merits of migration decisions.[23]

In keeping with the discretionary nature of the Act, migration decision making in the early days was largely the preserve of migration agents and non-lawyers who relied more on their political contacts than on the law in order to achieve the result sought by their clients.[24] The rise in popularity of

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20 Between 1982 and 1991, applications under the *ADJR Act* increased from 30 to 160 per annum (see Table 1, below). In all but two of the years between 1986 and 1992, immigration constituted the largest single source of review work for the Federal Court. In 1983–4, aviation generated 42 applications, compared with 31 for migration. See Administrative Review Council, *8th Annual Report* (1984) Australian Government Publishing Service, Canberra at 100–1. In 1984–5, there were 48 applications concerning taxation, compared with 45 relating to migration. See Administrative Review Council, *9th Annual Report* (1985) Australian Government Publishing Service, Canberra at 121–2. By 1991, migration cases accounted for nearly half of the total number of applications made under the *ADJR Act.*

21 See Pearce, D C, "The Fading of the Vision Splendid? Administrative Law Retrospect and Prospect" (1989) 58 *Canberra Bull Public Admin* 15.

22 See ss6, 7 and 18 of the Act 1958–89.

23 For a description of the avenues available to persons wishing to challenge the merits of a migration decision before 1989, see Warburton, G, "The Rights of Non-Citizens in Australia" (1986) 9 No 2 *UNSWLJ* 90; and Crock, M, "Administrative Law and Immigration Control in Australia" unpublished PhD Thesis, Melbourne University, 1994 at ch3. For a critique of the old system, see Crock, M, "Life After the Platters: A Chance for a Little Justice and Administrative Sanity for Migrants" (1986) 60 *L Inst J* 1204.

24 See generally Armit, M, *Australia and Immigration 1788–1988* (1988) Australian Government Publishing Service, Canberra.

judicial review brought new players into the field who relied on legal tools that were directly confronting to decision makers used to the subtlety of deal-doing. Of greater concern to the Government was the normative effect of the courts' rulings. The grant of a visa or entry permit to an individual by way of favour may not have affected the overall conduct of the immigration program. The ruling by a court concerning the type of people who were eligible for such documents did.

Over the course of the 1980s, the Federal and High Courts turned the notion of Ministerial discretion on its head. Where apparently unfettered statutory powers were seen once as judicial no-go areas, by the end of this decade such discretions were regarded as almost open invitations to curial intervention. Problems arose for the Government when the broad discretions of the Act were connected with the broader grounds for judicial review. Without guidance from Parliament as to how decisions were to be made, the migration provisions became subject to the full force of the evolving common law jurisprudence on procedural fairness, relevancy and reasonableness in administrative decision making. For their part, the courts became critical of both the way decisions were being made and the substance of the rulings.

B. Procedural Fairness

The High Court's decision in *Kioa v West*[25] in 1985 represented something of a turning point in the judicial review of migration decisions. For the first time, the Court found that the open-ended discretion to deport illegal migrants in what was section 18 of the Act did not evince a legislative intention to exclude the rules of procedural fairness. A majority of the justices held that the rules did apply — and in circumstances where it was not easy to discern in the applicant any form of "legitimate expectation" to a hearing.[26] The result was to swing the judicial pendulum firmly in favour of implying procedural fairness in cases involving the exercise of most kinds of statutory powers affecting the rights, interests and expectations of individuals.

On the question of the content of the rules, or the type of hearing required, the High Court gave the Kioa family only the narrowest of victories, but it was enough to open the portals to judicial intervention. Brennan J, for example, took the view that the nature of the hearing required could vary from a full-blown trial to nothingness, depending on the nature of the legislation governing the decision-making process. He drew back from finding that Jason Kioa's hearing rights were nugatory, but he identified only one matter in respect of which the applicant had not been afforded an adequate hearing.[27] Mason J took a slightly more generous approach, but concurred that in ordinary circumstances illegal migrants who were simply and clearly in breach of the law, may not be entitled to much of a hearing at all.[28] The key to the majority's diverse rulings was the shared finding that where the rules of

25 (1985) 159 CLR 550.

26 See Allars, M, "Natural Justice Writ Large or Small?" (1987) 11 *Syd LR* 306; and Tate, P, "The Coherence of 'Legitimate expectation' and the Foundations of Natural Justice" (1988) 14 *Monash ULR* 15.

27 Above n25 at 615–6.

28 Id at 586–7.

procedural fairness operate, applicants are entitled to be heard in respect of all matters that are crucial or critical to the decision-making process.

By the end of the 1980s, the courts appear to have accepted that the rules of procedural fairness applied to every class of migration decision. Even the pariahs of migration law — the unauthorised border arrivals — were recognised as having some procedural entitlements.[29]

The debate over the content of procedural fairness related to both the nature of the hearing required and the matters in respect of which a hearing had to be given. The courts held that migration officials were obliged to afford applicants with an adequate opportunity to present all matters relevant to their case. While no judge went so far as to require formal, or even informal oral hearings,[30] the courts' interpretation of the procedural requirements for legal decision making was problematic because of the range of matters decision makers could be pressed to consider.

The courts rejected claims that departmental officials were obliged to assist applicants in the presentation of their cases, or that they should embark on independent inquiries into matters not raised directly by applicants.[31] However, they held that it was unlawful for decision makers to close their minds to relevant matters by refusing to inquire into information that was readily available to them.[32] It was also improper to prevent applicants from presenting evidence by misleading them as to their prospects of success.[33]

C. *Relevant and Irrelevant Considerations*

The expansion of the rules of procedural fairness led inevitably to much greater scrutiny by the courts of the matters taken into account by decision makers in reaching a decision. With no statutory guidance as to the criteria that had to be applied in reaching a decision, it was open to applicants to argue that any range of matters were "critical" to a ruling. From a finding that such issues attracted a right to be heard, it was a short step to rule that the failure to take a "critical" matter into account also vitiated a decision on the grounds set out in sections 5(1)(e) and 5(2)(b) of the *ADJR Act*. While the courts claimed to eschew oversight of the merits of decisions, the grounds of review provided equal scope for scrutinising the relevancy of matters that *were* taken into account in making a ruling.

Throughout the 1980s, the courts became both more expansive in their interpretation of the migration legislation and more critical in reviewing the

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29 See, for example, *Singthong v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 80 ALR 147; and *Pesava v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 95.

30 See for example, *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, discussed below n67 and accompanying text.

31 See, for example, *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155; *Barrett v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 18 ALD 129; and *Broussard v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 21 FCR 472.

32 See *Prasad v Minister for Immigration and Ethnic Affairs*, ibid.

33 See, for example, *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167; and *Sheng v Minister for Immigration and Ethnic Affairs*, Unreported, Federal Court, Gray J, 17 February 1986.

exercise of open-ended discretions. Nowhere was this more evident than in the judicial review of decisions made under what was paragraph 6A(1)(e) of the Act. This provision empowered the Minister to grant permanent residence to non-citizens lawfully in Australia on "strong humanitarian or compassionate" grounds. In a series of cases, the Federal Court made section 6A(1)(e) into a major safety net for unlawful non-citizens, refugee claimants and the vast array of unusual cases involving less fortunate individuals. It overrode the notion that the provision be accessible only to persons in Australia legally. In *McPhee v Minister for Immigration, Local Government and Ethnic Affairs*,[34] for example, Lee J held that decision makers who entertained an application for entry on compassionate or humanitarian grounds could not exclude illegal applicants. He made this finding on the basis that illegal status could be cured through the grant of a temporary permit under section 6(2) of the Act, a provision that did not limit the range of persons eligible for consideration by the Minister.[35]

The breadth of section 6A(1)(e) was manifest most forcefully, however, in the range of matters the courts found to be covered by the terms "humanitarian" and "compassionate". In the two cases of *Dahlan v Minister for Immigration, Local Government and Ethnic Affairs*[36] and *Damouni v Minister for Immigration, Local Government and Ethnic Affairs*,[37] Hill J and French J found that the terms had to be given their normal meaning. They questioned the propriety of policy guidelines that in any way restricted the application of the provision. The effect of these and other rulings was to strike down the policy regime that treated "humanitarian" cases as those involving people in refugee-like situations, while "compassion" was reserved for cases involving family and personal misfortune.

A similar fate awaited the policy directive that section 6A(1)(e) be available only to persons whose misfortunes had occurred after their arrival in Australia.[38] In *Damouni*, French J pointed out that the provision did not even require the misfortune to be suffered by the applicant personally. Hardship suffered by relatives and associates could be relevant also.[39] Dr Evan Arthur, then director of the Department's Asylum Policy Branch, wrote frankly in 1991 of the impact of the courts' rulings on section 6A(1)(e). He said:

> The Department had virtually only one criterion left to it. This was the requirement that to establish the existence of compassionate or humanitarian grounds, applicants had to show that if they were forced to leave

34 (1988) 16 ALD 77.

35 Note that different views were taken of this discretion. See, for example, *Maitan v Minister for Immigration and Ethnic Affairs* (1988) 78 ALR 419; and *Taveli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 23 FCR 162.

36 Unreported, Hill J, 12 December 1989.

37 (1989) 87 ALR 97.

38 See, for example, *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 16 ALD 526; and *Eskaya v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 217.

39 Above n37 at 103.

> Australia, they would face a situation that would invoke strong feelings of pity or compassion in the ordinary member of the Australian public.[40]

This trend towards a more critical interpretation of the migration legislation, together with a greater willingness to criticise the matters taken into account became apparent across the whole range of migration decisions. Again, the courts were accused of being insensitive to the administrative impact of the rulings in the burden they were placing on decision makers. Just as importantly, they were charged with overstepping the bounds of judicial review by engaging in the review of decisions on their merits.

D. "Unreasonableness"

The third broad head of judicial review that gave rise to difficulties for the Government in the migration area was that of legal "unreasonableness" as expressed in section 5(2)(g) of the *ADJR Act*. Known also as *Wednesbury* unreasonableness,[41] this head of judicial review enables the courts to strike down decisions that are found to be so unreasonable that no reasonable decision maker would have reached them.

The migration cases of the 1980s still dominate the Australian jurisprudence that has developed around this head of review.[42] The cases are very much the product of the form of the old migration legislation. By the end of the decade the open-ended discretions were seen by the courts as an invitation to evaluate every aspect of the decision-making process. Some judges were very cautious, stressing that a mere difference in opinion or a preference for a different result could not justify a finding of unreasonableness. However, others took a more interventionist and critical approach. Generally these were the same Federal Court judges who were rather creative in their use of other heads of judicial review.

The case law of the 1980s helps to explain why the Government came to regard the codification of decisional criteria in migration decision making to be a pressing necessity. Once the courts had ceased to regard Ministerial discretion as a barrier to curial intervention, open-ended powers became open invitations to scrutinise the way discretions were exercised. From the courts' perspective, the open-ended discretions made it difficult to draw a firm line between the judicial review of decisions and the review of cases on their merits.

When the Act was amended in December 1989, the Government appears to have taken the view that the "problem" of judicial review could be solved by replacing the Minister's broad discretions with provisions setting out very clearly the grounds on which decisions had to be made. The sweeping discretions that characterised the old Act were replaced by mandatory requirements governing everything from the correct lodgment of applications to the removal

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40 Arthur, E, "The Impact of Administrative Law on Humanitarian Decision-Making" (1991) 66 *Canberra Bull Public Admin* 90 at 5.

41 After the comments of Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229–30.

42 See, for example, *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, discussed below n48 and accompanying text; *Prasad v Minister for Immigration and Ethnic Affairs*, above n31; *Videto v Minister for Immigration and Ethnic Affairs*, above n33; and *Luu v Renevier* (1989) 91 ALR 39.

of immigration outlaws. These changes made it easier for the Government to control the way migration officials were using their powers. Because the statutory intention was expressed so clearly, codification also restricted the ability of the courts to rule migration decisions invalid on the grounds of either relevance of the matters considered or legal unreasonableness. By the same token, the regulatory process defined the matters in respect of which an applicant had a right to be "heard", thereby reducing the applicant's scope for arguing denial of procedural fairness. The distinction between judicial review and merits review was addressed also by establishing a specialist immigration tribunal — the IRT — with powers to hear and determine cases using quasi-inquisitorial, non-adversarial techniques.[43] The IRT did not hear its first case until June 1990. Once in operation, however, the tribunal gave disgruntled applicants an opportunity for seeking merits review of decisions that for the first time involved oral hearings and final determinations.[44]

4. *The Reforms in the Context of the 1989–1992 Refugee "Crisis"*

Many aspects of the 1989 amendments to the Act seem to have been directed at the way the courts had been using the broader grounds for judicial review in the review of migration decisions. Nevertheless, it was not until December 1992 with the passage of the *Migration Reform Act* 1992 that specific provisions were introduced targeting the grounds on which the courts were able to review migration rulings. The question to be asked is why concern about the courts persisted and even intensified after the amendment of the Act and the creation of a detailed system of regulations in 1989.

The codification process greatly reduced the scope for judicial creativity in most aspects of migration decision making. However, there remained one area in which tight regulation was not possible: the determination of refugee applications. The status of persons in Australia who claim to be refugees is ascertained in accordance with the United Nations Convention relating to the Status of Refugees and the subsequent Protocol ("the Refugee Convention and Protocol").[45] Having signed and ratified these instruments, the Australian Government is committed to applying the international legal definition of refugee. As a matter of law and politics, it cannot be seen to substitute a different test for determining refugee status.

In practical terms, this means that refugee claimants must show that they meet the definition of "refugee" set out in Article 1A(2) of the Refugee Convention, as amended by the Protocol. The definition requires applicants to

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43 On the 1989 reforms, see Cooney, above n4; Crock, M, "Immigration In the 1990's: Australia's Brave New World" (1990) 59 *Aust Admin L Bull* at 2; and Lee, E, "The Dramatic Amendments to Australian Immigration Law" (1990) 64 *L Inst J* 499 Pt 1 and 587 Pt 2.

44 Before December 1989, merits review was conducted by a non-statutory body known as the Immigration Review Panels which had power to recommend the overturn of a decision after reviewing a matter on the papers. The operation of the panels is described in Crock, M, above n23 at ch3.

45 The Refugee Convention was done at Geneva, 28 July 1951, 189 UNTS 150, entered into force 21 April 1954. The Protocol was done at New York, 1 January 1967, 606 UNTS 267, entered into force 4 October 1967. Australia is a party to both instruments.

show that they are outside their country of usual residence and that they are unable or unwilling to return because of a "well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion". Where Australian courts have given the definition a broader interpretation than that favoured by the Government, politicians generally have felt constrained in the steps that they have been able to take to remedy the judicial pronouncements.[46]

When the Act was amended in 1989, surprisingly little attention was paid to the issue of refugee determinations. The system first established in 1978 was left virtually intact. Refugee status decisions remained the province of the Minister, acting on the advice of a special inter-departmental advisory committee. This committee made recommendations about both initial requests for recognition and appeals against "primary" refusals of refugee status. Applications had to be in writing and in the English language, and there was no right to an oral hearing of a claim. The failure to reform the refugee determination system in 1989 was a recipe for disaster. The procedures were extraordinarily cumbersome because of the requirement that determinations be made on the papers, with the ultimate decision lying with the Minister. Just as importantly, the lack of a credible avenue for the hearing appeals on the merits meant that those refused refugee status had little option other than to seek judicial review. With the grounds for review available under the *ADJR Act* and the objective standard presented by the Refugee Convention definition of refugee, the ingredients were there for the courts to play a fulsome role in the refugee determination process.[47]

A. *Judicial Review and the Determination of the Substance of Refugee Status*

The catalyst for Government (and Opposition) concern with the courts in the refugee area was the case of *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* ("*Chan*'s case").[48] Chan was a PRC national whose case had been in the judicial pipeline for many years, with the Government firm in its resolve that the applicant was not a refugee in spite of his history as a political dissident and as a member of a politically discredited family. Chan became a cause célèbre by accident of history. Between the time his case was heard by the High Court and the date on which judgment was delivered, the PRC Government began its purge of "pro-democracy" supporters, massacring scores of demonstrators in Beijing and other centres, and focusing the world's attention squarely on conditions in the country. The High Court does not mention the upheavals of June 1989, yet the judgments of its members resonate with the events. The Court found that the refusal to grant Chan refugee status was unlawful on the bases that the Minister had not applied the correct definition of

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46 On recent legislative developments that suggest a new willingness to legislate against certain judicial interpretations of the definition, see below n63.

47 For a description of the refugee determination procedures in Australia, past and present, see Crock, M, above n23 at chs3,5; and Crock, M, *Immigration Control and the Law in Australia* (forthcoming) at ch6.

48 Above n42.

refugee; and that in all the circumstances the Minister's decision was so unreasonable that it could have been made by no reasonable person.

Chan's case is remembered for the High Court's discussion of the "real chance" test in its determination of what constitutes a "well-founded fear" of persecution on the Refugee Convention grounds.[49] Of equal concern to the Government, however, was the Court's interpretation of the word "persecution". In the leading judgment, McHugh J opted for the "ordinary meaning" of the word, favouring the formulation proffered by the American Court of Appeal. That court spoke in terms of "the infliction of suffering or harm ... in a way regarded as offensive".[50] The politicians decried this interpretation as an open invitation to the bureaucracy to grant refugee status to any person whose circumstances could excite the pity of the average middle-class Australian.[51]

Another aspect of the High Court's ruling that worried the Government was the Court's ruling on the burden of proof in cases where some time has elapsed between the persecution alleged and the claim for recognition as a refugee. The High Court was unanimous in holding that the applicant's fear of persecution had to be justified at the time his claim for refugee status was considered.[52] Once a well-founded fear of persecution had been established, however, the Court held that the onus was on the Government to show that subsequent events were sufficient to remove any plausible basis for the applicant's concern.[53] In *Chan*'s case, all five Justices found that there had been no material change in the circumstances that gave rise to the applicant's original fear of persecution. They were unanimous in finding it patently unreasonable to regard the applicant's experiences as anything less than persecution on Convention grounds.[54]

At the time *Chan*'s case was decided, the system for determining refugee status culminated in individual rulings being made by the incumbent Minister personally, albeit on the advice of a recommendatory committee. This meant that Ministers had to become involved with individual decisions, with the result that they tended to "own" the decisions made. In this context the finding by the High Court that the decision in *Chan* was legally unreasonable was confronting for the politicians at a very personal level. The ruling also threw into relief the divide between the Minister's concern for the interests of the

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49 See Taylor, S, "Australia's Interpretation of Some Aspects of Art 1A(2) of the Refugee Convention" (1994) 16 *Syd LR* 32; and Mathew, P, "Sovereignty and the Right to Seek Asylum: the Case of Cambodian Asylum-Seekers in Australia" (1994) 15 *Aust Y'book Int'l L* 35.

50 *Kovac v Immigration and Nationalisation Service*, 407 F. 2d. 102, 107 (9th Circuit) (1968). See *Chan*'s case, above n42 at 431.

51 See Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control* (1992) Australian Government Publishing Service, Canberra at 59; and the comments of Ruddock MP, *Hansard*, House of Representatives, 16 December 1992, 3935.

52 Above n42 at 390 per Mason CJ; 398–9 per Dawson J; 408 per Toohey J; 413–5 per Gaudron J; and 432–3 per McHugh J.

53 Id at 390 per Mason CJ; 399 per Dawson J; 408 per Toohey J; 415 per Gaudron J; and 432–3 per McHugh J.

54 Id at 391 per Mason CJ; 399–400 per Dawson J; 408 per Toohey J; 415–6 per Gaudron J; and 431–5 per McHugh J.

Australian public generally and the Court's concern to uphold the rights of the individual in the context of the rule of law.

The inability of the Government to call the shots in the determination of refugee claims seems to have become a source of intense frustration and annoyance for the Government between 1989 and 1992. At the heart of the matter was the influx over this period of a substantial number of border refugee applicants, known colloquially as "boat people". At the same time a much larger group of on-shore asylum seekers emerged from the overseas student body in Australia following the PRC Government's brutal repression of the pro-democracy movement in that country. The boat people were feared because of the potential threat they represented to the control of Australia's vast northern coastline. The Government's primary defence was to detain all border applicants pending the determination of any application for admission — a policy that met with quite organised opposition from civil libertarian lawyers and refugee advocates throughout Australia.[55] Parliament's response to the ensuing court actions was to pass a series of amendments to the Act targeted with increasing directness at the courts.

The complexity of Australia's relationship with Cambodia and its uneasy path towards peace is well known.[56] By 1990–1 the Government appears to have become set in its resolve not to "go soft" on the boat people. The Minister would neither grant the detainees visas on refugee or humanitarian grounds, nor let them out of custody pending the determination of their claims for refugee status. The cases that were brought to challenge both the decisions to refuse refugee status and the legislation passed to keep the detainees locked up further illustrate the divide that opened up between the Government and the courts.

The first attempt to free the boat people was made in May 1992. Two days before the application was to be heard by O'Loughlin J in the Federal Court in Darwin, the Government rushed through what became Part 2, Division 4B of the Act. This new part conferred on the detained boat people the title "designated persons", and gave a legislative basis to the policy of mandatory detention. The amending legislation was duly challenged as being unconstitutional. The High Court upheld the validity of the detention provisions, with the exception of section 54R (now section 183) of the Act,[57] but commented in passing that the custody of the boat people between 1 November 1989 and 5 May 1992 had probably been unlawful.[58]

Shortly after the High Court handed down its decision in *Chu Kheng Lim*, some of the boat people lodged claims for damages for wrongful detention in

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55 See Brennan, F, "Litigating the rights of the marginalised — A Revolution in the Rights of Asylum Seekers and Indigenous Peoples" UNIYA Occasional Paper No 46; Crock, M, Protection or Punishment: The Detention of Asylum Seekers in Australia (1993) at ch5; and Hamilton, A, "Three Years Hard" (1993) 3 *Eureka Street* No 1 24–30 and No 2, 22–8.

56 See Evans, G, *Australia's Foreign Relations in the World of the 1990s* (2nd edn, 1995); and Mathew, P, above n49.

57 See above n18.

58 See *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs*, above n18. The case is discussed in Crock, M, "Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum-Seekers in Australia" (1993) 15 *Syd LR* 338.

the High Court. The Government immediately amended the Act so as to "quantify" the damages payable in such an action to a "designated person". The rate was set at one dollar per day. The compensation proceedings have since been expanded to include a constitutional challenge to the dollar-a-day legislation.[59]

The saga continued in 1994 with the introduction and passage of a further Act produced in response to a decision by the High Court on the subject of acquisition of property on unjust terms.[60] The Act repealed the dollar-a-day section (section 184) of the Act and retrospectively "cured" the legislative deficiency that gave rise to the implication that the boat people had been wrongfully detained in the first place.[61]

There is no better illustration of the depth of the executive's fixation on the judiciary's involvement in the boat people saga than section 4 of this amending Act which reads as follows:

> (1) Judicial decisions have determined that section 88 (previously section 36) of the Principal Act has a particular operation. That operation does not accord with the intention of the Parliament or with the previous understanding of the Minister and the Department. Prior to those decisions, none of the persons subject to custody under section 88 sought to challenge their custody under that section on the basis of the interpretation that section was found to have under those decisions.
>
> (2) The object of sections 8 and 9 is to ensure that sections 87 (previously section 35) and 88 of the Principal Act have and, since 1 November 1989 have had, an operation that is consistent with the operation that the Minister and the Department previously understood those sections to have had and that Parliament intends those sections to have.

The effect of this Act was to amend repealed provisions in a manner that has no prospective operation and no purpose other than to frustrate the damages claims being made by the former detainees. Although the constitutionality of the legislation remains the subject of a challenge before the High Court, the passage of the Act seems to have encouraged the Government towards more extreme measures aimed at stemming the flow of refugee claimants into the country. These have included the nomination of some refugee producing countries as "safe third countries" and the institution of corresponding bans on applications for refugee status being entertained from persons with a right to reside in such countries. Not surprisingly, a determination that a person is ineligible to claim refugee status in Australia is not a "judicially reviewable" decision for the purposes of Part 8 of the Act.[62] In June 1996 further amendments to the Act were proposed to effectively ban access to persons held in immigration detention by either the Human Rights and Equal

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59 See *Ly Sok Pheng v Minister for Immigration and Ethnic Affairs* High Court Proceedings No S199 of 1992. The challenge includes within its ambit the amendments replacing the dollar-a-day provisions (discussed below).

60 See s51(xxi) of the Constitution; and *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

61 See *Migration Legislation Amendment Act* No 3 1994 [No 2], Act No 102 of 1995. The legislation amends the repealed ss35 and 36 of the Act of 1958–89 and their successors, ss87–8 of the Act of 1958–94.

62 For a discussion of these and other changes, see Mathew, P, "Retreating from the Refugee Convention" in Alston, P and Chiam, M (eds), *Treaty Making and Australia* (1995).

Opportunity Commission or the Federal Ombudsman. For good measure a provision was included stating that "nothing in this Act or in any other law (whether written or unwritten) requires the Minister or any officer to ... (aa) give a person (in immigration detention) an application form for a visa".[63] At the time of writing the Migration Legislation Amendment Bill (No 2) had not yet been enacted.

The fact that the Government is now prepared to challenge the courts' interpretation of the definition of refugee is apparent also in the Migration Legislation Bill (No 4) 1995. This Bill was introduced in response to the ruling of Sackville J in *Minister for Immigration, Local Government and Ethnic Affairs v A & B*.[64] In that case Sackville J held that a couple fleeing PRC's one-child policy could be described as belonging to a "particular social group" for the purposes of the Refugee Convention definition of refugee. The Bill would have amended the Act so as to stipulate that the fertility control policies of foreign governments cannot be used to found a claim that a person belongs to a particular social group for the purposes of making out a claim for refugee status. The Government only allowed the Bill to lapse when the Full Federal Court reversed the trial judge's finding.[65]

B. Judicial Review and Refugee Determination Procedures

If the courts caused the Government grief in their review of substantive refugee decisions, their rulings also affected the way decisions in this area were being made. The courts declined to use the principle of procedural fairness to dictate the form of hearings that had to be given to refugee claimants. For example, they rejected the notion that asylum seekers have a right to an oral hearing of their cases because of the importance credibility plays in the assessment of refugee claims.[66] This rhetoric did not prevent the courts from scrutinising very closely the nature of the "hearing" given to applicants through the old refugee determination system. Indeed, the courts' rulings on the legality of the procedures followed in the refugee cases seem to have played a significant role in forcing the Government towards the oral hearing of refugee claims.

The judicial assault on the refugee determination procedures was manifest in cases such as *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*[67] and *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs*.[68] The applicants in these two matters were refugee claimants

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63 See Migration Legislation Amendment Bill (No 2) 1996. Under cl193(3) access to the Human Rights and Equal Opportunity Commission or the Federal Ombudsman would be available only where a *detainee* makes a complaint in writing to these authorities. The proposed legislation effectively removes the ability of these authorities to investigate complaints made on behalf of detainees.

64 (1994) 127 ALR 383. See Migration Legislation Amendment Bill (No 4) 1995.

65 See *Minister for Immigration, Local Government and Ethnic Affairs v Respondent A & B* (1995) 130 ALR 48.

66 See *Zhang de Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165; and *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs* (1994) 33 ALD 441.

67 Above n30.

68 (1991) 31 FCR 123.

from Iran who claimed that they were in fear of persecution because of their political opinions and because of their actions as dissidents. Controversy arose over inflammatory letters the men had written to the Iranian embassy in Australia after their arrival in the country. The two argued that they had been denied procedural fairness because the decision maker had disregarded the letters as a mere artifice designed to improve the applicants' chances in their refugee claims. The Full Federal Court agreed that the decisions in respect of the men were in breach of the rules of procedural fairness. It found that the decision maker had no right to assume that the men's actions were merely self-serving attempts to gain recognition as refugees because other constructions could be placed on their behaviour. A majority of the Court[69] held that the proper course for the Minister was to put the allegations of contrived behaviour to the applicants before making an adverse finding as to their credibility. This was so even though the information on which the allegations were based had come from the applicants themselves.[70]

The effect of these two cases, the Government argued, was to require an extra step in the decision-making process in each case to allow applicants to respond to interpretations made of the applicants' own material. The Courts were accused of being insensitive to the administrative (and therefore financial) ramifications of their rulings.[71] While test cases like *Zhang de Yong* failed to establish an immutable right to an oral hearing for refugee claimants, this did not stop some judges from finding that the absence of such a hearing could result in a denial of procedural fairness.[72]

The most significant test cases for the Cambodian asylum seekers were those of three women who embarked on a hunger strike in mid-1992 in protest against the refusal to grant them refugee status. In *Mok v Minister for Immigration, Local Government and Ethnic Affairs (No 1)*[73] the argument was made that the Cambodian detainees were not getting a fair hearing of their asylum claims because of pressures within the bureaucracy to deny the applicants refugee status. It was asserted that the propensity to reject the Cambodians' claims was the result of very public statements by the Prime Minister and the Minister for Foreign Affairs and Trade to the effect that the detainees could not be refugees. After a hearing lasting 44 days, Keely J found that while there was no evidence of actual bias in the decision maker, there existed a reasonable apprehension that the official would have been influenced by the statements of the politicians. On appeal, the Full Federal Court drew back from endorsing Keely J's highly controversial finding as to the apparent bias of the decision maker. However, it agreed with the trial

69 Keely J dissented. See *Somaghi*'s case, above n67 at 119–20 per Gummow J; and at 108–9 per Jenkinson J.

70 In this respect the cases are at odds with the general rule that decision makers are under no obligation to either make out an applicant's case or to let the applicant know how her or his evidence is being received. See *Kioa v West*, above n25 at 587 per Mason J; *Chan Woon Sheung v Mahoney* (1987) 14 FCR 100; and *Geroudis v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 19 ALD 755 at 756–7.

71 See Joint Standing Committee on Migration Regulations, above n51 at pars4.61–67.

72 See, for example, *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 225.

73 (1993) 47 FCR 1.

judge that the decisions were in error because of the misconstruction of the definition of the term refugee.[74] It would appear to be no mere coincidence that the Act now allows for the review of migration decisions on grounds of actual bias, but not on the basis of reasonable apprehension of bias.[75]

The *Migration Reform Act* 1992 was passed at the height of the controversy surrounding the boat people and other on-shore asylum seekers. With its provisions relating to the procedures that must be followed to make a lawful migration decision, together with the reformulation of the grounds on which the Federal Court can review such decisions, the legislation is consistent with the succession of specific amendments to the Act targeted at the courts.

The fact that the *Reform Act* also established the RRT is an interesting concession to the judiciary's implicit urging that refugee claimants be given oral hearings. As well as providing a proper basis for assessing the credibility of asylum seekers, the present system is many times more efficient than its predecessor. The issue that remains for determination is whether the limitations on judicial review under Part 8 of the Act were (or are) necessary and whether they will restrict the incidence and normative impact of cases like *Chan; Somaghi* and *Heshmati*; and *Mok Gek Bouy.*

5. *Numbers and Norms: Was Part 8 a Necessary Reform?*

A. *The Statistics*

To place the apparent jurisprudential trends in context, it is instructive to consider the statistical data that is available showing the number of applications made to the courts during the 1980s and 1990s together with the win/loss ratio recorded by the Department. The figures give a broad indication of the problems facing the Government, bearing in mind the cost of court actions and the delays they engender in the finalisation of cases.

Through material compiled by the Administrative Review Council (ARC), some information is available about the migration cases brought before the Federal Court between 1982–7. These reveal a steady increase in the number of applications throughout the decade with a marked increase in later years (see Table 1).

74 See *Minister for Immigration, Local Government and Ethnic Affairs v Mok Gek Bouy* (1994) 36 ALD 225.

75 See s476(1)(f) of the Act. Although the decision by Keely J at first instance was not delivered until 1993, the action was pending during the period of the formulation and passage of the *Reform Act* in 1992.

Table 1[76]

Applications to the Federal Court Under the *ADJR Act* in respect of decisions made under the *Migration Act* 1958

Year	Applications Received	Granted	Refused	Withdrawn	Pending
1982–3	30	7	5	13	5
1983–4	31	7	6	1	16
1984–5	45	3	14	23	20
1985–6	80	9	33	21	37
1986–7	106	7	22	8	37
1987	94				
1988	97				
1989	95				
1990	137				
1991	160				
1992	192				

After 1987, reliable statistics were not kept until the Department created its litigation database in July 1993. These more recent records reveal no decrease in the number of applications made to the courts after codification of the Act in 1989. On the contrary, recourse to the courts appears to have increased at an exponential rate. Of equal significance are the statistics for use of the courts in the last two financial years (see Table 2)[77] and the source of the applications (see Table 3). While the number of general applications for judicial review (identified under the heading "other") has begun to decline, the fall has been more than compensated by the appeals on points of law coming from the IRT, the RRT and the AAT. Of these three review bodies, it is the RRT that dominates the statistics as the source of most applications to the Federal Court. In the financial year 1995–6 the number of migration cases being heard by the courts has grown to an extraordinary 561 applications. When appeals to the AAT[78] are added to these figures, the Department records over 700 litigation matters for the year.

76 See ARC *Annual Reports* of 1982–3 at 74; 1983–4 at 100–1; 1984–5 at 121–2; 1985–6 at 178–9; 1986–7 at 202–3; 1987–8 at 140–1; 1988–9 at 160; 1989–90 at 125; 1990–1 at 145; Department of Immigration, Local Government and Ethnic Affairs, *Review '92* at 342. Note that the Department's statistics differ from those collected by the ARC.

77 Special thanks are due to Mr John Mathews and Mr Bruce Harper of the Department's Litigation and Review Branch for the recent statistical data reproduced in Tables 2, 3 and 5 below.

78 Departmental statistics for the financial year as at 21 June 1996 recorded 140 appeals to the AAT in the migration area. Facsimile from Mr Peter Judd dated 24 June 1996.

Table 2

The Number of Applications Made in the Federal and High Courts Seeking Review of Migration Decisions from 1/7/93–21/6/96

	1993–4	1994–5	1/7/95–21/6/96
Federal Court	371	372	521
Full Federal Court	33	15	22
High Court	4	4	18
Total	408	391	561

Table 3

The Source of Applications Detailed in Table 2, above

	1993–4	1994–5	1/7/95–21/6/96
IRT	70	44	83
RRT	52	202	286
AAT	3	8	5
Other*	283	137	187
Total	408	391	561

* Actions brought under the *ADJR Act*; the *Judiciary Act*; Part 8 of the Act; and section 75 of the Constitution.

A closer examination of the statistical data prepared by the Determination of Refugee Status subdivision of the Department's Client Services Division helps to put the application rate to the Federal Court in refugee cases in perspective. Table 4 reveals that the number of cases being determined by the refugee status authorities at the primary level has dropped in recent years so that in 1994–5 there were almost as many appeals lodged to the RRT as there were cases determined at first instance. The final column in the Table shows the raw number of decisions affirmed by the RRT. In percentage terms the figures for 1995–6 translate into success rates for refugee claimants of between 17 per cent and 18 per cent of all RRT determinations (see Table 5). The percentage of appeals taken from the RRT to the Federal Court in proportion to the number of cases heard by the tribunal has also increased rapidly. In 1993–4 the appeal rate was 4 per cent; in 1994–5 it was 8 per cent, while in the last financial year it ran at 12 per cent of cases heard by the RRT.[79] If we look at the leakage rate as the number of appeals relative to the cases rejected by the RRT, the figures suggest an even higher percentage.

79 Statistics supplied by Mr Peter Judd, Litigation and Review Branch, Department, facsimile dated 24 June 1996.

Table 4
RRT Determination Statistics

Year	Cases determined (primary)	Applications to RRT (No of cases)	Decisions affirmed
1992–3	8118	(to RSRC:) 4980	N/A
1993–4	7215	4527	1437
1994–5	4705	4633	2434
1995–6 (Jan–May)	4840	2588	2163

Table 5[80]
Successful Refugee Claims 1991–6

	1991–2	1992–3	1993–4	1994–5	1995–31/5/96
Primary Approvals (%)	5	4.86	12.6	10.7	14.63
Review Approvals (%)	N/A	8.75	8.9	17.6	17.35

The statistics do not reveal the number of post 1 September 1994 applications made under Part 8 of the Act. However, anecdotal evidence and the small number of Part 8 cases emanating from the Federal Court before 1996 suggest that until late 1995 the vast majority of court cases involved actions brought under the *ADJR Act.* The reasons for this appear to lie in initial concessions by the Department that applications made before 1 September be treated as if they had an accrued right to review under the *ADJR Act.* The dubious legal basis for this concession emerged as the Department began to resist attempts by applicants to rely on the "old" law to lodge appeals that were out of time for the purposes of the amended Act.[81]

The steady rise in the number of applications made to the Federal Court over the 1980s was not matched by the success rate of the applications made until 1988–9 (see Table 1). In that financial year, the Department recorded a "win" rate of 58 per cent, being the proportion of judgments, including stays refused, in favour of the Department. On these figures, 44 per cent of all applications made to the Federal Court were being determined in favour of applicants. In 1989–90; 1990–1; and 1991–2, 46 per cent; 42 per cent; and 37 per cent of the court cases respectively went against the Department.[82] Over the last three calendar years the Department's loss/concession ratio, calculated

80 See the Department's Monthly Reports: June 1992, 1993, 1994 and 1995: On-Shore Program Delivery: Sub-Program 2.7 Determination of Refugee Status which yield the following statistics. The figures for 1995–6 were provided by the Department's John Eastwood and relate to the year to date at 31 May 1996.

81 See *Mahboob v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 693; and *Singh v Minister for Immigration and Ethnic Affairs and Immigration Review Tribunal,* Unreported, Von Doussa J, 31 January 1996.

82 See the Department's *Review '91* at 279–80; and *Review '92* at 342.

by adding the cases withdrawn by the Department with those recorded as a loss, has begun to establish itself in a downward trend (see Table 6). Even with this decline, however, the percentage of cases in which applicants are achieving a positive result of sorts would seem to be more than sufficient to encourage disgruntled applicants to seek recourse through the courts.[83]

Table 6

The Success/Failure Rate of Applications Heard and the Number Settled Before Reaching the Court from 1/7/93–24/6/96

	1993–4	1994–5	1995–6
W'drawn by applicant	65	128	177
Withdrawn by DIEA	91	110	134
Win to DIEA	100	79	86
Loss to DIEA	36	32	18
Total	292	349	415

B. Theories of Cause and Effect

Putting aside momentarily the philosophical and theoretical questions of the roles the courts should play in the oversight of administrative decision making, the foregoing statistics raise some practical questions that go to determining whether Part 8 of the Act was a "necessary" reform. The first issue is whether the judicial review of migration decisions was a problem for the Government before September 1994. The second is whether the application rate can be attributed to the way the courts decide migration cases — a judicial "pull" factor, as it were — or whether the phenomenon is the result of other forces. The remaining question relates to the effectiveness of the reforms as a method of controlling the number of judicial review applications being made.

i. Is There a Problem?

A simple reading of the total number of people applying to the courts suggests that the Government does have a problem: the figures are high in historical terms and seem to be trending upwards, rather than downwards. On closer inspection, however, the nature of the problem is less clear cut.

The statistics since 1993 are interesting insofar as they reveal a decline in the number of appeals being brought from decisions by the IRT and yet a substantial increase in the "leakage" rate from the RRT to the Federal Court. The rise in RRT appeals has offset and overtaken the fall in general applications for judicial review. Where an increase has occurred in IRT appeals, these appear to be linked to particular types of visa applications. What is significant for present purposes is that these relate to "humanitarian" cases involving a quasi-amnesty that was called by the Government in November 1993 to allow

83 Note, however, that these statistics do not reveal the fate of applications remitted for reconsideration. Of the cases taken to judgment in the courts, the Departmental figures suggest that over 80% of rulings are made in favour of the Minister. Above n79.

certain unlawful non-citizens and highly qualified refugee applicants to regularise their status.[84]

For applications made after 1 September 1994, Part 8 of the Act is the principal avenue for curial review as a distinction is no longer made between judicial review and appeals from tribunal decisions on points of law. In practical terms, this should mean that the figure in the "other" column in Table 3 will continue to decline. Whether this will affect the overall statistics, however, is unclear in the absence of details concerning the type of cases included in this current catch-all group.

In the author's view, what the statistics do tell us is that the "problem" of judicial review appears to be localised to one area: refugee appeals. The number of cases going on from the IRT remains relatively small, the humanitarian cases notwithstanding. The flow on rate from the RRT to the courts, however, is already high and seems to be rising. At the very least, it must be said that there is a wide divergence between the judicial review "problem" in the areas of general immigration appeals and that encountered with refugee cases.

ii. Push and Pull Factors

The surprisingly high proportion of court cases being either lost or conceded by the Department could — and no doubt will — be used by parties on both sides of the judicial review debate. Some may argue that the statistics indicate that judicial "behaviour" is operating as a pull factor by attracting disgruntled applicants to seek curial review. Yet, a simple reading of the figures might equally support the notion that the data reflects the incompetence of the decision makers. In other words, the Department has simply been getting it wrong — both in the application of the law and in the choice of which cases to fight and which to concede. In the author's view, such a conclusion would be just as superficial and flawed as one that places all the "blame" with the persistence and interventionism of the courts. A preferable explanation for the phenomena observed is likely to be more complex and ambivalent in its allocation of cause and effect.

On the one hand, one must consider among the "push" factors the nature of the present legislative regime. In an attempt to reduce the scope for judges to engage in the review of the merits of migration decisions, the Government has created a regulatory regime of such complexity that it has guaranteed the increasing involvement of lawyers and judges in the review of decisions made. To determine an applicant's entitlements, the notion of "accrued rights" means it is not enough to be familiar with the latest of the statutory rules. A competent advisor must be able to identify and work with a range of legislative materials, all of which have different temporal applications. As of March 1996, the regulations first made in 1989 had been amended so many times that practitioners had to be familiar with no less than 76 versions of *the* Regulations.[85] The formalisation of the migration advisory industry has been aided in this regard by the tougher professional standards demanded of migration

84 See visa classes 816, 817 and 818.

85 For an example of how complex the task of tracing a path through the regulatory systems (past and present), see, for example, *Amanyar and Sadaat v Minister for Immigration and Ethnic Affairs*, Unreported, Jenkinson J, 22 December 1995.

agents — who include lawyers — under the migration agents registration scheme.[86] The irony of these developments is that the architects of the codification process were quite vehement in their opposition to the role being played by lawyers in challenging migration decisions during the 1980s and early 1990s.

Having said this, the codification of migration decision making is also an obvious reason for the relatively small number of appeals from the IRT to the courts. It is in the area of general migration applications that the move away from discretions towards more directed decision making has been most marked. In many instances there will be nothing to be gained from taking a tribunal decision on appeal to the Federal Court. Provided the already complicated regulatory regime is allowed to stabilise without further radical emendation, this trend might be expected to continue. In this context it is interesting to note the way the Department has been treating IRT appeals. The statistics reveal that the Department has only ever taken two decisions of the IRT on appeal to the Federal Court. No appeal has been lodged by the Department since 1993. This reluctance to take cases to the courts suggests a preference for tribunal rulings that, unlike their judicial counterparts, do not have a binding or normative effect on primary decision makers.

Although difficult to prove, the rate of appeals from the IRT to the Federal Court may also reflect a degree of user satisfaction with the tribunal — controversy over the past Minister's appointment process notwithstanding.[87] In determining "push" factors, it is worth noting that while the IRT and the RRT share the same procedural methodology — both are quasi-inquisitorial bodies — the IRT can be constituted by a panel of three members, at least one of whom on average has legal qualifications. In contrast, the RRT is constituted by single members, not all of whom are lawyers. The IRT generates a much smaller proportion of Federal Court appeals in comparison with its overall case load than does the RRT. Appeals from the IRT to the Federal Court represented 3.8 per cent of cases finalised by that tribunal in 1993–4; 2.4 per cent of such cases in 1994–5 and 4 per cent in 1995–6.[88] At the same time, it sets aside a much greater proportion of the decisions it reviews than its brethren tribunal.[89]

The rise in the number of refugee cases being appealed to the courts is not capable of ready explanation. One significant factor was the "judicialisation" of refugee processing with the plethora of cases generated by court actions surrounding the various groups of boat people between 1989 and 1992. Throughout the refugee crisis of 1989–92, the Government took the view that the problems encountered with the refugee cases were largely the "fault" of meddlesome lawyers and judges.[90] From today's perspective, it is difficult to

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86 On this point, see *Cunliffe v The Commonwealth of Australia* (1994) 182 CLR 272.

87 See Joint Standing Committee on Migration, *The Immigration Review Tribunal Appointment Process* (1994) Australian Government Publishing Service, Canberra.

88 See above n83.

89 The set aside/remission rate of the IRT was 50% of cases finalised in 1993–4; and 59% of such cases in 1994–5. Immigration Review Tribunal, *Annual Report 1994–94* (1995) Australian Government Publishing Service, Canberra, at 4. See also "Summary of Federal Court Appeals" facsimile dated 20 June 1996.

90 This analysis is borne out by the rhetoric of the politicians both in Parliament and in the popular media over the period in question. See, for example, the exchange between then Minister Mr Hand MP and former Liberal Minister Mr Mackellar MP, *Hansard*, House of

encapsulate the passions that were raised by the breakdown that occurred in the refugee determination system over that period. Whatever the blame attributed to the refugee advocates, there can be no doubt that the breakdown of the system was due in large part to fundamental flaws in the old refugee determination process, with its emphasis on written submissions that had to be translated into the English language. As well as denying applicants a chance to present their case orally, the involvement of the Minister in the determination process ensured that politics played a significant role in the decisions made. In the author's opinion, the distress generated by the treatment of the boat people at the turn of the decade might have been avoided if the politicians had not been involved with the cases at such an intimate level.

The structural changes made to the determination regime without doubt have produced a fairer and more efficient system for refugee applicants. However, in some respects they have continued the "judicialisation" process. The institution of oral hearings and codified procedures has made it much easier for people to determine their rights and entitlements. The more public nature of the refugee status proceedings has also encouraged the involvement of more immigration advisers. Legal Aid is granted more readily to refugee claimants than it is to non-citizens facing other types of migration problems. Anecdotal accounts by practitioners and officials within the immigration bureaucracy suggest that it is not necessarily the lawyers who are responsible for many of the more recent court applications in the refugee area. Appeals are being lodged by applicants on their own initiative, or through the offices of non-legally qualified migration agents.

The final, and perhaps most obvious explanation for the high number of refugee appeals may be the very nature of refugee claims. If the common experience of other refugee receiving countries is any indication,[91] the desperation of those seeking to remain in the country may contribute to the tendency to fight adverse decisions to the very last.

In summary, then, what do the available statistics tell us? They confirm that the number of applications to the courts has continued to rise, but they reveal that the source of the increase is localised to refugee cases. Without a longitudinal survey of applicants for judicial review it is not possible to explain with any certainty the phenomenon that is occurring. However, what is apparent is that the "push" factors — the structural problems with the regulatory regime; the "judicialisation" of the determination processes; the nature of refugee claims and the systems governing the review of cases on their merits — are at least as substantial as the apparent "pull" factor — the courts' sympathetic treatment of cases.

Given that the nature of the cases and the interests of the people involved have not changed, it is my view that the large rise in court applications since 1994 must have a "systemic" base. In this context, one further explanation can

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Representatives, 5 May 1992 at 2384 and the comments of the Minister at 2372.

91 On moves to restrict access to the courts in refugee cases in Belgium, see Carlier, J Y and Vanheule, D, "Les limites de l'egalite. L'Arret no. 61/94 de la Cour d'Arbitrage du 14 juillet" (1994) *Revue du Droit des Etrangers* 548. For a discussion of the debate in North America and England, see Legomsky, S, *Immigration and The Judiciary: Law and Politics in Britain and America* (1987) at 290–301.

be advanced for what is occurring. The explosion in review applications in 1995–6 could reflect a greater general awareness of judicial review as an option due to the simple fact that the law governing judicial review of migration decisions has been collected in the *Migration Act* 1958. The hypothesis would run that for as long as judicial review was governed by the *ADJR Act* and the *Judiciary Act,* the migration agents and to some extent the applicants themselves saw judicial review as a remedy that could be accessed only through lawyers. Now that it is part of the *Migration Act,* it is seen as part and parcel of the migration process.

The increase in the rate of applications to the courts clearly has been viewed by the Government as an indicator that it was and is "necessary" to curb the courts' power to judicially review migration decisions. In my opinion, this analysis is flawed because it fails to give due recognition to the complex amalgam of structural forces behind the rising popularity of the courts. Without knowing the real causes of the problem, there is a risk that the Part 8 reforms will merely attempt to gag the messenger and yet leave the system no better in the result. I say "attempt to gag the messenger" because there is another reason why the measures restricting the judicial review of migration decisions are misconceived. The reforms fail to show a clear understanding of the judicial process and of what judges do when they review administrative decisions. It is to the issue of the effectiveness of the Part 8 reforms and the theoretical question of the appropriate role of the courts that the article turns for its conclusion.

6. *Assessing the Impact of the Reforms*

Part 8 of the Act seems to be premised on the notion that the intervention of the judiciary in migration cases would diminish if the grounds on which the courts can review cases were restricted. Minister Hand said of the measures in his second reading of the *Migration Reform Act* that "the Government wishe[d] to make the application of the legal concepts of migration decision making predictable".[92]

At one level, the codification of decisional referents in the migration legislation has constrained and will continue to constrain the role played by the courts in the review of cases. The imposition of strict time limits on applications and the removal of any discretion in the courts to allow applications to be made out of time affects the range of people eligible to bring matters before the Federal Court. For the purposes of interpreting the legislation, the intention of Parliament is now spelt out in the Act and the Regulations: it is no longer something left for the courts to divine in individual cases from the nebulously expressed "object, scope and purposes" of the Act.[93] The legislation is equally forceful in its statement of the procedures that need to be followed to make a lawful migration decision. Although it was some time before decisions made under the 1989 Regulations began to filter through to the courts, it is noteworthy that many of the early attempts to challenge the validity of

92 See Commonwealth Parliamentary Debates, *Hansard,* House of Representatives, 4 November 1992 at 2623.

93 See *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 66 ALR 299.

regulations made under the amended Act met with no success.[94] Recent decisions have confirmed that the restrictive provisions of the Act have impacted harshly on the procedural entitlements of persons affected by the legislation.[95]

However, it is another thing to assume that the restriction in the grounds of review available to the courts will discourage judicial creativity where a judge encounters what she or he considers a case involving a grave injustice to an individual. The judge's tools of trade — the migration legislation; conventions relating to how statutes are to be interpreted; and the review powers, however they are expressed — inevitably provide some scope for curial intervention. It is because judges can and do manipulate legal principles to achieve certain results that the attempt to restrict judicial review in Part 8 of the Act may fail.

A. Two Views of the Judicial Function

The attempt in the *Reform Act* to constrain the role of the courts suggests that the framers of the legislation favoured a very narrow role for judicial review: one that requires the (unelected) judiciary to oversee no more or less than the proper application of rules set down by Parliament. This approach is not without the support of some influential administrative law theorists.[96] It is given expression in the Act in the codified decision-making procedures and the replacement of natural justice as a head of review with the narrower ground of procedural ultra vires. What is not recognised in the legislation is the alternative vision that remains so much a part of judicial culture in Australia. This is the notion that judicial review involves the promotion of justice and equity in the context of the rule of law and the protection of the rights of individuals affected by an exercise of administrative power.[97] The failure in Part 8 of the Act to acknowledge this version of judicial review sends a clear message about the theory preferred by the drafters of the legislation. It would be naive to assume, however, that the call to curial restraint will produce uniform compliance within the judiciary.

B. The Scope for Continued Judicial Activism

The use that can be made of the "rule of law" and interpretative conventions is well illustrated by the comments of Burchett J in a series of cases concerning regulations designed to allow certain unlawful non-citizens residence in Australia. He took the view that legislation designed to confer a benefit on persons suffering from

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94 See, for example, *Eremin v Minister for Immigration, Local Government and Ethnic Affairs*, Unreported, Wilcox J, 1 August 1990; and (1990) 21 ALD 69 (Full Federal Court); and *Aban v Minister for Immigration, Local Government and Ethnic Affairs*, unreported, Keely J, 9 April 1991, noted at (1991) 23 ALD 207; and (1991) 31 FCR 93 (Full Federal Court).

95 See, for example, *Fang v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 583.

96 See, for example, the theorists discussed by Harlow, C and Rawlings, R, *Law and Administration* (1984) at ch2. See also the critiques of judicial review in Nonet, P and Selznick, P, *Law and Society in Transition: Towards Responsive Law* (1978); Unger, R M, *Law in Modern Society: Toward a Criticism of Social Theory* (1976) at 166–242; and Hutchinson, A, "Mice under a chair: Democracy, Courts and the Administrative State" (1990) 40 *Uni Toronto LJ* 374.

97 See, for example, Craig, P, *Administrative Law* (1994) at 17–40; and Legomsky, above n87 at ch V.

misfortune should be read generously because Australia's good name as a humanitarian nation demanded it. In *Fuduche v Minister for Immigration, Local Government and Ethnic Affairs*[98] Burchett J said:

> the benevolent intent of the regulation which, on ordinary principles ... should be given a broad and generous construction in favour of the Australian citizens and residents that it was intended to benefit, and in furtherance of the good name of Australia that its humanity maintains.[99]

Burchett J's views on the "generous" construction of migration regulations met with disapproval when his decision in *Teo*'s case was taken on appeal.[100] The Full Court was more pragmatic in its approach, remarking that the increasingly restrictive nature of the migration legislation contained a rather strong message to the courts that a "generous" construction of the regulations should actually be eschewed by the judiciary. However, these comments did not prevent the court from agreeing with most of the substantive findings of, and relief ordered by the judge at first instance.

The fact that Part 8 will not stop all judicial activism is borne out when one considers the likely impact of excluding the three key heads of judicial review — natural justice, relevancy and reasonableness. The court still has the power to review decisions on the basis that the law has been misinterpreted or misapplied. It also retains the ability to challenge the exercise of a power where a decision maker fails to have proper regard to the merits of a case. The language of the court may be reduced to the niceties of jurisdictional error and jurisdictional fact,[101] but this may not alter the substantive relief granted by the court.

Of the three broad heads for review affected by Part 8 of the Act, it may be the removal of natural justice as a ground that has the greatest impact on judicial activism. Even in this area, however, it is possible to conceive of ways in which the courts could have reconfigured their rulings to accommodate Part 8. The terms of the code of procedures in Part 2, Subdivision 3AB of the Act leave some scope for argumentation in areas such as the identification of matters critical to the decision in question. In the recent High Court case of *Minister for Immigration and Ethnic Affairs v Teoh*[102] the High Court found for the applicant on the basis that Australia's adoption of certain international conventions created a legitimate expectation to a hearing in respect of matters addressed in the international instruments.[103] After the introduction of Part 8, Mr Teoh may not be able to call in aid such common law expectations of a hearing. With some ingenuity, however, one could envisage arguments being

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98 (1993) 45 FCR 515.

99 Id at 527. For similar comments, see *Chen v Minister for Immigration and Ethnic Affairs (No 2)* (1994) 123 ALR 126 at 130–1; *Moskal v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 125 ALR 307 at 313–5; and *Teo v Minister for Immigration and Ethnic Affairs* (1994) 35 ALD 242 at 246.

100 *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194.

101 See id at 199.

102 (1995) 128 ALR 353.

103 For a discussion of this case see Allars, M, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh*'s Case and the Internationalisation of Administrative Law" (1995) 17 *Syd LR* 204; and Walker, K and Mathew, P, "Case Note: *Minister for Immigration v Ah Hin Teoh*" (1995) 20 *MULR* 236.

raised about the centrality of the same international conventions either to the interpretation of relevant legislation or to the exercise of a particular discretion. In the case of applications to judicially review tribunal decisions, there may be scope also for a "back door" use of the principles of natural justice. The Act enjoins both IRT and RRT members to conduct appeals in a way that is "fair, just, economical, informal and quick".[104] According to the Federal Court, these provisions mean that the tribunals are obliged at least to observe the rules of procedural fairness.[105]

In recent cases where the courts have ruled against a decision on the basis of unreasonableness, it is noteworthy that this head of review has always been used in conjunction with other grounds of review. For example, in *Fuduche v Minister for Immigration, Local Government and Ethnic Affairs*,[106] Burchett J supplemented his finding of legal unreasonableness with rulings that the Minister's delegate had misinterpreted and misapplied the criteria relating to the admission of "special need relatives". The nexus between abuse of power and misinterpretation of the law was present equally in cases such as *Chan Yee Kin*. In other instances, the courts have used the notion of "substantial compliance" to get around the stringency of mandatory requirements.[107]

C. *Judicial Review and the Fact/Law Distinction*

The fact that Part 8 may not restrict judges minded to overturn an adverse refugee determination is borne out by the recent Full Federal Court ruling in *Guo Wei Rong v Minister for Immigration and Ethnic Affairs*.[108] That case concerned a couple who fled from the PRC by boat in 1989, who were refused refugee status and deported, and who returned to Australia (again by boat) and repeated their claim for refugee status. The pair gave evidence that they had both been detained and given harsh treatment after their first flight to Australia; and that the husband had been denounced as a spy of the Australian government, imprisoned and mistreated. The pair claimed that they had a real fear of persecution because of the disregard they had shown to the country's one-child policy; and because of other matters including the husband's involvement in arranging the illegal departure of various people by boat and his undischarged prison sentence. By the time the case came before the Full Federal Court, the couple were expecting their fourth child and there was uncontroverted evidence that they would face punishment upon their return to China, having twice left the country without permission and otherwise flouted the country's laws.

At first instance the tribunal's findings were challenged unsuccessfully on grounds which included the assertion that the decisions made were legally unreasonable. It is interesting that, on appeal, the Full Court did not fault this aspect of the trial judge's finding. Instead, it examined in some detail the way

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104 See ss353 and 420 of the Act.

105 See *Courtney v Peters* (1990) 98 ALR 645.

106 Above n98.

107 See, for example, the Full Federal Court decision in *Hamilton v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 349. Compare, however, the more recent decision in *Fang v Minister for Immigration and Ethnic Affairs*, above n95.

108 (1996) 135 ALR 421.

the tribunal went about making its decision, concluding ultimately that the tribunal had misdirected itself as to the test to be applied in determining refugee status. The case provides an interesting discussion of the process to be followed by the RRT and the extent to which the tribunal must engage in reasoned speculation. What may prove most controversial is that a majority of the Court followed its finding concerning the error of law made, by making a declaration that the applicants are refugees and ordering the Minister to issue protection visas.[109] In the leading judgment, Einfeld J examined the earlier cases of *Sordini v Wilcox*;[110] *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs*[111] and *Minister for Immigration and Ethnic Affairs v Conyngham.*[112] He concluded that in the case before him — as in *Sordini v Wilcox* — all the substantive issues of fact had been decided by the RRT and it was only the application of the law to the facts that was wanting. In the result, the judge found that the unanimous ruling by the Court that the decisions were unlawful could have only one outcome: the issue of protection visas for the two applicants. On this basis Einfeld and Foster JJ declared the applicants to be refugees and ordered the grant of the appropriate visas. It is worth recalling at this point that the powers given to the Federal Court under Part 8 of the Act are identical to those conferred by section 16 of the *ADJR Act.*

The Department resisted these orders and appealed to the High Court. In response to a decision to renew the applicants bridging visas instead of issuing protection visas, the applicants went back to the Federal Court claiming that the Department was in contempt of court. At time of writing the result of this follow-up application was not known, nor had the High Court heard the application for leave to appeal from the Full Court decision. For present purposes, the imbroglio demonstrates forcefully that where the courts are minded to intervene in a case, it is most likely that they will continue to do so, the restrictions of Part 8 notwithstanding.

D. Reviewing Non-reviewable Discretions

Another recent example of judicial interventionism arose in the context of the various "non-reviewable, non-compellable" discretions conferred on the Minister by the Act. These are the powers given to the Minister to override adverse tribunal decisions so as to grant a visa, and the discretions to allow certain individuals to lodge refugee claims.[113] As at 5 June 1996 there were no less than 65 cases pending before the courts involving challenges to the exercise or non-exercise of these discretions.[114]

In *Ozmanian v Minister for Immigration and Ethnic Affairs*[115] Merkel J examined the arrangements put in place by the former Minister, Senator

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109 Note that Beaumont J took the more conventional step of referring the matter back to the RRT for redetermination in accordance with the law.

110 (1983) 70 FLR 326 at 347.

111 Above n72 at 240.

112 (1986) 11 FCR 528 at 541.

113 See above n19.

114 Information supplied by the Department's Legal Branch by facsimile dated 5 June 1996. In the possession of the author.

115 (1996) 137 ALR 103.

Bolkus, to deal with the pleas for clemency which the special residual discretions are designed to accommodate. Rather than burden the Minister with the numerous claims made, it appears that cases were handled by a member of the Minister's personal staff. This person would review the evidence and decide whether a plea had sufficient merit to warrant examination by the Minister. Where the Minister's staffer considered a claim to be without merit, the applicant would be told simply that the Minister was not inclined to consider whether or not to exercise the discretion conferred on him.[116]

Merkel J found that the legislative schema allowed for three possible decisions: decisions to exercise, or refuse to exercise the residual power; and a decision to decline to consider whether or not to exercise the power. He also held that a decision was made when the staff member decided on the Minister's behalf that the Minister would not consider whether or not to exercise the power.[117] The judge opined that in the absence of an instrument of delegation, the "decision" made by the Minister's staffer was neither authorised nor valid. However, he determined that he was precluded from making a finding to this effect by the provisions of Part 8 which rendered the decisions in question non- justiciable.

The case stands as another example of judicial interventionism, because Merkel J found another means through which to grant relief to the applicant. He analysed the procedures followed by the Minister's staffer and concluded that the *conduct* engaged in for the purpose of making the staffer's decision was reviewable. He found that the *ADJR Act* remained applicable to the case because the "invalid" decision by the staffer was "made under an enactment" for the purpose of section 3(4) of that Act. Absent any statement to the contrary in section 485 of the *Migration Act,* he held that the *conduct* engaged in by the Minister's staff for the purpose of making the decision remained reviewable under sections 6 and 8 of the *ADJR Act.* Merkel J proceeded to identify a breach of the rules of procedural fairness in the delegate's failure to disclose to the applicant certain information that was pivotal to the decision made. As the defect identified was procedural in nature, the applicant was able to meet the preconditions for the review of conduct set out by the High Court in *Australian Broadcasting Tribunal v Bond.*[118]

E. In the High Court

The messages emanating from the High Court in recent times have been mixed. On the one hand, recent rulings by single members of the bench suggest a degree of antipathy towards the initiatives taken to restrict access to the broader grounds for judicial review. In *Re Beddlington and Minister for Immigration and Ethnic Affairs; Ex parte C*[119] Gummow J took the step of referring back to the Federal Court matters concerning the proper interpretation of section 48B of the Act. What is interesting is that he reserved for later consideration by the High Court the arguments that had been raised concerning

116 This was confirmed by the Minister's staffer in a letter to the applicant. See id at 110.
117 See id at 118.
118 (1990) 170 CLR 321. See (1996) 37 ALR 103 at 129–34.
119 High Court Matter S39 of 1996. Unreported, Gummow J, 2 April 1996.

breach of procedural fairness — relevancy and reasonableness. His approach sets a very interesting precedent and reinforces the argument that Part 8 of the Act may not stop the courts from granting relief by whatever means they have available.

On the other hand, more recent decisions by the Court reveal the pressures being generated by the increasing migration workload. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[120] involved a group of asylum seekers from Southern China who arrived in Australia in July 1992 on a boat code-named the Labrador and who were detained thereafter at the facility in Port Hedland. An appeal to the High Court was brought by the Minister from a Full Federal Court ruling that the Minister's delegate had applied the wrong test in determining whether or not the applicants were refugees.[121]

A majority of the High Court rebuked the Federal Court on two levels. In a joint judgment Brennan CJ, Toohey, McHugh and Gummow JJ found that the lower court had scrutinised too closely the reasoning of the Minister's delegate. They found that while the Federal Court paid lip service to the well established dictum that reviewing courts should give a "beneficial construction" to the reasons given by a decision maker, it did not observe this practice in the result. The judges also found that the present provisions governing the recognition of refugees provide less scope for judicial review than did the wording of the Act in force at the time the leading refugee case *Chan Yee Kin* was decided. The legislation pertaining in *Wu Shan Liang* referred (and still refers) to the Minister being "satisfied that a person is a refugee". The judges distinguished this language from that of earlier legislation which referred to refugee status as a matter of fact.[122]

Kirby J did not concur with this second aspect of the majority's judgment, preferring to reserve the question of the effect of the change in the refugee provisions until the matter had been the subject of proper submissions by counsel in an appropriate case.[123] He concurred with the majority, however, in finding that the Federal Court had subjected the delegate's reasoning to unduly close scrutiny and analysis. Like the majority judgment, his ruling sends a strong message to the Federal Court judges to curb their interventionist behaviour. Whether the ruling has an impact on the way this branch of the judiciary approach the review of refugee cases remains to be seen.

7. *Concluding Remarks*

One of the first proposals put forward by the new Minister, Mr Ruddock after the Coalition assumed government in March 1996 was the institution of further restraints on access to the Federal Court in migration cases. The Minister announced that he would be considering the imposition of requirements that applicants obtain leave to appeal to the Federal Court in migration cases as a precondition to the hearing of judicial review applications.[124] The announcement

120 (1996) 136 ALR 481.
121 See *Wu v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 432.
122 Above n120 at 484.
123 Id at 505.
124 See Millett, M, "Refugees may lose right to day in court" *The Sydney Morning Herald* 21 March 1996 at 5.

confirms that the focus of the Government remains on the courts, rather than on the other forces that might be contributing to the rising popularity of judicial review as an avenue of redress. Again, it is doubtful whether such a measure would stem the flow of applications because the source of the leakage is not being addressed.

Whether or not Part 8 (alone, or in conjunction with other restrictive measures) will work to reduce applications to the Federal Court, there are still other reasons why the changes are a retrograde step. The real impact of the new provisions will be felt by applicants who are not eligible to seek review by the Federal Court. This may be because the relevant decision is not "judicially reviewable", or because the application is barred on other grounds such as the expiration of the time limits imposed on appeals. These people will be forced to seek judicial review in the High Court through the devices of declaration, injunction and prerogative writ.

The cost and complexity of a High Court action may prove a disincentive to some disgruntled applicants. For some lawyers, however, the prospect of developing a High Court practice will hold more attractions than fears. Indeed, the promise of exposure in the High Court may encourage the large legal firms to take on more immigration cases on a pro bono basis, as they did for the Cambodian and Chinese boat people. Once again, the (clearly unintended) result for the Government may well be an increase in the number of legal actions, rather than the converse.

From the High Court's perspective, there can be nothing welcome about the move to make it a first port of call for disgruntled migration applicants. The Court is already overworked, with lengthy delays experienced by people both waiting for a hearing and waiting for rulings to be handed down. In view of the seriousness of the High Court's task as final arbiter of the law in Australia, it must be regressive to clutter the Court's time with immigration cases.[125] The need to free the Court from the grind of original jurisdiction work was one of the prime motives for the establishment of the Federal Court in 1976. As the High Court said itself so expressively in 1975:

> A court which has the ultimate responsibility for interpreting the Constitution, and for the development of the law throughout Australia, cannot afford to occupy its time with the consideration of cases which raise no questions of substantial importance. If the court is to be deluged with appeals of no real significance, its efficiency will inevitably be impaired, since the members of the court will be deprived of that time for depth of study and maturity of deliberation without which a final court of appeal cannot adequately perform its functions. [126]

To the extent that the judicial review provisions of the Act are designed to deter applications to the Federal Court, consideration should be given to the negative impact of the changes on the High Court. If, on the other hand, the amendments are designed as a threat to or even a punishment of the judiciary

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125 This point was made forcefully by the then Chief Justice of the High Court, Mason CJ, but met with little sympathy from the politicians. See, for example, the comments of (the now Minister) Mr P Ruddock, MP, *Hansard,* House of Representatives, 11 November 1992 at 3145.

126 *Moller v Roy* (1975) 6 ALR 321 at 330.

for the interventionism of the 1980s, the implications are even more serious. If the Minister were to deny access to the Federal Court, forcing applicants to seek review in the High Court, it is not hard to envisage a quick deterioration into chaos for all the parties involved. In his speech to the Australian Institute of Administrative Law in Sydney on 11 April 1996 the respected journalist Mr Jack Waterford suggested that this scenario would place tremendous pressures on the High Court to take a very hard line on migration applications. In view of the serious human impact of many of the decisions in question, it is my view that the High Court could apply just as much pressure on the Government. If the Court chooses to grant orders nisi as a matter of course, applicants would face lengthy delays until the hearing of their cases, and the Government would be effectively frustrated in its attempt to improve the efficiency of its decision-making system.[127] The approach taken by Gummow in *Re Beddlington and Minister for Immigration and Ethnic Affairs; Ex parte C*[128] should provide food for thought in this regard.

For the Government and the High Court to be reduced to playing such games is a matter of great concern, especially as the fight would affect the general operation of the Court. At issue is the very balance of our democratic system of government. This system relies on the free and active participation of both the Legislature as law maker, and the courts as protector of the rule of law.

The final reason for decrying the Part 8 amendments lies simply in the fact that the judicial review of migration decisions has been taken out of the mainstream. It cannot be healthy to set apart one area of public administration with legislation marking the jurisdiction as one where the courts are clearly not welcome. In the author's view, it would have been preferable for the Government to address its problems with the judicial review of migration decisions with generic legislation. For example, it could have taken up the suggestions made by the ARC in 1986 to create a code of procedures for all administrative agencies. As it is, immigration has been made quite literally into a law unto itself — reinforcing an old stereotypical view of the administration that the Department has tried hard to shake off in recent years.

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127 In this regard, see the procedures put in place by the High Court to handle the high volume of applications made in the industrial law jurisdiction. See High Court Practice Direction No 1 of 1994, CCH *Australian High Court and Federal Court Practice* (Looseleaf Service, continually updated), par9-542.

128 Above n119.