

JUDICIAL REVIEW OF MIGRATION DECISIONS: AN INSTITUTION IN PERIL?

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I. INTRODUCTION

Few areas of Australian law have attracted such sustained public attention in recent years as judicial review of migration decisions. Ministers,¹ scholarly commentators² and Parliamentary Committees³ have all scrutinised the performance of courts exercising powers of judicial review, especially in refugee cases. Successive governments have either enacted,⁴ or proposed,⁵ legislation designed to curtail the power of the courts to override the determinations of administrative decision-makers, including bodies such as the Refugee Review Tribunal and the Migration Review Tribunal.

Commentators strongly disagree as to whether the powers of the courts to review migration decisions should be further curtailed. There is little dispute, however, that the present legislative regime governing review of migration

* Judge, Federal Court of Australia. The views are those of the author, not the Court. The author wishes to thank Ms Belinda Baker and Mr Simon Ower for their valuable research assistance.

1 See, for example, the Hon P Ruddock, "Narrowing of Judicial Review in the Migration Context" (1997) 15 *AIAL Forum* 13; The Hon P Ruddock, "Immigration Reform: the Unfinished Agenda", address to the National Press Club, 18 March 1998: <<http://www.minister.immi.gov.au/transcripts/spe18-3.htm>>. For other references see M Crock, "*Abebe v Commonwealth – Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions*" (2000) 24 *MULR* 190 at 215, nn 124-5.

2 J McMillan, "Federal Court v Minister for Immigration" (1999) 22 *AIAL Forum* 1; compare R Creyke, "Restricting Judicial Review" (1997) 15 *AIAL Forum* 22; M Crock, "Judicial Review and Part 8 of the *Migration Act*: Necessary Reform or Overkill?" (1996) 18 *Syd L Rev* 267.

3 Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999 ("*Migration Judicial Review Report*"); Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, esp Ch 6.

4 *Migration Act* 1958 (Cth) ("*Migration Act*"), Part 8, which was introduced by the *Migration Reform Act* 1992 (Cth) ("*Migration Reform Act*"). The relevant portions of the *Migration Reform Act* came into force on 1 September 1994.

5 See, for example, Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth) ("*Judicial Review Bill*"); Migration Legislation Amendment Bill (No 2) 2000 (Cth).

decisions, which stands outside the system of judicial review established for administrative decisions generally, is unsatisfactory. The reasons for this state of affairs illuminate not only the difficult questions facing policy-makers, but the practical consequences of tension between successive governments and the courts in relation to migration cases.

II. THE BIFURCATED SYSTEM OF JUDICIAL REVIEW

Part 8 of the *Migration Act* 1958 (Cth) ("*Migration Act*") confers limited powers of review on the Federal Court in respect of "judicially-reviewable decisions". This expression is defined to include decisions of the Migration Review Tribunal and the Refugee Review Tribunal, as well as "other decisions made under this Act, or the regulations, relating to visas".⁶ The legislation specifically provides that, in spite of any other law, the Federal Court has no jurisdiction to review 'judicially-reviewable decisions' other than the jurisdiction conferred by Part 8 itself.⁷ It follows that the general powers of the Federal Court in relation to administrative decisions, conferred by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("*ADJR Act*") and by s 39B(1) of the *Judiciary Act* 1903 (Cth) ("*Judiciary Act*"),⁸ are not available in relation to migration decisions.⁹

Since the Federal Court has power to review migration decisions only on the grounds specified in the *Migration Act*,¹⁰ it lacks jurisdiction to grant relief on certain grounds of judicial review available under the *ADJR Act* and on applications for prerogative relief under s 39B(1) of the *Judiciary Act*. The grounds that are unavailable to the Federal Court in migration cases include a failure by the decision-maker to observe the rules of natural justice,¹¹ so-called *Wednesbury* unreasonableness¹² and the taking into account of irrelevant

6 *Migration Act*, s 475(1).

7 *Ibid*, s 485(1). The Court is also deprived of jurisdiction in relation to the categories of decisions excluded from the definition of "judicially-reviewable decision" by s 475(2) and (3). The jurisdiction to determine cases on remitter by the High Court is preserved, but is subject to s 485(3), which provides that the Federal Court has no powers in a remitted matter other than those it would have had if the application had been brought under Part 8 of the *Migration Act*.

8 The *Judiciary Act* 1903 (Cth), s 39B(1) confers jurisdiction on the Federal Court with respect to any matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The statutory language mirrors that of s 75(v) of the Constitution, which confers original jurisdiction on the High Court in like terms.

9 I use the expression 'migration decisions' to mean judicially-reviewable decisions. It is possible for the Federal Court to exercise powers of judicial review in relation to migration decisions other than "judicially-reviewable decisions" and decisions excluded from the definition of judicially-reviewable decisions by s 475(2) and (3): see, for example, *Rani v Minister for Immigration and Multicultural Affairs* (1997) 80 FCR 379 at 391; *Tuileufuga v Minister for Immigration and Multicultural Affairs* (1998) 87 FCR 389.

10 *Ibid*, s 476.

11 *Ibid*, s 476(2)(a). The Court is empowered to intervene if the decision-maker failed to observe the procedures laid down by the *Migration Act* itself or by the regulations: s 476(1)(a).

12 *Ibid*, s 476(2)(b).

considerations or the failure to take relevant considerations into account.¹³ Moreover, if the High Court remits a matter pursuant to s 44 of the *Judiciary Act*, the Federal Court has no greater powers than if the matter had been commenced in that Court under Part 8 of the *Migration Act*.¹⁴

The scheme limiting the Federal Court's power to review migration decisions was introduced as part of a package of reforms implemented by the *Migration Reform Act 1992* (Cth) ("*Migration Reform Act*"). The package included a new system of independent merits review of refugee decisions and a detailed prescription of procedural safeguards binding decision-makers, including the newly established merits review tribunals.¹⁵ To some extent, the curtailment of judicial review was the 'trade-off' for more extensive merits review of migration decisions. But, as Mary Crock has observed, the passage of the *Migration Reform Act* was preceded by an intensification of the then Government's concern about so-called 'judicial activism', with "outbursts from politicians becoming increasingly strident and explicit".¹⁶ The legislative history of the *Migration Reform Act* supports the view that the enactment of what is now Part 8 of the *Migration Act* reflected the concern of the Government of the day about the delays associated with judicial review, especially in refugee cases. The then Minister, for example, directed pointed criticism at lawyers acting on behalf of asylum seekers whose actions (so it was contended) had delayed the finalisation of their clients' claims.¹⁷ The legislative reforms were said at the time to be necessary to increase the predictability of migration decisions and, at least by implication, to reduce the opportunities to delay the decision-making process.

The obvious difficulty created by Part 8 of the *Migration Act* is that it creates a "bifurcated judicial review process".¹⁸ The High Court has a constitutionally entrenched jurisdiction to grant prerogative relief against officers of the Commonwealth, including the Ministers.¹⁹ So long as that jurisdiction remains intact, an aggrieved applicant may seek prerogative relief from the High Court in respect of a migration decision on grounds excluded by Part 8, including a denial of natural justice²⁰ and a failure by the decision-maker to take relevant considerations into account. The High Court's jurisdiction is not affected by the

13 *Ibid*, s 476(3)(d),(e).

14 *Ibid*, s 485(3). See note 7 *supra*.

15 The legislation established the Refugee Review Tribunal: see now *Migration Act*, Part 7, Div 2. The procedural requirements for the Refugee Review Tribunal, for example, are set out in Part 7, Div 4. Division 4 has been amended since the coming into force of the *Migration Reform Act*.

16 M Crock, note 2 *supra* at 274.

17 Australia, House of Representatives 1992, Debates, vol HR 187 New Series, p 2622 (Minister for Immigration, Local Government and Ethnic Affairs).

18 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 641, per Gaudron and Kirby JJ; at 658, per Gummow J.

19 Section 75(v) of the Constitution confers original jurisdiction on the High Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. In *Re Refugee Tribunal; Ex parte Aala* [2000] HCA 57 at [20], Gaudron and Gummow JJ with whom Gleeson CJ agreed, preferred the expression "constitutional writ" in lieu of "prerogative writ".

20 Illustrated by the important decision in *Ex parte Aala*, where the effect of the grant of writs of prohibition and certiorari was to "outflank and collaterally impeach the respective rights and liabilities under the [Migration] Act of the prosecutor and the Minister": at [10], per Gaudron and Gummow JJ.

fact that the Federal Court has been deprived of jurisdiction to review the particular decision by virtue of Part 8 of the *Migration Act*. The practical effect of the 'bifurcation' is that, in certain circumstances, a person wishing to challenge an adverse migration decision can do so only by invoking the original jurisdiction of the High Court.

The legislative scheme created by Part 8 of the *Migration Act* was challenged on constitutional grounds in *Abebe v Commonwealth*.²¹ Although the legislation survived the challenge by a bare majority, the majority judgments clearly recognised the extremely inconvenient practical consequences of upholding legislation which restricts the Federal Court's jurisdiction to review the legality of migration decisions. As Gleeson CJ and McHugh J remarked, the legislative scheme:

must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this Court. The effect on the business of this Court is bound to be serious.²²

Justice Kirby echoed these sentiments, pointing to the inconvenience, expense and delay attendant on the High Court having to determine applications in default of the availability of equivalent redress in the Federal Court.²³

In *Ex parte Durairajasingham*,²⁴ a case decided in the original jurisdiction of the High Court, McHugh J observed that the predicted serious effect on the High Court's business had materialised. As his Honour noted:

the effect of restricting the jurisdiction of the Federal Court to hear applications by persons claiming refugee status will often be to produce two hearings instead of one (a partial remitter to the Federal Court and a hearing in this court), to lengthen the time taken to dispose of those applications and to use the time of the federal judiciary inefficiently.²⁵

Justice McHugh pointed out that the establishment of the Federal Court had recognised that, as a consequence of an increasing number of matters arising under federal laws, the High Court could not act as a trial court and still discharge adequately its constitutional and appellate functions. Given these developments, McHugh J found it difficult to discern the rationale for the amendments which prevent the High Court remitting all issues arising under the *Migration Act* that fall within the Court's original jurisdiction. He invited

21 (1999) 197 CLR 510. The majority held that (i) Parliament has power to limit the grounds on which a federal court can deal with a 'matter' in respect of which jurisdiction is conferred upon it pursuant to s 77(1) of the Constitution; and (ii) it is consistent with Chapter III of the Constitution for the *Migration Act*, s 481(1) to empower the Federal Court to affirm a decision even though the decision might have been made unlawfully (that is, on grounds the Court lacks jurisdiction to address).

22 *Ibid* at 534.

23 *Ibid* at 583. See also his Honour's comments in *Ex parte Aala* at [133].

24 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407, per McHugh J.

25 *Ibid* at 409. Justice McHugh noted that of the 102 applications for prerogative relief pending in the Court in January 2000, 66 arose under the *Migration Act*: *ibid* at 409, n 2. Applications in migration matters filed in the High Court increased from eight in 1996-97 to 58 in 1998-99 and 70 in 1999-00: information supplied by High Court Registry.

Parliament to reconsider the legislation so as to enable the High Court to fulfil its role as “the keystone of the federal arch”.²⁶

III. THE LEGISLATIVE CHOICE

In the light of Justice McHugh’s comments, it is difficult to argue in favour of the status quo. But it is one thing to accept, as McHugh J did in *Ex parte Durairajasingham*, that the bifurcated system of judicial review created by Part 8 is unsatisfactory. It is another to agree on the solution. Justice McHugh saw the answer in redefining the jurisdiction of the Federal Court so as to make it co-extensive with that of the High Court. His Honour’s analysis implied that this should be done by *expanding* the jurisdiction of the Federal Court, rather than by narrowing that of the High Court.²⁷

As a matter of logic, however, the jurisdiction of the Federal Court could be made co-extensive with that of the High Court by restricting the powers of the High Court so that they are no wider than those of the Federal Court. The extent to which this solution is practicable depends upon the scope of Parliament’s power, by means of privative clauses, to limit the High Court’s original jurisdiction to grant prerogative relief in respect of migration decisions.²⁸ If such an approach is practicable, the disparity between the jurisdiction of the High Court and the Federal Court could be eliminated, or at least largely reduced, by legislation limiting or removing access to all courts in migration cases.

The latter course is under consideration by Parliament. Legislation, which has been tabled but not yet passed, is designed to restrict judicial review of migration decisions, not only in the Federal Court but also in the High Court. The purpose of the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth) (“Judicial Review Bill”), as explained in the second reading speech in the Senate, is to give effect to an:

election commitment to reintroduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances. This commitment was made in light of the extensive merits review rights in the migration legislation and concerns about the growing cost and incidence of migration litigation and the associated delays in removal of non-citizens with no right to remain in Australia.²⁹

26 *Ibid* at 411. The expression was first used by Sir Josiah Symon in 1897 in the *Adelaide Convention Debates*: see *ibid* at 411, n 10.

27 Justice McHugh said that, in his view, there was no reason for thinking that judges of the Federal Court “are not capable of dealing with all issues arising under [the *Migration Act*] which fall within [the High Court’s] jurisdiction”: *ibid* at 411.

28 *Migration Judicial Review Report*, paras 2.20-2.48; M Crock, “Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy” in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package? Papers Presented at the 1998 National Administrative Law Forum* Australian Institute of Administrative Law (1999) 57.

29 Australia, Senate 1998, Debates, vol 173, p 1025 (Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs). The Bill had been passed by the House of Representatives in September 1997, but was awaiting debate in the Senate when Parliament was prorogued in August 1998. For the second reading speech on the Migration Legislation Amendment Bill (No 4) 1997, see Australia, House of Representatives 1997, Debates, vol HR 214 New Series, pp 6281 ff.

The Minister's representative argued that Part 8 of the *Migration Act* had failed to achieve its objective of reducing challenges to migration decisions in the courts. The representative also criticised the Federal Court for "re-interpret[ing] the existing scheme's modest restrictions on judicial review to bring back the grounds of review that the Parliament specifically excluded in passing the *Migration Reform Act* in 1992".³⁰

This criticism appears to be a reference to the decision of the Full Federal Court in *Eshetu v Minister for Immigration and Multicultural Affairs*,³¹ in which a majority gave an expansive reading to the ground of review specified in s 476(1)(a) of the *Migration Act*.³² The majority in that case held that the requirement in s 420(2)(b) of the *Migration Act*, that the Refugee Review Tribunal "act according to substantial justice and the merits of the case", constituted a statutory 'procedure' that the Tribunal was bound to follow and which, if breached, gave rise to a ground of review under s 476(1)(a). In the event, the High Court, in a unanimous ruling, reversed the Full Court's decision in *Eshetu*,³³ holding that s 420(2)(b) was intended to be "facultative, not restrictive" and that it did not mandate specific procedures to be observed by the Tribunal.³⁴ Accordingly, the High Court held that a failure by the Tribunal to act according to 'substantial justice and the merits of the case' does not provide a basis for the Federal Court to set aside the decision.

The key to the proposed legislative scheme is the concept of a 'privative clause decision'.³⁵ This expression is defined to include a decision of an administrative character made under the *Migration Act* or *Migration Regulations*.³⁶ Any such decision is to be final and conclusive. It cannot be challenged or called into question and is not subject to prerogative relief in any court.³⁷ According to the *Explanatory Memorandum* of the Bill, the intention of the privative clause is to confine the High Court, in accordance with principles laid down by a series of High Court decisions,³⁸ to review on grounds of unconstitutionality, narrow jurisdictional error or *mala fides*.³⁹ Under the proposal, the Federal Court would have even more limited powers to review privative clause decisions.⁴⁰ Clearly enough, if the Judicial Review Bill is passed it is likely to raise constitutional questions that will need to be resolved by the High Court.

30 *Ibid.*

31 (1997) 71 FCR 300.

32 Section 476(1)(a) provides a ground of review where procedures that the *Migration Act* requires to be observed have not been observed.

33 (1999) 197 CLR 611.

34 *Ibid* at 628, per Gleeson CJ and McHugh J; at 635, per Gaudron and Kirby JJ.

35 Proposed s 474 of the *Migration Act*: see s 7 of the Judicial Review Bill.

36 Proposed s 474(2) of the *Migration Act*.

37 Proposed s 474(3) of the *Migration Act*.

38 Commencing with the judgment of Dixon J in *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 617-18. See also *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 630-3, per Gaudron and Gummow JJ.

39 *Explanatory Memorandum*, Migration Legislation Amendment (Judicial Review) Bill 1998 at [15].

40 Proposed s 476 of the *Migration Act*: see s 7 of the Judicial Review Bill.

The Judicial Review Bill is not the only measure designed to curtail judicial review of migration decisions. The Migration Legislation Amendment (No 2) Bill 2000 (Cth) continues what is said to be “the Government’s policy of restricting access to judicial review in all but exceptional circumstances”.⁴¹ This Bill, if passed, would prohibit representative or class actions in any proceeding raising an issue in connection with visas.⁴² It would also impose additional standing requirements for applicants who, *inter alia*, challenge the validity or interpretation of the *Migration Act* or the regulations.⁴³ If passed, the legislation would have a significant impact on judicial review of migration decisions, since representative proceedings challenging such decisions are not uncommon.⁴⁴

IV. THE WORKINGS OF JUDICIAL REVIEW

The current and proposed restrictions on judicial review reflect dissatisfaction by successive governments, from both sides of politics, with the workings of judicial review of migration decisions. The phenomenon cannot simply be attributed to the views of one particular party or one particular minister. While policy questions relating to migration often generate debate along party lines, there is a pattern of bipartisan governmental mistrust of the role performed by courts in reviewing migration decisions.

This raises the question of why judicial review of migration decisions frequently brings the courts and Parliament into a state of tension, if not conflict. The difficulties do not seem to be attributable simply to the fact that decision-makers dislike judicial intrusion into the realm of administration. It is true that judicial review of administrative action is frequently seen as being in conflict with the goals of timeliness and efficiency in decision-making.⁴⁵ But that perception has not yet prompted governments to dismantle the general system of judicial review of administrative decisions created and governed by the *ADJR Act*, which has now been in place for a quarter of a century.⁴⁶

Furthermore, empirical evidence about the practical operation of judicial review indicates that judicial review intrudes into the administrative process rather less than commentators sometimes suggest. It is certainly true that the number of applications for judicial review of migration decisions has increased in recent years, especially in refugee cases. But as Table 1 indicates, applications

41 Note 39 *supra* at [2].

42 Proposed s 486B of the *Migration Act*: see s 6 of the Migration Legislation Amendment Bill (No 2) 2000 (Cth).

43 Proposed s 486C of the *Migration Act*: see s 6 of the Migration Legislation Amendment Bill (No 2) 2000 (Cth).

44 See, for example, *Zang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384; *Chen v Minister for Immigration and Multicultural Affairs* (1994) 48 FCR 591; *De Silva v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 502.

45 R Sackville, “The Boundaries of Administrative Law – the Next Phase” in R Creyke & J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark*, Centre for International and Public Law, ANU (1998) 86 at 91-3.

46 See, generally, R Creyke & J McMillan, *ibid*.

for judicial review in the Federal Court, as a *proportion* of decisions made by the Refugee Review Tribunal, have not increased substantially in recent years. A similar pattern is evident in relation to applications for review from decisions of the Immigration Review Tribunal over the same period (Table 2).

TABLE 1:

Applications to the Federal Court for Judicial Review of Refugee Review Tribunal ("RRT") Decisions: 1995/96 – 1998/99⁴⁷

	1995/96	1996/97	1997/98	1998/99
Applications filed in the Federal Court seeking review of RRT decisions	282	419	476	651
Total decisions made by the RRT	3 384	4 245	6 508	6 524
Applications for review filed in the Federal Court as a percentage of the total decisions made by the RRT	8.3	9.9	7.3	10.0

TABLE 2:

Applications to the Federal Court for Judicial Review of Immigration Review Tribunal ("IRT") Decisions: 1995/96 – 1998/99⁴⁸

	1995/96	1996/97	1997/98	1998/99
Applications filed in the Federal Court seeking review of IRT decisions	87	173	95	137
Applications for review filed in the Federal Court as a percentage of the total decisions made by the IRT	4.7	7.1	4.2	5.5

47 *RRT Annual Reports*: 1995/96 Report, at 12; 1996/97 Report, at 13; 1997/98 Report, at 14, 15; 1998/99 Report at 6, 7.

Notes:

a. 'Decisions made by the RRT' excludes applications withdrawn by the applicant prior to a decision being made by the RRT.

b. Similar, but not identical, statistics to those represented in Table 1, have been prepared by the Department of Immigration and Multicultural Affairs: see Department of Immigration and Multicultural Affairs Fact Sheet 86, *Litigation Involving Migration Decisions*, 16 August 1999.

48 *IRT Annual Reports*: 1995/96 Report, at 13; 1996/97 Report, at 13; 1997/98 Report, at 12; 1998/99 Report, at 8, 18.

Notes:

a. The IRT became the Migration Review Tribunal ("MRT") on 1 June 1999. The MRT resulted from an amalgamation of the IRT and Migration Internal Review Office ("MIRO").

b. The *IRT Annual Reports* record applications as a percentage of total decisions made, but do not record the raw numbers of such decisions.

One of the themes of critics of judicial review is that the courts, especially the Federal Court, have persistently and impermissibly intruded into the area of merits review of Tribunal decisions.⁴⁹ It is for others to evaluate that criticism. But the empirical evidence suggests that this judicial propensity (assuming it to have been correctly identified) is not necessarily reflected in the outcomes of contested applications. As Tables 3 and 4 show, the proportion of applications for judicial review in the Federal Court which result in an order setting aside the challenged decision, after a contested hearing, is relatively low. In refugee cases, when allowance is made for successful appeals from first instance decisions, the proportion has not exceeded 11 per cent of finalised applications. The position is similar in relation to contested applications to set aside IRT decisions.

TABLE 3:

*Final Status of RRT Decisions, Following Review by the Federal Court: 1996/97-1998/99*⁵⁰

Final Status of Decision	1996/97	1997/98	1998/99
RRT decision upheld by judgment	97 (25%)	166 (36%)	281 (45%)
RRT decision set aside by judgment	43 (11%)	20 (4%)	54 (9%)
RRT decision remitted by consent		54 (12%)	97 (16%)
Application dismissed or withdrawn	249 (64%)	224 (48%)	188 (30%)

49 See, for example, J McMillan, note 2 *supra* at 2 ff.

50 *RRT Annual Reports*: Report 1996/97, at 14; Report 1997/98, at 15; Report 1998/99, at 7.

Notes:

a. Some applications for review are made by the Minister, but the number is not readily available. However, the figure is likely to be low.

b. The figures in Table 3 relate to the final status of the RRT decision. For example, if the Federal Court upholds the RRT decision, but the Full Court (or High Court) sets it aside, the decision will be recorded as 'set aside'. Where a decision is set aside by judgment or remitted by consent, the matter is sent back to the RRT for reconsideration. Where a decision is upheld by judgment, or an application is dismissed or withdrawn, the RRT decision is unchanged.

c. Separate figures for RRT decisions set aside by judgment and remitted by consent are not available for 1996/97.

d. 'Application dismissed' refers to applications for review that are dismissed by a Judge prior to a hearing on the merits (this may occur, for example, where the proceedings are dismissed for non-attendance at a directions hearing). 'Application withdrawn' refers to those withdrawn by the applicant prior to hearing.

TABLE 4:

*Outcome of Applications in the Federal Court for Review of IRT Decisions: 1996/97 – 1998/99*⁵¹

Final Status of Application	1996/97	1997/98	1998/99
Application dismissed	30 (33%)	35 (27%)	36 (26%)
Application upheld and remitted	2 (2%)	17 (13%)	8 (6%)
Application remitted by consent	19 (21%)	35 (27%)	46 (33%)
Application withdrawn	39 (43%)	44 (33%)	48 (35%)

This, of course, is not the whole picture. A full analysis of the impact of judicial review requires consideration of the outcome of applications resolved in ways other than orders made after a contested hearing. Tables 3 and 4 demonstrate that a high (although apparently declining) percentage of applications for judicial review are withdrawn by the applicants or are dismissed prior to a final hearing. An additional group of applications in the Federal Court is resolved by consent orders remitting the matters to the RRT or IRT (now the Migration Review Tribunal) for reconsideration according to law. In 1997/98, 12 per cent of applications to the Federal Court from the RRT were resolved in this way, while in 1998/99 the proportion increased to 16 per cent. In the case of the IRT, about one third of applications were remitted by consent in 1998/99.

The proportion of judicial review applications resulting in consent orders remitting the proceedings to the appropriate Tribunal is likely to be a product, in part, of the prevailing judicial interpretation of the governing legislation, in this case the *Migration Act*. As I suggest later,⁵² since the *Migration Act* indirectly incorporates the Convention Relating to the Status of Refugees (the “Refugees Convention”) into domestic Australian law, it is inevitable that the courts will apply the Refugees Convention to new situations. But caution needs to be exercised before attributing a rise in the proportion of consent orders to a judicial propensity to expand unduly the boundaries of review of migration

51 *IRT Annual Reports*: 1996/97 Report, at 13; 1997/98 Report, at 13; 1998/99 Report, at 8.

Notes:

a. Few applications for review are made by the Minister. In 1996/97 the Minister filed only one application. In 1998/99 the figure was eight.

b. See second note to Table 3, note 50 *supra*.

c. It should be noted that the meaning of ‘application dismissed’ in Table 4 differs slightly from that in Table 3. In Table 4, ‘application dismissed’ refers to all applications dismissed by the Court, whether after a hearing on the merits, or prior to a hearing on the merits. The meaning of ‘applications withdrawn’ is the same as in Table 3, namely, that the application was withdrawn by the applicant.

52 See note 80 *infra*.

decisions. Many factors are likely to influence the rate of consent orders in migration cases. These might include, for example, a willingness on the part of the Minister's representatives to consent to reconsideration of cases where the Tribunal's reasoning is plainly flawed, even though a court may be unlikely to intervene.⁵³ In the absence of empirical research, it is difficult to interpret the recent increase in consent orders (modest as the numbers are) as a measure of unwarranted or excessive intrusion by the courts into the decision-making process in migration cases.

The limited success rate of contested applications for judicial review of migration decisions may reflect the fact that the High Court has acted on a number of occasions to correct what it has regarded as erroneous reasoning in the Federal Court. For example, in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,⁵⁴ the High Court firmly warned against over-zealous scrutiny of Tribunal reasons; in *Minister for Immigration and Ethnic Affairs v Guo*,⁵⁵ the Court reiterated the warning and disapproved of decisions which had taken an unduly critical approach to the Tribunal's application of the so-called 'real chance' test of persecution; and in *Eshetu*,⁵⁶ to which reference has already been made, the Court rejected an expansive construction of a statutory ground of review that would have opened the way to judicial review of the merits of Tribunal decisions. Moreover, the outcome to date of applications in the original jurisdiction of the High Court gives migration applicants little cause for optimism.⁵⁷ Of course, as critics have pointed out, there has been a tendency for applicants to raise new arguments as replacements for those rejected by the courts or precluded by legislative amendments.⁵⁸ Even so, the apparent lack of correlation between the judicial adventurism identified by some commentators and the outcome of judicial review applications in migration cases perhaps suggests that, by and large, the proper boundaries of judicial review have been observed.

The concerns expressed by policy-makers about judicial review of migration decisions are by no means limited to criticisms of particular judgments or of the way in which the power of judicial review is exercised. Recently stated objections to judicial review include the expense of resisting applications in the courts (to which must be added the cost of maintaining a system of merits review of initial decisions); the time taken by courts to finalise applications for judicial review; and the fact that a significant proportion of applicants institute proceedings simply as a means of delaying their enforced departure from Australia.⁵⁹

53 Cf *Epeabaka v Minister for Immigration and Multicultural Affairs* (1999) 84 FCR 411.

54 (1996) 185 CLR 259.

55 (1997) 191 CLR 559.

56 Note 33 *supra*.

57 Of the 32 matters resolved in the 11 months to 31 May 2000, 26 were refused, three were discontinued and only three resulted in orders favourable to the applicant: information supplied by the High Court registry.

58 J McMillan, note 2 *supra*.

59 Each of the points was made in the second reading speech for the Judicial Review Bill: Australia, Senate, Debates, pp 1025-6 (2 December 1998).

Yet even these objections, which rest on considerations largely beyond the control of the courts, do not seem of themselves to explain why successive governments have attempted to limit the scope of judicial review of migration decisions. It is difficult to suggest, for example, that migration cases are subject to inordinate delays in the courts. A study of migration cases finalised in the Federal Court in 1998, for example, showed that the median duration of all such cases was 4.8 months, while the median duration of all cases proceeding to judgment was 7.9 months.⁶⁰ While there may well be significant room for improvement in the management of migration cases, the figures do not indicate that the Court is countenancing lengthy avoidable delays. In this respect, it is instructive to note that in 1996/97 the *average* disposition time in the RRT (measured from the filing of the application to final resolution) was 357 days in cases where the applicant was not in detention.⁶¹ The figure for the IRT for the same year was 332 days.⁶²

Of course, even if the courts administer judicial review applications with maximum efficiency, there will inevitably be some passage of time before an application for judicial review can be resolved. If applicants are permitted to remain in Australia pending determination of their application, some will (and plainly do) use the judicial review process as a means of prolonging their stay. Whether this cost outweighs the virtues of retaining judicial review in migration cases is ultimately a value judgment. That judgment must take into account, however, the fact that only a small proportion of Tribunal decisions are challenged and that the time taken to process the challenges appears not to be excessive. It is fair to assume, too, that unmeritorious applications for judicial review are, generally speaking, resolved more swiftly than those which have prospects of success.

The financial burden imposed by migration cases also raises issues the resolution of which ultimately depend on value judgments. The 'running costs' attributable to litigation in migration cases was \$10 224 000 in 1998/99.⁶³ This was said to cover a total of 1 134 applications and appeals to the courts and 237 applications to the Administrative Appeals Tribunal ("AAT"), presumably mostly in deportation cases. The figure therefore covers not merely applications for judicial review, but also applications for review to the RRT, as well as court

60 T Matruglio and G McAllister, "Part One: Empirical Information about the Federal Court of Australia" ALRC, Sydney, March 1999, cited in ALRC Discussion Paper 62, *Review of the Federal Civil Justice System*, August 1999 at 272.

61 *RRT Annual Report*, 1996/97, at 13. The figure for applicants in detention for that year was 52 days. Curiously enough, the RRT Annual Reports for 1997/98 and 1998/99 contain no information on the average disposition time in non-detention cases. The 1997/98 Report, at 14, 15 merely says that 77 per cent of non-detention cases were finalised within 118 days, while the 1998/99 Report, at 7, says that 79 per cent of non-detention cases were finalised within 118 days.

62 *IRT Annual Report*, 1996/97, at 9. The average disposition time in 1997/98 was 281 days and in 1998/99, 226 days: *IRT Annual Reports*, 1997/98, at 9, 1998/99, at 6.

63 Department of Immigration and Multicultural Affairs, *Annual Report 1998/99*, Sub-program 5.1. A further \$3 525 000 was recorded as 'other programs appropriations'. The *Annual Report* does not make clear the significance of distinguishing between the two categories.

proceedings initiated by the Minister.⁶⁴ While an expenditure of some \$10 million cannot be dismissed as trivial, it is difficult to characterise the cost of judicial review of migration decisions, of itself, as a major drain on Commonwealth resources.

V. THE SOURCES OF TENSION

The significance of empirical information for policy questions is invariably a matter of judgment. Nonetheless, on the face of it, judicial review in migration cases does not seem to have created practical difficulties obviously more profound or far-reaching than those experienced in other areas in which courts review administrative decisions. If that is correct, what explains the tension between Parliament and the courts that seems to have characterised judicial review of migration decisions?

A. Different Perspectives

The starting point for an answer to this question is that the perspective of the courts is necessarily different from that of the Executive government and, indeed, Parliament. The Chief Justice of Australia, writing extra-judicially, has observed that the law-making role of judges in common law jurisdictions inevitably subjects the courts to critical scrutiny.⁶⁵ The Chief Justice pointed out that certain areas of judicial activity are especially likely to bring the courts “into collision with governments and Parliaments”.⁶⁶ The areas he nominated included judicial review of administrative action. As the Chief Justice noted:

[w]hen a matter is committed to decision to the judicial branch of government then, to the extent defined by the scope of the litigation, it is out of government control. It is not in the nature of governments to relish matters being taken out of their control.⁶⁷

The fact that judicial review sometimes brings courts into collision with governments does not mean that the Executive and Parliament will seek to overturn the courts’ supervisory powers over administrative decisions. As I have noted, if that were the case, Parliament would have modified or abolished the powers conferred on the Federal Court by the *ADJR Act*. But the Chief Justice’s comments bring home the fact that the institution of judicial review, except to the extent it is constitutionally entrenched, is potentially vulnerable to curtailment by Parliament. It is especially at risk when governments consider, rightly or wrongly, that the courts are persistently exceeding their legitimate

64 In 1998/99, the Minister filed 34 applications for judicial review, 26 appeals to the Full Federal Court and eight special leave applications in the High Court: *ibid*.

65 AM Gleeson, “Legal Oil and Political Vinegar” (1999) 10 *Pub L Rev* 108 at 110-11.

66 *Ibid* at 111. See also, R Sackville, “The Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States” (2000) 28 *Fed L Rev* 315.

67 *Ibid* at 112.

functions or are unduly interfering with the implementation of governmental policy.

B. The Novelty of Judicial Review of Migration Decisions

A second factor of some importance is that judicial review of migration decisions is, comparatively speaking, a recent innovation which has brought the courts into direct conflict with Ministerial decision-makers. In an illuminating article, Mary Crock has pointed out that, prior to 1989, the *Migration Act* reflected a philosophy that the admission or expulsion of non-citizens was a matter of Ministerial prerogative and hence an inappropriate subject for judicial review.⁶⁸ The legislation conferred sweeping discretionary powers on the Minister in terms that for many years were thought to be largely unreviewable. This view was consistent with the early case law which recognised that:

one of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests.⁶⁹

In the 1980s the courts “turned the notion of Ministerial discretion on its head” as apparently unfettered statutory powers became an “almost open invitation to curial intervention”.⁷⁰ The courts applied the swiftly developing principles of federal administrative law to migration decisions. Not only did the courts apply concepts of procedural fairness, relevant considerations and *Wednesbury* unreasonableness to the migration decision-making process,⁷¹ but they frequently set aside decisions made by the Minister personally.⁷² They also threatened to interfere with the implementation of policies the Government regarded as central to its program. In particular, the policy of detaining ‘boat people’ pending resolution of their status generated legal challenges and, in consequence, retrospective legislation designed to preclude judicial intervention.⁷³

C. The Control Principle

68 M Crock, note 2 *supra* at 275.

69 *Attorney-General for Canada v Cain and Gilhula* [1906] AC 542 at 546, applied in *Robtelmes v Brennan* (1906) 4 CLR 395 at 400, per Griffith CJ; at 411-12, per Barton J. See also *Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1 at 30.

70 M Crock, note 2 *supra* at 276.

71 *Ibid* at 276-83. See also the decisions in *Kioa v West* (1985) 159 CLR 550 (procedural fairness) and *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (*Wednesbury* unreasonableness applied to a Ministerial interpretation of the test for a “well-founded fear of persecution” under the *Convention Relating to the Status of Refugees*).

72 Decisions made by the Minister personally can still be challenged under Part 8 of the *Migration Act*: see, for example, *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556 (a case where ‘actual bias’ by the Minister was held to be established; special leave to appeal has been granted by the High Court).

73 M Crock, note 2 *supra* at 283-5. See *Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1; M Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia*, Federation Press (1993).

There is a third, more fundamental reason for the tension between Parliament and the courts on migration issues. Immigration has long been an especially sensitive area of public policy in Australia, reflected in the fact that the very first enactment passed by the Commonwealth Parliament was the *Immigration Restriction Act 1901* (Cth), which subjected immigrants to the notorious dictation test. Since Federation what Kathryn Cronin describes as “a culture of control” has dominated migration policy.⁷⁴ As she observes, the control principle is usually interpreted by governments and departments as meaning that Parliament or the Executive, and not the courts, exercise “sole control rights over immigration”,⁷⁵ a view endorsed by the courts until relatively recently.

The control principle has been especially in evidence during the periods when numbers of ‘boat people’ have arrived illegally in Australia. The arrival of such people outside planned intakes seems invariably to have generated intense public and political concern, leading to swift legislative measures designed to curb the phenomenon. The second wave of boat people,⁷⁶ mostly from the People’s Republic of China and Cambodia, gave rise to the policy of mandatory detention and the phenomenon of “tit for tat legislation”⁷⁷ as Parliament enacted laws to overcome judicial decisions which had cast doubt on the legality of aspects of the policy.

It is striking, in retrospect, that the numbers of boat people generating such concern were so few. Between November 1989 and May 1995, a total of 1 902 boat people arrived in Australia, of whom 499 had departed the country by March 1995.⁷⁸ These numbers pale into insignificance, not only by comparison with the gross annual intake of migrants but with the number of persons overstaying the expiration of their visas.⁷⁹ Yet the small numbers of illegal entrants provided the catalyst for the transformation of Australian migration law. Recent developments provide no basis for believing that the political sensitivity of migration policy has diminished.

D. The Refugees Convention

74 K Cronin, “A Culture of Control: An Overview of Immigration Policy-Making” in J Jupp and M Kabala (eds), *The Politics of Australian Immigration*, Australian Government Publishing Service (1993) 83.

75 *Ibid* at 96.

76 The first arrived in the mid 1970s, after the fall of Saigon.

77 The phrase is used by M Crock, “The Peril of the Boat People: Assessing Australia’s Responses to the Phenomenon of Border Asylum-Seekers” in H Selby (ed), *Tomorrow’s Law*, Federation Press (1995) 28 at 37.

78 Department of Immigration and Ethnic Affairs, Fact Sheet 81: *Locating Overstayers in Australia*, 25 July 1995. The figures are cited by M Crock, *ibid* at 31.

79 The gross migration intake for the year ended 30 June 1995 was 87 428. Department of Immigration and Multicultural Affairs, Fact Sheet 1: *Immigration: The Background*, 23 June 2000. At the same time the number of overstayers was estimated to be 51 300: Department of Immigration and Multicultural Affairs, *Annual Report 1996/1997*, at 94.

A fourth difficulty flows from the operation of the Refugees Convention, the terms of which are indirectly adopted by the *Migration Act*.⁸⁰ The very point of the Refugees Convention is to impose protection obligations on contracting states towards people arriving in their territory who are able to satisfy the definition of 'refugee' in Article 1A(2) of the Refugees Convention.⁸¹ The protection afforded by the Refugees Convention is not limited to refugees who arrive lawfully in the territory of the contracting state. On the contrary, Article 31(1) specifically prevents a contracting state from imposing penalties, on account of their illegal entry or presence, on refugees who come directly from a territory where their life or freedom is threatened. Moreover, Article 33(1) prohibits a contracting state from expelling or returning a refugee to the frontiers of territories where his or her life or freedom would be threatened for any one of the so-called 'Convention reasons'.

The language of the Refugees Convention is such that a person reasonably fearing persecution for a Convention reason secures protection by arriving in the territory of a contracting state. The lawfulness or otherwise of the claimant's arrival is irrelevant to the validity of his or her claims. The Refugees Convention therefore provides a powerful, often irresistible, incentive for people fleeing persecution to take any steps necessary, lawful or otherwise, to reach the territory of a contracting state. In this sense, the philosophy underlying the Convention collides directly with the central principle that has been at the heart of Australian migration policy since Federation. Australia, as an island continent, is less vulnerable than most countries to mass movements of people. But the authorities can never shut off completely the stream of people claiming protection as refugees. To that extent, the Refugees Convention will be seen by some as impeding the orderly implementation of migration policy.

Judicial review of refugee decisions compounds the problem from the perspective of policy-makers, since the language of the Refugees Convention lends itself to a broad construction, in keeping with its humanitarian purpose. As Kirby J remarked in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* ("Chen"):⁸²

the language of the Convention is opaque. Perhaps it is deliberately so given that it must apply to the great variety of acts of oppression, despotism, fanaticism, cruelty and intolerance of which humanity is capable.

It is inevitable that the courts will be faced with novel claims under the Refugees Convention and that some of these will be upheld. One consequence is

80 Under the *Migration Act*, s 36(2), a criterion for a protection visa is that the applicant is a non-citizen to whom Australia has obligations under the Refugees Convention. Section 65(1) provides that if the Minister is satisfied, *inter alia*, that the criteria prescribed by the Act for a visa have been satisfied, he or she is to grant the visa.

81 A 'refugee' is defined, in Art 1A(2) of the Refugees Convention as a person who: *owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

82 (2000) 170 ALR 553 at 564, [46].

that the courts will be seen as the agents by which the scope of the Refugees Convention has been enlarged and further uncertainties created for those charged with the implementation of migration policy.

The point can be illustrated by recent decisions on the meaning of the expression 'particular social group', forming part of the definition of 'refugee' in Art 1A(2) of the Refugees Convention. In *Applicant A v Minister for Immigration and Ethnic Affairs*,⁸³ a majority of the High Court held that persons who opposed China's 'one-child policy' and who feared enforced sterilisation did not constitute members of a 'particular social group'. In *Chen*, the Court was confronted with a new problem, namely persecutory treatment directed towards so-called 'black children', comprising children born outside the parameters of the one-child policy. The key difference between the two cases, according to the joint judgment in *Chen*, is that:

[black] children are...persecuted for what they are (the circumstances of their parentage, birth and status) and not by reason of anything they themselves have done by engaging in certain behaviour or placing themselves in a particular situation.⁸⁴ The sins of their parents, if they be such, are being visited upon the children.⁸⁴

One effect of the decision which can hardly be said to strain the words of the definition in Art 1A(2), is to enlarge significantly the numbers of arrivals from China who might legitimately be able to claim the protection of the Refugees Convention. Similarly, decisions recognising that a group defined by gender, such as women or married women in a particular country,⁸⁵ in one sense expand the scope of the Refugees Convention but do so without violence to its language or purpose.

E. Legislative Amendments

A fifth source of tension lies in the reliance on amendments to legislation and regulations to overturn unexpected or unwelcome judicial decisions. From the perspective of the policy maker, the fact that Parliament, or the Executive acting under the authority of Parliament, has addressed an issue, should resolve the particular problem. The 'tit for tat' phenomenon arises because there is a profound difference, not always appreciated, between the intention of the proponents of particular amendments and the intention to be attributed by courts, following established principles of statutory construction, to the legislation as a whole. A related difficulty is that repeatedly amending already complex legislation frequently leads to unanticipated problems. It then falls to the courts to resolve the problems, often in ways which frustrate the expectations of those responsible for the amendments.

The elaborate statutory scheme specifying the requirements for a valid application is a case in point. The *Migration Act* specifically states that an application for a visa is valid if, and only if, the application complies with all

83 (1997) 190 CLR 225.

84 Note 82 *supra* at 558, [18].

85 *Islam v Secretary of State for the Home Department* [1999] 2 AC 629 (HL); *Minister for Immigration and Multicultural Affairs v Khawar* [2000] FCA 1130 (FC).

prescribed requirements.⁸⁶ The Minister is enjoined “not to consider an application that is not a valid application”.⁸⁷ As the prescribed requirements become ever more detailed, the opportunities for mistaken consideration of invalid applications multiply. In consequence, the occasions for the exercise of powers of judicial review also multiply.⁸⁸ A scheme which was intended to increase certainty instead leads to uncertainty and, from a policy-maker’s perspective, disruption of the decision-making process.

VI. CONCLUSION

I have identified five sources of the tension between Parliament and the Executive, on the one hand, and courts exercising powers of judicial review of migration decisions, on the other. These by no means exhaust the reasons for the apparent dissatisfaction by successive governments, of all political persuasions, with the institution of judicial review in its application to migration decisions. They are sufficient to demonstrate, however, that the institution is indeed in peril. The irony is that the fate of judicial review of migration decisions is likely to rest with the High Court.

86 *Migration Act*, s 46(1)(b).

87 *Ibid* s 47(3).

88 See, for example, *Minister for Immigration and Multicultural Affairs v A* (1999) 91 FCR 435 (FC); also *Minister for Immigration and Multicultural Affairs v Li* [2000] FCA 1456; cf *Yilmaz v Minister for Immigration and Multicultural Affairs* [2000] FCA 906 (FC).