NATURAL JUSTICE AND DEPORTATION

KIOA AND OTHERS v. *MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS AND ANOTHER*[1]

Introduction

The concept of natural justice dates back to medieval times and embodies the notion that the repository of a decision-making power should, before arriving at any conclusion, grant a hearing to any person whose interests will be inimically affected by the exercise of that power.

"Interests" were previously confined to legal rights,[2] but have now been expanded to include interests which, while not amounting to the status of a legal right, are nevertheless capable of being affected by the exercise of such powers. These interests have frequently been called "legitimate expectations",[3] which Barwick, C.J. limited to "[a] recognition or entitlement at law",[4] but the High Court has preferred the interpretation of Lord Fraser of Tullybelton, who equated "legitimate" with "reasonable" so as to include "expectations which go beyond enforceable legal rights, provided they have some reasonable basis".[5]

In administrative law natural justice is governed by two rules expressed in the form of Latin maxims:

1. *Audi alteram partem* (literally, "hear the other side"). The decision-maker must give a hearing to one whose interests will be adversely affected by the decision.

2. *Nemo debet esse judex in propria sua causa* (literally, "no one shall be judge in his own case"). The decision-maker must be unbiased.

The statute in question may or may not prescribe hearing procedures. In the absence of a manifestation of a clear contrary intention, the courts will imply a duty to observe natural justice. "[T]he justice of the common law will supply the omission of the legislature".[6]

---

[1] (1985) 62 A.L.R. 321; (1985) 60 A.L.J.R. 113.

[2] *Ridge* v. *Baldwin* [1964] A.C. 40; [1963] 2 All E.R. 66, *per* Lord Reid.

[3] A phrase first used by Lord Denning in *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149 at 170.

[4] *Salemi* v. *MacKellar (No. 2)* (1977) 137 C.L.R. 396 at 404; (1977) 14 A.L.R. 1 at 7; (1977) 51 A.L.J.R. 538 at 542. Hereafter *Salemi (No. 2)*.

[5] *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 A.C. 629 at 636; [1983] 2 All E.R. 345 at 350.

[6] *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180 at 194; (1863) 143 E.R. 414 at 420.

The deportation power: previous authority

S. 18 of the Migration Act 1958 (Cth.) (the Migration Act) authorises the Minister for Immigration and Ethnic Affairs (the Minister) to "order the deportation of a person who is a prohibited non-citizen". In 1977 the two Australian High Court cases of *Salemi* v. *MacKellar (No. 2)*[7] and *R.* v. *MacKellar; Ex parte Ratu*[8] held that the observance of natural justice is not a condition for the valid exercise of the deportation power. Four factors accounted for the judgments:

1. There was no requirement that the Minister ascertain any fact, or form any opinion, before exercising the power conferred by s. 18. Appropriate relief[9] is available to those against whom such an order has been made, and who have a legal right to stay in Australia. The Minister's power under s. 18 was unfettered if the issue of the deportation order was based on the fact that the non-citizen was a prohibited immigrant.

2. S. 18 provides legal authority for the removal of one who has no right to be in Australia. Deportation is a consequence of a prohibited immigrant's failure to leave, and therefore does not deprive him or her of any right, interest or legitimate expectation of a benefit.

3. Ss. 12, 13 and 14 of the Migration Act contemplate deportation under certain circumstances; however, in contrast to s. 18, the person affected has a right to have his or her case considered by an independent commissioner before any decision is made.

4. The Minister was under no obligation to give reasons for an order made under s. 18. It followed that the proposed deportee would be unable to prepare for a hearing as he or she could not know of the allegations made against him or her. The absence of a duty to account for a deportation order strengthened the view that the exercise of power under s. 18 was not conditioned on the observance of the principles of natural justice.

Salemi (No. 2) was decided by a statutory majority[10] comprising Barwick, C.J. and Gibbs and Aickin, JJ. Stephen and Murphy, JJ. dissented. Jacobs, J. stated that natural justice need not be observed if the ground for deportation is that the non-citizen is a prohibited immigrant. In his opinion, an "amnesty" promised by the Minister to those prohibited immigrants who voluntarily came forward sufficed to attract natural justice.

The facts of *Ratu* led to an almost unanimous affirmation of *Salemi (No. 2)*. The majority consisted of Barwick, C.J., Gibbs, Mason, Jacobs, and Aickin, JJ., who held that the power conferred on the Minister by s. 18 was not subject to an obligation to observe the principles of natural justice. Murphy, J. dissented while Stephen, J. did not consider that issue. Barwick, C.J. and Stephen and Murphy, JJ. agreed that there had been

---

[7] *Supra* n. 4.

[8] (1977) 137 C.L.R. 461; (1977) 14 A.L.R. 317; (1977) 51 A.L.J.R. 591. Hereafter *Ratu*.

[9] *E.g.* a writ of habeas corpus, a declaration or an injunction.

[10] Judiciary Act 1903 (Cth.), s. 23. Sub-s. (2)(b) states that, when the court is evenly divided, the judgment of the Chief Justice shall prevail.

no denial of natural justice in this case; Jacobs, J. stressed the point—that the status of "prohibited immigrant" did not warrant a hearing prior to deportation, if that were the reason for the expulsion order—he had made in *Salemi (No. 2)*.

In the period between the decisions of *Salemi (No. 2)* and *Ratu* and the present case, various amendments were made to the Migration Act, whilst the Administrative Decisions (Judicial Review) Act 1977 (Cth.) (the A.D.J.R. Act) was passed to facilitate judicial review.

The facts of the case

Isileli Kioa, a Tongan citizen, entered Australia on 8th September, 1981 to attend a three-month training course. His temporary entry permit was valid until 8th December, 1981. He was shortly followed by his wife Fheodolena and their daughter Elitisi on 7th November, 1981. Both possessed temporary entry permits expiring on 31st March, 1982.

On 15th December, 1981 Mr. Kioa went to the Melbourne office of the Department of Immigration and Ethnic Affairs (the Department) to apply for an extension to his visa, producing airline tickets to show that he and his family were due to depart for Tonga on 31st March, 1982. His application was not immediately processed for want of further information, but there was no reason to suppose that it would be denied.

In March 1982 the Kioa family suddenly left the address they had given to the Department, who believed that they had returned to Tonga. Nothing further was therefore done about Mr. Kioa's visa extension application. In actual fact Mr. Kioa had resigned from his position with the Tongan Tourist Office and had moved with his family to Bulleen, Victoria, where he found employment and became active in the Tongan Christian Fellowship, concerning himself with Tongan youth and the plight of Tongan illegal immigrants. A daughter, Elvina, was born on 14th November, 1982.

Mr. Kioa was apprehended at his place of work on 25th July, 1983. In an interview on the 27th, Mr. Kioa stated that he had stayed in Australia to better financially assist his relatives in Tonga, who had suffered from the ravages of Cyclone Isaac in March of 1982.

Meanwhile, letters from Mr. Kioa's employer and the leader of the Fellowship exhorted the Minister to allow the Kioa family to remain. These were treated by the Department as an application for permanent residency status.

On 12th September 1983 the Department formally refused Mr. Kioa's visa extension application of December 1981 and ordered him to leave Australia with his family as soon as possible. Mr. Kioa did not comply with this request. The Department then presented, on 6th October, 1983, a written submission to the Minister's delegate, who had been appointed under s. 66D of the Migration Act. Para. 22 reads as follows:

> Mr. Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are

seeking to circumvent Australia's immigration laws must be a source of concern.

A summary of Australia's immigration policy was set out in para. 24:

> Persons who enter as students, or their dependants, are expected to honour the undertakings contained in visa applications signed overseas. It is in the public interest to ensure that persons abide by normal immigration selection procedures and do not queue-jump by remaining illegally in Australia to the prejudice of prospective migrants who abide by the procedures. Presence of such queue-jumpers is inimical to the Government control of migration programs as well as impacting upon job availability for legal residents. Illegals who do not leave voluntarily should expect to face the prospect of deportation when located.

S. 13 of the A.D.J.R. Act imposes, on decision-makers bound to observe it, a duty to give reasons for a decision. A statement of reasons for the deportation orders was applied for under s. 13 and subsequently granted on 11th November, 1983. No mention was made of para. 22.

S. 5(1) of the A.D.J.R. Act, which lists grounds of judicial review, was invoked in an application to the Federal Court. The Kioas sought review of the deportation orders and of the delegate's refusal to grant them further temporary entry permits under s. 7(2), followed by permanent entry permits under s. 6A(1)(e),[11] of the Migration Act.

This application was dismissed by Keely, J.; his decision was upheld in an appeal to the full Federal Court. Special leave was then granted for an appeal to the High Court.

The submission before the High Court was that, in light of amendments to the Migration Act since *Salemi (No. 2)* and *Ratu* and the enactment of the A.D.J.R. Act, the Minister is now bound to observe the rules of natural justice when making a deportation order under s. 18. Ss. 5(1) and 13 of the A.D.J.R. Act were relied upon to support this proposition.

The appeal was allowed by a majority comprised of Brennan, Mason, Wilson, and Deane, JJ., with Gibbs, C.J. dissenting. The judgment of the Federal Court was set aside, and the deportation orders quashed, on the ground that their making involved a breach of natural justice.

It was held that:

1. The amendments to the Migration Act since *Salemi (No. 2)* and *Ratu*, combined with the passing of the A.D.J.R. Act, have superseded the previous statutory framework relieving the Minister of a duty to abide by natural justice when issuing a s. 18 deportation order: *per* Brennan, Mason, Wilson, and Deane, JJ., Gibbs, C.J. dissenting.

---

[11] Because a valid temporary entry permit is needed to qualify for a valid exercise of s. 6A(1)(e), which authorises the grant of a permanent entry permit on 'compassionate or humanitarian' grounds, the delegate's refusal to renew the appellants' entry permits under s. 7(2) was seen as tantamount to refusing them permanent entry permits.

2. S. 5(1) of the A.D.J.R. Act merely summarises the common law grounds of judicial review; it should therefore be read in the light of the common law and not be interpreted as subjecting decisions to which it applies to obligations hitherto unimposed. S. 5(1)(a), which specifies natural justice as a ground for judicial review, does not decree that natural justice applies where it formerly did not. Bowen, C.J. and Franki, J. are correct when, in *Minister for Immigration and Ethnic Affairs* v. *Haj-Ismail*,[12] they declared s. 5(1)(a) to mean that "relief may be sought where rules of natural justice are applicable in the exercise of a power and effect has not been given to them."[13]

3. The delegate had not failed to take into account the fact that Elvina Kioa is an Australian national and thus had the legitimate expectation of being able to enjoy the benefits flowing from her citizenship. Natural justice did not go so far as to give a ten-month-old infant the opportunity to present a case against the deportation of his or her parents. The submission that the delegate was bound to observe certain provisions of the International Covenant on Civil and Political Rights and of the Declaration of the Rights of the Child, both of which are incorporated in the Human Rights Commission Act 1981 (Cth.), was considered and rejected by Gibbs, C.J. and Brennan and Wilson, JJ. Treaties do not have the force of law unless they are given that effect by statute;[14] this is not done by the preamble to the Human Rights Commission Act. In any event the delegate is under no obligation to observe these provisions.

The judgments

Brennan, J. notes that, before a court has jurisdiction to review a decision on the ground of breach of natural justice, a "threshold" question must be asked: Has the legislature intended that observance of natural justice be a condition of the valid exercise of the power? Should such an intention be found to exist, a second question arises: What do the principles of natural justice require in the particular circumstances?

The principles of natural justice are flexible and vary according to "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting [and] the subject-matter that is being dealt with".[15] At the very least "the person concerned should have a reasonable opportunity of presenting his case."[16] Fairness is required;[17] what is fair will depend on the circumstances.[18] Because of its changeable content,

---

[12] (1982) 40 A.L.R. 341; (1982) 57 F.L.R. 133.

[13] *Id.*, A.L.R. at 347; F.L.R. at 140.

[14] *Simsek* v. *Minister for Immigration and Ethnic Affairs* (1982) 148 C.L.R. 636; (1982) 40 A.L.R. 61; (1982) 56 A.L.J.R. 277.

[15] *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 at 118, *per* Tucker, L.J.

[16] *Ibid.*; approved by *University of Ceylon* v. *Fernando* [1960] 1 All E.R. 631; [1960] 1 W.L.R. 233 and *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660; [1973] 1 All E.R. 400.

[17] *National Companies and Securities Commission* v. *News Corp. Ltd.* (1984) 52 A.L.R. 417 at 427-8; (1984) 58 A.L.J.R. 308 at 314, *per* Gibbs, C.J.

[18] *Mobil Oil Australia Pty. Ltd.* v. *Federal Commissioner of Taxation* (1963) 113 C.L.R. 475 at 504, *per* Kitto, J.

it has been said that the notion of natural justice "is so vague as to be practically meaningless."[19] In its defence Lord Reid states that "[this is] tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist".[20]

The first step in ascertaining what must be done to satisfy the requirements of natural justice is to look at the statute in question, which may both answer the threshold question and set out means of compliance. Procedure may be modified to meet the particular exigencies of the case, to the extent that notice of an intended exercise of the power may be waived if it will frustrate the purposes for which the power was conferred.[21]

If a power affects the interests of an individual in a manner different from that of the public at large, a possibility with the exercise of executive, administrative and judicial powers, the repository of the power is bound to afford a hearing to the person affected. This may of course be displaced by statute,[22] and the decision-maker is not obliged to give a hearing if he or she is not bound to do so. With respect to interests not amounting to legal rights, the *kind* of interest affected is not relevant; what counts is the *manner* in which they have been affected.

His Honour lists standing requirements. The possessor of a legal right which has been affected has standing automatically; a person whose legitimate interest is affected requires "a sufficient interest to give him standing in public law",[23] *i.e.* an "aggrieved party", one who has a "peculiar grievance" different from any felt by the public at large,[24] and whose interests "may be prejudicially affected by what is taking place".[25] In the case of enforcing public law duties by one with no rights to do so in private law, a "special interest" in the subject matter of the action will suffice.[26]

The courts must "limit their examination of the observance of the principles of natural justice to the procedures adopted by the repository of the power",[27] otherwise they "trespass into a field of decision-making for which their own procedures are ill-suited."[28]

Brennan, J. cites two factors which indicated, in *Salemi (No. 2)* and *Ratu*, an intention to exclude natural justice from the operation of s. 18:

---

[19] *Supra* n. 2, A.C. at 64-5; All E.R. at 71, *per* Lord Reid.

[20] *Ibid.*

[21] *Commissioner of Police* v. *Tanos* (1958) 98 C.L.R. 383 at 396; *Heatley* v. *Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487 at 513-5; (1977) 14 A.L.R. 519 at 539; (1977) 51 A.L.J.R. 703 at 713; *De Verteuil* v. *Knaggs* [1918] A.C. 557 at 560-1. This has provoked the comment that "the contents of natural justice range from a full-blown trial into nothingness": G. Johnson, "Natural Justice and Legitimate Expectation in Australia" (1985) 15 *F.L.R.* 39 at 71.

[22] As in *Pearlberg* v. *Varty* [1972] 2 All E.R. 6; [1972] 1 W.L.R. 534.

[23] *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 at 275.

[24] *R.* v. *Town of Glenelg; Ex parte Pier House Pty. Ltd.* [1968] S.A.S.R. 246 at 251-2.

[25] *R.* v. *Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299 at 308-9, *per* Lord Denning.

[26] *Australian Conservation Foundation Inc.* v. *Commonwealth* (1980) 146 C.L.R. 493; (1980) 28 A.L.R. 257; (1980) 54 A.L.J.R. 176; *Onus* v. *Alcoa of Australia Ltd.* (1981) 149 C.L.R. 376; (1981) 36 A.L.R. 425; (1981) 55 A.L.J.R. 631.

[27] *Supra* n. 1, A.L.R. at 376; A.L.J.R. at 144.

[28] *Ibid.*

1. The disparity between other deportation powers (ss. 12, 13 and 14) and s. 18, which showed that the Minister was not bound to have any regard to the interests of a proposed deportee. This is supported by the Minister's unqualified power to cancel a temporary entry permit at any time: s. 7(1).

2. The nature and purpose of s. 18 is to protect the population of Australia and may occasionally be exercised peremptorily. However, the insertion of s. 6A, which lists conditions on which entry permits can be granted to aliens already in Australia, and s. 27(2A), which provides a defence to the offence of becoming a prohibited immigrant (s. 27(1)(ab)), makes it necessary to ask, before exercising the power conferred by s. 18: Should the prohibited immigrant be deported, or should he or she be granted a further entry permit, and perhaps a permanent entry permit?

The complex of powers in ss. 6 (which forbids non-citizens to enter Australia without an entry permit), 6A, 7 (which deals with the cancellation, expiration and renewal of entry permits) and 18 are directed towards the status and disposition of the immigrant; the Minister must, before exercising any of those powers, have regard to the immigrant's interests and grant him or her a hearing before making a decision.

There is therefore a substantial distinction between the present Migration Act and that relied on in *Salemi (No. 2)* and *Ratu*. The significance of s. 7(1) is decreased.

As it will subsequently be seen, Brennan, J.'s view of the enactment of the A.D.J.R. Act is inconsistent with that of the other majority judges. His Honour sees its enactment as an entirely neutral factor. S. 5 lists common law grounds of judicial review while s. 13 merely provides the means by which the reasons for the making of a decision may be ascertained. Brennan, J. does not agree that the absence of an obligation to give reasons was vital to the conclusions reached in *Salemi (No. 2)* and *Ratu*, but accepts that the existence of s. 13 further distinguishes the cases and deprives them of their earlier authority.

The Minister is now obliged to observe natural justice when making a deportation order under s. 18. He or she, or rather, his or her delegate, should have given the appellants a chance to reply to the highly damaging allegation in para. 22. Although not referred to in the statement of reasons, para. 22 was in material which the delegate was to consider and was capable of exciting prejudice. This suffices to hold that the appellants should have been granted an opportunity to be heard.[29]

Mason, J. begins by saying that it is a fundamental rule of natural justice that "when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it."[30]

---

[29] *Kanda* v. *Government of Malaya* [1962] A.C. 322 at 337.

[30] *Twist* v. *Randwick Municipal Council* (1976) 136 C.L.R. 106 at 109; (1976) 12 A.L.R. 379 at 382-3; (1976) 51 A.L.J.R. 193 at 194; (1976) L.G.R.A. 443 at 445; *supra* n. 4, C.L.R. at 419; A.L.R. at 19;

"Right or interest" here refers to personal liberty, status, and preservation of livelihood and reputation as well as to proprietary rights and interests. The reference to "legitimate expectation" means that the doctrine applies even though something short of a legal right or interest has been affected.

His Honour prefers the phrase "procedural fairness" in the context of administrative decision-making as "natural justice" has been too closely associated with the procedures of courts of law. There can now be said to exist a common law duty to act fairly, or to accord procedural fairness, in the making of administrative decisions affecting rights, interests and legitimate expectations, subject to a clear contrary intention. A duty to accord a hearing arises when the decision "directly affects the person (or corporation) individually and not simply as a member of the public or a class of the public."[31]

Because fair procedures must be adopted in the making of such decisions, the appropriate question to ask is: What does the duty to act fairly require in the circumstances of the particular case? The answer will depend, *inter alia*, on the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting.[32]

Mason, J. is of the opinion that the Migration Act as amended imposes a duty to act in accordance with natural justice. He sees a "radical legislative change" with the new procedures of judicial review introduced by s. 5(1) of the A.D.J.R. Act; the obligation to give reasons for a decision, introduced by s. 13, is an element in that provision for judicial review. It cannot now be suggested that an obligation to comply with procedural fairness is inconsistent with the statutory framework.

Mason, J. examines the requirements of procedural fairness in the context of a s. 18 deportation order. Where the reason for the order is that the proposed deportee is a prohibited immigrant, procedural fairness does not insist that he or she be given a hearing. However, where the reasons for deportation are personal to the immigrant, have not been dealt with by him or her, and which were obtained from another source, procedural fairness requires that a hearing be given.[33]

As a matter of fairness, the appellants should have been given a hearing with regard to para. 22, which was extremely prejudicial. Para. 22 was not cited in the statement of reasons, but neither was it disavowed. A risk of prejudice arose.

Wilson, J. believes that amendments to the Migration Act since 1977 have tightened statutory controls over prohibited immigrants. His Honour

---

[30] *continued*
A.L.J.R. at 548; *supra* n. 8, C.L.R. at 476; A.L.R. at 329; A.L.J.R. at 598; *Heatley, supra* n. 21 at 498-9; *FAI Insurances Ltd.* v. *Winneke* (1982) 151 C.L.R. 342 at 360; (1982) 41 A.L.R. 1 at 13; (1982) 56 A.L.J.R. 388 at 395; *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] A.C. 945.

[31] *Supra* n. 4, C.L.R. at 542; A.L.R. at 45; A.L.J.R. at 560, *per* Jacobs, J.

[32] *R.* v. *Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group* (1969) 122 C.L.R. 546 at 552-3; *supra* n. 17, A.L.R. at 427-8, 434; A.L.J.R. at 314, 318.

[33] *Re H.K. (An Infant)* [1967] 2 Q.B. 617.

cites as support ss. 27(1)(ab) and 31A, which authorises the Minister to request the departure of a prohibited non-citizen. The power of deportation is now one of last resort and of increased significance, as not only will the proposed deportee be subject to custody and a form of travel and a destination not of his or her choosing, but he or she may also be liable to reimburse the Commonwealth for costs incurred in the execution of the deportation: s. 21A. His Honour relies on s. 13 of the A.D.J.R. Act to show that there is no longer a statutory framework declaring that the Minister is not bound to observe natural justice when deporting a prohibited immigrant under s. 18.

What the rules of natural justice require in a s. 18 deportation situation will depend on the framework within which the decision is made; Wilson, J. adds that "[e]ven within the same statutory framework, differing circumstances may call for a different response."[34]

In this case the Minister should have allowed the appellants to respond to para. 22 as it implied that Mr. Kioa was actively assisting Tongan illegal immigrants to evade Australian immigration laws, as distinct from aiding them to regularise their status legally. Wilson, J. notes that setting aside the delegate's decision for want of procedural fairness would only offer the appellants a technical victory in light of Australian immigration policy and of the delegate's assessment of their case. However, to condone a breach of natural justice because it can be shown that it did not affect the decision would be to frustrate the purpose of the A.D.J.R. Act.

Deane, J. suggests that the making of a deportation order against a prohibited immigrant "drastically and adversely changes his rights and, to some extent, dehumanizes his status";[35] he or she may be transported against his or her will to any place outside Australia and—to add insult to injury—may be liable to pay the Commonwealth for any costs incurred in the deportation.

In the absence of a clear contrary intention, one with the power to make an administrative decision affecting the rights, interests, status or legitimate expectations must observe the requirements of natural justice or procedural fairness.

The content of procedural fairness is controlled by statutory provisions and varies with the circumstances of the particular case. Procedural fairness may be satisfied even if an opportunity to be heard is not given on the ground of impracticality.[36] However, his Honour finds it difficult to envisage a deportation situation where natural justice is completely excluded or so modified that a hearing is not contemplated. He states:

> The mere circumstance that there is no apparent likelihood that the person directly affected could successfully oppose the making of a deportation order neither excludes nor renders otiose the obligation

---

[34] *Supra* n. 1, A.L.R. at 359; A.L.J.R. at 134-5.
[35] *Id.*, A.L.R. at 382; A.L.J.R. at 148.
[36] *E.g.* where the prohibited immigrant has gone into hiding.

of the administrative decision-maker to observe the requirements of procedural fairness.[37]

From this premise Deane, J., in apparent disagreement with Mason, J. (and, as will be seen, with Gibbs, C.J.) and with Jacobs, J. in *Salemi (No. 2)* and *Ratu*, holds that, even when the basis of a deportation order is that the person affected is a prohibited immigrant, he or she is not to be deprived of the right to a hearing. Without further elucidation his Honour states that the appellants should have been given the opportunity to respond to matters raised in paras. 21,[38] 22 and 26.[39]

In his dissenting judgment Gibbs, C.J. lists the four reasons for the decisions in *Salemi (No. 2)* and *Ratu* and, drawing an analogy with the present case, finds that an applicant seeking the grant of a further temporary entry permit does not have a right to be heard by the Minister considering the application. The fact that the applicant is a prohibited immigrant will justify the refusal of a temporary entry permit and the issue of a deportation order.

His Honour believes that amendments to the Migration Act since *Salemi (No. 2)* and *Ratu* would not have made any difference to the final judgments in those two cases. The amendments relevant to the present issue—his Honour did not specify which were so relevant—reveal an intention to give the Minister increased powers to deal with prohibited immigrants. The fact that s. 27(1)(ab) has made it an offence to become a prohibited immigrant does not mean that the Minister is obliged to prosecute—an action certain to attract natural justice—rather than to deport. However, the consequences of becoming a prohibited immigrant have not become so serious that *Salemi (No. 2)* and *Ratu* must be reconsidered.

Gibbs, C.J. concedes that s. 13 of the A.D.J.R. Act renders obsolete one of the factors responsible for the decisions in *Salemi (No. 2)* and *Ratu*. Nevertheless, the three remaining reasons are still capable of sustaining the proposition for which those two cases are authority, *i.e.* when deporting under s. 18, the Minister is not required to abide by the rules of natural justice. S. 13 simply imposes, on decisions to which it applies, an obligation to state the reasons for such decisions. The status of "prohibited immigrant" will be sufficient to warrant deportation. Of course, in such cases, reasons may still be relevant, as in situations where the Minister has considered something completely extraneous, *e.g.* the political affiliations of the proposed deportee.

If the contrary view were taken and natural justice did apply, Gibbs, C.J. holds that there has been no breach here. Para. 22 is not mentioned in the statement of reasons; it must be accepted that it played no part in

---

[37] *Supra* n. 1, A.L.R. at 383; A.L.J.R. at 149.

[38] It was suggested that if Mr. Kioa had been genuine in his desire to stay, he should have waited for a decision on his visa extension application.

[39] It was recommended that if the delegate agreed with the submission, he was to sign the deportation orders against Mr. and Mrs. Kioa, which he did.

his decision. *Kanda* v. *Government of Malaya*[39a] does not apply here as no risk of prejudice was created. His Honour seems to be limiting risks of prejudice to those consciously perceived by the decision-maker and excluding those which may have a subconscious effect on him or her.

Conclusion

Amendments to the Migration Act and the enactment of the A.D.J.R. Act have rendered obsolete the previous statutory framework of the Migration Act, which held that the Minister is under no obligation to observe natural justice when ordering a deportation under s. 18. *Salemi (No. 2)* and *Ratu* have now been superseded.[40]

However, a hearing need not be given to a proposed deportee if the reason for the order is his or her status as a prohibited immigrant. Only Deane, J. goes so far as to suggest that *all* prohibited immigrants, even those who have no prospect of reversing the deportation order made against them, should be allowed a hearing; he seems to be more concerned, at this point, with strictly adhering to the tenets of procedural fairness. The majority view is surely correct, as a prohibited immigrant has, in the context of a desire to remain in Australia, no right, interest or legitimate expectation of which he or she can be deprived. Mason, J. adds the point that advance notice of a deportation order may cause a prohibited non-citizen to go into hiding, thereby frustrating the purpose of s. 18 and creating havoc with Australia's migration programmes. But, to repeat Wilson, J.'s point, a breach should not be condoned even though it can be shown that it did not affect the final decision.

An obvious solution to this dilemma would be for the legislature to define the Minister's obligations when deporting under s. 18. This will, in all probability, render the law rigid and inflexible, which would be highly undesirable. The most expedient means of resolving this problem would be for the Minister to grant a hearing to the proposed deportee before making a deportation order, and to reserve a discretion as to whether or not to afford a hearing to one whose deportation is based solely on the fact that he or she is a prohibited immigrant.

CHARLES WONG—Second Year Student

[39a] *Supra* n. 29.

[40] It was never submitted that *Salemi (No. 2)* and *Ratu* be overruled because they had been incorrectly decided; it was submitted that the context in which they had been decided no longer exists, thereby justifying a departure in the present case.