PART 8 OF THE *MIGRATION ACT 1958* (Cth) AND THE DECISIONS IN ABEBE AND ESHETU

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Introduction

On 14 April 1999 and 13 May 1999 the High Court published its decisions in *Abebe*[1] and *Eshetu*[2] respectively. Their immediate effect was to resolve questions that arose concerning the constitutional validity of the judicial review scheme created by Part 8 of the *Migration Act 1958* (Cth) ('Part 8' and the 'Act' respectively)[3] and the reliance by the Federal Court on s.420 of that Act as a means of interfering with factual findings of the Refugee Review Tribunal (the 'RRT') and the Immigration Review Tribunal (the 'IRT').[4] However the decisions also raise, but do not necessarily resolve, a number of further issues concerning the power of the Parliament to confer a restricted jurisdiction upon the Federal Court, the operation of s.75(v) of the Constitution and the scope of the ground of judicial review commonly referred to as 'Wednesbury unreasonableness.'[5]

Before considering those issues, it is first necessary to consider the operation of Part 8.

Part 8 and Section 75(v) of the Constitution

Prior to 1 September 1994, decisions, and conduct engaged in for the purpose of making such decisions,[6] made under or pursuant to the Act were reviewable by the Federal Court exercising jurisdiction under the *Administrative Decision (Judicial Review) Act 1977* (Cth) ('the ADJR Act') and s.39B of the *Judiciary Act 1903* (Cth) (the 'JA'). However, on that day the new Part 8 of the Act came into force.[7]

First, Part 8 provides an exclusive code for judicial review by the Federal Court of migration decisions. The Federal Court's jurisdiction under the ADJR Act and s.39B of the JA is specifically excluded.[8]

Second, the jurisdiction conferred on the Federal Court is further confined to reviewing only 'judicially reviewable decisions' which, subject to the operation of s.475(2), are IRT decisions, RRT decisions and 'decisions relating to visas'. Section 475(2), in effect, excludes judicial

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1 *Abebe v The Commonwealth*; *Re The Minister for Immigration and Multicultural Affairs and Another; ex parte Abebe* (1999) 73 ALJR 584.

2 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 73 ALJR 746.

3 In the case of *Abebe.*

4 In the case of *Eshetu.*

5 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

6 For ease of reference these will be referred to as 'migration decisions'.

7 It was the final stage in the staggered reform introduced by the *Migration Reform Act 1992* (Cth): see the discussion in *Minister for Immigration and Multicultural Affairs v Ozmanian* (1997) 71 FCR 1; Part 8 applies to those 'judicially reviewable decisions' made on or after 1 September 1994: *Yaou* v *MIEA* (1996) 69 FCR 583.

8 S.485(1); however the Federal Court's jurisdiction to hear appeals from the AAT under s.44(l) of the *Administrative Appeals Tribunal Act 1975* (Cth) is not affected: s.485(2).

review by the Federal Court of decisions for which internal review is available and any aspect of the Minister's non-compellable powers.[9] Moreover, s.485(1) also operates to exclude the Federal Court's jurisdiction to review what could be described as 'conduct' (in the ADJR sense) engaged in for the purpose of making decisions under the Act.[10] The overall effect of these provisions is to restrict access to judicial review in the Federal Court until merits review is exhausted by the making of a 'final' decision.

Third, the grounds of review available under Part 8 are significantly narrower than those available under s.5 of the ADJR Act and s.39B of the JA.[11] Natural justice, unreasonableness, taking into account irrelevant considerations, failing to take into account relevant considerations, exercising a power in bad faith and otherwise exercising a power in such a way that it represents an abuse of power are specifically excluded. While 'actual bias' is a ground of review,[12] the exclusion of 'natural justice' results in 'apprehended bias' on the part of a decision maker not being a ground of review.[13] Moreover the error of law ground of review in s.476(1)(e) is more restrictive than the equivalent ADJR provision.[14] Whereas the latter simply refers to 'an error of law' the former only provides for 'an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found'. It seems that, at the very least, this formulation does not extend to allowing for review where there is a finding of fact in respect of which there is no evidence (which does fall within s.5(1)(f) of the ADJR Act).[15] These restrictions are discussed further below.

Fourth, s.478 of the Act imposes a strict 28 day time limit for making applications for judicial review. This cannot be extended.

As noted above, Part 8 only operates to inhibit the Federal Court's jurisdiction. An obvious tension arises between those provisions and s.75(v) of the Constitution which invests the High Court with original jurisdiction 'in all matters...in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. Unlike the jurisdiction conferred by the ADJR Act, the jurisdiction conferred on the Federal Court by Part 8 is, at least in some respects, significantly narrower than that conferred by section 75(v).[16] The writs referred to in s.75(v) can be granted at the very least where there is a breach of the rules of natural justice.[17] Section 75(v) can, on sufficient cause being shown, be invoked at any stage of the decision making process.[18] Further, there is no time limit upon the grant of remedies specified in s.75(v).[19] Prohibition can be granted at any time that reliance is sought to be placed on the legality of administrative action.[20]

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9 See ss.48B, 341, 345 and 417 and *MIMA v. Ozmanian*, supra.

10 *MIMA v Ozmanian*, supra.

11 See s.476(2), 476(3)(d) to (g).

12 s.476(1)(f).

13 *Bilgin v MIMA* (unreported, Federal Court of Australia, Finkelstein J, 6 October 1997). Unless otherwise stated all references to 'unreported' are Federal Court decisions.

14 s.5(1)(f).

15 See *ABT v Bond* (1990) 170 CLR 323, p.355-357 per Mason CJ.

16 Although still in some respects arguably wider: see *Abebe*, 590, per Gleeson CJ and McHugh J.

17 *Abebe*, 607, per Gaudron

18 For example, prohibition can be sought restraining a decision maker from apprehended bias prior to the making of a decision.

19 Order 55 rule 30 of the High Court Rules specify that application for order nisi for a writ of mandamus should be brought within two months of the 'refused to hear' but this period may be extended on sufficient cause being shown.

20 See Aronson & Dyer, *Judicial Review of Administrative Action* (Law Book Co), p.760

Until the enactment of Part 8, this jurisdiction was rarely invoked, other than in relation to Federal Courts and industrial tribunals, as the High Court's jurisdiction under s.75(v) of the Constitution was no wider[21] than the Federal Court's jurisdiction under the ADJR Act and s.39B of the JA. If an application for prerogative relief was filed in the original jurisdiction then, unless relief was sought against a member of a Federal Court or industrial tribunal, it could be remitted to the Federal Court pursuant to s.44 of the JA, without any loss of the grounds of review available.[22] Part 8 deals with this by expressly modifying the remittal power as follows:

> (3) If a matter relating to a judicially reviewable decision is remitted to the Federal Court under section 44 of the Judiciary Act 1903, the Federal Court does not have any powers in relation to the matter other than the powers it would have had if the matter had been as a result of an application made under this Part.[23]

Thus, if a person seeks to demonstrate the invalidity of a migration decision because, for example, it involves a breach of the rules of natural justice, they are forced to initiate proceedings in the High Court and remain there.[24] In the author's experience, to date very few cases have actually proceeded to a final hearing on the merits before a Full Bench.[25] The majority of cases appear to have either resulted in the application for an order being dismissed by a single Justice,[26] or the splitting of the proceedings, with the High Court remitting to the Federal Court that part of the proceeding which raises grounds of review it can determine consistent with Part 8 and retaining the remainder to be determined later if necessary.[27]

It was against this legislative background that *Abebe* and *Eshetu* came to be determined.

Abebe

Ms Abebe is an Ethiopian citizen who arrived in Australia in March 1997. She subsequently applied for a protection visa.[28] This was refused by a delegate of the Minister and she sought review in the RRT. On 30 September 1997 it rejected her application and affirmed the delegate's decision. She subsequently filed an application for judicial review in the Federal Court. That application sought to rely on some of the grounds specified in s.475(1) as well as the grounds excluded by s.475(2), namely that the decision involved a breach of the rules of natural justice and was manifestly unreasonable in the Wednesbury sense (the 'excluded grounds'). Davies J dismissed the application and declined to consider the excluded grounds.

Ms Abebe then commenced two sets of proceedings in the original jurisdiction of the High Court. One was by way of an application for prerogative relief pursuant to s.75(v) of the Constitution relying on the excluded grounds. The other was by way of statement of claim,

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21 And probably narrower.

22 Unless the proceedings raised a constitutional issue such a writ would almost invariably be remitted to the Federal Court.

23 S.485(3). Curiously, no restriction is placed on the remittal power in relation to the review of migration decisions which are not judicially reviewable decisions.

24 It is unclear whether an application initiated in the High Court 28 days after notification of the decision can be remitted to the Federal Court. It will depend upon whether the words 'had been as a result of an application made under this Part' in s.485(3) are meant to suggest that such an application is to be treated as though it were validly made under Part 8, i.e. within time.

25 However, *Eshetu* and *Abebe* did.

26 See, for example Re The Minister for Immigration and Multicultural Affairs; ex parte Singh M88/1997 (unreported, Hayne J, 2 June 1998) (transcript).

27 See, for example, *Bedlington v Chong* (1998) 157 ALR 436, 438.

28 It is a criterion for the grant of a protection visa that the Minister or his/her delegate be *satisfied* that the relevant applicant is a person to whom Australia owes protection obligations under the Refugees Convention: see ss.36 and 65 of the Act.

which in its final form raised the issue whether any or all of the provisions of Part 8 were invalid insofar as it related to judicial review by the Federal Court of RRT decisions.[29] Both matters were referred to the Full Court.

The basis of Ms Abebe's constitutional challenge to Part 8 was as follows. Unlike a *Hickman* clause,[30] Part 8 did not purport to expand the lawfulness of the RRT's decision - that is, it did not attempt to free the RRT from the obligation to afford natural justice or authorise it to make what may be otherwise termed unreasonable decisions.[31] Part 8 simply restricted the grounds upon which the Federal Court could intervene such that it could not determine conclusively the lawfulness or otherwise of the impugned decision. The vesting of such a limited jurisdiction in a Federal Court was, so it was argued, not authorised by s.77 of the Constitution and/or was generally inconsistent with Chapter III of the Constitution. Sections 76 and 77 of the Constitution relevantly provide:

> 76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter -
> (i) arising under this Constitution, involving its interpretation;
> (ii) arising under any laws made by the Parliament;
> (iii) of Admiralty and maritime jurisdiction;
> (iv) relating to the same subject matter claimed under the laws of different States.
> 77. With respect to any of the matters mentioned in the last two sections, the Parliament may make laws:
> (i) defining the jurisdiction of any Federal Court other than the High Court;
> (ii) defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the court of the states;
> (iii) investing any court of a state with federal jurisdiction.

At the core of Ms Abebe's argument and the disagreement between the Justices was the meaning of the word 'matter' in ss.75, 76 and especially s.77 of the Constitution. Ms Abebe argued that a 'matter' existed independently of a Court and its powers and procedures and involved the whole of the legal controversy arising out of a particular substratum of facts. According to this argument, what is conferred upon the Federal Court by Part 8 of the Act was not jurisdiction to decide a 'matter' but, at its highest, only jurisdiction to determine an aspect of the lawfulness of an RRT decision. A separate but related question was whether s.481(1)(a) was invalid insofar as it purported to confer on the Federal Court power to 'affirm' a decision of the RRT, but did not expressly confer power to dismiss an application. Arguably, this required the Federal Court to declare a decision lawful in circumstances where it could not be completely satisfied that that was the case.

The constitutional challenge was rejected by a majority of 4 to 3.[32]

Gleeson CJ and McHugh J upheld the validity of Part 8. Their Honours considered that, as s.77(ii) expressly authorised the making of laws defining the jurisdiction of the Federal Court 'with respect to any of the matters' listed in ss.75 and 76, even if what was conferred by Part 8 was jurisdiction over 'part' of a matter it was nevertheless valid.[33] Moreover, their Honours rejected the proposition that a matter existed independently of a court's powers and procedures concerning the rights and remedies that arise out of its determination. Thus one substratum of

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29 Although no issue was raised as to Ms Abebe's standing it seems that the only advantage to her in having Part 8 held invalid was that it would have enabled her application for prerogative relief to be remitted to the Federal Court. Given that it was dealt with anyway, it seems that she lost little by the failure of her constitutional challenge to Part 8.

30 See *R v. Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598.

31 See *Abebe*, p.606 per Gaudron J, and generally the discussion in *Deputy Commissioner of Taxation v Richard Walter Pty Limited* (1995) 183 CLR 168, esp 205 (per Deane and Gaudron JJ)

32 Gleeson CJ, McHugh, Kirby and Callinan JJ; contra Gaudron, Gummow and Hayne JJ.

33 Abebe, 591-592.

facts may give rise to a number of different 'matters' in different courts.[34] It followed that Part 8 answered the description required by s.77(ii), in that it was a law defining the jurisdiction of the Federal Court with respect to a 'matter' and not **part** of a matter.[35]

In relation to the issue raised concerning the use of the word 'affirm' in s.481(1), Gleeson CJ and McHugh J considered that the powers conferred by s.481 'are to be understood and exercised in the light of the context in which they appear'.[36] While not expressly stated, it appears that their Honours considered that a Federal Court order 'affirming' an RRT decision should not be taken as anything more than a statement that none of the grounds specified in s.476(1)[37] were made out.

Gaudron J held that Part 8 was wholly invalid. Her Honour considered that a 'matter' required a final and binding determination as to legal rights or duties which in this case was not the right to have the RRT decision set aside but the right of an officer of the Commonwealth to 'act or give effect to the RRT decision' i.e. to assume the legality of the decision.[38] In Her Honour's view it followed that a determination of the issues raised by Part 8 did not involve the exercise of judicial power and was thereby invalid and also that Part 8 was not authorised by s.77(ii) of the Constitution.[39] While, in view of that conclusion, it was not necessary for Gaudron J to determine whether s.77(ii) authorised the conferral of jurisdiction in relation to part of a 'matter', in Her Honour's view it did not.[40]

Gummow and Hayne JJ also held Part 8 invalid. They agreed with Gaudron J that Part 8 does not purport to confer jurisdiction to decide a 'matter'. Like Gaudron J, they considered that the RRT had a duty to decide Ms Abebe's application according to law and that she had a 'right' to enforce that obligation.[41] Such a right did not have its origin in Part 8.[42] Their Honours also considered that the drafting of s.481, particularly the reference to 'affirming a decision', illustrated that the Part 8 was intended to operate as a complete code of judicial review when, properly construed, it did not. In their Honours' view, as only some of the aspects affecting the final determination on Ms Abebe's rights and the RRT's duties could be decided by the Federal Court, the Court was not being conferred with jurisdiction over a 'matter' within the meaning of ss.77(i) and 76(ii) of the Constitution and therefore Part 8 was invalid.[43]

Kirby J, in effect, agreed with Gleeson CJ and McHugh J's analysis of what constituted a 'matter' in the context of Part 8.[44] As nothing in Part 8 directed the Court as to the manner in which it should exercise the jurisdiction conferred on it, it did not offend Chapter III.[45] Otherwise

34 Ibid, 592-594.

35 Ibid, 594.

36 Ibid, 598.

37 Or perhaps those relied on by the relevant applicant.

38 Ibid, 609.

39 Id.

40 Id.

41 Ibid, 618-619.

42 Id.

43 *Abebe*, *620*. Their Honours did not expressly deal with the question as to whether jurisdiction over part of a 'matter' could be conferred on the Federal Court. However, it appears from their Honours' comments at p.612 to 613, paragraphs 140 to 143 that they considered the conferral of such a jurisdiction to not be the conferral of judicial power.

44 Ibid, 628-631.

45 Ibid, 631.

Kirby J considered that an order 'affirming' a decision was no different to a dismissal, i.e. a rejection of the grounds of challenge.[46]

Callinan J upheld the validity of Part 8. His Honour's conclusions were to the same effect as those of Gleeson CJ, McHugh and Kirby JJ.

The application for prerogative relief was dismissed by all seven Justices. The substance of Ms Abebe's complaint was that the RRT committed a jurisdictional error and/or constructively failed to exercise its jurisdiction[47] by its failure to specifically address a claim that she was raped and physically abused while being detained for reasons of her political affiliation and racial background. Due to various inconsistencies in her evidence and the claims she made over time, the RRT rejected her assertion that she was detained. Gleeson CJ, McHugh and Callinan JJ found that, as the RRT expressly rejected her detention claim, it was not necessary to deal separately with the rape claim.[48] The rejection of the former carried with it an implicit rejection of the latter. Gummow and Hayne JJ[49] dealt with the remaining arguments put on behalf of Ms Abebe.[50]

Most of the justices deferred any detailed consideration of Wednesbury unreasonableness until their respective decisions in *Eshetu*. However in the context of construing Part 8 for the purpose of determining its constitutional validity, Gaudron J stated:[51]

> Although 'Wednesbury unreasonableness' owes its legal significance in this country to statutory provisions concerned with judicial review of administrative actions, this does not mean that it is wholly irrelevant to the grant of relief under s.75(v) of the Constitution.
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> A decision that is so unreasonable that no reasonable person could have arrived at it will often also be a decision involving a denial of procedural fairness. And there may be situations in which a decision of that kind cannot be related either to the matter to be decided or to the relevant head of legislative power. Moreover, reasonableness may have a further significance.
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> As with the rules of procedural fairness, it is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition of the exercise of that power that it be exercised reasonably, at least in the sense that it not be exercised in a way that no reasonable person could exercise it. However, as already indicated, that is not a matter that need now be decided.

Eshetu

Section 420 of Act provides:

> (1) The [Refugee Review] Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
> (2) The Tribunal, in reviewing a decision:
> (a) is not bound by technicalities, legal forms or rules of evidence; and
> (b) must act according to substantial justice and the merits of the case.

46 Ibid, 632.

47 It was also said that the RRT failed to afford Ms Abebe procedural fairness by its failure to specifically put to her that it did not accept the 'rape claim', failed to take into account a relevant consideration by failing to consider whether Ms Abebe was raped and that the RRT's failure to inquire into that matter rendered the decision so unreasonable that no reasonable decision maker could so exercise the power.

48 *Abebe*, 603, per Gleeson CJ and McHugh J.

49 With whom Gaudron and Kirby JJ agreed.

50 *Abebe*, 620-624.

51 Ibid, 608-609.

Provisions such as s.420 are often included in enabling legislation for both Federal and State tribunals.[52] One issue raised by *Eshetu* was the relationship between ss.420 and 476(1), especially 476(1)(a) and 476(1)(c). In particular could a 'breach' of s.420 give rise to a ground of review specified in s.476(1)? Could that become a means of avoiding the provisions of ss.476(2) and 476(3)(d) to (g)?

Mr Eshetu is also a citizen of Ethiopia. He left Ethiopia in June 1992 and arrived in Australia in September 1993. He subsequently made an application for refugee status. As a result of various legislative changes this became an application for a 'protection visa'. His application was refused by the Minister and he sought review in the RRT. In November 1995 the RRT refused his application.

Mr Eshetu claimed that he had a well founded fear of persecution (should he be forced to return to Ethiopia) on the grounds of his (anti-government) political opinion and his race.[53] A critical part of his application was a claim that in December 1991 he was a member of the Student Council at the University of Addis Ababa. Mr Eshetu claimed that on the day before a demonstration organised by the Council was due to occur, he and other members of the Council were detained and tortured. The RRT conducted a search of the various sources of information concerning human rights abuses in Ethiopia. This material did not confirm that such an event occurred.[54] Without making any express finding concerning Mr Eshetu's credibility the RRT found that the event did not occur as he claimed. It then considered the remainder of his application, based on the facts it did accept, but found that it was not satisfied that he had a well founded fear of persecution for the purposes of the refugee definition.[55]

Mr Eshetu sought review in the Federal Court under Part 8. Hill J considered that the RRT's conclusion in relation to the December 1991 incident 'totally lacked logic' and that the decision was 'so unreasonable that no reasonable tribunal could reach it.[56] Nevertheless because of s.476(2)(b), Hill J held that he was precluded from interfering and Mr Eshetu's application was dismissed.

Mr Eshetu appealed to the Full Court which allowed his appeal.[57] Davies J based his decision upon two grounds. First, accepting Hill J's conclusion as to the unreasonableness of the factual decision of the Tribunal, Davies J held that this meant there had been a failure to comply with s.420 of the Act. His Honour considered that s.420 had both procedural and substantive aspects. The procedural aspect required it to provide a mechanism of review that was 'fair', ie the procedures adopted by the RRT must be 'fair'.[58] If they were not, the ground of review specified in s.476(1)(a) was made out. Moreover, the substantive aspect s.420 formed part of the 'applicable law'. Accordingly if the RRT did not act 'in accordance with the substantial justice and merits of the case' the ground of review specified in s.476(1)(e) would be made out.[59]

The second ground upon which Davies J based his conclusion was that there had been an error of law on the part of the RRT, in that its reasoning disclosed a misunderstanding of the

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52 See for example, s.108(1)(b) *Anti Discrimination Act 1977* (NSW), s.138 *Veterans Entitlement Act 1986* (Cth)

53 Mr Eshetu is of Amahran ethnicity and it was claimed that the new government in Ethiopia is dominated by members of a rival racial/ethnic group.

54 Nor did it 'prove' that it had not occurred.

55 See *Chan v. Minister for Immigration* (1989) 169 CLR 369.

56 (1997) 142 ALR 474, 486-487.

57 (1997) 71 FCR 300; Davies and Burchett JJ allowed the appeal, Whitlam J dissented.

58 Ibid, 304.

59 Ibid, 304-305.

concept of 'well-founded fear of persecution'.[60] This error was said to be manifested by the RRT's failure to make findings in relation to parts of Mr Eshetu's claims, which, if proved, could have supported the existence of a well founded fear of persecution on Mr Eshetu's part. The matters the RRT failed to address included whether Mr Eshetu was a member of the Student Council, whether he suffered an injury to his leg, as he claimed, when he was detained and whether he had left Ethiopia because of persecution by government forces.[61]

In a separate judgment Burchett J agreed with Davies J. Whitlam J dissented both as to the proper construction of ss.420 and 476 and the finding that the RRT's approach to Mr Eshetu's application was unreasonable.[62]

Whether or not Davies J intended it, the consequence of *Eshetu* was that the restrictions in s.476(2) and 467(3)(d) to (g) were easily overcome in the numerous cases that were heard under Part 8 in the Federal Court following the Full Court's decision. An allegation of a breach of the rules of natural justice was effortlessly converted into an allegation of a breach of s.420 and the relevant decision set aside.[63] What was held to be manifest unreasonableness or a failure to consider a relevant consideration were automatically considered breaches of s.420 reviewable under s.476(1).[64] This jurisprudence grew to the point where Part 8 was held to have given the Federal Court a general jurisdiction to review 'certain types of *mistaken* findings of fact',[65] thereby threatening to undermine the warnings in *Bond*[66] concerning interference with factual findings of administrative bodies.

The Minister was granted special leave to appeal from the Full Court's decision in *Eshetu*. As a defensive measure,[67] Mr Eshetu brought an application under s.75(v) seeking relief for Wednesbury unreasonableness on the part of the RRT. Both the appeal and the application were heard together.[68]

All seven justices agreed that a breach of s.420 did not give rise to any ground of review specified in s.476(1).[69] Gleeson CJ and McHugh J considered that such provisions were made to free tribunals from procedural constraints otherwise applicable to courts of law but noted:

> The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question.[70]

Gleeson CJ and McHugh JJ also rejected Davies J's conclusion that the RRT's failure to make findings concerning certain aspects of Mr Eshetu's claims disclosed an error of law. In their

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60 Ibid, 313.

61 Ibid, 313.

62 Ibid, 369.

63 See for example *Gilson v. MIMA* (unreported, Lehane J, 21 July 1997); *Meadows v MIMA* (unreported, Einfield, Von Doussa and Merkel JJ, 23 December 1998).

64 See *Sun Zhan Qui v MIEA* (1997) 151 ALR 505, at 548-549 (per Wilcox J).

65 See *Inderjit Singh v. MIMA* (unreported, Weinberg J, 29 October 1998) followed by a Full Court in *Calado v. MIMA* (unreported, Moore, Mansfield and Emmett JJ, 2 December 1998).

66 *ABT v Bond* (1990) 170 CLR 321, 355-358 per Mason CJ.

67 That is, in the event that the appeal was successful.

68 And immediately after *Abebe*.

69 *Eshetu*, 754 to 755, per Gleeson CJ and McHugh J; 759, per Gaudron and Kirby JJ; 762, 763, per Gummow J; 773, per Hayne J, 775-778, per Callinan J. In so finding their Honours expressly agreed with the analysis of those provisions undertaken by Lindgren J in *Sun Zhan Qui v. MIMA* (unreported, 6 May 1997). Gaudron & Kirby JJ did state that s.420 'informs' the grounds in s.476(1) and 'described' the general nature of the review: *Eshetu*, 759.

70 *Eshetu*, 754-755.

Honours' view, this was just a means of disagreeing with the RRT's view of the merits of Mr Eshetu's case.[71] Gaudron and Kirby JJ agreed but their Honours found a different error of law had occurred in the RRT decision.[72]

This disposed of the appeal in the Minister's favour. However there remained for consideration Mr Eshetu's writ which, as noted above, sought to rely on there being Wednesbury unreasonableness on the part of the RRT.

Gleeson CJ and McHugh JJ held that, as the RRT had simply expressed its lack of satisfaction with Mr Eshetu's claim, and was only being criticised for giving weight to certain considerations and undue weight to others, it was not a case of 'Wednesbury unreasonableness'.[73] Their Honours appeared to confine Wednesbury unreasonableness to cases involving an unreasonable exercise of a discretion or an 'abuse of power'.[74] They left little, if any, room for it to operate in relation to factual findings.

In view of the fact that they would have allowed the appeal, Gaudron and Kirby JJ did not consider the writ in any detail. They did comment that 'In essence, an unreasonable decision is one from which no logical basis can be discerned'.[75]

Their Honours considered there was a 'logical basis' for the RRT's decision in Mr Eshetu's case namely that it did not accept Mr Eshetu's factual claims.[76]

Gummow J noted that the legislative context in which the RRT's decision was made provided that eligibility for the visa was conditional upon the Minister's delegate, and the RRT on review, being *satisfied* as to the relevant applicant fulfilling the Convention definition.[77] According to Gummow J and leaving aside the ADJR Act, Wednesbury unreasonableness was usually associated with abuses of discretionary powers and not fact finding by administrative bodies as to the existence of their jurisdiction.[78] In His Honour's view, it was logically inconsistent to assert, as Mr Eshetu's writ had asserted, that the RRT had acted unreasonably but within jurisdiction because unreasonableness with jurisdiction can only arise in relation to the exercise of discretionary powers.[79] According to Gummow J, a determination that a decision maker is not satisfied that a statutory criterion has been met and which is necessary to enliven a power 'goes to the jurisdiction of the matter and is reviewable under s.75(v)'.[80] But in what circumstances will such an opinion be reviewed where factual findings are involved? Gummow J made three observations. First, where the state of satisfaction depends upon factual matters as to which reasonable minds can differ, it will be difficult to show that no reasonable decision maker could have arrived at the decision in question, although 'it may be otherwise if the evidence which establishes or denies … that the necessary criterion has been met was all one

71 Ibid, 755, per Gummow J and 773, per Hayne J.

72 Ibid, 761-762. The error was said to be a failure to appreciate that the Ethiopian government might impute to Mr Eshetu a particular political opinion, namely a tendency to advocate violence. This error was never raised or suggested by any party or member of the courts at any relevant time during the litigation prior to the publishing of the judgment.

73 Ibid, 754.

74 Ibid, 753-754.

75 Ibid, 762.

76 Id. Hayne J stated that he prefer to express no view on the unreasonableness ground and its availability under s.75(v). His Honour agreed with Gleeson CJ and McHugh J that no manifest unreasonableness was demonstrated: *Eshetu*, 773. Callinan J's judgment was to similar effect: *Eshetu*, *779*-781.

77 Ibid, 765-766; see ss.36 and 65 of the Act.

78 Ibid, 766-767.

79 Ibid, 767-768.

80 Ibid, 768.

way'.[81] Secondly, factual findings in this context can be reviewed on a wider basis than that suggested in *Bond*[82] because they are matters going to jurisdiction.[83] Thirdly, in conducting that process, and depending upon the various circumstances, significant deference will be afforded to a tribunal's view on such factual matters.[84]

So what criteria are to be used in application under s.75(v) involving unreasonableness in a context such as this? Gummow J tentatively posed the following test:

> Where the issue whether a statutory power was enlivened turns upon the further question of whether the requisite satisfaction of the decision-maker was arrived at reasonably, I would not adopt the criterion advanced by Lord Wilberforce.[85] I would prefer the scrutiny of the written statement provided under s.430 by a criterion of 'reasonableness review'. This would reflect the significance attached earlier in these reasons to the passage extracted from the judgment of Gibbs J in Buck v. Bavone. It would permit review in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds.
>
> It may be that there should be accepted some stricter view as to what must be shown in such a case by an applicant seeking relief under s.75(v) of the Constitution. It is not necessary to determine whether this is so. That question may be left for developed argument in another case.[86] (emphasis added)

Gummow J held that there was nothing illogical about the RRT's reasoning in Mr Eshetu's case.[87] In dismissing the application Gummow J added the following remarks which may be of significant consequence.

> There is a further aspect of this procedural bifurcation which should be noted. The application to this Court under s.75(v) of the Constitution was instituted on the footing that the effect of s.476(2)(b) and s.485(1) of the Act was to deny to the Federal Court the jurisdiction it otherwise would have had under s.39B of the Judiciary Act 1903 (Cth) ('the Judiciary Act') in respect of a 'Wednesbury unreasonableness' ground of review. However, where the question is whether the Minister was obliged by s.65 to grant a protection visa upon satisfaction that the applicant met the criterion under s.36(2) for a protection visa, 'Wednesbury unreasonableness' does not enter the picture. Rather, *the question would appear to be whether the Minister did not have jurisdiction to make the decision* (s.476(1)(b)), the decision was not authorised by the Act (s.476(1)(c)), the decision involved an error of law (s.476(1)(e)) or there was no evidence or other material to justify the making of the decision (s.476(1)(g) as amplified by s.476(4)). The exclusion by s.476(2)(b) of 'Wednesbury unreasonableness' would not be material. Upon that footing, the Federal Court would have jurisdiction conferred by both s.486 of the Act and s.39B of the Judiciary Act, concurrently with that conferred upon this Court by s.75(v) of the Constitution.[88] (emphasis added)

It appears that, consistent with Gummow J's view that an attack upon whether a state of satisfaction was reasonably reached is a matter going to jurisdiction, His Honour considers that such an attack can invoke, *inter alia*, the ground of review specified in ss.476(1)(b), notwithstanding the express terms of s.476(2)(b). It may be that the comments of Gaudron J in *Abebe* set out above are to the same effect insofar as Her Honour suggests that, as a matter of construction, it is usually an essential precondition to the exercise of a statutory power that it be

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81 Ibid, 770.

82 (1990) 170 CLR 321, 355-356 (per Mason CJ).

83 *Eshetu* at 770.

84 Id.

85 In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* (1977) AC 1014.

86 Ibid, 771.

87 *Eshetu*, 771.

88 Ibid, 772.

done reasonably. Presumably, if it is not exercised reasonably, it is not authorised by the statute.

A Few Observations

It need hardly be stated that nothing in the judgments in *Eshetu* and *Abebe* can be taken as an endorsement of the clumsy scheme of judicial review created by Part 8, especially the restriction on the remittal power of the High Court. To require litigants to pursue similar remedies on different bases in different courts is only productive of expense, delay and uncertainty. With ever increasing restrictions on legal aid and the high cost of pursuing judicial review applications in the High Court as opposed to the Federal Court, the result will be that recipients of adverse but legally flawed decisions will be denied their rights, whereas less deserving but well resourced litigants will be given a second chance at judicial review and the opportunity to create further delay.

The RRT is often described as being an 'inquisitorial' or 'investigative' body and not an 'adversarial' one.[89] Certainly, there is no contradictor to the application for review and, to an extent, the conduct of the review from the time of filing the application, lodging material, conducting a hearing and the making of a decision, is codified.[90] Despite this, it was not seriously doubted in *Abebe* and *Eshetu* that the RRT must still observe the requirements of procedural fairness in its conduct of the review, although the content of those requirements was clearly affected.[91] Apparently, emphatic wording is required before 'procedural fairness' is excluded.

Abebe and *Eshetu* raise for consideration, but do not resolve, questions as to what is truly meant by 'manifest unreasonableness' and the circumstances in which the establishment of such a ground in the legislative context in which the RRT operated will result in the issue of a writ mentioned in s.75(v). For various reasons many of the views expressed were tentative. Clearly, manifest unreasonableness can be invoked where the exercise of a discretionary power relevantly miscarries. Beyond that, the position is less clear. Gleeson CJ and McHugh J appear to deny it any role in relation to factual findings. Gaudron and Kirby JJ allow it to operate where the decision lacks a logical basis. Gummow J suggests, but does not conclude, that factual findings made in the course of achieving or denying a state of satisfaction which is a precondition to the exercise of a power can be reviewed under s.75(v) if they are not, *inter alia*, based on 'logical grounds'.[92] Presumably this applies with equal force to the ADJR and, according to Gummow J, and possibly Gaudron J, can be invoked under Part 8 as well. Hayne J expressly left open whether unreasonableness extends beyond abuses of discretionary powers into reviewing findings of fact.[93] Otherwise there appears to be no movement (yet) from the *Bond*[94] position that findings of fact cannot be reviewed if there is some material to support them[95] as 'want of logic is not synonymous with error of law'.[96]

Eshetu is the third case in the last three years in which the High Court has 'corrected' what it saw as impermissible merits review by the Federal Court of administrative decisions concerning

89 See for example *Abebe*, 621, per Gummow and Hayne JJ.

90 See former ss.423 to 431 of the Act.

91 See also *Abebe*, 616-617, per Gummow and Hayne JJ.

92 See text to notes 78 and 88 above.

93 *Eshetu*, 773. Callinan J's judgment appears to assume, without deciding, that unreasonableness can extend into factual matters: *Eshetu*, 779-781.

94 (1995) 170 CLR 321.

95 Ibid, 356.

96 Ibid, 356; see *Eshetu*, 770, per Gummow J.

refugee applicants.[97] The irony of *Eshetu* was that, although one could disagree with the factual findings of the RRT when compared with the material before it, overall the decision was thorough and well reasoned. That the Federal Court was prepared to interfere with it might lead to the impression that it was seeking to assume a general jurisdiction to conduct merits review of RRT decisions via a combination of ss.420 and 476(1) of the Act. However, the decision of the Full Court of the Federal Court in *Eshetu* arose in a context where the Court was being confronted with numerous applications seeking to invoke s.476 in relation to RRT decisions where some of those decisions were perverse and logically indefensible. This is illustrated by some of the subsequent decisions in which the Federal Court invoked s.420.[98]

Where to now for the Federal Court? Recently the Court has taken an expansive view of what is required by s.430 of the Act in relation to the RRT's obligation to provide reasons and, in particular, its obligation to 'set out its findings on material questions of fact' and 'refer to the evidence or any other material on which the findings of fact are based'.[99] This has developed from implying an obligation to make findings on the crucial issues of fact presented by an application for a protective visa[100] to one which requires a finding in relation to each relatively important aspect of the *evidence* before the tribunal.[101] Gummow J may have had this development in mind when he stated in *Eshetu* that s.430 'does not provide the foundation for a merits review of the fact-finding processes of the Tribunal'.[102]

97 The other two are *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 185 CLR 259 and *Minister for Immigration and Ethnic Affairs v. Guo* (1997) 191 CLR 559.

98 See for example *Calado v MIMA* (unreported, Law Mansfield and Emmett JJ, 2 December 1998) where the RRT reasoned that because the members of a tribe spoke a particular language, and the relevant applicant spoke Portugese, he was not therefore not a member of that tribe without finding whether he in fact spoke their language as well as Portugese. In *Elmi v MIMA* [1998] 1457 FCA (unreported, Emmett J, 19 November 1997) Emmett J set aside a decision where the RRT rejected the credibility of a 16 year old Somalian woman on the basis, inter alia, that even though she lived in Mogadishu's outer suburbs and left the city when she was 13, she could not identify where its university was. She was not even asked whether she had ever travelled to the centre of the city to see the university.

99 s.430(1)(c) and (d) of the Act.

100 See *Muralidharan v MIEA* (1996) 62 FCR 402, 413-416, per Sackville J.

101 See *Kandiah v. MIMA* (unreported, Finn J, 3 September 1998) and *Thevendram v. MIMA* [1999] FAC 182 (unreported, Spender, North and Merkel J, 9 March 1999). *Contra Ahmed v MIMA* (unreported, Lee, Branson and Marshall JJ, 21 June 1999).

102 *Eshetu*, 765.

CLARIFICATION

The Registrar of the Federal Court of Australia has written to the *AIAL Forum* with a comment on the article by John McMillan, 'Federal Court v Minister for Immigration' (1999) 22 *AIAL Forum* 1. The Registrar drew attention to a reference in the article to *Devarajan v MIMA* [1999] FCA 796 (see text to n 105). The article noted that the decision of Moore J in that case involved a 9 month delay for a 6 page judgment. The Registrar has pointed out that 6 months of the delay resulted from making available certain documents that had been filed by the applicant in the proceedings to the Minister, for him to consider whether to exercise discretionary powers conferred by ss 417 and 48B of the *Migration Act 1918*. The issue was mentioned in para 21 of the judgment of the Court.