PREPARING REASONS FOR ADMINISTRATIVE DECISIONS AND NATURAL JUSTICE

- **When are reasons for decision required to be given by a decision maker?**
- **How can reasons be drafted to effectively communicate a decision?**
- **Understand where reasons often fail to be understandable and defensible**
- **Recent developments in "natural justice"**
- **What must be done to reduce the prospects of reasons being challenged**

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INTRODUCTION

This paper looks at when reasons ought be given, when they will be adequate/inadequate, some of the recent case law in relation to that issue and procedural fairness, in the context of seeking to further illuminate the difference between judicial review and further consideration of the merits of a case (which is precluded in judicial review[1]).

As will be seen from the below examples, such a distinction is difficult to make, even for superior Courts. Further, it is made more difficult by a failure in the case law to more clearly distinguish the difference between the adequacy of reasons and the persuasiveness of reasons, noting authority that unintelligible reasons are inadequate. That is, while it is clear that reasons must be "adequate" if not persuasive, the requirement to be intelligible requires further refinement in order that this requirement does not step over into merits review[2].

Why Give Reasons?

Fundamentally, the act of giving reasons is an attempt to explain a decision. The rationale for imposing a requirement to give reasons is,

> *"…. that they amount to a 'salutary discipline for those who have to decide anything that adversely affects others'. They encourage 'a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making'. They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions. Where the decision effects the redefinition of the status of a person by the agencies of the State, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons. By giving reasons, the repository of public power increases 'public confidence in, and the legitimacy of, the administrative process'[3]."*

In this context, understanding when reasons are required, the extent of reasons required to be

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[1] See for example *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321; 359-360 (Mason CJ); *Sinclair v Mining Warden at Maryborough* [1975] HCA 17; 132 CLR 473; 481 (Barwick CJ) and 483 (Gibbs J**).**

[2] In regard to my discussion in this paper on that issue, I have drawn much from the paper by McDonald, L.: "Reasons, Reasonableness and Intelligible Justification in Judicial Review" (2015) 37 SydLR 467.

[3] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 ("Palme"); as per Kirby J at 242, [105].

provided and when reasons may be said to be inadequate are key to whether a decision may stand or fall.

WHEN ARE REASONS REQURED

At the outset, it is important to note that reasons for decisions are not required under the common law[4]. It is only where legislation confers a right to reasons that reasons are required. Thus the requirement to give reasons can only be understood within the particular legislative regime in which such rights arise[5]. Further, it is important to recognise that the sources of such rights are now multifarious and found in both state and federal laws (some allowing merits review[6] as well as judicial review[7]).

The High Court has given content to this duty in a number of cases, including more recently in *Wingfoot*[8]. In that case, the High Court considered the duty of a Medical Panel to give reasons under Part IV of the *Accident Compensation Act (Vic),* holding,

> *"The duty of a Medical Panel to give reasons for its opinion on a question referred to it is no more and no less than the statutory duty imposed by s 68(2) itself. The content of that statutory duty defines the statutory standard that a written statement of reasons must meet to fulfil it.*
>
> ***The standard required of a written statement of reasons in order to fulfil the duty imposed on a Medical Panel by s 68(2) of the Act falls therefore to be determined as an exercise in statutory construction. In the absence of express statutory prescription, that standard can be determined only by a process of implication.***
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> ***General observations, drawn from cases decided in other statutory contexts and from academic writing, about functions served by the provision of reasons for making administrative decisions are here of limited utility****. To observe, for example, that the provision of reasons imposes intellectual discipline, engenders public confidence and contributes to a culture of justification, is to say little about the standard of reasons required of a particular decision-maker in a particular statutory context. The standard of reasons required even of courts making judicial decisions can vary markedly with the context.*[9]
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> *…*
>
> *The reasons that s 68(2) of the Act obliged the Medical Panel to set out in a statement of reasons to accompany the certificate as to its opinion were the reasons which led the Medical Panel to form the opinion that the Medical Panel was required to form for itself on*

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[4] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 ("*Osmond*").
[5] As required by High Court authority in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ("*Blue Sky*") and decisions of the High Court expressly considering statutory duties to provide reasons such as *Wingfoot* (referred to below).
[6] *Administrative Appeals Tribunal Act 1975 (Cth)* s 28; *ACT Civil and Administrative Tribunal Act 2008 (ACT)* ss 22B–22F; *Administrative Decisions Review Act 1997 (NSW)* ("ADRA") ss 49–54; *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* ss 45–7; *State Administrative Tribunal Act 2004 (WA);* ss 21–3; *Queensland Civil and Administrative Tribunal Act 2009 (Qld);* s 158; *South Australian Civil and Administrative Tribunal Act 2013 (SA);* s 35.
[7] Such as is found in the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ("ADJRA") at s 13 and similar state laws including ACT, Queensland, Tasmania and Victoria, noting NSW provides for such review under the *Uniform Civil Procedure Rules 2005 (NSW)* ("UCPR") r 59.9.
[8] *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 ("*Wingfoot*").
[9] *Wingfoot*; 498, [43]-[45].

> *the medical question referred for its opinion.* ***What is to be set out in the statement of reasons is the actual path of reasoning by which the Medical Panel arrived at the opinion the Medical Panel actually formed for itself****.*[10]"

That is, generalized statements (such as the kind made by Kirby J in *Palme* and set out above) in the absence of close attention to the precise requirements of the particular statute are of little use in determining the nature and extent of the reasons required to be given in accordance with the statute.

In this context, *Kalokerinos*[11] provides some helpful instruction as to the extent of the reasons required. In that case, the Court of Appeal held that while,

> *"…****the Commercial Tribunal might decide a question with respect to a matter of law without expressly disposing of the question****, and* ***it was open to the Court to infer from the wording of the Tribunal judgment that the question had been decided****. In my respectful view this is correct****; it is possible to establish that it was necessary to decide something which had been in issue or had been debated in order to dispose of the proceedings, and the reasons given may sustain the inference that it had been disposed of even though not expressly mentioned.*** *It was also Carruthers J's view that the expression "a question with respect to a matter of law" is confined to a pure question of law; that is to say, his Honour did not see the provisions of subs.20(5), in whole or by reference to the words "decides" or "question with respect to," as widening the matter potentially under appeal beyond the pure question of law.[43]"*

Of course, decisions in which the reasons provided do not fulfil their statutory obligations will constitute to an error of law[12]. In addition, deficiencies in relation to particular obligations may result in challenges to the decision on the ground of reasonableness. In that context, a conclusion unsupported by reasons may be unreasonable.

TEST FOR ADEQUATE REASONS

Justice Woodward expressed effective reasons by describing the preferred response of an unsuccessful party:

> "*Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.* [13]"

The Full Court of the Federal Court later cited this approach with approval[14].

It follows inexorably from the above test that a failure to provide clear understandable reasons will amount to a failure to properly execute a statutory duty and give rise to a claim of unreasonableness. In that regard, *Li*[15] is the leading decision.

In *Li*[16], the applicant applied for a Skilled Independent Overseas Student visa in 2007, having worked and trained as a cook. In this context, she was required to provide an assessment

[10] *Wingfoot*; 499, [48].
[11] *Kalokerinos v HIA Insurance Services Pty Ltd* [2004] NSWCA 312 ("*Kalokerinos*") at paragraph [43].
[12] *Wingfoot*; 501, [55].
[13] *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 ("*Ansett*"); 507.
[14] *Rich Rivers Radio Pty Ltd v Australian Broadcasting Tribunal* (1989) 22 FCR 437 ("*Rich Rivers*"); 444.
[15] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ("*Li*").
[16] *Ibid*; 367, [76].

showing her skills were appropriate for the occupation. The Minister's delegate initially refused her visa application (for reasons not relevant to the appeal), and Ms Li sought merits review of this decision before the Migration Review Tribunal. By this time, Ms Li had obtained further work experience and sought a fresh skills assessment. This further skills assessment was unsuccessful, but Ms Li's migration agent advised the Tribunal that there were errors in the skills assessment and asked the Tribunal not to make any decision until the assessment authority had reconsidered the assessment. Nonetheless, the Tribunal decided not to grant an adjournment and informed Ms Li that it considered she had 'been provided with enough opportunity to present her case and is not prepared to delay any further'. The Tribunal relied on the unfavourable skills assessment and dismissed her application for merits review. The High Court held that the decision not to adjourn, which was a discretionary decision, was unreasonable. As French CJ stated (in the majority),

> *The MRT's approach in this case, …. was captured succinctly, and apparently exhaustively, by the words "the applicant has been provided with enough opportunities to present her case". It made no reference to the probability that the first respondent would be able, within a reasonable time, to secure the requisite skills assessment. The Minister submitted, against a straw-person argument not put, that there is no general obligation upon the MRT to adjourn a decision because the applicant for review "considers" that the passage of time will allow a visa criterion to be met. That was not this case. There was good reason to expect that the criterion would be met. The MRT denied the first respondent what would have been, in the circumstances, a reasonable opportunity to acquire the TRA skills assessment which was essential to her success. The first respondent's migration agent had shown the MRT that there was a proper basis for expecting a favourable outcome in response to his request for a review by TRA. That was borne out by the event (72). There was no practical countervailing consideration disclosed in the MRT's reasons for refusing to defer its decision. The first respondent was denied procedural fairness and that denial constituted jurisdictional error.*
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> *The refusal by the MRT to defer its decision was held by Greenwood and Logan JJ in the Full Court to be "unreasonable" amounting to a failure to discharge the "core statutory function of reviewing the decision" (73). The question of the "unreasonableness" of the MRT's decision not to adjourn the review was agitated, independently of the question of its asserted failure to accord procedural fairness to the first respondent. This aspect of the case raises the question whether the decision of the MRT was unreasonable in the sense used by Lord Greene MR in Associated Provincial Picture Houses Ltd v Wednesbury Corporation(74), that is to say so unreasonable that no reasonable tribunal could have made it.*
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> ***In approaching that question it is necessary to keep in mind the distinction between a decision-maker finding a jurisdictional fact and a decision-maker exercising a discretion**. The distinction was made by Gummow A-CJ and Kiefel J in Minister for Immigration and Citizenship v SZMDS (75) when, referring to so-called "Wednesbury unreasonableness" their Honours said (76):*
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> > *"The concern here is with abuse of power in the exercise of discretion, again on the assumption that the occasion for the exercise of discretion had arisen upon the existence of any necessary jurisdictional facts. **Confusion of thought, with apprehension of intrusive interference with administrative decisions by judicial***

review will be avoided if the distinction between jurisdictional fact and other facts then taken into account in discretionary decision making is kept in view*."*

(*Footnotes omitted.) Bearing that distinction in mind, it is appropriate to turn to the general question whether the MRT's decision not to defer its determination was so unreasonable as to constitute jurisdictional error.* [17]

….

The rationality required by "the rules of reason" is an essential element of lawfulness in decision-making. ***A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power. It falls outside the framework of rationality provided by the statute. To that framework, defined by the subject matter, scope and purpose of the statute conferring the discretion, there may be added specific requirements of a procedural or substantive character. They may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions (88). Vitiating unreasonableness may be characterised in more than one way susceptible of judicial review.*** *A decision affected by actual bias may lead to a discretion being exercised for an improper purpose or by reference to irrelevant considerations. A failure to accord, to a person to be affected by a decision, a reasonable opportunity to be heard may contravene a statutory requirement to accord such a hearing. It may also have the consequence that relevant material which the decision-maker is bound to take into account is not taken into account.* [18]

…

The decision of the MRT to proceed to its determination was not, on the face of it, informed by any consideration other than the asserted sufficiency of the opportunities provided to the first respondent to put her case. The MRT did not in terms or by implication accept or reject the substance of the reasons for a deferment put to it by the first respondent's migration agent. It did not suggest that the first respondent's request for a deferment was due to any fault on her part or on the part of her migration agent. It did not suggest that its decision was based on any balancing of the legislative objectives set out in s 353. Its decision was fatal to the first respondent's application. There was in the circumstances, including the already long history of the matter, an arbitrariness about the decision, which rendered it unreasonable in the limiting sense explained above*.* [19] [Emphasis added.]

As put by the majority,

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

[17] Ibid; 347-348.
[18] Ibid; 350.
[19] Ibid; 352.

In Sharp v Wakefield, it was said that when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice. That is what is meant by "according to law". It is to be legal and regular, not arbitrary, vague and fanciful. The discretion must be "exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself" (146). It is pointed out in Wade and Forsyth (147) that the legal conception of discretion dates from at least the sixteenth century. In Sharp v Wakefield (148), Lord Halsbury L Chad referred to Rooke's Case (149), in which it was stated that the discretion of commissioners of sewers "ought to be limited and bound with the rule of reason and law".

This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness(150). The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power (151). Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.

In Klein v Domus Pty Ltd (152), Dixon CJ said that where discretions are ill defined (as commonly they are) it is necessary to look to the scope and purpose of the statute conferring the discretionary power and its real object. The ordinary approach to statutory construction, reiterated in Project Blue Sky Inc v Australian Broadcasting Authority (153), requires nothing less. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.[20] [Emphasis added.]

McDonald says that the reasoning in *Li*[21] is contrary to the orthodox understanding of unreasonableness[22]. Specifically, that the High Court has lowered the test of reasonableness by making it conditional upon "*the standard indicated by the true construction of the statute*" [23]. As he puts it,

> "*How can a variable, context-dependent standard be accommodated within a conceptual framework of review supposedly set up by the separation of judicial power from executive administration? Without something like Wednesbury as a default standard of review, it becomes difficult to maintain that the substantive nature of unreasonableness of review is a strictly limited exception …*

Others agree with this proposition, including the idea that *Li* widened the test of unreasonableness and go further by considering that if reasonableness is implied by reason of the statute, the statute may exclude this requirement by express terms[24]. Indeed, the majority in *Singh* so held.

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[20] Ibid; 362-364 as per Hayne, Kiefel and Bell JJ.
[21] Ibid.
[22] McDonald, L.; *"Reasons, Reasonabless and Intelligible Justification in Judicial Review"* (2015) 37 SydLR 467; 483. Reasonableness as set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[1947] EWCA Civ 1; [1948] 1 KB 223 ("Wednesbury").
[23] Ibid; 483 citing *Li*; 364, [67].
[24] Barker J and Nagel "Legal unreasonableness: Life after Li" (FCA) [2014] FedJSchol 15; [13]-[15] citing *Minister for Immigration and Border Protection v Singh*, the Full Court of the Federal Court (2014) 23 FLR 437 ("*Singh*"); 445, [43] and [56].

> ***The conditioning of a power such as the one in s 363(1)(b) of the Act with a requirement of reasonableness occurs because of an implication concerning parliamentary intention in the conferral of such a power. There is****, as the High Court said in Li, particularly at [29] per French CJ, at [63] per Hayne, Kiefel and Bell JJ, and at [88] per Gageler J,* ***a presumption of law that Parliament intends an exercise of power to be reasonable. There is an analogy with the implication that Parliament intends an exercise of power to be conditioned by an obligation to afford procedural fairness****: see Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 367 per Deane J; Attorney General (NSW) v Quin (1990) 170 CLR 1 at 36 per Brennan J; Kruger v Commonwealth (1997) 190 CLR 1 at 36 per Brennan CJ; Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at [40] per Gaudron and Gummow JJ; Li at [88]-[92] per Gageler J.* ***Subject to any impinging Constitutional consideration, the presence of a clear statutory qualification or contrary intention may be capable of modifying or excluding either implication.***
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> *In order to understand how the standard of legal unreasonableness is to be ascertained, it is important to see where the concept fits in terms of the Court's supervisory powers over executive or administrative decision-making. In Li, the judgments identify two different contexts in which the concept is employed****. Legal unreasonableness can be a conclusion reached by a supervising court after the identification of an underlying jurisdictional error in the decision-making process****: Li at [27]-[28] per French CJ, at [72] per Hayne, Kiefel and Bell JJ; cf Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611 at [39] per Gummow A-CJ and Kiefel J.* ***However, legal unreasonableness can also be outcome focused, without necessarily identifying another underlying jurisdictional error. The latter occurs in what French CJ (in Li at [28]) calls "an area of decisional freedom": it has the character of a choice that is arbitrary, capricious or without "common sense".*** *See also the plurality at [66] referring to an area within which a decision-maker has a genuinely free discretion. The plurality in Li described this as an inference to be drawn because the Court cannot identify how the decision was arrived at. In those circumstances, the exercise of power is seen by the supervising court as lacking "an evident and intelligible justification". Gageler J also uses language suggestive of review for legal unreasonableness being concerned with an examination by the supervising court of the outcome of the exercise of power (in Li at [105])…*[25] [Emphasis added.]

That is, the nature of the obligation is informed by the nature of the statutory obligation. This is also highlighted by the Full Court's decision in *Singh*, in which it determined the Migration Review Tribunal's decision to refuse an adjournment was unreasonable by reference to the statutory regime. In particular, it was noted that,

> *Given the nature of the visa criterion, and in order to give purpose to the merits review, the Tribunal conducted the review on the basis that the first respondent should be able to sit an IELTS test after his application for review was lodged with the Tribunal. This is consistent with the principles set out earlier in Berenguel at [24]-[27] and the Tribunal acting on the most up-to-date information.* [26]

[25] *Singh*; 445, [43]-[44].
[26] *Singh*; 450, [69].

Mr Singh had sought the relevant adjournment in order to obtain a re-mark of the test he had sat. The Court held that the Tribunal's justification for not allowing the adjournment was not 'objective or intelligible' given[27], the request was:

- for a specific purpose, being a re-mark of the English test[28];
- there was objective evidence of a reasonable basis to doubt the accuracy of the result of the English test for one component of that test (as he had passed that component on three previous occasions)[29];
- the time required to obtain the re-mark was unlikely to be significant[30]; and
- there would be significant and inevitable prejudice to Mr Singh if the request for adjournment was refused[31].

As the Full Court put it,

> *There was no evidence about any factual reason why the Tribunal needed to make a decision in early January 2013. There was no prejudice to anyone from a short adjournment of the review, but there was significant and inevitable prejudice to the first respondent if the adjournment were refused. His application for review would be doomed to failure. The Minister accepted that the refusal by the Tribunal to adjourn was not legitimately affected by policies of which the Court has no experience.*
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> *If a proportionality analysis were undertaken (cf Li at [30], [74]), it could be said that the exercise of power to refuse a short adjournment in these circumstances was disproportionate to the Tribunal's conduct of the review to that point, to what was at stake for the first respondent, and what he might reasonably have hoped to secure through a re-mark*.[32]

This case also shows that the proportional effect on the parties is a factor to be considered where reasons are not "intelligible".

Of course, the statutory obligation to provide reasons, of their nature impose obligations of procedural fairness[33]. A fact demonstrated by *Li* and *Singh*, noting French CJ held there was also a lack of procedural fairness in *Li*. It must also be acknowledged that to the extent that the Migration Act has sought to reduce judicial review (including by the introduction of, for example, s 197C of the Act, which proscribed the extent of procedural fairness in respect of certain sections of the Act) has lead to increased case law and the development of other administrative remedies.

[27] *Singh*; 451, [75].
[28] *Singh*; 450, [68].
[29] *Singh*; 451, [73].
[30] *Singh*; 451, [74].
[31] *Singh*; 451, [76]-[77].
[32] *Singh*; 451, [76]-[77].
[33] As per *Kioa v West* (1985) 159 CLR 550 as per Brennan J (as he then was) at 629: "*[i]n the ordinary case ... an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.*"

ADEQUACY/INADEQUACY OF REASONS

While it is clear that reasons must be adequate, the High Court has also been clear that courts ought not be quick to set aside reasons. In *Wu Shan Liang*[34], the High Court considered the Full Court of the Federal Court's decision to overturn a decision of the Refugee Review Tribunal ("RRT") because the reasons of the RRT suggested that the Tribunal had required the likelihood of persecution to be established on a balance of probabilities, rather than consistent with High Court authority in *Chan*[35]. In that context, the High Court held that:

- the use of the work "speculative" by the RRT did not suggest that the delegates had abandoned the process of looking to the future which is of the essence of the *Chan* test and

- the attribution by the delegates of weight to particular material did not equate to a renunciation of the "real chance" test and an erroneous adoption of a balance of probabilities test.

In reinstating the RRT's decision, the majority[36] had the following to say.

> "…[T]he delegate starts and finishes with the correct test; **it is only some phraseology in between which provides the basis for a conclusion that she had slipped from an assessment of real chance to an assessment of balance of probabilities**.
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> *When the Full Court referred to "beneficial construction", it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is Collector of Customs v Pozzolanic (35). In that case, a Full Court of the Federal Court (Neaves, French and Cooper 11) collected authorities for various propositions as to the practical restraints on judicial review. It was said that a court should not be "concerned with looseness in the language . . . nor with unhappy phrasing" of the reasons of an administrative decision-maker (36). The Court continued (37): "The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error."*
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> *These propositions are well settled.* ***They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed (38). In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision.*** *This has been made clear many times in this Court. For example, it was said by Brennan J in Attorney-General (NSW) v Quin (39):*
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> > *"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."*[Emphasis added.]

[34] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.
[35] *Chan v. Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 379 ("*Chan*"). In which the High Court determined that in order to establish a well-founded fear of persecution, an applicant for refugee status need only show there was a "real chance" they may be persecuted upon return to their country of origin.
[36] As constituted by Brennan CJ, Toohey, McHugh and Gummow JJ..

Short Summary of Case Law re: Adequacy of Reasons

So when will Courts uphold a decision by reference to the reasons (in addition to reasonableness as set out in Li and Singh above)? The following principles, extracted from the case law make it clear that reasons must:

- satisfy the minimum required under the statute, as opposed to "fixing some ideal or even desirable level of reasoning[37]", although "no standard of perfection is required[38]";
- disclose the actual path of reasoning (as set out in *Wingfoot*, above[39]);
- there must be enough detail to enable to a court to conduct judicial review, to determine whether there was an error of law[40];
- they must be comprehensible: expressed in "clear language" capable of being understood[41];
- they must not contain "value generalities"[42];
- they must set out the decision maker's understanding of the relevant law (where legal principles must be applied) and the reasoning process describing how the law applied to the facts as found[43];
- they must not make a finding of fact where there is no evidence of that fact[44];
- apply the Briginshaw[45] standard and failure to do so in relation to serious and/or criminal matters will result in jurisdictional error[46]; and
- the reasoning must reflect the case put before the Tribunal, cases may not be decided on grounds not run or presented for comment at hearing[47].

All of these matters assist in forming a decision as to whether the impugned decision had an "intelligible justification".

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[37] *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Secretary of the Treasury (2014) 242 IR 318; 331, [47].*
[38] *Comcare v Lees*(1997) 151 ALR 647 ('"*Lees*"); 656.
[39] *Wingfoot*; 499, [48].
[40] *Wingfoot*; 499, [48].
[41] *Lees*; 656.
[42] *Ansett Transport Industries (Operations) Pty Limited v Wraith* (1983) 48 ALR 500; 507.
[43] *Ansett*; 507.
[44] *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32 (29 September 2010); (2010) 241 CLR 390 ("*Kostas*"). In that case, The Tribunal made a finding adverse to Mr and Mrs Kostas to the effect that the builder had properly given notice of claims for extensions of time. That was a finding for which there was no evidence before the Tribunal. It was critical to the Tribunal's conclusion that notices of default grounding the termination by Mr and Mrs Kostas were not valid. The primary judge acted within his jurisdiction and powers when he allowed the appeal against the Tribunal's decision.
[45] *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[46] M164/2002 v Minister for Immigration & Multicultural Affairs [2006] FCAFC 16 at [117].
[47] *Suvaal v Cessnock City Council* [2003] HCA 41; (2003) 200 ALR 1; (2003) 77 ALJR 1449 (6 August 2003) ("*Suvaal*").

CURRENT SITUATION

McDonald notes[48] that there are different categories of statutory obligations: those that are general[49] and those that are specific. In relation to the latter, the unfair dismissal provisions of the Fair Work Act 2009 (Cth) are a good example of specific provisions in so far as they comprehensively proscribe the matters, which must be considered when making decisions, for example:

(a) who is able to bring a claim of unfair dismissal (s 382 and 383 FWA);

(b) what will constitute an unfair dismissal (s 383 FWA);

(c) criteria for considering harshness (s 387 FWA[50]).

In section 387 of the FWA, it is the case that what this has lead to in practice is a form of decision writing that addresses each criteria in turn to ensure the decision records each criterion has been considered and the determination in relation to each[51]. This is a useful model in relation to statutory provisions that provide clear guidance as to the matters to be addressed in a decision.

The real difficulty arises where there are general provisions giving rise to discretions. McDonald argues[52] that history of judicial review of decisions discloses that Courts have (in general) approached judicial review of decisions on the basis Courts may review "intelligibility" of decisions (by reference to the relevant statutory regime), but not the "persuasiveness" of the reasoning set out in any decision, noting that "the law does not require public authorities to engage in the correct reasoning process[53]". This is certainly consistent with decisions of the Full Court of the Federal Court, including *Singh* in which it was stated,

> *The standard of legal reasonableness will apply across a range of statutory powers, but the indicia of legal unreasonableness will need to be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case. As we have said, unlike some other grounds for review of the exercise of power, the reasoning process in review for legal*

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[48] McDonald, L.; *"Reasons, Reasonabless and Intelligble Justification in Judicial Review"* (2015) 37 SydLR 467; 474.

[49] Ibid; 475, such as s 13 of the ADJRA.

[50] ***Section 387*** *In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:*

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

[51] For a recent example see: *Piggott v Wellpark Holdings Pty Ltd* [2016] FWC 3188 (14 June 2016).

[52] McDonald, L.; *"Reasons, Reasonabless and Intelligble Justification in Judicial Review"* (2015) 37 SydLR 467; 470 and 481.

[53] Ibid; 472 citing Endicott, T.; Administrative Law (2nd Ed); Oxford University Press (Oxford); 2011; 209.

> *unreasonableness will inevitably be fact dependent. That is not to diminish the importance of the supervising court maintaining an approach which does not involve the substitution of its own judgment for that of the decision-maker. Rather, it is to recognise that any analysis which involves concepts such as "intelligible justification" must involve scrutiny of the factual circumstances in which the power comes to be exercised*[54].

Of course this line is not brightly drawn between because,

> "*..even minimal adequacy requirements raise questions that go to the substance of the reasons, not just their form,* [thus] *the line between intelligibility and persuasiveness of reasons is difficult to draw too clearly*. [55]"

Thus McDonald argues that more guidance is required as to how to "quarantine" "intelligibility" from substantive review[56]. Further, the line is even more difficult to draw where there is an attempt to impugn a discretionary decision on the ground of reasonableness whether reasons have been given or not (although the latter will present an easier task to impugn a given decision).

As stated by Justice Mortimer in *Kaur*[57],

> "***In Singh, the Full Court identified two different analyses which might be applied in such a circumstance. If the repository of the power had given no reasons for the outcome, then the supervising court can only focus on the outcome of the exercise of power in its factual context as presented and evaluate for itself the justification or intelligibility of that outcome, bearing in mind the constraints applicable to the role of a supervising court. If the repository of the power has given reasons, then it is the justification given in the reasons, and the intelligibility of the exercise of power as explained in the reasons, which the supervising court should examine, bearing in mind the constraints applicable to that task***. *Limiting the examination to the reasons given by the repository of the power is consistent with the approach taken to the role of reasons generally in assessing jurisdictional error: namely, that reasons enable a supervising court to see what the repository of the power herself or himself saw as relevant, irrelevant, or as her or his statutory task. In deciding whether there was an excess of jurisdiction, this is the perspective which is important, understanding why the power was exercised as it was: see Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30 at [10] per Gleeson CJ. Where there are reasons given by a repository of the power, which are not sufficient to provide an intelligible justification, for a supervising court to engage in finding and applying facts and reaching its own conclusions about how and why, through a different reasoning process, the exercise of power could be justified is tantamount to a re-exercise of the power by the supervising court and in my opinion crosses the line, well established in Australian law, between a review of the exercise of a power and the exercise of it, as described by Brennan J in Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 35-38.*[58]

In that case, Justice Mortimer determined that as the Tribunal gave no reasons for the exercise of power under s 362B, and even though it was not expressly obliged by the Act to give reasons, its failure to do so left the exercise of power unexplained. That absence of explanation meant the supervising court was required (consistent with *Singh)* to focus on the outcome of the exercise of power in its factual context as presented and evaluate for itself the justification or intelligibility of

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[54] *Singh*; 447, [43]-[44].
[55] Ibid; 470.
[56] Ibid; 470.
[57] *Kaur v Minister for Immigration and Border Protection* [2014] FCA 915 (28 August 2014)
[58] *Kaur v Minister for Immigration and Border Protection* (2014) 236 FCR 393 ("*Kaur*"); [110].

that outcome, bearing in mind the constraints applicable to the role of a supervising court. In that context and having regard to the following matters, it was held that the discretion was unreasonably exercised in the circumstances of this case.

- The Tribunal had taken almost two years to come to the point of even considering the first appellant's review application. The Tribunal had "no particular sense of urgency about the review, nor objectively was there any basis for such urgency" [59].

- During the five months during which the Tribunal and the appellant engaged in communications, all were by way of telephone and email aside from the two hearing invitations and, further, on at least two occasions, the Tribunal officers actively followed up with the first appellant by telephone when the Tribunal had sent her an email. The first appellant was responsive, and indeed her communications disclosed a level of anxiety to ensure that she was being kept informed, that she supplied the information the Tribunal required and did all that was asked of her[60].

- Given the above circumstances, her non-response to the second hearing invitation and then two weeks later her failure to attend the hearing was, given her past behaviour, out of character. "So much should have been obvious to the Tribunal officers and to the Tribunal member[61].

In that context, it was held that,

> "A tribunal acting fairly, according to substantial justice and the merits of this applicant's case, would have taken some step to find out what had happened. A tribunal acting fairly, according to substantial justice and the merits of this applicant's case, would have done what this Tribunal, and its officers, had been doing with this review applicant for the past five months: telephoned or emailed her. Subsequent events, as disclosed by the evidence, demonstrate that, when those methods of communication were used with the first appellant after the Tribunal decision, she was responsive in a timely way. There is no basis to conclude she would have been otherwise if telephoned or emailed either by the Tribunal officer who filled in the "no response" to hearing invitation form, or by the Tribunal member herself. In keeping with the conduct to that point, a simple telephone call or email after the "no response" form was filled in would, I find, most probably have resulted in the first appellant attending the second hearing. [62]

What this case shows is that even where there is no express requirement to give reasons under the statute, a failure to give reasons may lead to a successful challenge to the decision made. It also shows the importance of have regard to the overall circumstances of the case. However, it is difficult to draw a principled line between the actions of the court in determining reasonableness in the absence of reasons by reference to reasons the Court says ought to have been provided. This seems to be very close to the prohibition against merits review.

PROCEDURAL FAIRNESS - Recent Case of SZSSJ

In *SZSSJ*[63], the Minister was successful in persuading the High Court that the Full Court of the Federal Court was right to conclude that the Federal Circuit Court had jurisdiction to entertain the

[59] *Kaur;* [138].
[60] *Kaur;* [139].
[61] *Kaur;* [140].
[62] *Kaur;* [140].
[63] *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901 as per French CJ, Kiefel, Bell, Gageler, Keane, Nettle, Gordon JJ. I note I only deal with SZSSJ and not the additional applicant, whom was in a less complicated situation and was dealt with on substantially the same terms.

proceedings and that the applicants were owed procedural fairness, but was wrong to conclude that the applicants had been denied procedural fairness. This case is useful in terms of understanding when reasons may be deficient, for its clear focus on the proper basis for determining judicial review on the ground of procedural fairness.

Background

The Department published information (as part of routinely publishes statistics on its website) that effectively disclosed the identities of 9,258 applicants for protection visas who were, at the time, in immigration detention ("Data Breach"). This was an error. The disclosure was published on the website and lasted from 10 to 24 February 2014. Once alerted to the breach the Department engaged an external computer (KPMG) to determine the reasons for the breach and made that report (in an abridged form) available to those affected.

In the abridged version, the report stated that it was not in the interests of those affected to disclose further information in respect of entities [who] had accessed the information, other than to acknowledge that access originated from a range of sources. There was an obvious risk that the information had been viewed by countries from whence those affected came. That is, those affected, being applicants for protection visas, were potentially at increased risk of persecution in their countries of origin. The question for the Department was what to do about that risk.

Letters were sent by the Department expressing regret (amongst other things). The Departments efforts then turned to conducting International Treaties Obligations Assessments" (ITOAs) The reason for carrying out the ITOAs was to assess the effect of the Data Breach on Australia's international obligations in relation to each of those affected. The relevant standardized departmental instructions in the Procedures Advice Manual for the conduct of an ITOA provided that a finding by a departmental officer that a non-refoulement obligation was engaged in relation to a particular affected person might result in referral of that case to the Minister. Then the Minister was to decide whether to exercise a power conferred by specified sections ss 48B, 195A and 417 of the MA.

The relevant section conferred "non-compellable" powers on the Minister to do (or not do) a range of things including grant a visa (in the cases of ss 195A and 417) or to lift a statutory bar to the making of an application for a visa (in the case of s 48B). Each is a power that is expressed as being one that the Minister "may" exercise if "it is in the public interest to do so". They could only be exercised by the Minister personally and there was no duty to consider the exercise. It was also a common feature of the sections that the powers they conferred could (and, in the case of the power conferred by s 195A, could only) be exercised in respect of unlawful non-citizens who are in immigration detention under s 189 of the Act for the duration provided by s 196. One of the possibilities to those in immigrant detention is removal from Australia under s 198. In that context,

Section 197C of the Act provided that for the purpose of s 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. Further, such removal should occur as soon as reasonably practicable irrespective of whether there has been an assessment, according to law, of Australia's non- refoulement obligations in respect of the non-citizen. However, section 197C was only inserted with effect from 16 December 2014. Erroneously and contrary to the relevant transitional provisions, the Full Court held that section 197C did not apply in relation to the removal of an unlawful non-citizen who had commenced a proceeding for an

injunction against an officer before 16 December 2014.

The Applicant SZSSJ

Applicant SZSSJ was a Bangladeshi national he was in Australia on a student visa from 2005. When his student visa expired in 2012, he was taken into detention. Around that time he applied for a protection visa. As at the date of the Data Breach, he was in immigration detention awaiting removal under s 198 of the Act. His application for the protection visa had been refused and he had exhausted his rights to merits and judicial review under Parts 7 and 8 of the Act.

SZSSJ then commenced a proceeding in the Federal Circuit Court ("FCC") seeking declaratory and injunctive relief against the Minister and the Secretary arising from the Data Breach. The Federal Circuit Court initially dismissed that application for want of jurisdiction. On appeal, the Full Court of the Federal Court held that the FCC did have jurisdiction, and remitted the matter for a determination on the merits the claim. In the meantime, an officer of the Department had written to SZSSJ on 1 October 2014. The letter stated that an ITOA had been commenced in relation to SZSSJ's case to assess the effect of the Data Breach on Australia's non-refoulement obligations with respect to him. The letter also invited SZSSJ to provide any additional information he wished to be taken into account in relation to that assessment within (14 days). That is, he was invited to make submissions.

On 23 December 2014, another officer of the Department wrote to SZSSJ enclosing country information it proposed to take into account when conducting the ITOA. The information indicated "that Bangladesh accepts involuntary and voluntary returnees; that people who return to Bangladesh from abroad, either voluntarily or involuntarily, are unlikely to face adverse attention on their return; and that the return of failed asylum seekers is unlikely to be reported by Bangladeshi airport authorities to other Bangladeshi government agencies". SZSSJ was again invited to provide a response to that country information within a further 14 days.

By December 2014, there was also correspondence between the Department and SZSSJ regarding the proceeding which remained pending in the FCC, including a letter dated 1 December 2014, in which SZSSJ's demanded an unabridged copy of the KPMG report including all information about whom had accessed that data. The response from the Australian Government Solicitor ("ASG") (on 12 February 2015) disagreed that procedural fairness required that action and did not provide the unabridged report. The ASG provided copies of part of the Procedures Advice Manual explaining the ITOA procedures and set out the terms of the instruction given to officers conducting the ITOAs. It was noted that the process required assessing officers to assume the information might have been accessed by authorities in the country in which the applicant feared persecution or other relevant harm. I note that without it being necessary to decide this issue, the Full Court held that this information, along with the invitation to make submissions, was conduct that generated an obligation of procedural fairness[64].

Importantly, the letter advised that once the assessing officer has completed the ITOA, SZSSJ

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[64] *SZSSJ v Minister for Immigration and Border Protection* (2015) 234 FCR 1 (2 September 2015), [90], citing *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] UKPC 2; [1983] 2 AC 629. This matter was not appealed because it was obiter.

would be notified of the outcome and he would be handed a notification letter (if still in detention), or it would be posted to the most recent postal address provided to the Department and any authorised and appointed) recipient. If the ITOA concluded that Australia's non-refoulement obligations were not engaged SZSSJ would be given a copy of the ITOA. If it was a 'positive' outcome (i.e. non-refoulement obligations are engaged), he would not receive a copy of the ITOA and his case would be referred to the Minister to determine under the Minister's intervention powers under the *Migration Act 1958* (the Act).

The Federal Circuit Court heard and determined SZSSJ's claim for relief on the merits on 28 April 2015. The ITOA process in relation to him had then still not been completed and his claim as then reformulated was focused on the fairness of the process that had been conducted up until that time. Concerned that the relief was premature, the Federal Circuit Court dismissed the proceeding on the basis that the Court was not satisfied that SZSSJ had then been denied procedural fairness and not satisfied that SZSSJ faced a realistic threat of sudden removal while the ITOA process was continuing. SZSSJ appealed to the Federal Court.

Relevant to the High Court decision, the Full Court determined:

1. the FCC's jurisdiction was not excluded by s 476(2)(d) of the Act;

2. the ITOA process was a statutory process in which procedural fairness was required; and

3. procedural fairness had not been afforded to SZSSJ and (the other applicant).

The Full Court also determined that the Minister personally decided whether to exercise the powers conferred by ss 48B, 195A and 417 of the Act in respect of applicants for visas affected by the Data Breach. Further, the process for considering these matters was:

i. the Minister decided to consider the exercise of his dispensing powers under s48B,s195Aors417;

ii. departmental officials acting under the ultimate direction of the Minister have commenced an ITOA process to assist him in making that decision, which process is directed to gauging Australia's non-refoulement obligations; and

iii. the public interest was the relevant criteria for the Minister's decision under each provision.

The Full Court found the process to have been unfair for two reasons.

A. The process itself had not been adequately explained. By reference to SZSSJ, the Full Court said

> *Although by 12 February 2015 he was aware that what was sought were his views on any non- refoulement obligations arising from the Data Breach, he still did not know the identity of his decision-maker, the function being exercised by that decision-maker, the relevance of the ITOA process to that function or the criteria by which it would be decided.*

B. The refusal to provide the unabridged KPMG report. The Full Court inferred from the abridged copy (with which SZSSJ and SZTZI had been provided), that there was additional in the un-abridged version, which they had not been given (which was unknown to both the Applicants and the Full Court).

The Full Court held that give the circumstances of the Data Breach fairness required the Department to reveal all that it knew about its own disclosures, saying,

> *Rare is the case where a decision-maker asks a claimant to make submissions about what should happen in consequence of a failure to adhere to statutory safeguards of confidentiality committed by the decision-maker affecting the claimant. In such a case, it is inevitable that the decision-maker must show its full hand subject to any proper (and curially supervisable) consideration of confidentiality.* [65]
>
> *….it undermines fairness to suggest that in such an unusual situation the Department does not have to reveal the full circumstances so that the person affected can assess, with full information, whether some adverse impact occurred or may have occurred on which he or she wishes to be heard (absent some good reason not to do so, such as confidentiality).* [66]

The High Court held that the circumstances of the Data Breach did not warrant a departure from the ordinary requirements of procedural fairness as set out below.

- A court may only proceed for the purpose of and cannot go beyond "the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power"[67].
- The requirement to afford a reasonable opportunity to be heard to the person who has an interest apt to be affected by exercise of that power. Breach of that requirement will occur where the procedure adopted undermines the opportunity of the person to propound their claim for a favourable decision so as to amount to a "practical injustice". [68]
- Affording a reasonable opportunity to be heard requires that the person whose interest is affected be put on notice of:
    - the nature and purpose of the inquiry;
    - the issues to be considered during the inquiry; and
    - the nature and content of information that entity undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person.

Specifically in this case, the High Court held that the relevant parties were put on notice as to the the nature and purpose of the assessment and of the issues to be considered in conducting the assessment from the time of the formal notification of the commencement of the ITOA process occurring when the initial letters were sent out. Both parties were told that an assessment was to be conducted. They were told that the assessment to be conducted was an ITOA in accordance with procedures set out in the Procedures Advice Manual. They were told that the purpose of conducting the ITOA was to assess the effect of the Data Breach on Australia's non-refoulement obligations under the relevant conventions. The Procedures Advice Manual was available to them and to their representatives. The Manual made clear that a finding that a non-refoulement

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65 *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 ("*SZSSR No1*"); [121].
66 *SZSSJ No 1*; [123].
67 *SZSSJ;* 914 citing *Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319 at [78]; 85 ALJR 133.
68 *SZSSJ;* 915, citing *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37]; 77 ALJR 699 as explained in *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25 at [36], [57].

obligation was engaged might result in referral to the Minister to decide whether or not to exercise a relevant non-compellable power in the particular case. That was reiterated in the later letter from the ASG to SZSSJ.

While the fact of the Minister's decision affected the legal characterisation of the ITOA process, it has no effect on what was in fact to occur in the ITOA process or on the possibility of that process leading a decision by the Minister, under the relevant sections, to grant a visa or to lift the bar. While the Minister's power was conferred in terms of what the Minister thought to be in the public interest, the ITOA process was concerned only to inquire into a particular aspect of the public interest: compliance with Australia's non-refoulement obligations. The absence of notification of the fact of the Minister's decision and the correct legal characterisation of the ITOA process deprived neither applicant in this case of any opportunity to submit evidence or to make submissions bearing on the subject matter of their respective ITOAs.

The assumption made in the ITOA process was that their personal information might have been accessed by authorities in Bangladesh and China. This assumption removed it from any consideration as to whether procedural fairness had been provided in relation to this issue, because it effectively removed it from the scope of factual inquiry leading to the relevant decisions. That is, if actual disclosure in relation to particular individuals had been made part of the factual inquiry, the outcome with regard to procedural fairness is likely to have been different. Having said that, the High Court held that such an assumption was "sensible because the true extent of access to the personal information of each affected applicant must in practical terms have been unknowable". I note the High Court does not refer to any evidence about this issue and this appears to be based on assumptions including that it would be impossible to trace where data may have been sent after access (which ought surely to have been the subject of expert evidence but only if it was a fact in issue, which is was not given the assumption that was made).

In this context, SZSSJ and SZTZI could not be said to have been deprived of the opportunity to submit evidence or to make submissions relevant to the subject matter of the ITOA process. Exactly how and why (and to what extent) the Data Breach occurred was simply not relevant to the question of whether one or more of Australia's non-refoulement obligations were engaged in respect of them, it having been assumed that disclosure had occurred.

What this case demonstrates is that finding the line between jurisdictional review and trespassing on the forbidden territory of the decision-maker's powers/discretions is difficult even for superior courts. Notwithstanding the High Court's foray into what appear to be problematic evidentiary issues, the High Court has made it clear that it is only where there are facts requiring determination before making an impugned decision that procedural fairness can operate. Where facts are effectively deemed proven (as they were in this case) there can be no lack of procedural fairness in respect of a failure to provide information.

Another way to look at the reasoning of the High Court is that the decision of the Full Court effectively held procedural fairness ought be provided in respect of agreed facts, which is contrary to the test for procedural fairness. Alternatively, it is also true to say that the extent of the breach for each individual was irrelevant to the procedure given it was assume to have occurred, being an assumption wholly in favour of all affected persons and thus unaffected by further submission (except to a party's detriment) and so the principles of procedural fairness could not be engaged.

SUMMARY

There are a number of ways in which reasons may be held to be deficient. However, if the reasons fail to have proper regard to the statutory context within which they occur, the decision may be held to be unreasonable in line with *Li* and *Singh*. While the line between intelligibility and persuasiveness is ill defined, cases such as *SZSSJ* indicate (albeit in the different context of judicial review alleging procedural unfairness) that the key is a focus on the nature of the power being exercised, in the context of the statutory and/or other relevant procedural context.