Convention and Protocol relating to the Status of Refugees, 1951 and 1967 - determination of refugee status - determination a step in deciding to deny applicant an entry permit - whether decision under Convention and Protocol a decision 'under an enactment' - whether applicant entitled to reasons for decision - the law of Australia

Mayer v. Minister for Immigration and Ethnic Affairs
Davies J. (1984) 55 ALR 587
(Federal Court of Australia (General Division))

The facts: - Australia is a party to the 1951 Convention and 1967 Protocol relating to the Status of Refugees, but these agreements have not been implemented as part of the law of Australia. Under the Migration Act 1958 (Cth) a non-citizen may not remain in Australia without an entry permit. An entry permit may not be granted to a non-citizen after his entry into Australia unless under the Act: one ground for such a grant is that . . .

> (c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967." (s.6A (1)(c))

The applicant sought an entry permit relying on his status as a refugee. The Minister decided that he was not eligible for a grant of refugee status under s.6A (1)(c). The applicant sought reasons for that decision, under s.13 (1) of the Administrative Decisions (Judicial Review) Act 1977 (Cth), which entitles persons affected by a range of administrative decisions made 'under an enactment' to seek judicial review of the decision on specified grounds. For the Minister it was argued that decisions as to refugee status were made under the prerogative pursuant to a treaty which was not part of the law of Australia, and were therefore not made 'under an enactment'.

Held: (at pp. 588, 589-90, 591-3). The determination of refugee status for the purposes of s.6A of the Migration Act 1958 was a statutory, not a prerogative decision. It was under the Act a necessary prerequiste to the grant of an entry permit and therefore a decision having legal effect. Accordingly it was a decision made 'under an enactment' within the meaning of s.13(1) of the 1977 Act, and the applicant was entitled to request reasons for the decision.

International Covenant on Civil and Political Rights 1966 - U N. Declaration on the Rights of the Child - Whether relevant as such in judicial review of a deportation decision - whether made relevant by Human Rights Commission Act 1981 (Cth) - the law of Australia

Kioa v. Minister for Immigration and Ethnic Affairs (1984) 55 ALR 669

(Federal Court of Australia (General Division)) Northrop, Jenkinson, Wilcox JJ.)

The facts: - The applicants, K and his wife, who were Tongan citizens, entered Australia on temporary entry permits in 1981. They overstayed, and steps were eventually taken to deport them under the Migration Act 1958 (Cth) s.18. In the meantime a daughter, E, had been born to them who was, by virtue of her birth in Australia, an Australian citizen and entitled to remain in Australia.

It was argued for K that the Minister's delegate had failed to take into account the interests of the daughter staying with her family in Australia, contrary to Articles 23 (1) and 24 (1) of the International Covenant on Civil and Political Rights of 1966, and Principles 1, 2, 4, 6, 7 and 8 of the Declaration of the Rights of the Child, 1959. Neither instrument is as such part of Australian law, but each is scheduled to the Human Rights Commission Act 1981 (Cth), the preamble of which declares that 'it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform' inter alia with those instruments.

Held: - (per Northrop, Wilcox JJ.) (at pp. 675-6, 677, 678-80, 681). The 1981 Act imposed no additional or special obligation on the Minister or his delegate to consider the human rights enumerated in the scheduled Covenant and Declaration; taken as such, and divorced from the general humanitarian principles enunciated therein (which were relevant in their own right), the Covenant and the Declaration were legally irrelevant;

(per Jenkinson J.) (at pp. 689-90). In reviewing a decision to deport a person, a court could properly be influenced by the view expressed in the Preamble to the 1981 Act; an exercise of power in conformity with the principles of the scheduled Covenant and the Declaration would, other things being equal, be preferred to an exercise of power inconsistent with those principles. But there was no indication that the Minister's delegates had failed to consider or weigh those principles in the balance in the present case.