MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS ..... APPELLANT;
RESPONDENT,

AND

JIA LEGENG ..... RESPONDENT.
APPLICANT,

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS; EX PARTE JIA.

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS ..... APPELLANT;
RESPONDENT,

AND

WHITE ..... RESPONDENT.
APPLICANT,

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS; EX PARTE WHITE.

[2001] HCA 17

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

Administrative Law — Natural justice — Bias — Decision by Minister to cancel visa on grounds of character — Whether public or private statements by Minister evidenced prejudgment — Migration Act 1958 *(Cth), ss* 501, 502.

Section 501 of the *Migration Act* 1958 (Cth) provided that the Minister could cancel a visa that had been granted to a person if, amongst other things, the Minister was satisfied that the person was not of good character. Section 502(1)(b) provided that if the Minister intended to make a decision under s 501 and decided that, because of the seriousness of the circumstances giving rise to the making of that decision, it was in the national interest that the person be declared an excluded person, the Minister could, as part of the decision, include a certificate declaring the person to be an excluded person.

HC OF A 2000-2001

PERTH *Oct* 24-26 2000

CANBERRA *March* 29 2001

Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ

A Chinese national living in Australia was convicted of crimes and sentenced to imprisonment. His pending visa application was subsequently refused by a delegate of the Minister. He appealed to the Administrative Appeals Tribunal which set aside the decision and remitted it to the Minister with a direction that the applicant qualified for a Transitional (Permanent) Visa on the basis that he was of good character. The Minister made statements in a radio interview and a letter to the President of the Tribunal expressing concern at the Tribunal's decision and its approach to similar cases. The Minister later cancelled the applicant's visa and declared him to be an excluded person.

A New Zealand national living in Australia was convicted of crimes and sentenced to imprisonment. A deportation order was made against him by a delegate of the Minister. He appealed to the Tribunal which set aside the decision and remitted it to the Minister with a direction that the national not be deported. The Minister thereafter cancelled his visa and declared him to be an excluded person.

Held, (1) that in neither case was the Minister's decision vitiated by actual bias.

(2) By Gleeson CJ, Gummow, Hayne and Callinan JJ, Kirby J dissenting, that the Minister's statements on radio and in the letter to the President of the Tribunal did not give rise to a reasonable apprehension of bias in the case of the Chinese national or, by the whole Court, in the case of the New Zealand national,

by Gleeson CJ and Gummow J on the ground that the Minister was not required to avoid conducting himself in such a way as would expose a judge to a charge of apprehended bias;

by Kirby J on the ground that the Minister's decision concerning the New Zealand national, in contrast to that concerning the Chinese national, was not vitiated by bias actual or imputed because his remarks on radio and in the letter were not addressed to the New Zealand national's application and were made some eighteen months before his decision upon that application;

by Hayne J on the ground that the Minister was entitled to set and announce the standard to be applied in determining whether a person was not of good character; and

by Callinan J on the ground that the Minister's statements did not convey an appearance of bias.

Per Gleeson CJ, Gummow and Hayne JJ. The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 at 91, 100 and *Johnson v Johnson* (2000) 201 CLR 488, applied.

Per Gleeson CJ, Gummow, Kirby and Hayne JJ. In considering whether conduct of a decision-maker indicates bias, the nature of the decision-making process, and the character of the person upon whom Parliament has conferred the decision-making capacity, may be of critical importance.

Per curiam. A decision by the Minister to invoke the powers given by

ss 501 and 502 where he is dissatisfied with a previous decision of the Tribunal does not constitute an abuse of power.

Minister for Immigration and Multicultural Affairs v Gunner (1998) 84 FCR 400, approved.

Decisions of the Federal Court of Australia (Full Court): sub nom *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556 and *White v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 511, reversed.

APPEALS from the Federal Court of Australia and CERTIORARI and PROHIBITION.

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS V JIA and RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS; EX PARTE JIA

Jia Legeng, a Chinese national, arrived in Australia on a student visa in August 1991. In February 1995, he was convicted of four offences involving harm to, and sexual penetration of, a woman with whom he had previously been in a relationship. In August 1995, a delegate of the Minister for Immigration and Multicultural Affairs refused an application by Mr Jia for a Special (Permanent) Entry Permit. His case was subsequently reassessed and, on 1 December 1995, a delegate of the Minister refused to grant him a Transitional (Permanent) Visa or a Resident Return Visa. He applied to the Administrative Appeals Tribunal for review of that decision. The Tribunal set aside the decision and remitted it to the Minister with a direction that Mr Jia qualified for a Transitional (Permanent) Visa on the basis that he was a person of good character.

The Minister appealed to the Federal Court. Carr J allowed the appeal in part and remitted the matter to an identically constituted Tribunal which, on 14 March 1997, arrived again at the same conclusion.

On 14 April 1997 the Minister participated in a radio interview, during which he expressed concern about the Tribunal's decision and expressed views about the manner in which he might deal with Mr Jia's case. He also stated his beliefs about the character of persons who had committed crimes and had been punished by imprisonment. By letter of 30 April 1997, the Minister replied to a letter from the President of the Tribunal, expressing concern at the conclusions reached in Mr Jia's case and the Tribunal's approach to similar cases. He stated his view that the Tribunal had given insufficient weight to the seriousness of Mr Jia's crimes. On 23 May 1997 Mr Jia was granted a Transitional (Permanent) Visa. Following his receipt of a departmental minute asking whether he wished to act pursuant to ss 501 and 502 of the Act, the Minister decided that Mr Jia was not of good character, that the discretion to cancel the visa would be exercised, and that he was to be declared an excluded person.

Mr Jia commenced proceedings in the Federal Court for a review of

the Minister's decision pursuant to s 476 of the Act. French J decided against Mr Jia on each ground raised by him (1). He appealed to a Full Court which (Spender and R D Nicholson JJ, Cooper J dissenting) held that, in exercising his powers under ss 501 and 502, the Minister had been affected by actual bias (2). By special leave granted by Gaudron and Hayne JJ, the Minister appealed to the High Court. Mr Jia also applied for writs of certiorari and prohibition pursuant to s 75(v) of the Constitution, alleging that the decisions of the Minister were induced or affected by bias or were made in circumstances where there was a reasonable apprehension of bias.

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v WHITE and RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS; EX PARTE WHITE

Te Whetu Whakatau White was born in New Zealand and took up residence in Australia in 1987. In March 1994, he was convicted and sentenced to imprisonment on charges of manslaughter and committing an aggravated dangerous act. In February 1997 he was convicted of two offences of dangerous driving causing grievous bodily harm.

On 9 January 1998 a delegate of the Minister, acting pursuant to s 200 of the *Migration Act*, made a deportation order against Mr White. Following a merits review, the Tribunal set aside the decision and remitted the matter to the Minister for review with a direction that Mr White not be deported. After receiving a departmental minute concerning the matter, the Minister decided pursuant to s 501 that Mr White was not of good character and that his visa should be cancelled and a s 502 certificate issued. Mr White applied to the Federal Court for review of the Minister's decision. French J decided against Mr White on each ground raised by him. Mr White appealed to a Full Court (Ryan, North and Weinberg JJ) which rejected each ground of appeal. The Full Court adjourned the further hearing of the appeal and granted leave for Mr White to rely on the ground of bias, based upon the decision of the Full Court in *Jia v Minister for Immigration and Multicultural Affairs* (3). In further reasons, the Full Court held that the Minister's decisions had been affected by actual bias, by reason of his statements following the Tribunal's decision in Mr Jia's case (4). By special leave granted by McHugh and Kirby JJ, the Minister appealed to the High Court. Mr White applied for relief pursuant to s 75(v) of the Constitution, alleging that the Minister's decision had been vitiated by actual bias, apprehended bias, and unreasonableness.

The two cases were directed to be heard together.

(1) *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87.
(2) *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556.
(3) (1999) 93 FCR 556.
(4) *White v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 511.

R R S Tracey QC (with him *P R MacLiver*), for the appellant in each case. Actual bias will not be established unless the decision-maker's mind was so prejudiced in favour of a conclusion already formed that he was not capable of altering that conclusion irrespective of the evidence or arguments presented (5). The Minister's radio interview and letter did not mean that he had so prejudged the issues that he was incapable of altering his conclusions in light of any relevant information provided to him. The context in which he expressed his views in the interview and letter was different from that in which he had made his decisions, because of the further information before him on the latter occasions (6). The Full Court did not hold that the inferences of fact drawn by Carr J were not open to him and, accordingly, ought not to have substituted its own inferences (7). If the Full Court was entitled to draw its own inferences, so too is the High Court (8). The inferences drawn by the trial judge are to be preferred to those of the Full Court. The standard required of a decision-maker in cases of apprehended bias will vary according to the particular circumstances and the function being discharged (9). The reasonable observer must be assumed to have knowledge of the material objective facts (10). The observer should also be taken to be aware of the restraints and influences on a Minister which are not normally applicable to statutory tribunals and other decision-makers (11). Even if a reasonable apprehension of bias existed, the rule of necessity would permit the making of the decisions (12). In Mr White's case, leave should not have been granted to amend the application and notice of appeal to raise a matter for the first time on appeal and after the appeal had been decided against him (13). Where the raising of the new ground at the primary hearing would have affected the evidence

(5) *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 91, 100; *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 123, 127.

(6) *Galea v Galea* (1990) 19 NSWLR 263 at 279.

(7) *Minister for Immigration, Local Government and Ethnic Affairs v Hamsher* (1992) 35 FCR 359 at 369; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 84 FCR 541 at 554.

(8) *Warren v Coombes* (1979) 142 CLR 531 at 553.

(9) *Webb v The Queen* (1994) 181 CLR 41 at 76.

(10) *Minister for Immigration, Local Government and Ethnic Affairs v Mok* (1994) 55 FCR 375 at 397-398.

(11) *Franklin v Minister of Town and Country Planning* [1948] AC 87 at 103-105; *R v Amber Valley District Council; Ex parte Jackson* [1985] 1 WLR 298 at 307-308; [1984] 3 All ER 501 at 508-509.

(12) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 299-300; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88-89, 96, 102.

(13) *Banque Commerciale SA (In liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 284; *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Coulton v Holcombe* (1986) 162 CLR 1 at 11; *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 49 FCR 409 at 416, 428-429.

to be called by the other party, that is sufficient reason for the refusal of leave to add the ground on the appeal (14).

W S Martin QC (with him *H N H Christie*), for the respondents. The statutory ground of judicial review is to be interpreted and construed by reference to the ordinary meaning of the words of the statute, rather than by application of the common law principles relating to natural justice. Bias will be established if the decision-maker did not bring an impartial and unprejudiced mind to the resolution of the question (15). If the common law principles do apply, the question of bias focuses on whether the decision-maker brings an impartial and unprejudiced mind to the resolution of the question, not upon whether he has such a closed mind that there can only be one outcome (16). The proposition that the Minister had a predetermined view is not so grave or extraordinary as to require a higher degree of proof (17). The Full Court was required to give effect to its own conclusion on the facts, regardless of whether it considered that the findings of the trial judge were open to him (18). The evidence was sufficient to sustain the finding of bias. The Minister was required to observe the rules of procedural fairness in exercising his powers under ss 501 and 502 (19). These include the rule against apprehended bias, whether the decision-maker is sitting in an administrative or judicial capacity (20). The test is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question (21). In the case of Mr White, the granting of leave to amend the application and notice of appeal was a discretionary power (22) which should be exercised with the

(14) *Federal Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451 at 455.

(15) *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11]; *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71.

(16) *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11]; *R v Gough* [1993] AC 646; *RDS v The Queen* [1997] 3 SCR 484; *Liteky v United States* (1994) 510 US 540; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142.

(17) *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; 110 ALR 449 at 450.

(18) *Warren v Coombes* (1979) 142 CLR 531 at 551.

(19) *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

(20) *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Re Maurice; Ex parte Attorney-General (NT)* (1987) 17 FCR 422.

(21) *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11]; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41.

(22) *House v The King* (1936) 55 CLR 499.

objective of achieving justice (23). The additional evidence was of a kind which a Full Court would readily admit (24).

R R S Tracey QC, in reply, referred to *Vakauta v Kelly* (25); *Laws v Australian Broadcasting Tribunal* (26); and *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (27).

Cur adv vult

29 March 2001

The following written judgments were delivered:—

1 GLEESON CJ AND GUMMOW J. Four proceedings have been heard together. Two are appeals by the Minister for Immigration and Multicultural Affairs (the Minister) against decisions of the Full Court of the Federal Court of Australia. In each case it was held that, in exercising his powers under ss 501 and 502 of the *Migration Act* 1958 (Cth) (the Act) to cancel a visa and declare a person to be an excluded person, the Minister was affected by actual bias. The other two proceedings are in the nature of defensive responses to the appeals. Mr Jia and Mr White both seek relief from this Court, in the exercise of its original jurisdiction, based on s 75(v) of the Constitution, on the ground that, even if the decisions of the Full Court were to be overturned, the relevant decisions of the Minister involved a denial of natural justice in that they were induced or affected by bias or were made in circumstances where there was a reasonable apprehension of bias.

2 Because Pt 8 of the Act relevantly limits the jurisdiction of the Federal Court and confines it to dealing with a claim of actual bias (s 476(1)(f) and (2)(a)) (28), Messrs Jia and White were unable, in the proceedings they brought in the Federal Court, to seek to make a case of apprehended bias. However, subject to any discretionary consideration, they may seek to make such a case in this Court (29). The relationship between the two different bias contentions will require further consideration. It is convenient to explain the nature of the dispute between the parties by reference to the appeals.

The background to Mr Jia's case

3 Mr Jia is a Chinese national who arrived in Australia on a student visa in August 1991. Since then, his dealings with the immigration authorities have been complex. He made an unsuccessful application

(23) *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.
(24) *CDJ v VAJ* (1998) 197 CLR 172.
(25) (1989) 167 CLR 568 at 575.
(26) (1990) 170 CLR 70 at 88, 100.
(27) (1953) 88 CLR 100 at 116.
(28) See *Abebe v The Commonwealth* (1999) 197 CLR 510.
(29) *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

for refugee status, was detained in custody for a time, and was convicted of a number of offences against the immigration and taxation laws. In November 1993, it was decided that he met the threshold criteria for an application for a Special Entry Permit.

4 In December 1993, Mr Jia was arrested and charged with a number of offences, allegedly committed in November 1993, in relation to a woman named You Li, with whom he had previously had a relationship. In February 1994, he was granted permission to work in Australia. In April 1994, he applied for a Special Entry Permit. In August 1994, he was granted a Processing Entry Permit to allow him to maintain his legal immigration status in Australia whilst his application for a Special Entry Permit was processed. In February 1995, Mr Jia was brought to trial on the charges that had been laid against him in December 1993. He was convicted of four offences. They involved unlawful assault upon You Li causing her bodily harm, unlawful detention of You Li, making a threat to unlawfully harm her, and sexually penetrating her without her consent. He was sentenced to a total term of imprisonment of six years and three months. That included a sentence of four years and nine months, after allowing credit for time spent in custody, in relation to the sexual penetration offence. He appealed to the Court of Criminal Appeal of Western Australia. The appeal was dismissed in August 1995.

5 On 18 August 1995, a delegate of the Minister refused Mr Jia's outstanding application for a Special (Permanent) Entry Permit. He applied to the Migration Internal Review Office for a review of that decision. Following review, his case was reassessed. On 1 December 1995 a delegate of the Minister refused to grant him a Transitional (Permanent) Visa or a Resident Return Visa. He applied to the Administrative Appeals Tribunal (the Tribunal) for a review of that decision. His application came on for hearing before Deputy President Barnett in June 1996.

6 The Tribunal set aside the decision under review and remitted it to the Minister with a direction that Mr Jia qualified for obtaining a Transitional (Permanent) Visa on the basis that he was a person of good character.

7 It is unnecessary for present purposes to consider at length the reasoning of Deputy President Barnett. It is important, however, to note some aspects of it, because it forms part of the background to certain public comments later made by the Minister.

8 Mr Jia's application for a visa had been refused under the provisions of s 501 of the Act, which will be referred to in more detail below. In brief, it was concluded that, having regard to his past criminal conduct, he was not of good character.

9 The delegate who had made the decision had acted pursuant to a recommendation from an officer of the Department of Immigration and Ethnic Affairs. That officer, in turn, had taken into account a Procedures Advice Manual. The Manual had offered guidance to decision-makers. It stated that, in the absence of special circumstances,

a person would, normally, as a matter of policy, be taken to be not of good character because of past criminal conduct if the person had at any time been convicted of a crime and sentenced to imprisonment for a period of not less than one year. However, the Manual went on to state that, in considering whether to grant a visa, a decision-maker should consider all relevant factors, including whether the applicant had shown by subsequent conduct that he or she was reformed. Factors to be taken into account were said to include the nature and circumstances of the offence, including the age of the applicant at the time of the offence, the subsequent conduct of the applicant, the time that had elapsed since the occurrence of the offence, the circumstances of the person at the time of the application, the nature of the application, and the likelihood of re-offending. The officer who made the recommendation to the delegate examined all those factors and set out the result of such examination.

10 The approach taken to the matter by Deputy President Barnett also involved a consideration of those questions. In one respect, however, his reasoning might fairly have been regarded as surprising. His examination of the nature and circumstances of the offences committed by Mr Jia led him to a conclusion as to the culpability of Mr Jia's conduct which was significantly more favourable than that which had been reached by the criminal courts. He investigated, in detail, the relationship between Mr Jia and You Li, and the events which led to Mr Jia's convictions. He formed the opinion that You Li had behaved badly towards Mr Jia. He considered that there were strongly mitigating circumstances. He said that, in view of the jury's findings and the judge's sentences, "the applicant must have gone beyond what [was] permissible in the sometimes stormy 'give and take' of lovers' quarrels". This was a strikingly benign complexion to put upon the facts. Rape is a serious crime of violence. The view that was taken of Mr Jia's conduct is impossible to reconcile with the sentences that were imposed. The Deputy President referred to witnesses who had given character evidence on behalf of Mr Jia. He concluded that, although there had been a brief period of criminal conduct which may have indicated otherwise, Mr Jia was a person of good character.

11 That decision attracted public attention and adverse comment. The Minister set out to have it overturned.

12 The Minister appealed to the Federal Court. The appeal was allowed by Carr J, but upon a limited basis. Carr J concluded that, in certain respects, Deputy President Barnett had acted in breach of the rules of procedural fairness. In particular, he had failed to give proper notice to the Minister of the use he intended to make of certain material that he took into account in his decision. The matter was remitted to the Tribunal.

13 In March 1997, Deputy President Barnett again considered the case. He came to the same conclusion. He set aside the delegate's decision and remitted the matter to the Minister with a direction that Mr Jia

qualified for obtaining a visa on the basis that he was of good character. That decision was made on 14 March 1997.

14 On 14 April 1997, officers of the Department of Immigration and Multicultural Affairs prepared a background brief for the use of the Minister as required. It was not prepared under his instructions. The issue addressed by the brief was media criticism of the decision of the Tribunal in the case of Mr Jia.

15 It was an agreed fact in the subsequent Federal Court proceedings that, at the time the background brief was prepared, the Minister held the following opinion (30):

1. That "most Australians would find it difficult to reconcile a six and a half year jail sentence for rape with a finding by a Deputy President of the [Tribunal] that the person concerned is of good character".
2. That "this latest [Tribunal] decision has essentially rejected the court's finding of culpability by finding Mr Jia's behaviour leading to the offences justifiable because of the rape victim's conduct towards him and his own reasonable or unreasonable feelings of jealousy".
3. That "the government is concerned about the emerging trends for tribunals to discount the importance the government attaches to character issues".

It was agreed that the Minister did not publicly express those opinions, that his state of mind was that he had difficulty in accepting the line of reasoning taken by the Tribunal, and that he was sure that most Australians would be surprised that a non-citizen with such convictions had been found to be of good character.

16 The opinions referred to in 1 and 2 above were reasonably open.

17 On 14 April 1997, the Minister was interviewed on radio. The interviewer expressed concern about the decision of the Tribunal. The Minister said he was unhappy with the way in which the Tribunal had been dealing with a number of immigration matters, and that he had asked the Joint Committee on Migration of the Parliament to look into the question of criminal deportation. He discussed the legislative provisions relating to character. The interviewer asked what the law provided as to whether a person was of good character. The Minister said:

> "What we are looking at here is the commission of offences. I don't believe you are of good character if you've committed significant criminal offences involving penal servitude. The law does actually write down that that is the test and it adds another test ... if you are known to associate with organisations that are involved in criminal activity, you can be found to be of not good character."

(30) *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87 at 95 (emphasis removed).

18 When asked, in effect, what he could do about it, the Minister said:

> "I'm considering what steps I can take and there are some avenues. One of the suggestions that's been made is that I could in fact grant the visa and then cancel it on character grounds. I have to weigh up whether or not that is a proper course for me to follow and I also have to look at the issue as to what the potential cost might be to the community if it opens up a whole host of other possible appeals to the Federal Court."

19 On 15 April 1997, the Minister lodged an appeal to the Federal Court against the second decision of the Tribunal, but that was subsequently withdrawn.

20 On 23 April 1997, a departmental officer sent a minute to the Minister setting out the options available to him. They were said to be:

> "1. To further appeal to the Federal [C]ourt on matters of law; or
> 2. To proceed to visa grant but for you then to decide to intervene and personally cancel the visa under section 501 of the *Migration Act* on the basis that Mr Jia is not of good character; or
> 3. To accept the [Tribunal's] decision and finalise the assessment of Mr Jia's application."

21 The departmental minute said:

> "In any litigation arising from decisions by you to cancel Mr Jia's visa and to declare him an excluded person, you could be called to give evidence and be subject of close scrutiny. You could well be called upon to give evidence about your views as to Mr Jia's character and be subject to cross-examination about the justification of your decisions and to rebut any possibility of grounds of bias or improper purpose being made out."

22 The minute stated that a decision to cancel Mr Jia's visa and to declare him to be an excluded person would indicate to the community the Government's concern about the acceptability of the Tribunal decision in the national interest, and reflect its determination that a non-citizen with a history of criminal conduct and an apparent disregard for the law should not remain in Australia.

23 On 23 May Mr Jia was granted a Transitional (Permanent) Visa. He was also informed that the Minister was personally considering his powers under ss 501 and 502. Mr Jia was invited to comment and provide any information he might consider relevant.

24 In the meantime, there had been an exchange of correspondence between the Minister and the President of the Tribunal. On 30 April 1997, the Minister replied to a letter written by the President of the Tribunal, which was not in evidence. It is obvious from the opening words of the Minister's letter that his letter was written in response to an expression of concern by the President about comments attributed to the Minister in a newspaper article. What the President wrote in

expressing those concerns does not appear from the evidence. In particular, the evidence does not show whether, and to what extent, the President invited the Minister to explain his criticisms of the way in which the Tribunal went about its business. The Minister's letter elaborated on his concerns about recent decisions of the Tribunal. The letter said:

> "That persons such as Mr Jia can be found to be of 'good character', despite his recent conviction for a serious crime undermine[s] the Government's ability to control entry into Australia on character grounds. I am concerned that this may set a precedent for decisions by the [Tribunal] in the future. To allow this to pass without condemnation would increase the threshold for decisions relating to character considerations. Although I recognise that [Tribunal] decisions are not precedential, as a matter of law, such decisions may be viewed by the Tribunal and officers in determining the character requirements under s 501 as the acceptable standard. It would undermine the Government's desire to protect the Australian community."

25 There is another paragraph in the letter which is of significance. It said:

> "The seriousness of the crime, which is an important consideration, does not appear to have been given sufficient weight in the Tribunal's deliberations. Where the courts have determined that a substantial period of imprisonment was appropriate for the crime committed, the seriousness of the crime is a primary consideration. Crimes involving violence and drugs are regarded as particularly abhorrent and are viewed as significant in the consideration under the character and deportation provisions of the Act."

26 The terms of that paragraph are inconsistent with a view that conviction of a significant crime automatically, and without consideration of any other circumstances, produces the consequence that a person is not of good character. The references to the "seriousness of the crime", "an important consideration", "a primary consideration", and "sufficient weight" all imply judgment and evaluation.

27 In concluding his letter, the Minister stated that the community looks to him as the Minister to ensure that criminals who are non-citizens are not permitted to remain in Australia.

28 On 27 May 1997, the Minister discontinued the appeal to the Federal Court.

29 On 6 June 1997, an officer of the department sent a minute to the Minister for consideration of whether the Minister wished to act, under ss 501 and 502 of the Act, to cancel Mr Jia's visa and to declare him to be an excluded person.

30 The minute outlined the facts of the case, including Mr Jia's convictions which had resulted in his imprisonment, and his other convictions for lesser offences. It referred to the decisions of the

Tribunal. It pointed out that the Tribunal had twice found Mr Jia to be of good character, and had found that he had received strong and continuing support from Australian citizens and residents who knew him. Reference was made to the hardship that Mr Jia might suffer if required to leave Australia. Again, all this is inconsistent with a view that there is no occasion to look beyond the fact of a criminal conviction. Although the minute leaned in favour of cancellation, it did not make any firm recommendation in that regard. The Minister's decision, which was dated 10 June 1997, was endorsed on an attachment to the minute. It was to the effect that Mr Jia was not of good character, that the discretion to cancel his visa would be exercised, and that he was to be declared an excluded person and that a certificate to that effect would be signed.

31 Mr Jia then commenced proceedings in the Federal Court for a review of the Minister's decisions pursuant to s 476 of the Act.

Mr Jia's proceedings in the Federal Court

32 Section 476 of the Act provides that application may be made for review by the Federal Court of certain decisions, which include decisions under ss 501 and 502, on specified grounds. For present purposes, the relevant grounds are that the decision was induced or affected by fraud or by actual bias (s 476(1)(f)), that the decision involved an error of law (s 476(1)(e)), that the decision was not authorised by the Act (s 476(1)(c)) or that the decision was an improper exercise of power (s 476(1)(d)).

33 The primary ground relied upon by Mr Jia was that the Minister's decisions were induced or affected by actual bias. That was the ground upon which he ultimately succeeded in the Full Court of the Federal Court. As to the other grounds, it suffices to mention at this stage that there is a notice of contention to which it will be necessary to return in due course.

34 The matter came before French J at first instance in the Federal Court (31). He decided against Mr Jia on all grounds that were argued. For the moment, it is convenient to deal only with the ground of actual bias.

35 French J said that actual bias, within the meaning of s 476, "must be a pre-existing state of mind which disables the decision-maker from undertaking or renders him unwilling to undertake any or any proper evaluation of the materials before him or her which are relevant to the decision to be made" (32).

36 His Honour cited, with approval, judicial statements to the effect that, where there is a claim of actual bias involving prejudgment, the applicant must show that the decision-maker "had a closed mind to the issues raised and was not open to persuasion by the applicant's

(31) *Jia* (1998) 84 FCR 87.
(32) *Jia* (1998) 84 FCR 87 at 104.

case'' (33), and that actual bias exists where ''the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant'' (34).

37 French J found that the evidence indicated that the Minister had formed, on the basis of Mr Jia's convictions and sentence, a view strongly adverse to the conclusion that he could be described as a person of good character. However, he said, the question was whether, by his mental state, the Minister was disabled from or unwilling to have regard to other relevant circumstances. French J expressed his conclusions as follows (35):

> ''The onus of demonstrating actual bias lies upon an applicant for judicial review and it is a heavy onus. The fact that an applicant may have demonstrated that on the decision-maker's provisional views he has an uphill job to persuade him away from those views is not enough to demonstrate actual bias.
>
> The Minister's case may not have been helped by his public discussion of Mr Jia's case on radio in a way that exposed his views adverse to Mr Jia. For the hypothesis is then open that having taken a public position on what is undoubtedly a politically sensitive case the Minister would find it difficult to appear to resile from that position. On the other hand, he did leave himself an escape route in the radio interview referring as he did to the need to 'weigh up' whether it was proper for him to adopt the procedure of granting the visa and then cancelling it on character grounds. Moreover, the Minister is an elected official, accountable to the public and the Parliament and entitled to be forthright and open about the administration of his portfolio which, it is common knowledge, is a matter of continuing public interest and debate.
>
> The department had provided the Minister with a comprehensive minute in advance of his decision which drew attention to factors both adverse and favourable to Mr Jia.
>
> The Minister's criticism of the [Tribunal] related not just to the Jia case but was placed in a wider context of concern about his perception of a trend in Tribunal decision-making. He was entitled to make those observations and to draw them to the attention of the Tribunal President. In assessing the standards of behaviour required of the Minister it is important to bear in mind that he is not acting as a judge or tribunal but as an administrative decision-maker implementing government policy.

(33) *Wannakuwattewa v Minister for Immigration and Ethnic Affairs* (unreported; Federal Court of Australia (North J); 24 June 1996) at 4.

(34) *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 134, per North J.

(35) *Jia* (1998) 84 FCR 87 at 106-107.

> While it is clear that the Minister had strong views about Mr Jia's case, I am not satisfied that those views precluded him from the consideration of all the relevant circumstances so as to constitute actual bias inducing or affecting the decision within the meaning of s 476(1)(f)."

38 Mr Jia appealed to the Full Court of the Federal Court. The appeal was heard before Spender, Cooper and R D Nicholson JJ (36).

39 All three members of the Full Court accepted the test of actual bias applied by French J. Cooper J held that no error had been shown in the decision of French J. He said that it was open to French J to find that the Minister, although holding strong, even incorrect, views, in April 1997, was still concerned to do what was proper in respect of the appellant. He also found that it was open to French J, having regard to all the circumstances that existed in June 1997, not to be satisfied that the Minister either consciously or unconsciously acted contrary to the advice and without regard to the material placed before him because he had a closed mind on the issue of the appellant's character. Spender and R D Nicholson JJ were of a contrary opinion.

40 Spender J considered that the evidence went beyond showing merely that the Minister had strong views about Mr Jia's case. He thought that the evidence showed that the Minister believed that persons convicted of serious crime were persons of bad character. He referred to the statement to that effect in the radio interview. This, his Honour said, was not an expression of a preliminary view, capable of alteration, or the statement of a general rule subject to exception in the particular circumstances of a case. Spender J said (37):

> "Section 501(2) does not equate significant past criminal conduct with the absence of good character. That was the view of the Minister. That view is wrong. That view means that the Minister's decision that Mr Jia was not of good character is affected by actual bias."

41 Spender J considered that his conclusion was reinforced by the terms of the letter written by the Minister to the President of the Tribunal. He also strongly criticised the Minister for writing the letter. He said (38):

> "In my respectful opinion, the Minister, who is after all frequently one party to a hearing in the Tribunal, is not entitled to pressure the Tribunal into accepting his view, particularly one which is in my opinion so fundamentally mistaken. The Tribunal is supposed to be independent, and that independence is put seriously at risk if a Minister thinks and acts as if he is entitled to lobby the Tribunal to

(36) *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556.
(37) *Jia* (1999) 93 FCR 556 at 567.
(38) *Jia* (1999) 93 FCR 556 at 568-569.

reach a conclusion which is his preferred (and in this case mistaken) view of the law.''

42 That characterisation of the Minister's letter to the President was made in the following circumstances. The letter was an answer to a letter written to the Minister by the President of the Tribunal. The Federal Court did not have before it either the letter written by the President to the Minister, or any information as to the terms of that letter except such as might be inferred from the Minister's reply. To describe the letter from the Minister to the President as an attempt ''to pressure the Tribunal into accepting his view'', or engaging in lobbying the Tribunal to reach a particular conclusion, is unwarranted. Without knowing what the President wrote to the Minister, it is not possible fairly to make such an evaluation of the Minister's response.

43 R D Nicholson J, after having expressed agreement with French J's formulation of the test for actual bias, went on to consider the inferences to be drawn from the evidence. His Honour said (39):

> ''In my opinion the inferences to be drawn from all the circumstances relied on for the appellant including particularly the respondent's statement on radio on 14 April 1997 and his letter to the President of the Tribunal was that the respondent's view had passed the point of strong prejudgment and reached the point where the respondent was precluded from consideration of all the relevant circumstances in relation to the appellant. The conclusive circumstances for the drawing of this inference are:
>
> (1) The expression of belief by the respondent that a person (which must include the appellant) could not be of good character if they have committed significant criminal offences. The reference to 'weighing up' was only directed to the propriety of the course proposed, not to the circumstances relevant to the appellant.
>
> (2) The respondent considered that if the appellant was found to be of good character the Government's aims would be undermined. The respondent as a Minister of the Crown could not therefore embark on a course in relation to the appellant which he considered had that effect.
>
> (3) The Tribunal's decision should not set a precedent for the future. The respondent thereby ruled out that he would act to the same effect in the future in relation to the appellant.
>
> (4) The Tribunal decision warranted condemnation. The respondent would not therefore have embarked on a course in relation to the appellant which he considered brought that result.
>
> (5) The Tribunal's decision involved a misconstruction of the tests in relation to character decisions. The respondent would not therefore have been prepared to apply the sub-section in possible favour of the appellant as the Tribunal had done.

(39) *Jia* (1999) 93 FCR 556 at 602-603.

By those expressions and statements the respondent precluded himself from any possible acceptance of the view that the appellant could be found now to be a person of good character despite his past criminal record. The balanced character of the departmental memoranda to him cannot disguise the position which the evidence shows the respondent had reached in his mind.

The drawing of these inferences, for which the appellant bears a heavy onus, is aided by the application of the *Jones v Dunkel* principle applied to the absence of any evidence from the respondent when issues were raised on the evidence for him to answer ...

Conscious again of the heavy onus necessary to establish actual bias, I therefore conclude the primary judge failed to draw inferences which should have been drawn. I would allow the application for review on the ground of actual bias.''

44 The Minister now appeals to this Court against the decision of the Full Court of the Federal Court.

The background to Mr White's case

45 Mr White was born in New Zealand. In 1987, at the age of nineteen, he took up residence in Australia.

46 Before his arrival in Australia, Mr White had incurred a number of convictions in New Zealand for relatively minor offences. He had never been sentenced to a term of imprisonment. Between December 1988 and October 1989, whilst living in Western Australia, he incurred eight convictions, all for relatively minor offences. They included instances of disorderly and violent behaviour. In no case was a custodial sentence imposed. In September 1991, while on a return visit to New Zealand, he was convicted of being an unlicensed driver with an excessive blood alcohol level. He was ordered to do 150 hours of community service and disqualified from holding a driver's licence for one year. He was also charged with other offences, but those charges never came to a hearing. He returned to Australia.

47 In June 1993, while Mr White was employed at Katherine in the Northern Territory, he and a number of Maori companions became involved in a drunken brawl with a group of Aboriginals. The fighting began in a hotel and extended to a street. At one stage, Mr White was armed with a small bat. He and a number of his companions attempted to drive off in a car, but they were dragged back by several Aboriginal men and fighting resumed. Mr White climbed back into the car, and then used it as a weapon. He drove into one member of the Aboriginal group and knocked him to the ground. He then turned the vehicle around and aimed it at the same man who had just managed to stand up. He drove the car into him again. He then continued to drive down the street at speed, veering to the incorrect side of the road, and ran down another Aboriginal man who had been involved in the fight. Next, he turned back along the main street, and drove at speed towards

two Aboriginal women. He knocked one of them down, and she suffered a broken arm. The other woman was killed. The car then hit a pole. Mr White got out and fled down the street. As a result of that incident, he was convicted of manslaughter in March 1994 and sentenced to imprisonment for four years. He was also convicted of three offences of committing an aggravated dangerous act and sentenced to imprisonment for two years. All sentences were to be served concurrently. He was released from prison, in June 1994, presumably on parole.

48 In April 1996, Mr White, while driving a vehicle without a licence, and while intoxicated, had a head on collision with another motor vehicle. Passengers in both vehicles suffered serious injuries. In February 1997 following a plea of guilty, he was convicted of two offences of dangerous driving causing grievous bodily harm. He was sentenced to imprisonment for twelve months, but the sentence was suspended. He also pleaded guilty to a number of lesser offences arising out of the same incident.

The proceedings concerning Mr White

49 Division 9 of Pt 2 of the Act provides for deportation of non-citizens in certain circumstances. Section 200 empowers the Minister to order deportation of a non-citizen to whom Div 9 applies. Section 201 provides, so far as presently relevant, that a non-citizen, who has been a permanent resident of Australia for less than ten years when he committed offences for which he was sentenced to at least one year's imprisonment, is a person to whom s 200 applies. On 9 January 1998, a delegate of the Minister, acting pursuant to s 200, made a deportation order against Mr White.

50 That decision was subject to merits review by the Tribunal. On 21 May 1998, the Tribunal set aside the decision and remitted the matter to the respondent (described as the Department of Immigration and Multicultural Affairs) for review "with a direction that the applicant not be deported". It is unnecessary to examine the reasons for that decision, which included a view that, on balance, deportation would involve hardship to Mr White and his relatives.

51 On 13 August 1998, an officer in the department wrote to Mr White drawing his attention to the powers of the Minister under ss 501 and 502 of the Act. At that stage, Mr White held a Special Category Visa which had been granted to him on 31 January 1992. He was warned that consideration was being given to the cancellation of that visa and to the making of a declaration that he be an excluded person. He was invited to comment if he wished. He made written submissions in response.

52 On 14 October 1998, a departmental minute was sent to the Minister. It canvassed the matters relevant to an exercise of the Minister's powers under ss 501 and 502. It did not treat Mr White's criminal conviction as automatically establishing bad character. On the contrary, the Minister was informed that he would need to consider,

not only Mr White's convictions, but also matters tending to show rehabilitation or good character. Reference was made to his voluntary work for a religious organisation, his search for employment, his statement that he no longer consumed alcohol, and his claim that he was channelling his energies into lawful and healthy recreational pursuits. The Minister was informed that it was open to him to find that Mr White was not of good character. It was not said that he was bound to make such a finding, and the material provided to the Minister was inconsistent with such a suggestion. Issues relevant to the exercise of the Minister's discretion under ss 501 and 502 were canvassed. The Minister was asked to indicate whether he found that Mr White was not of good character, whether he exercised his discretion to cancel Mr White's visa, and whether he would issue a s 502 certificate. The Minister marked and signed the minute in such a way as to indicate that he decided each of those questions adversely to Mr White.

53 On 14 October 1998, the Minister signed a certificate recording his decision under s 501 and his declaration under s 502. On 22 October 1998 Mr White was informed of the decision and declaration, of his limited rights to apply for another visa, and of his right to seek a review of the decision by the Federal Court. He applied to the Federal Court. The grounds, and the amended grounds, upon which he sought review are not presently relevant. They were all considered and rejected by French J, who gave his decision on 21 May 1999 (40).

54 There was then an appeal to the Full Court of the Federal Court. The grounds of appeal were amended pursuant to a notice dated 14 July 1999. Neither the original nor the amended grounds contained any matter of present relevance. On 15 July 1999, the Full Court of the Federal Court delivered its judgment in *Jia v Minister for Immigration and Multicultural Affairs* (41).

55 The appeal to the Full Court was heard before Ryan, North and Weinberg JJ. They delivered reasons for judgment on 22 October 1999. In those reasons they considered and rejected all the original and amended grounds of appeal. Their reasons for doing so are not presently material. However, they pointed out that, in the course of argument, the appellant had sought to raise a claim of bias, based upon the decision in *Jia*. Without deciding the matter at that stage, they gave leave to the appellant to raise this new point. In order to give the parties an opportunity to file further evidence, they adjourned the further hearing. The further evidence filed was principally directed to providing information as to the facts and proceedings in *Jia* and formally proving what was in evidence in that case. There was also evidence explaining why the appellant had not raised the point earlier.

(40) *White v Minister for Immigration and Multicultural Affairs* [1999] FCA 690.
(41) (1999) 93 FCR 556.

In brief, it was said that there had not been an opportunity to consider the decision in *Jia* until shortly before the hearing of the appeal.

The decision of the Full Court of the Federal Court concerning Mr White

56 In their joint reasons for judgment, given following the further hearing proposed in the reasons of 22 October 1999, the members of the Full Court dealt with the contention of actual bias based upon the facts that had emerged in *Jia* and the decision in that case. There was a dispute as to whether the appellant should be given leave to amend his grounds of appeal and adduce further evidence. That issue was resolved in the appellant's favour. There is a challenge to that aspect of the decision, but it is convenient to leave it to one side for the moment.

57 Turning to the further evidence, and particularly to the evidence about the events the subject of the decision in *Jia*, the Full Court referred to the Minister's radio interview of 14 April 1997, in which he had said that he did not "believe you are of good character if you've committed significant criminal offences involving penal servitude", and to his letter of 30 April 1997 to the President of the Tribunal. The conclusions drawn by Spender J and R D Nicholson J in *Jia* on the basis of that evidence were noted. Reference was then made to the leave that had been given to the Minister to adduce further evidence. Pursuant to that leave, a solicitor had given evidence of a Statement of Agreed Facts which had been before the court in *Jia*, in which the opinions held by the Minister at various times were set out.

58 Their Honours considered the test to be applied to determine actual bias where, as here, it was said to have taken the form of prejudgment. In particular, they referred to the test that had been applied in *Jia*. They said that "it was plainly open to the majority in *Jia* to infer that [the Minister] was incapable of persuasion that the [Tribunal's] line of reasoning was acceptable when he came to decide ... whether Mr Jia was of good character". It was said to be open to the appellant to rely on the reasoning of the majority in *Jia* to draw an inference as to what the Minister's state of mind was on 10 June 1997, that being a fact relevant to a conclusion as to the Minister's state of mind on 14 October 1998. There was then discussion of the general rule that one Full Court should follow an earlier decision of another Full Court. Next, there was reference to *Jones v Dunkel* (42) and to the Minister's failure to give evidence as to his state of mind in October 1998. That failure was said to make it easier to draw an adverse inference against him, both in relation to his state of mind in June 1997 and as to his state of mind in October 1998. After concluding that the factual inference drawn by the majority in *Jia* was correct, their Honours said that no facts had emerged to support an inference that the Minister's

(42) (1959) 101 CLR 298.

view had changed between June 1997 and October 1998. He had not given evidence that he did not have the closed mind imputed to him by the majority in *Jia*. On that basis, a finding of actual bias was made, and the decisions of 14 October 1998 under ss 501 and 502 of the Act were set aside.

The statutory framework

59 Part 2 of the Act deals with the control of the arrival and presence in Australia of non-citizens. Section 29 provides that the Minister may grant a non-citizen permission, to be known as a visa, to travel to and enter Australia and/or to remain in Australia. There is a legislative scheme covering application for a grant of visa, and for the detention and deportation of non-citizens who are present without lawful permission. Parts 5, 6, 7 and 8 deal with review of decisions relating to immigration matters. There are procedures for internal review, and for external review. Some such procedures involve full merits review, and others involve review on limited grounds. Part 8 deals with review by the Federal Court. Section 475 specifies the decisions that are, and those that are not, judicially reviewable. It has been common ground that the decisions, under ss 501 and 502, made in the present cases, were judicially reviewable. The grounds upon which judicial review in the Federal Court is available are set out in s 476. Reference to these has already been made.

60 Part 9 of the Act contains provisions that are described as miscellaneous. They include ss 501 and 502, which, at the relevant time, were in the following terms:

> "501(1) The Minister may refuse to grant a visa to a person, or may cancel a visa that has been granted to a person, if:
> (a) subsection (2) applies to the person; or
> (b) the Minister is satisfied that, if the person were allowed to enter or to remain in Australia, the person would:
> (i) be likely to engage in criminal conduct in Australia; or
> (ii) vilify a segment of the Australian community; or
> (iii) incite discord in the Australian community or in a segment of that community; or
> (iv) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or violence threatening harm to, that community or segment, or in any other way.
> (2) This subsection applies to a person if the Minister:
> (a) having regard to:
> (i) the person's past criminal conduct; or
> (ii) the person's general conduct;
> is satisfied that the person is not of good character; or
> (b) is satisfied that the person is not of good character because of the person's association with another person, or with a

group or organisation, who or that the Minister has reasonable grounds to believe has been or is involved in criminal conduct.

(3) The power under this section to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person, is in addition to any other power under this Act, as in force from time to time, to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person.

502 (1) If:

(a) the Minister, acting personally, intends to make a decision:

(i) under section 200 because of circumstances specified in section 201; or

(ii) under section 501; or

(iii) to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2);

in relation to a person; and

(b) the Minister decides that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person;

the Minister may, as part of the decision, include a certificate declaring the person to be an excluded person.

(2) A decision under subsection (1) must be taken by the Minister personally.

(3) If the Minister makes a decision under subsection (1), the Minister must cause notice of the making of the decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the decision was made."

61 As the facts of the present cases show, the powers conferred upon the Minister by ss 501 and 502 form part of a statutory scheme which involves a complex pattern of administrative and judicial power, and differing forms of accountability. The Minister is a Member of Parliament, with political accountability to the electorate, and a member of the Executive Government, with responsibility to Parliament. As French J recognised in his decision at first instance in the case of Mr Jia, the Minister functions in the arena of public debate, political controversy, and democratic accountability. At the same time, the Minister's exercise of statutory powers is subject to the rule of law, and the form of accountability which that entails. In relation to an applicant for, or holder of, a visa the Minister, either personally or through a delegate, may be an initial decision-maker, a party to proceedings for administrative or judicial review, and the holder of a power of cancellation and exclusion under ss 501 and 502.

62 In *R v Anderson; Ex parte Ipec-Air Pty Ltd* (43), Kitto J said:

> "It is a general principle of law, applied many times in this Court and not questioned by anyone in the present case, that a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself ... The courts, while claiming no authority in themselves to dictate the decision that ought to be made in the exercise of such a discretion in a given case, are yet in duty bound to declare invalid a purported exercise of the discretion where the proper limits have not been observed."

63 In the same case, it was also said that there is "a significant difference between a discretion given to a minister and one given to a departmental head" (44). The context in which that difference was being considered concerned the right to act on the basis of governmental policy, the implication being that, when a power is reposed in a Minister, the statute, in the absence of an indication to the contrary, would be taken to contemplate that the Minister would be entitled, within the limits of any other constraints that may be found in the statute, to act in accordance with such policy. There are other consequences that flow from the circumstance that a power is vested in, and exercised by, a Minister. Relevantly to the present case, they include the consideration that the conduct of a Minister may need to be evaluated in the light of his or her political role, responsibility and accountability.

64 As has been noted, it was common ground, in both cases, in the Federal Court, and in this Court, that the Minister's decisions under ss 501 and 502 were judicially reviewable, that the decisions would be vitiated if actual bias were shown, and that the Federal Court had the jurisdiction to set the decisions aside on that ground if the ground were established.

65 There was also a substantial measure of agreement as to the meaning and effect of s 501. Counsel for the Minister accepted that, in the application of s 501(2)(a)(i), the Minister was bound to consider whether the person in question was of good character at the time of the decision, that "character" was a matter of enduring moral qualities, that is to say, disposition rather than general reputation (45), and that past conviction of serious crime did not necessarily mean, without examination of any other matters, that a person was of bad character at

(43) (1965) 113 CLR 177 at 189.
(44) *Anderson* (1965) 113 CLR 177 at 202, per Menzies J.
(45) *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422 at 431-432, per Lee J; *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187 at 194.

the time of decision-making. As Latham CJ put it, in *In re Davis* (46), "[a] man may be guilty of grave wrongdoing and may subsequently become a man of good character". This submission was consistent with the Procedures Advice Manual made available for the use of departmental officers, and with the approach taken by the authors of the departmental minutes provided to the Minister in relation to the challenged decisions.

66 Although the decision of the majority of the Full Court of the Federal Court in *Jia* was based on the ground of actual bias, it was in substance a finding that the Minister was invincibly committed to an erroneous view of the law (ie that past conviction of serious crime necessarily required an adverse conclusion under s 501(2)(a)(i)). The alleged bias took the form of prejudgment which, in turn, was said to have arisen from a misunderstanding of the meaning of s 501, and a refusal to entertain the possibility of a different point of view. Since one of the grounds of review under s 476 of the Act which was both available and, at least in the case of *Jia* was relied upon, was error of law, it is puzzling that the matter was dealt with under the rubric of bias. French J, at first instance, had rejected contentions both of actual bias and error of law. His reasoning as to the former is set out above. As to the latter, he referred again to the comment made by the Minister in his radio interview of 14 April 1997 and said (47):

> "If that be a misstatement of the law the making of an erroneous statement in the course of a radio interview is not, in my opinion to be given any particular weight in inferring that the Minister's acted upon an erroneous view in making the decision to cancel a visa particularly having regard to the direction and assistance he received from the Departmental minute."

67 In the Full Court, Spender J did not find it necessary to deal with the ground of error of law. However, his conclusion of actual bias, set out in a passage quoted above, related the bias to erroneous prejudgment of a matter of law. R D Nicholson J noted the argument that the Minister was operating under a mistaken view of the law, in that he considered a person who was convicted of a serious crime could not as a matter of law be a person of good character. However, he interpreted the ground of appeal as being related to certain aspects of the Procedures Advice Manual which had been held in *Minister for Immigration and Ethnic Affairs v Baker* (48) to be inconsistent with the legislation. There was, his Honour said, no evidence that the Minister acted in accordance with the Manual. Therefore, the ground of appeal based on error of law failed.

68 That accounts for the somewhat surprising consequence that, where

(46) (1947) 75 CLR 409 at 416.
(47) *Jia* (1998) 84 FCR 87 at 108.
(48) (1997) 73 FCR 187 at 192-193.

the substantial criticism of the Minister was that his statement in the radio interview revealed an approach to the interpretation of s 501 that was contrary to its meaning, his decision was set aside, not on the ground of error of law, but on the ground of bias in the form of unalterable prejudgment.

69 It was not argued, either in the Federal Court or in this Court, that the Minister's decision in either case constituted an abuse of power in the form of a deliberate refusal to follow the provisions of the statute. The arguments on bias were expressed in terms of prejudgment, and were bound up with an alleged misunderstanding of the law. It was not contended, or found, that the Minister had determined that, notwithstanding the provisions of s 501, he would exercise his statutory powers, regardless of his views of the character of Mr Jia or Mr White, simply on the basis that they had been convicted of serious offences. Some of the arguments, and some of the findings, carried a suggestion of that; but if any such submission were to be advanced, or any such conclusion reached, the allegation would have had to be distinctly made and clearly proved.

70 A different argument alleging improper exercise of power, which is a ground of review under s 476(1)(d) of the Act, was advanced, and is the subject of a Notice of Contention. It was argued that the Minister exercised his powers under s 501 in order to reverse the decision in *Jia* that had been made by the Tribunal, and that that was either beyond power, or was an improper exercise of power. That argument will be considered when dealing with the Notice of Contention.

The Minister's appeal in the case of Mr Jia

71 In resisting the Minister's appeal, counsel for Mr Jia raised, by way of notice of contention, an argument that both French J and the Full Court had adopted a test of actual bias which was unduly favourable to the Minister. All that was necessary to constitute bias, it was said, was an inclination or predisposition of mind. Under pressure of argument, this was qualified by the addition of adjectives such as ''wrongful'' or ''improper''. The precise content of those adjectives, in the context, is not clear. Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. The fact that, in the case of judges, it may be easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias (49).

72 The test which was applied both by French J and by the Full Court

(49) As to members of the Commonwealth Conciliation and Arbitration Commission, see *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546.

was orthodox. It accords with the decisions of this Court in *Laws v Australian Broadcasting Tribunal* (50) and *Johnson v Johnson* (51). The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion. This preliminary argument should be rejected.

73 There is another preliminary matter that should be mentioned. It concerns the nature of the decision to be made under s 501. The Minister is given a discretionary power to cancel a visa if sub-s (2) applies to a person who holds a visa. Sub-section (2) applies if the Minister, having regard to either of two matters, is satisfied that the person is not of good character. The two matters are either the person's past criminal conduct or the person's general conduct. It is the Minister's satisfaction that makes the sub-section applicable. Such provisions are construed as requiring the decision-maker reasonably to be so satisfied. The question then on judicial review is whether the decision-maker could have attained that satisfaction reasonably, in the sense explained in numerous authorities in this Court (52). In *Foley v Padley* (53), Brennan J emphasised that the question on judicial review is not whether the court would have formed the opinion in question, and that an allegation of unreasonableness in the formation of the opinion by the decision-maker may prove to be no more than an impermissible attack on the merits of the decision.

74 The satisfaction specified in s 501(2) relates to whether the person is of good character at the time of the decision. Such a satisfaction may be formed having regard to the person's past criminal conduct. It is common ground that character means disposition rather than reputation, and that considerations such as the seriousness of the past criminal conduct, the time that has elapsed since it was committed, and the possibility of rehabilitation, may be relevant and, in some cases, important. Even so, where a Minister is given the function of deciding whether, having regard to past criminal conduct, a person is not of good character, in the ordinary case the fact of a conviction, or a

(50) (1990) 170 CLR 70 at 91, per Deane J; at 100, per Gaudron and McHugh JJ.

(51) (2000) 201 CLR 488.

(52) *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 57; *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535 at 567-568, 576-577; *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Foley v Padley* (1984) 154 CLR 349 at 353, 370, 375; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276; *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303, 308; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 652-654 [133]-[137].

(53) (1984) 154 CLR 349 at 370.

number of convictions, the nature of the offence or offences, and the severity of the punishment imposed, will be the most reliable guide to a proper decision. A conclusion that a person who has recently been convicted of serious crimes of violence, and sentenced to a substantial term of imprisonment, is not of good character, is, on the face of it, not unreasonable. In the case of Mr Jia, the opposing view was, to a substantial extent, based upon a re-consideration and re-evaluation of the facts and circumstances of the crimes for which he was convicted and sentenced. For the Minister to conclude, on the basis of the convictions and sentences, that he was satisfied that Mr Jia was not of good character, and to reject the opposing view, is an outcome that is consistent with the legislation.

75 The appeal from French J to the Full Court was an appeal by way of rehearing; the relevant provision of the *Federal Court of Australia Act* 1976 (Cth) (s 27) is not materially different from the provision of the *Family Law Act* 1975 (Cth) (s 93A(2)) considered by this Court in *Allesch v Maunz* (54). It was not disputed that the principles as to reviewing a primary judge's findings of fact were as stated in *Warren v Coombes* (55).

76 It was not suggested by the majority in the Full Court that the reasoning of French J at first instance was affected by specific error; rather, what was said was that "the primary judge failed to draw inferences which should have been drawn" (56).

77 In comparing the reasoning of French J at first instance, and Cooper J in the Full Court, with that of the majority in the Full Court, four principal differences emerge.

78 First, both French J and Cooper J evaluated the statements and conduct of the Minister in the light of his political functions and responsibilities. This is a matter of importance. In considering whether conduct of a decision-maker indicates prejudgment, or in some other respect constitutes a departure from the requirements of natural justice, the nature of the decision-making process, and the character of the person upon whom Parliament has conferred the decision-making capacity, may be of critical importance. French J was right to consider the Minister's conduct in relation to the radio interview, and the letter to the President of the Tribunal, in the light of the fact that he was "an elected official, accountable to the public and the Parliament and entitled to be forthright and open about the administration of his portfolio which ... is a matter of continuing public interest and debate" (57). This is a matter that will be considered further in relation to the argument on apprehended bias.

79 Secondly, the majority in the Full Court attached adverse

(54) (2000) 203 CLR 172.
(55) (1979) 142 CLR 531.
(56) *Jia* (1999) 93 FCR 556 at 603.
(57) *Jia* (1998) 84 FCR 87 at 106.

significance to the Minister's letter to the President of the Tribunal. However, they did so without knowing the terms of the letter from the President to the Minister, to which the Minister's letter was a reply. Furthermore, they either overlooked, or attached no weight to, part of the letter which was inconsistent with a view of the operation of s 501 to which they inferred the Minister was absolutely committed.

80 Thirdly, the majority in the Full Court, applying *Jones v Dunkel*, attached substantial weight to the failure of the Minister to give evidence. In this respect, it is to be noted that, in the course of the hearing, there was tendered an agreed statement of facts, which included a number of paragraphs concerning the Minister's opinion on 14 April 1997. These are set out above. The opinions expressed were reasonably open. There was also in evidence the departmental minute which the Minister had before him when he made the impugned decision. The process of reasoning in that minute was not said to be inconsistent with the statutory provisions, and all the relevant considerations were put before the Minister. When French J had before him that information, there was no compelling reason why he should have inferred from the Minister's failure to give evidence that he held opinions about s 501 different from the author of the minute, and additional to those set out in the agreed statement of facts.

81 Fourthly, the majority in the Full Court treated the Minister's statement in the radio interview that he "[did not] believe you are of good character if you've committed significant criminal offences involving penal servitude" as reflecting a concluded and unalterable view of the law, and as to its application in the case of Mr Jia. This is an unwarranted interpretation of what was said, having regard to the context. French J noted that, by the time the Minister came to make his decision concerning Mr Jia, the Minister's attention had been drawn to judicial decisions on s 501, and that the minute presented to him for his decision proceeded upon an orthodox approach to the meaning of s 501. He might also have observed that the letter written by the Minister to the President of the Tribunal reflected a view of s 501 different from a view that conviction of a significant offence automatically meant that a person would be treated as not of good character.

82 The reasoning of French J, and Cooper J in the Full Court, is to be preferred to that of the majority in the Full Court. The reasoning of the majority, far from demonstrating error on the part of French J warranting appellate intervention, reflects error of its own.

83 It is necessary to turn again to the notice of contention, which seeks to support the decision of the majority in the Full Court upon alternative grounds. The first of those grounds has been considered and rejected above. Each of the remaining grounds also attributes error of law both to French J and the Full Court.

84 It was argued that, in exercising the powers given by s 501, and s 502, the Minister was in effect, and impermissibly, nullifying the decision of the Tribunal. A submission that ss 501 and 502 should not

be construed so as to confer upon the Minister a power to set at nought a decision of the Tribunal where the Minister took a different view of the material considered by the Tribunal was supported by the decision of Sackville J in *Gunner v Minister for Immigration and Multicultural Affairs* (58). French J, in the present case, considered, and disagreed with, the decision of Sackville J. Subsequently, and before the appeal to the Full Court in the present case, the case of *Gunner* went on appeal to the Full Court of the Federal Court, which reversed the decision of Sackville J (59). That decision was followed by the Full Court in the present case.

85 The reasoning of the Full Court of the Federal Court on the appeal in *Gunner* was correct, and applies to the present case. The powers conferred upon the Minister by ss 501 and 502 are not to be qualified by an unexpressed limitation to the effect that they may not be exercised in a case where the Tribunal has set aside a decision to cancel a visa, or set aside a deportation order made against a person, unless there has been some material change in circumstances. Nor does a decision by the Minister to invoke the powers given by ss 501 and 502 where he is dissatisfied with a previous decision by the Tribunal involve an abuse of power. The Full Court, in *Gunner* (60), said:

> "It was not suggested that, having regard to the serious crimes committed by the respondent, there was not material on which the Minister could be satisfied that he was not of good character. Nor could it be suggested that those crimes were not sufficiently serious to be capable of founding a view that it was in the national interest that he be deported. Counsel did not suggest that the Minister acted out of a fit of pique or was motivated by a desire to overturn the [Tribunal's] decision just for the sake of doing so. It is true that in the circumstances of this case the question of orders under ss 501 and 502 would not have arisen if the [Tribunal] had reached a different decision. However, the Minister accepted the decision which the [Tribunal] did make. He did not disobey it and did not proceed with an appeal against it. Rather, he exercised a separate statutory power which was available to him and the exercise of which was directed towards the purpose for which the power was conferred, namely the removal from Australia of non-citizens who have committed serious crimes or are otherwise not of good character."

86 With immaterial differences in relation to the matter of appeal, those observations apply equally to this case. The fact that the Minister disagreed with the decision of the Tribunal, and ultimately decided to

(58) (1997) 50 ALD 507.
(59) *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400.
(60) (1998) 84 FCR 400 at 408-409.

exercise his own powers in such a way as to produce a practical result different from that which followed from the Tribunal's decision, does not mean there was an abuse of power. The fact that the Minister's powers extend to enabling that to be done is simply the consequence of the legislative scheme. There is nothing in the scheme which obliges the Minister to defer to the Tribunal, or to refrain from giving effect to his own opinions and judgment, when considering whether to act under ss 501 and 502. In that respect it is to be noted that s 502(3) involves its own form of accountability, by requiring the Minister, when a decision is made under s 502(1), to notify each House of the Parliament within fifteen sitting days.

87 A further argument, which was also similar to an argument that was considered and rejected by the Full Court of the Federal Court in *Gunner* (61), concerned s 502. Section 500 of the Act provides for merits review by the Tribunal of decisions under s 501, other than decisions to which a certificate under s 502 applies. Thus, it was argued, the focus of attention in considering the seriousness of the circumstances and the national interest, should be the exclusion of the decision from merits review by the Tribunal. As the Full Court observed in *Gunner* (62), the circumstances in question are the respondent's past criminal conduct. It is the seriousness of that conduct which has to be assessed in the national interest, which dictates that people who engage in sufficiently serious crime should not have the benefit of an Australian visa. "The effect of s 502, when invoked, is to ensure that the Minister is to have the final and only say on the question of whether the person in question should or should not be entitled to enter or be in Australia." (63) In the present case French J was right to conclude that it was open to the Minister to reach a view adverse to the respondent.

88 The decision of French J was correct. The Minister's appeal against the decision of the Full Court in the case of Mr Jia should be allowed.

The appeal in the case of Mr White

89 To a substantial extent, the outcome of the Minister's appeal in the case of Mr White is dictated by the success of his appeal in the case of Mr Jia.

90 One of the grounds of appeal is that the Full Court of the Federal Court erred in allowing Mr White to raise, in the manner and at the time he did, a claim of actual bias based upon the decision of the Full Court in the case of Mr Jia. It is unnecessary to deal with that ground.

91 In so far as the reasoning of the Full Court in finding actual bias in the case of the decisions under ss 501 and 502 relating to Mr White

(61) (1998) 84 FCR 400 at 409.
(62) (1998) 84 FCR 400 at 409.
(63) *Gunner* (1998) 84 FCR 400 at 409.

followed that of the majority in the case of Mr Jia, the conclusion, reached above, that the majority in the case of Mr Jia was in error has a consequential effect in the present case. Furthermore, the criticisms that have been made of the reasoning in the case of Mr Jia apply with even greater force in the case of Mr White.

92 The impugned decisions were made in October 1998, more than a year after the events concerning Mr Jia. The minute that was before the Minister at the time of his decisions was expressed in terms inconsistent with the approach to s 501 that had been attributed to the Minister largely on the basis of what he had said in a radio interview in April 1997. The use of *Jones v Dunkel* was surprising, especially having regard to the manner in which the issue of actual bias arose and was developed. The point (in its presently relevant form) was not taken at first instance. When it was allowed to be raised, belatedly, on appeal, the agreed statement of facts used in the case of Mr Jia was again treated, on both sides, as correct. It included statements as to opinions held by the Minister at a certain time. The departmental minute put to the Minister at the time of his decision was in evidence. What was it expected that the Minister, in the circumstances, might seek to prove? It might have been thought understandable that he would be content that his case be argued on the basis of the material already before the court. If the Minister's decision not to give evidence personally was based on a view that such material did not make out a case of actual bias, then that view was correct. At the time of the decision of the Full Court in the case of Mr White, the Minister had a pending application for special leave to appeal to this Court against the decision of the Full Court in the case of Mr Jia. He was arguing that that decision was wrong; an argument that has prevailed. It was consistent with the approach he was taking that he should not regard it as necessary that he should add to the evidence on the basis of which he had succeeded at first instance in the case of Mr Jia. A possible explanation of the Minister's failure to give evidence in the course of Mr White's appeal, which does not appear to have been considered by the Full Court, is that he (or his advisers) took the view that, as French J had held, he was entitled to succeed on the basis of the existing material. One reason such a view might have been taken is that it was right.

93 There is a notice of contention in this appeal also. It raised the same issues as have already been considered in relation to the other appeal.

94 The Minister's appeal in this case also should be allowed.

The application under s 75(v) of the Constitution

95 Against the possibility that the findings of actual bias in these two cases might be set aside, in each case a claim has been made in this Court to the effect that there was a denial of procedural fairness in that the decisions of the Minister were made in circumstances of apprehended bias. It was said that a fair-minded observer might

reasonably apprehend that the Minister might not bring an impartial and unprejudiced mind to the task of deciding the matters that required decision (64).

96 The argument on behalf of each applicant was put as follows:

> "The Full Court of the Federal Court has found that the decision of the [Minister] was affected by actual bias, applying a significantly more stringent test than that applicable to apprehended bias. The facts which gave rise to that conclusion [clearly] satisfy the less stringent requirement of apprehended bias. No fair minded lay observer cognisant of those facts could help but reasonably apprehend that the [Minister] might not bring an impartial and unprejudiced mind to the resolution of the question he was required to decide."

97 The argument cannot be put upon the basis that if five Federal Court judges found actual bias, a reasonable observer, considering the same facts, might surely at least have a reasonable apprehension of bias. After all, the argument only arises for consideration upon the hypothesis that the five judges were wrong. One cannot logically treat their erroneous decision as supporting a conclusion of apprehended bias. If their decision had been correct, the question would not have arisen. Their decision having been found to be in error, and set aside, it cannot be used in aid of an alternative argument. Nor can a process of reasoning which has been found to be unreliable be attributed to a reasonable observer.

98 The new case of apprehended bias requires closer attention to the content of the requirements of natural justice, and the concept of bias.

99 In *Ebner v Official Trustee in Bankruptcy* (65) the majority judgment, referring to the law as to procedural fairness, and apprehended bias, warned:

> "The application of the principle in connection with decision makers outside the judicial system must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making."

100 We agree with the observations on this subject made by Hayne J in his reasons for judgment in the present case.

101 Reference has earlier been made to the significance which French J correctly attached to the position and role of the Minister, and to the Full Court's failure to give proper weight to those considerations in connection with the claim of actual bias. In various respects, decisions by the Minister stand in a different position to those of delegates acting under s 496. For example, decisions by a delegate under s 501

(64) *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11].
(65) (2000) 205 CLR 337 at 343-344 [4].

attract merits review by the Tribunal (s 500(1)(b)) while those of the Minister under s 501 do not.

102 Although it would require some qualification in the light of later developments in the law, Lord Thankerton's speech in *Franklin v Minister of Town and Country Planning* (66) stands as a useful reminder that lawyers usually equate "bias" with a departure from the standard of even-handed justice which the law requires from those who occupy judicial, or quasi-judicial, office. The Minister is in a different position. The statutory powers in question have been reposed in a political official, a member of the Executive Government, who not only has general accountability to the electorate and to Parliament, but who, in s 502, is made subject to a specific form of parliamentary accountability. The power given by s 502 requires the Minister to consider the national interest. As Brennan J observed in *South Australia v O'Shea* (67): "The public interest in this context is a matter of political responsibility." The powers given by ss 501 and 502, as has already been held, enabled the Minister in effect to reverse the practical consequences of decisions of the Tribunal in the cases of the persons involved, even though no new facts or circumstances had arisen; and even though the Minister had been involved in the proceedings before the Tribunal. As the circumstances of the radio interview demonstrate, the Minister himself can be drawn into public debate about a matter in respect of which he may consider exercising his powers. He might equally well have been asked questions about the cases in Parliament. The position of the Minister is substantially different from that of a judge, or quasi-judicial officer, adjudicating in adversarial litigation. It would be wrong to apply to his conduct the standards of detachment which apply to judicial officers or jurors. There is no reason to conclude that the legislature intended to impose such standards upon the Minister, and every reason to conclude otherwise.

103 In *CREEDNZ Inc v Governor-General* (68), Cooke J, in the context of a claim that in advising on an Order in Council relating to a development proposal Ministers had been in breach of the requirements of natural justice, said:

> "The references in the amended statement of claim to a real probability or suspicion of predetermination or bias are beside the point in relation to a decision of this nature at this governmental level. Projects of the kind for which the *National Development Act* 1979 (NZ) is intended, whether Government works or private works, are likely to be many months in evolution. They must attract considerable public interest. It would be naive to suppose that

(66) [1948] AC 87 at 104.
(67) (1987) 163 CLR 378 at 411.
(68) [1981] 1 NZLR 172 at 179.

Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on the desirability of such projects until the stage of advising on an Order in Council."

104 There was a measure of artificiality about categorising the complaint against the Minister as bias. There is an even greater measure of artificiality about treating the rules of natural justice, and the legislation, as requiring the Minister, in exercising his powers under ss 501 and 502, to avoid doing or saying anything that would create an appearance of a kind which, in the case of a judge, could lead to an apprehension the subject of the apprehended bias rule.

105 The Minister was obliged to give genuine consideration to the issues raised by ss 501 and 502, and to bring to bear on those issues a mind that was open to persuasion. He was not additionally required to avoid conducting himself in such a way as would expose a judge to a charge of apprehended bias.

106 The applications for relief under s 75(v) of the Constitution should fail.

Conclusion

107 Each appeal by the Minister should be allowed. The decisions of the Full Court of the Federal Court should be set aside. In the case of Mr Jia, in place of the orders made by the Full Court, it should be ordered that the appeals to that court be dismissed with costs. The same order should be made in the case of Mr White. In the case of Mr Jia, the respondent should pay the appellant's costs of the appeal to this Court. In the case of Mr White, special leave to appeal was granted on the condition that the appellant pay the respondent's costs of the appeal and, accordingly, an order to that effect should be made.

108 Each application for relief under s 75(v) of the Constitution should be dismissed with costs.

109 KIRBY J. Two appeals (69) and two applications for constitutional writs and related relief have been heard by this Court. The important question involved in each proceeding is the extent to which decisions by the Minister for Immigration and Multicultural Affairs (the Minister), in effect to require the removal from Australia of two foreign nationals, were affected by bias, actual or imputed.

110 In the Full Court of the Federal Court of Australia (the Full Court) each of the foreign nationals, Jia LeGeng (Mr Jia) and Te Whetu Whakatau White (Mr White), succeeded in establishing that the Minister's decisions concerning them were induced or affected by "actual bias" (70). This was an unusual and serious finding against

(69) From decisions of the Full Court of the Federal Court of Australia: *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556; *White v Minister for Immigration and Multicultural Affairs* [1999] FCA 1433.

(70) *Migration Act* 1958 (Cth), s 476(1)(f).

any officer of the Commonwealth, particularly a Minister of the Crown holding a constitutional office (71).

The resurgence of complaints of actual bias

111 Until recently it was extremely rare for parties before Australian courts to assume the task of establishing "actual bias" on the part of a decision-maker. Sometimes, in the heat of disappointment or distress caused by an adverse decision, actual bias was alleged. Usually such allegations were later withdrawn (72). This was because, as the law of natural justice concerning the right to an impartial decision-maker has developed in Australia (73), it was ordinarily sufficient for the complainant to establish "imputed", "apparent", "apprehended", "suspected", "notional" or "deemed" bias (imputed bias). Although the two kinds of bias obviously overlap, imputed bias does not require the complainant to establish anything about the subjective motives, attitudes, predilections or purposes of the decision-maker. It is enough to show that "in all the circumstances the parties or the public *might* entertain a reasonable apprehension that [the decision-maker] *might* not bring an impartial and unprejudiced mind to the resolution of the question involved in it" (74). A party would be foolish needlessly to assume a heavier obligation when proof of bias from the perceptions of reasonable observers would suffice to obtain relief.

112 However, amendments to the *Migration Act* 1958 (Cth) (the Act) have limited the grounds upon which the Federal Court can review decisions alleged to have been made in breach of the rules of natural justice (including those of the kind made by the Minister in these proceedings (75)). Relief has been confined, relevantly, to cases of "actual bias". This has caused something of a revival of the consideration of actual bias in the Federal Court (76), which other courts, not similarly confined in their jurisdiction (77), have been relieved from exploring. This practical consideration must be kept in

(71) Under the Constitution, s 64.

(72) As in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 367.

(73) The development of the law is explained in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 352-358 [43]-[58], 379-381 [135]-[139]; see also de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed, (1995), pp 522-523 [12-004].

(74) *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-294 (emphasis added); see also *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272 at 275; *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 368; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [7]; reasons of Hayne J at 397 [184].

(75) See the Act, s 476(2).

(76) A point noticed by Wilcox J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 122.

(77) The constitutionality of the imposition of such limits on the jurisdiction of the Federal Court was upheld by this Court in *Abebe v The Commonwealth* (1999) 197 CLR 510.

mind to understand the decisions of the Full Court of which the Minister complains in these appeals.

113 In proceedings brought in the original jurisdiction of this Court for the issue of constitutional writs against the Minister, this Court is not confined by the Act as the Federal Court is. The Act could not, and does not seek to, expel this Court's constitutional jurisdiction (78). Indeed, it expressly recognises that such jurisdiction is preserved (79). In terms, the applicable limitations imposed by the Act are addressed only to the Federal Court and then in respect of the "grounds" that may (or may not) support an application for review in that Court.

114 Accordingly, in their applications in the original jurisdiction of this Court, there was no need for Mr Jia or Mr White to assume the burden of establishing that the decisions of the Minister affecting them were induced or affected by *actual* bias. In the appeals, each of those parties defended the findings of actual bias made by the Full Court of the Federal Court. But just in case they lost those appeals, each of them mounted an alternative, substantive, claim for relief from this Court based on allegations of *imputed* bias. In the circumstances of their cases, such claims presented much more significant problems for the Minister. This was because, by the authority of this Court, the test to be applied in deciding an allegation of imputed bias (80) is a stringent one. It is one designed to uphold very high standards of manifest impartiality on the part of those who exercise public power.

115 The standards concerning imputed bias are rigorous in the case of those who exercise judicial power (81). They are likewise rigorous for jurors (82), arbitrators (83), court appointed referees (84) and others connected with the exercise of judicial power. But they are also rigorous in the case of statutory tribunals and other such bodies (85). The question presented by the applications for constitutional writs by Mr Jia and Mr White is whether those standards are relevantly less rigorous where a Minister is designated by legislation to be the repository of a discretionary power, where the decisions of the Minister can have a significant effect (extending ultimately to "life

(78) *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 632 [64].

(79) See the Act, s 486.

(80) Especially *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-294; *Webb v The Queen* (1994) 181 CLR 41 at 51; *Johnson v Johnson* (2000) 201 CLR 488 at 498-500 [29]-[35].

(81) *Livesey v NSW Bar Association* (1983) 151 CLR 288.

(82) *Webb v The Queen* (1994) 181 CLR 41.

(83) *R v Gough* [1993] AC 646.

(84) *Najjar v Haines* (1991) 25 NSWLR 224; Allars, "Procedural Fairness: Disqualification Required by the Bias Rule", *The Judicial Review*, vol 4 (1999) 269, at p 275.

(85) *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142.

itself'' (86) in some cases) and where that power is deployed adversely to a person who is a foreign national seeking to remain in Australia.

The facts, proceedings and legislation

116 The detailed facts of the cases concerning Mr Jia (87) and Mr White (88) are set out in other reasons. Those reasons disclose the serious criminal offences of which Mr Jia and Mr White were respectively convicted (89). In the case of Mr Jia, his conviction and sentence were for a course of conduct which included unlawful sexual penetration of his former domestic partner. Upon his conviction, he was sentenced to imprisonment for six years and three months. In the case of Mr White, he had a long record of minor criminal offences in New Zealand and Australia before the serious wrong-doing that resulted, whilst he was intoxicated, in his causing the death of one innocent person and serious injury to others. In respect of those acts he was convicted of manslaughter and sentenced to four years imprisonment. He received further sentences, each of two years imprisonment, for three convictions of committing an aggravated dangerous act. All sentences were to be served concurrently (90). In respect of a later offence of driving whilst intoxicated he was sentenced to another term of imprisonment of twelve months but the sentence was suspended.

117 Both Mr Jia and Mr White claimed that the conduct which gave rise to their respective convictions and sentences was out of character; that they had reformed; and that each had substantial ties with the Australian community. Both of them adduced evidence from Australian citizens to show that, despite the significant convictions, they were, at the time the Minister made his decision (and still are), persons of ''good character'', in the sense of basic qualities of nature and worth (91).

118 Other members of the Court have also set out the relevant statutory background against which Mr Jia and Mr White were afforded, as foreign nationals, visas of differing kinds, to be and remain within Australia prior to the decision of the Minister that they be removed. The provisions of the Act, pursuant to which the Minister made his

(86) *Abebe v The Commonwealth* (1999) 197 CLR 510 at 577-578 [191], per Gummow and Hayne JJ.

(87) Reasons of Gleeson CJ and Gummow J at 513-519 [3]-[30]; reasons of Callinan J at 567-577 [194]-[223].

(88) Reasons of Gleeson CJ and Gummow J at 523-526 [45]-[55]; reasons of Callinan J at 592-595 [286]-[297].

(89) Reasons of Gleeson CJ and Gummow J at 514 [4], 523-524 [46]-[48]; reasons of Callinan J at 567-568 [201], 592-594 [286]-[291].

(90) The court also ordered that Mr White be released after twelve months upon entering into a recognisance.

(91) See *Melbourne v The Queen* (1999) 198 CLR 1 at 15-16 [33]-[34], 33-35 [90], 40-41 [105], 67-68 [197].

respective decisions in their cases, are also set out (92). I will not repeat them.

119 Both Mr Jia (93) and Mr White (94) each failed before the primary judge in the Federal Court (French J) but were successful in the Full Court (95). Substantially, the decision of the Full Court in Mr White's appeal was held to follow the conclusion of the earlier Full Court majority in Mr Jia's appeal (96). Accordingly, so far as the appeals to this Court are concerned, if the Minister could succeed in disturbing the outcome in the appeal concerning Mr Jia, subject to any additional questions which Mr White argued to defend the Full Court's judgment, Mr White would also lose. Subject to the applications for constitutional relief, the result would be to confirm the Minister's order for his removal from Australia.

120 Accordingly, as Gleeson CJ and Gummow J have done (97), I will concentrate on the arguments in the appeal of Mr Jia. For like reasons, I will pass by the grounds of appeal to this Court which challenged the procedure by which the Full Court permitted Mr White to enlarge his grounds of appeal to invoke the ground of actual bias suggested by the supervening decision concerning Mr Jia (98). Like the other members of the Court, I will proceed directly to the substantive issues that will decide these two cases.

The claims of actual bias fail

121 *The appeal in Mr Jia's case*: The central issue in the Minister's appeal concerning Mr Jia is whether the Full Court erred in inferring that the Minister was actually biased against Mr Jia when he made the decision complained of. The contention that a Minister, discharging powers conferred upon him by statute, made a decision for reasons of personal prejudice, bias and unalterable prejudgment against an individual, clearly involves a most serious accusation. If upheld, a

(92) Reasons of Gleeson CJ and Gummow J at 527-528 [60]; reasons of Callinan J at 577-578 [225].

(93) Reasons of Gleeson CJ and Gummow J at 519-521 [34]-[37]; reasons of Callinan J at 578-579 [226]-[230].

(94) Reasons of Gleeson CJ and Gummow J at 525 [53]; reasons of Callinan J at 595 [298].

(95) Reasons of Gleeson CJ and Gummow J at 521-523 [38]-[43]; reasons of Callinan J at 579-581 [231]-[235], 595-598 [299]-[308].

(96) Explained in the reasons of Callinan J at 595-597 [300]-[307].

(97) Reasons of Gleeson CJ and Gummow J at 536 [89], 536-537 [91].

(98) Reasons of Gleeson CJ and Gummow J at 536 [90]. It is also appropriate to pass by the approach to the appeals adopted in each case in the Full Court. Both sides in these proceedings agreed that past authority of the Federal Court concerning the nature of an appeal, for which the *Federal Court of Australia Act* 1976 (Cth), s 24 provides, was erroneous: see *Duralla Pty Ltd v Plant* (1984) 2 FCR 342 at 349-353.

question might arise as to whether the Minister should remain in office (99).

122 Ministerial decisions are not the subject of the same requirements of actual and manifest independence and impartiality as are required by law of the decisions of courts and tribunals. Nevertheless, the misuse of a high public office by a Minister for ends alien to the legislation conferring powers on the holder of that office would, self-evidently, involve a serious wrong-doing. If proved, it would render the Minister answerable to colleagues in the Ministry and the Minister's political party, to the Parliament and, through public discussion of the matter, to the electorate and the public generally.

123 However, political sanctions of the last-mentioned kind, peculiar to an elected official constitutionally required to sit in Parliament (100), by no means exhaust the remedies available for established cases of actual bias. If such bias were based on venality (eg, acceptance of a bribe) or similar abuse of office, criminal offences might also have been committed. Likewise, if the powers of the office were exercised for purposes alien to those for which the powers were conferred, relief under public law could ordinarily be invoked. In such a case, in legal theory, the purported exercise of power for extraneous purposes might be classified as no exercise at all and the decision as void.

124 The suggestion that appeared to run through a number of strands of the Minister's argument before this Court, that the political character of his office (and his accountability to the Parliament) exempted him from compliance with the law against bias, or from answering to the courts on that ground, must be firmly rejected. It is a proposition that cannot be reconciled with the hypothesis upon which s 75(v) of the Constitution is based. That cardinal provision of the Constitution renders all officers of the Commonwealth (of whom the Minister is one) answerable before this Court (and not just in the Parliament) for the lawfulness of their conduct. The suggestion of immunity or exemption is likewise incompatible with decades of administrative law. Even in countries which do not enjoy formal constitutional entitlements equivalent to that afforded by s 75(v) of the Constitution, Ministers (and other officers of the Executive Government) have been held accountable to the courts for administrative decisions purportedly made pursuant to powers conferred upon them by, or under, legislation (101).

125 This said, a decision which the law would unhesitatingly invalidate

(99) Remarks of McHugh J in the special leave hearing: *Minister for Immigration and Multicultural Affairs v White* (unreported; High Court of Australia; 5 September 2000) transcript of proceedings, 8, line 300.

(100) Constitution, s 64.

(101) Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986), p 22; Finn, "Myths of Australian Public Administration" in Power (ed) *Public Administration in Australia: a watershed* (1990), p 41; Pearce, "Executive Versus Judiciary", *Public Law Review*, vol 2 (1991) 179.

in the case of a court or an independent tribunal, where extremely high standards of actual and apparent impartiality are required, will not necessarily find an exact reflection in the decision-making of a Minister. He or she typically operates in a less formal way, in a milieu of politics and subject to additional and different forms of public accountability. Therefore, in searching for the "state of mind" of a Minister, against whom an accusation of *actual* bias is made, a court will ordinarily be left, as in these proceedings, to draw inferences. Unless a Minister has imprudently stated, at or about the time of the decision in question, that, in making the decision, he or she has acted out of prejudice towards the person affected, the most that a court can ordinarily do is to consider whether an inference of actual bias should be drawn from the objective facts that were proved.

126 With respect, I do not find it so "puzzling" (102) or "surprising" (103) to read the reasons of the judges in the majority in the Full Court in Mr Jia's case, responding to the allegation of actual bias made against the Minister. As I will endeavour to demonstrate in dealing with the case of imputed bias, Mr Jia had a number of powerful arguments in that regard upon which he could reply. These included the terms of the Minister's remarks in a radio interview (104); the comments specific to his case in a letter to the President of the Administrative Appeals Tribunal (AAT) (105); the agreed facts tendered in the appeal concerning the Minister's opinions (106); and the close proximity between the interview and letter, and the decision made soon thereafter. Also possibly relevant was the accurate prediction, at the time the interview took place, of what was going to happen and quickly did.

127 Nevertheless, because of the seriousness of the alleged wrong-doing, that the Minister had, in effect, given way to his animosity against Mr Jia and people like him or acted upon a prejudgment of his case, it is clear law that such allegations will only be upheld by a court where the accusations are distinctly made and clearly proved (107). In short, the accusation of such bias must be "firmly established" (108). At first instance, French J declined to draw that conclusion in Mr Jia's case. He recognised the stringent standard of proof required and held that, to make out such a case, Mr Jia had to prove that, at the time of the

(102) Reasons of Gleeson CJ and Gummow J at 530 [66].
(103) Reasons of Gleeson CJ and Gummow J at 530-531 [68].
(104) Set out in the reasons of Callinan J at 571-573 [215].
(105) Set out in the reasons of Callinan J at 574-576 [217].
(106) Set out in the reasons of Gleeson CJ and Gummow J at 516 [15].
(107) *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361: see reasons of Gleeson CJ and Gummow J at 531 [69].
(108) *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-554; Allars, "Procedural Fairness: Disqualification Required by the Bias Rule", *The Judicial Review*, vol 4 (1999) 269, at p 278.

decision, the Minister had "a closed mind to the issues raised and was not open to persuasion by the applicant's case" (109).

128 The appeal from the decision of French J to the Full Court was by way of a rehearing (110). But it was not a hearing de novo. It was necessary for Mr Jia to show error in the primary judge's conclusion before the Full Court would be authorised to disturb French J's conclusion. In my view, having regard to the difficulty in any case of establishing "actual bias", and the particular difficulty of demonstrating it in the present circumstances, no such appealable error was revealed.

129 It follows that the majority of the Full Court erred in giving effect to a conclusion that actual bias on the part of the Minister had been established. The mistake was, perhaps, understandable. The limitation on the jurisdiction of the Federal Court tends to force persons in the position of Mr Jia, in that Court, to accuse federal decision-makers of *actual* bias:

> "The result will be to substitute for an inquiry into the character of the decision an inquiry into the character of the decision-maker. Not only is such an inquiry invidious, it tends to miss the applicant's grievance." (111)

130 So far as concerns the remaining arguments raised by Mr Jia to defend the outcome in the Full Court, I agree substantially in the reasons of Gleeson CJ and Gummow J for rejecting them. In particular, I concur in their Honours' conclusion that, notwithstanding a decision of the AAT favourable to the applicant, the Minister could still decide to exercise his powers under ss 501 and 502 of the Act (112). It follows that I too believe that the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Gunner* (113) was correct. I would prefer to say that it is where s 502 of the Act *applies* (rather than "when *invoked*" (114)) that the section has the effect that the Minister has the "final say" on whether the person concerned is entitled to enter or remain in Australia or, if in the country, whether that person should be removed. It follows that the Minister's appeal concerning Mr Jia should be allowed. The judgment in his favour should be set aside.

(109) *Wannakuwattewa v Minister for Immigration and Ethnic Affairs* (unreported; Federal Court of Australia (North J); 24 June 1996) at 4, cited *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 123.

(110) Reasons of Gleeson CJ and Gummow J at 533 [75] citing *Allesch v Maunz* (2000) 203 CLR 172: see also *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111]; *DJL v Central Authority* (2000) 201 CLR 226 at 245-247 [39]-[42].

(111) *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 122.

(112) Reasons of Gleeson CJ and Gummow J at 534-536 [84]-[87].

(113) (1998) 84 FCR 400.

(114) Reasons of Gleeson CJ and Gummow J at 535 [85], citing *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400 at 409.

131 *The appeal in Mr White's case*: Because the applicable arguments in Mr White's case overlapped those of Mr Jia, and because the conclusion of the Full Court of the Federal Court in that appeal substantially relied upon, and applied, the earlier decision in *Jia*, the same result follows for the Minister's appeal against the Full Court's decision favourable to Mr White.

132 There were certain additional factual arguments available to the Minister in the case of Mr White which reinforce this conclusion. No specific mention of Mr White was made publicly by the Minister. Nor did the Minister make specific public reference to decisions affecting him, his conviction and sentence, or a possible course to circumvent the AAT's decision in his case. Nor was there a close proximity between the Minister's decision and the statements in the broadcast and the letter relied upon by Mr White, as there had been in the case of Mr Jia. In fact, the Minister's broadcast and letter were dated almost eighteen months before the decision was made concerning Mr White. These facts imposed upon Mr White the added burden of relating the alleged earlier "actual bias" of the Minister, which referred to other persons, to the much later decision concerning Mr White. These additional considerations reinforce the conclusion that the Full Court erred in finding that the Minister's decision concerning Mr White was, when made, affected by actual bias. In that case too, the appeal should be allowed and the orders of French J restored.

The broader ambit of imputed bias

133 *A test of possibilities and appearances*: The foregoing conclusions do not, however, dispose of these proceedings. With respect, and unlike Gleeson CJ and Gummow J (115), and Callinan J (116), I do not regard the applications by Mr Jia and Mr White as presenting little more than a reworked version of the arguments that failed in the appeals. I do not consider that the applications of Mr Jia and Mr White, invoking the constitutional writs, are suitable for peremptory rejection "for the same reasons" (117).

134 Quite different considerations are raised when an allegation of *imputed* bias is made in this Court. An applicant in such a case is not concerned, as such, with the state of mind or attitude of the decision-maker. The focus of attention is on the decision itself and the manner in which it was apparently arrived at. The criteria are not subjective to the decision-maker. They are wholly objective. The issue raised is decided not by reference to a serious accusation of deliberate wrong-doing and misuse of office. It is judged by the much more readily established consideration of how the decision, and the process of

(115) Reasons of Gleeson CJ and Gummow J at 537-540 [95]-[106].
(116) Reasons of Callinan J at 590-592 [278]-[282].
(117) Reasons of Callinan J at 601 [324].

arriving at it, *might* appear to the persons affected and to the public, judged reasonably and objectively.

135 Many decisions of this Court have emphasised that *imputed* bias is determined by reference to a standard that is more easily made out. Such bias must still be "firmly established" (118). It is not enough that the reasonable bystander has a vague sense of unease or disquiet. The test for imputed bias, which has now been accepted by this Court, is expressed in terms of possibilities (might), rather than of the proof of a "high probability" (119) of bias inconsistent with the fair performance of public duties, that was formerly the accepted criterion.

136 The reason for embracing this different, and less stringent, requirement in the case of allegations of imputed bias is not difficult to find. It can be attributed to the social purpose served by this branch of the law of natural justice. That purpose is to uphold vigilantly the high standards applicable to the appearance of justice and fairness in official decision-making in Australia. At least two reasons sustain this approach. If the appearances are just, and the procedures manifestly fair, the likelihood is that just and fair conclusions will follow. As well, appearances affect the confidence of the community in the decisions of those who exercise public power on the community's behalf. Although many of the cases concerning imputed bias have related to courts, tribunals and decision-makers connected with them, the rule is one that applies to the decisions of every public office-holder. Being a rule of natural justice, it adapts to the nature and significance of the decision concerned, the character of the office of the decision-maker and the requirements, express or implied, of any legislation applicable to the case.

137 *Political office-holders are not immune*: It is quite wrong to suggest that, because the decision-maker is a Minister, necessarily a politician and an elected official, he or she is exempt from the requirements of natural justice, or enjoys an immunity from disqualification for imputed bias. A moment's reflection on basic principle shows why this is so. Ministers are sometimes the repositories of statutory powers conferred upon them by the Parliament. Relevantly to the cases of Mr Jia and Mr White, those are the powers conferred by ss 501 and 502 of the Act (120). In respect of those provisions, a Minister must exercise the power "personally". He or she cannot delegate them to

(118) *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553.

(119) *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116; cf *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-294.

(120) These provisions have since been amended by the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act* 1998 (Cth).

an official of the Department (121). The Minister must report the exercise to the Parliament (122). However, this does not mean that a Minister is at liberty to give vent to personal biases, idiosyncratic opinions, prejudice against a particular applicant or blanket rules, applied without regard to any specific features of the case in hand. Nor is a Minister at liberty to apply blindly his own, a departmental, a Party or even a Government policy which is inconsistent with the assumptions of individual justice and administrative decision-making that are inherent in the grant of power by the Parliament.

138 In many countries the power which, in Australia, is enjoyed under the Act by the Minister, is conferred on an official or statutory body. But in every case, whether conferred on a Minister, official or statutory body, the grant of power is limited to those purposes, express or implied, appearing in the legislative grant. The contrary proposition can be tested in this way. It cannot seriously be suggested that a Minister could lawfully exercise the statutory power to remove from Australia persons such as Mr Jia or Mr White for reasons that were, or appeared to be, venal, personal to the Minister's family or friends, motivated to curry political favour, or designed to pursue some idiosyncratic or even political advantage of the Minister's own. The decisions that fall to be made under the Act are too important for it to be suggested that the identity of the Minister as a politician, answerable to the Parliament and the electorate, somehow cloaks him or her with an exemption from compliance with the general law.

139 Relevantly, the law obliges the Minister, in the particular case, to reach a decision on the merits of that case by reference only to considerations that are relevant to the grant of power and compatibly with the exercise of that power with respect to an individual. If, in discharging the functions of office, and making decisions such as those committed to the Minister by ss 501 and 502 of the Act, he or she acts in such a way that the persons affected, or the public, might entertain a reasonable apprehension that the Minister might not have brought an impartial and unprejudiced mind to the resolution of the question involved, the law intervenes. It does so because the Minister, like everyone else in our Commonwealth, is subject to the law. The Constitution, by s 75(v) in particular, guarantees the right of a person affected to invoke that law.

140 Ministers, including a long line of predecessors of the present Minister, have often been held accountable to the law and the Constitution by this Court (123). If preceding Ministers were not

(121) The Act, s 502(1)(a)(ii) and (2) set out in the reasons of Gleeson CJ and Gummow J at 527-528 [60].

(122) The Act, s 502(3); see reasons of Gleeson CJ and Gummow J at 527-528 [60].

(123) eg, *Kioa v West* (1985) 159 CLR 550; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; cf *Attorney-General (NT) v Hand* (1991) 172 CLR

granted immunity from compliance with the law, because they held political office or because they were answerable to the Parliament and the electorate, there is no reason why the present Minister should enjoy a different, and more elevated, status.

141 *Avoiding over-judicialisation*: Ministers are not judges. Clearly, the pressures, processes and nature of Ministerial decision-making differ from the judicial task. Consequently, the obligations imposed by courts on officers of the Commonwealth, including Ministers, should not "over-judicialise" the performance of their functions, including in the making of decisions required of them by statute. I accept that the Minister's remark on an early morning interview by radio should not be dissected in the way sometimes appropriate to analyses of the considered reasons of a court or tribunal.

142 I also acknowledge that the letter by the Minister to the President of the AAT, relied on in Mr Jia's case, was written in apparent answer to an unproved communication to the Minister from the President of the AAT. I would not myself interpret the last-mentioned communication (as Spender J did in the Full Court) as an attempt to "lobby" the AAT to reach conclusions favourable to the Minister, in his capacity as a litigant before that body (124). The requirements of natural justice (including in respect of the apparent fairness and impartiality of decision-making by officers of the Commonwealth) are flexible. I would reject arguments based on infelicity of expression by the Minister, either in his broadcast or in his letter.

143 Similarly, I would not attach a great deal of significance to (or draw adverse inferences in these cases from) the failure of the Minister to give oral evidence or to submit himself to cross-examination. Although Ministers, whilst holding office, are not immune in this country from giving evidence before courts, a court would not ordinarily hasten to draw an inference that the Minister had deliberately refrained from giving oral evidence because of a concern that the impugned decision would be revealed as affected by bias or that the Minister would be forced to make concessions damaging to the Minister's case. Ministers have to perform highly complex and onerous functions. They carry heavy burdens that severely limit the time available for them to give evidence in individual cases. In Mr Jia's case, the Minister might have considered it sufficient to rely on the record as, in the opinion of the majority of this Court (125), it is held to be. Applying the test of whether the parties, or the public, might entertain a reasonable apprehension that the Minister might have

(123) *cont*
185; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

(124) *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556 at 568-569 [60] cited reasons of Gleeson CJ and Gummow J at 521-522 [41].

(125) Reasons of Gleeson CJ and Gummow J at 537 [92]; reasons of Callinan J at 599-600 [315]-[317].

been biased, I do not believe that the principle expressed in *Jones v Dunkel* (126), that an adverse inference may sometimes be drawn from a failure to give evidence, should loom large in evaluating appearances in the applications brought to this Court by Mr Jia and Mr White.

144 But this leaves, in Mr Jia's case, the actual terms of the radio interview and the manner in which the Minister expressed his letter to the President of the AAT. Neither of these was pitched at a level of generality. Neither was expressed in terms of public policy or political philosophy alone. Each contained specific references to Mr Jia personally. Each dealt with the particularities of his case and the decision that was available to the Minister, in effect, to have the last say. In my respectful opinion, the appearances emerging from the transcript of the radio interview and the letter, taken with the fact that soon after the decision was made adverse to Mr Jia, do give rise to the reasonable apprehension of bias on the part of the Minister as decision-maker.

145 Listening to the broadcast described in the transcript and looking at the letter now disclosed, considered in terms of the sequence of events that quickly followed, I consider that a reasonable member of the public might entertain an apprehension that the Minister might not have been able to bring an impartial and unprejudiced mind to the resolution of the question involving Mr Jia. With all respect to those of a contrary opinion, I consider that the party affected and the impartial bystander would conclude that the prejudgment asserted had been firmly established. Subject to what follows, this conclusion would entitle Mr Jia, at least, to the constitutional relief that he seeks.

146 *Approach: impression, not fine analysis*: Other members of the Court have set out the texts of the radio broadcast and letter in question (127). They have dissected its paragraphs. In my respectful view, this is not how the law of imputed bias operates. Being concerned primarily with the impact of events upon the persons affected and upon reasonable members of the public (128), what is involved is the general impression derived from the evidence, not a lawyer's fine verbal analysis.

147 Accordingly, I ask myself what a reasonable member of the public might think who heard the radio broadcast, read the letter and knew that, within eight weeks of the former and six weeks of the latter, the Minister had cancelled Mr Jia's visa and declared him an excluded person. I add to these considerations the fact that the Minister was put in something of a spot by the radio interviewer. I also take into account that he was virtually invited to write a letter in response to the

(126) (1959) 101 CLR 298 at 305, 308, 320-321.

(127) Reasons of Gleeson CJ and Gummow J at 516-517 [17]-[18], 517-518 [24]-[27]; reasons of Callinan J at 571-573 [215], 574-576 [217].

(128) cf *Public Utilities Commission v Pollak* (1952) 343 US 451 at 467, per Douglas J (diss).

letter written to him by the President of the AAT. We now know that the Minister had a minute from his Department that presented, as one possibility, confirmation, in Mr Jia's case, of the grant of the visa proposed, not once but twice, by a Deputy President of the AAT.

Imputed bias is established in Mr Jia's case

148 Against these collected considerations it is impossible to ignore the following that establish imputed bias in the case of the decision affecting Mr Jia:

149 *The language of prejudgment*: First, there is the actual language in which the interview and the letter are expressed. Making all due allowance for the context, the overall impression of each of these records is one of a strong Ministerial predisposition antipathetic to the case of Mr Jia. In the interview, Mr Jia is singled out and personally mentioned as an instance of the kind of decision of the AAT with which the Minister is "very unhappy". Indeed the decision in his case is described as being of a type that may even require amending legislation to ensure that it cannot happen again. Mention of Mr Jia appears in a context of complaints about the drop in the number of criminal deportations confirmed by the AAT. This drop "disappoint[s]" the Minister. By implication, the drop in numbers needs reversal. The most immediate way to achieve such reversal would be by increasing such deportations. These observations are made in a setting where AAT decisions are presented as becoming a kind of precedent, followed by officials in the Department. This had happened although the Minister was of the view that "I don't believe you are of good character if you've committed significant criminal offences involving penal servitude", as Mr Jia had. Furthermore, the Minister expressly indicated that he was considering what steps he could take, in effect to overturn the decision favourable to Mr Jia. Whilst acknowledging that he would have to "weigh up" the proper course, the overall impression left by the radio interview is that the Minister would almost certainly act (as, in fact, he quickly did) to uphold the views that he expressed so strongly in the interview. A reasonable bystander, hearing the broadcast, would, I think, conclude that the Minister had singled out Mr Jia's case as a prime example of what needed to be corrected and could be corrected by him.

150 The same is the overall impression which I gain from the Minister's letter to the President of the AAT. Again, it singles out Mr Jia's case. That case is mentioned as one of only two isolated for specific complaint. The letter refers to the decision concerning Mr Jia as one that "undermine[s] the Government's ability to control entry into Australia on character grounds". It expresses the Minister's concern about the decision and his inability to "allow this to pass without condemnation". In the English language, that word, "condemnation", is a very strong one. It is stronger by far than "surprise", "disappointment", "disagreement" or even "disapproval". Given that the Minister had the ultimate power to give effect to his

"condemnation", and that he did so virtually at once, it is, in my opinion, somewhat unrealistic to suggest that such strongly worded opinions, specific to Mr Jia, would be calmly set aside. That possibility invokes a vision of a dream-world of administration, far from reality (129).

151 There are many additional statements in the Minister's letter which reinforce the impression of the Minister's very strong feeling about Mr Jia's case. He condemns the Tribunal's deliberations in the case. He does so notwithstanding that only nine criminal deportations were set aside by the AAT in a space of four years. These statistics represented an average of but two adverse decisions a year — scarcely a flood of reversals. Yet they were sufficient to inspire the Minister's strong expression of opinion.

152 If the Minister's letter had not singled out Mr Jia's case, Mr Jia might have had difficulty in firmly establishing a case of imputed bias on the Minister's part. But the express mention of the decision in his particular matter, and in a context of the Minister's repeated indication of his resolve to uphold the Government's decisions, would, I feel sure, leave a reasonable member of the Australian community with the kind of belief that is all that Mr Jia needs to establish in order to succeed in this aspect of his case.

153 *The prompt implementation of an adverse decision*: Such a conclusion follows more readily from the fact that the Minister's eventual decision was actually predicted as an option and one that he was considering at the time of the radio interview. The decision that Mr Jia be removed from Australia followed within six weeks of the Minister's letter to the President of the AAT. With greater time for emotions to cool and preconceptions to be modified, it might possibly be inferred that the Minister could approach the minute of the Department with dispassion, focusing only on the individual merits of Mr Jia's case. However, given the short interval involved, it is certainly open to a reasonable conclusion that the considerations that loomed large in the Minister's mind when he made his decision were still those mentioned in his letter: "The community looks to me as the Minister to ensure that criminals who are non-citizens are not permitted to remain in Australia." A reasonable and dispassionate observer would, I believe, conclude that a decision made only six

(129) The psychology and sociology of reversing stated personal inclinations in corporate decision-making (the "escalation phenomenon") is the subject of much research and writing. This tends to support commonsense assumptions that most people find it very hard to alter course on an important decision once they have made, and announced, a predisposition: Staw and Ross, "Knowing when to pull the plug" [1987] *Harvard Business Review* 68; Staw and Ross, "Behavior in Escalation Situations: Antecedents, Prototypes, and Solutions" in Cummings and Staw (eds) *Research in Organizational Behavior* (1987), vol 9, p 39; cf Bowen, "The Escalation Phenomenon Reconsidered: Decision Dilemmas or Decision Errors?", *Academy of Management Review*, vol 12 (1987) 52.

weeks after such remarks were made might reflect the stated resolve to respond to the suggested "community expectation" rather than, as the law required, to the individual merits of Mr Jia's case.

154 *Self-invited political pressure to act*: The political and public character of the Minister's office is not irrelevant to the appearances that are at stake here. The Minister had made his public statements, specific to Mr Jia's case, on a popular radio programme. The statements had then been published in a newspaper. These, in turn, apparently occasioned the letter to the Minister from the President of the AAT. In such circumstances, where Mr Jia's case had been elevated to one of public and political controversy, the Minister was, in a sense, put to the test of responding to what he had declared to be the community's expectations of ensuring that such convicted criminals as Mr Jia were not permitted to remain in Australia. In these circumstances, a reasonable bystander would, I believe, conclude that it would take a super-human dispassion and objectivity for the Minister (such statements notwithstanding) to confirm Mr Jia's visa to remain in Australia. It is not difficult to imagine the political, parliamentary and media reaction to such a U-turn by the Minister. Effectively, he had painted himself into a corner.

155 The Minister did not have to offer comments specific to Mr Jia's case, least of all in a public broadcast. As the repository of a specific and sensitive statutory power that required him to consider such a case individually and on its merits, he was not in the position of a completely unbridled politician. In accordance with Standing Orders, Ministers commonly decline comment in the Parliament on cases currently before the courts. Where a Minister enjoys the statutory power of discretionary determination, in matters of sensitivity and importance (such as those conferred on the Minister under the Act), a similar prudent reticence in respect of individual cases is demanded. Such reticence is not incompatible with political and parliamentary discussion of *general* issues. But, in relation to *particular* cases, silence should, in my view, be the rule. Otherwise, depending on what is said, the person affected and the reasonable bystander might conclude, indeed conclude quite easily, that the individual has not been accorded his or her legal rights, but has been sacrificed on the altar of political opinion and perceived popular attitudes.

156 Introducing Mr Jia's case in the public broadcast and in the letter to the President of the AAT was not, in my respectful opinion, merely "imprudent" (130). The Minister was entitled to have, and to express, "strong views" on matters of general principle, including as they affected the operation of the Act. But to the extent that he did so, in respect of a particular case, he ran the risk that he would thereby disable himself from exercising the powers of the decision-maker in that case. This, in my opinion, is what occurred in Mr Jia's case.

(130) cf reasons of Callinan J at 579 [229] referring to the reasons of French J.

157 If this Court does not adhere to these standards, Ministers, entrusted by the Parliament with extremely important decisions seriously affecting the rights of individuals, will be at liberty to make remarks in public about such individuals and their applications and then solemnly proceed, as the repository of statutory power, to exercise the power adversely to such persons. It would be hard to conceive of a practice more likely to undermine public confidence in the independent and impartial decision-making of statutory decision-makers. Ministers, as statutory decision-makers, like other persons entrusted to decide the fate of individuals, must simply learn the rule of reticence. They must avoid the appearance and actuality of prejudgment. If they do not, the law affords a remedy to those actually, or apparently, adversely affected.

158 The purpose of insisting on such high standards of administrative decision-making, including by administrators who are Ministers, is to "enhance the public confidence in the impartiality of the judicial system" (131). Whereas the reasonable observer might quite easily accept that such a political office-holder has a large leeway for comment about matters of public policy or political philosophy, higher expectations are, in my view held in relation to a decision by such a person, pursuant to legislation, particular to an identified individual. In such a case, the Minister would be expected to decide the matter, without invalidating predispositions or prejudgment. He or she would be required to do so solely by reference to the relevant facts of the case and by application of the applicable law. This is the price to be paid for reposing such powers on Ministers. To give genuine consideration to a particular case, as the Act requires, implies that the consideration will be free from the disqualifying appearance of prejudgment. This was not a Ministerial decision about broad policy or resource allocation. It was about the fate of individual human beings.

159 *Realistic judgment not fictions*: There is a growing reluctance to assume, even with respect to judges, that personal attitudes and preconceptions can always be put aside. In relation to political office-holders, who may have no formal training, there is even less reason to expect that statutory powers can always be exercised with legal accuracy, fairness and without invalidating unreasonableness. Lawyers may embrace the fiction that a Minister, voicing extremely strong opinions on a particular case, can quickly divorce himself or herself from such opinions when the moment of decision arrives (132). However, the parties affected by such decisions and reasonable observers among the Australian public do not live in a world of fictions. They live in the real world. They see the same person, set upon the same course, deciding the same case soon after. With respect to those of a different view, I believe that a reasonable member of the

(131) *United States v Conforte* (1978) 457 F Supp 641 at 651.
(132) Reasons of Callinan J at 579-580 [232], 583 [244].

public viewing what was said, and written, by the Minister, and what was decided by him, might have a real apprehension that the Minister might not be able to bring an impartial and unbiased mind to bear on the decision. This Court's duty is to give effect to the impression of that impartial observer. It is not, in the case of Ministers, to restore a test that obliges proof of a "high probability" of implied bias. The *possibility* of the appearance of such bias is enough so long as that conclusion is firmly held. Such possibility, I regret to say, is abundant in Mr Jia's case.

160 It is true that the Minister's decision is not open to judicial review in the Federal Court on the grounds of imputed bias (133). But, with respect, that fact is irrelevant. The limitation on the grounds that may be agitated in the Federal Court does not provide an exemption from the law of natural justice or of imputed bias concerning the decision-making of a Minister pursuant to legislative power. The Minister's decision may be reviewed in this Court. Mr Jia has invoked that review. The fact that, in the appeal, it is held that *actual* bias has not been established does not conclude the question raised by Mr Jia's argument of *imputed* bias.

161 To suggest that the Minister might be rescued from the appearance of such preconceptions by the colourless prose of a departmental minute is particularly unconvincing in this instance. To contend that his mind could be brought back to the appearance of impartiality by the responsibilities of office and the seriousness of the decision for Mr Jia (and his Australian domestic partner and child) invokes a greater faith in reasoning from fictions than I can muster (134). To infer that the Minister would be willing and able to resile from his strongly expressed opinions about Mr Jia's case involves a triumph of faith over practical experience. This Court should not be so unworldly. Public law, as it has developed in Australia over the past thirty years, is robust and effective precisely because it is grounded in realism.

162 *Conclusion: imputed bias is established*: Many decisions by perfectly honest repositories of legislative power are set aside for imputed bias without necessarily reflecting on the subjective integrity, motives or attitudes of the decision-maker concerned. So it is with the Minister's decision in Mr Jia's case. As a matter of subjective attitudes, the Minister may indeed (contrary to appearances and apparent realities) have approached his decision free from preconceptions which he so forcefully expressed, in the radio broadcast and the letter, shortly before his decision was made. But the principal

(133) Reasons of Callinan J at 583 [244].

(134) Staw and Ross, "Behavior in Escalation Situations: Antecedents, Prototypes, and Solutions" in Cummings and Staw (eds) *Research in Organizational Behavior* (1987), vol 9, 39, pp 67-68 explaining a case study of a Premier of a Canadian province who, having proposed hosting a world fair, became even more committed to it despite strong evidence doubting its viability, because of personal and political investment. Many other illustrations spring to mind.

beneficiary of the law of imputed bias is the community as a whole. Only incidentally is it the person in respect of whom the impugned decision is made. Being addressed to a different concern, it is unsurprising that the law will sometimes produce an outcome on *imputed* bias different from that reached in respect of allegations of *actual* bias. So, in my view, it does in Mr Jia's case.

163 The sense of disquiet which the majority in the Full Court expressed in *Jia* (and by inference all members of the Full Court in *White*) does not sustain, in Mr Jia's case, a conclusion that he established *actual* bias on the part of a Minister. But it does, in my view, reflect the kind of belief that is invoked by the allegation of *imputed* bias. That case is made out in Mr Jia's application to this Court. Subject to what follows, Mr Jia is therefore entitled to relief under the Constitution.

The doctrine of necessity does not uphold the Minister's decision

164 The Minister submitted that, if such a conclusion were reached, this Court should nonetheless withhold relief in Mr Jia's case on the basis that the "doctrine" of necessity required the Minister to make the decision, that office-holder being identified "personally" as the repository of the applicable power entrusted with the relevant discretions by the Parliament (135).

165 It is true that, sometimes, necessity can impose on public office-holders a duty of decision-making from which they would otherwise be disqualified because the law assumes that the decision will be made and defines those who alone may make it (136). In such a case, it is accepted that the law gives a higher priority to securing a decision, even one possibly affected by a suggested defect, than not securing a decision at all (137). Such necessity will more readily arise, for example, in a final appellate court (138). It may, in the past, have arisen in this Court (139).

166 There is no such case of necessity here. To hold that there is would be to elevate inconvenience to necessity (140). It is not uncommon,

(135) The Act, ss 501(2), 502(1)(a) and (2).

(136) *Builders' Registration Board (Q) v Rauber* (1983) 57 ALJR 376 at 385-386; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88-89, 96-98; *Australian National Industries Ltd v Spedley Securities Ltd (In liq)* (1992) 26 NSWLR 411 at 421, 423; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 393-394 [172]; cf at 359 [64]-[65], 368 [101]-[103].

(137) See *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 299-300; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88-89, 96, 102.

(138) *Laird, Secretary of Defense v Tatum* (1972) 409 US 824 at 837-838; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 169.

(139) eg, *Bank of NSW v The Commonwealth* (the *Bank Nationalisation Case*) (1948) 76 CLR 1: see *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 393-394 [172].

(140) *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 368 [102], 396 [179].

where a particular Minister faces a difficulty in making a decision under a statute, where the administration of that statute is generally the responsibility of the Minister in question, to secure administrative arrangements that permit another Minister to perform the statutory function concerned (141). It is not the requirement of s 501 or s 502 of the Act that the decisions there mentioned must be made only by the Minister for Immigration and Multicultural Affairs, although normally they will be. It is possible, and conformable to the Act, for another Minister to exercise the powers contemplated by the sections. This is so as long as the person making the decision answers to the description of "Minister" and makes the decision personally. In such a case, the requirements of the sections are fulfilled (142). The argument of necessity fails.

Constitutional relief should be granted to Mr Jia

167 Mr Jia had other arguments in support of his claim for the issue of constitutional writs. However, as the foregoing is sufficient to entitle him to such relief, I need say no more about them. Once it is established that a relevant principle of natural justice has been breached, in that the decision of the Minister was flawed by imputed bias, established authority would entitle Mr Jia to relief under s 75(v) of the Constitution (143). It does so unless he is disentitled by reference to a discretionary ground.

168 Although Mr Jia's application to this Court exceeded the time for invoking the original jurisdiction in a case of this kind, it was entirely proper that Mr Jia should first exhaust his appellate rights. He did this. It is no fault of his that the ground upon which, in my view, he succeeds was unavailable to him in the Federal Court (144).

169 Mr Jia should therefore have the extension of time sought by him. In its discretion, this Court should provide constitutional relief. This would not ensure that the ultimate decision made in Mr Jia's case is favourable to his application to stay in Australia. But it would ensure that the decision was made by a Minister, unaffected by the disqualifying conduct and personal remarks relevant to Mr Jia's case, which, in my opinion, disabled the present Minister from making the decision that Mr Jia be removed from Australia.

No grounds for constitutional relief for Mr White

170 For a number of reasons, I do not consider that this conclusion

(141) This was done in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 28.

(142) cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 351-352.

(143) As pointed out in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 99-100 [38], per Gaudron and Gummow JJ with reference to *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116-119 and other cases.

(144) By virtue of the Act, s 476(1).

requires the same outcome in Mr White's case. As already stated, that case was factually different. At no time did the Minister make any disclosed public references to Mr White's application, to his past criminal convictions or the outcome appropriate to his case in substitution for that recommended by the AAT. There was a very long interval between the radio interview and letter to the President of the AAT concerning Mr Jia and the decision made by the Minister affecting Mr White. The specificity of reference and the close proximity of the decision, available to assist Mr Jia to make out his claim of imputed bias, are absent from Mr White's case. Mr White must rely on nothing more than the Minister's general observations about deporting foreign nationals with criminal convictions, his dissatisfaction with AAT decisions in that regard and the general incompatibility of recent serious criminal convictions and the existence of a ''good character'' necessary to avoid an order for removal.

171 Given these differentiating features, a reasonable observer would not, in my view, conclude that the Minister might have been unable to bring an impartial and unprejudiced mind to the resolution of Mr White's application. Whatever misapprehensions the Minister may have held a year and a half earlier, concerning the sufficiency of a serious criminal conviction to warrant personal action of a particular kind under ss 501 and 502, a reasonable observer would, I think, infer that such interval was adequate to repair his misapprehension. Moreover, without minimising the seriousness of Mr Jia's offence against his former domestic partner, a reasonable observer would be entitled to view the decision in Mr White's case as more serious in the context because of the very long history of criminal offences in New Zealand and Australia; the shocking features of the incident of enraged driving which led to the death of an innocent person; the supervening criminal offences and the fact that there was, in Mr White's case, no basis on which it could be suggested that the criminality was to be viewed as an isolated lapse from an otherwise substantially unblemished life. In short, the Minister's decision in Mr White's case does not reasonably appear to have been affected by presuppositions about that case itself, publicly expressed by the Minister immediately before his decision was made. On this footing, the considerations that produce the outcome which I favour in Mr Jia's application do not apply to Mr White's case.

172 To answer the Minister's appeal, Mr White, by notice of contention, relied on other grounds to contest the validity of the Minister's decision (145). Those grounds were not expressly relied on to support the provision of constitutional relief. In particular, in his application for such relief, Mr White did not argue on the basis that the Minister had erred in law in making a decision under s 502 of the Act. The

(145) Namely that the Minister's discretion was exercised for an improper purpose; that he acted without relevant material; and improperly used his powers under the Act.

cancellation there provided for is limited to cases involving "the national interest". This is an expression different from "the public interest" (146). I would reserve its applicability in a case of the kind involving Mr White. However, this argument was not invoked in Mr White's claim (147).

173 This Court's duty is to respond to the application for constitutional relief as presented. It is not to search for some different or alternative case which a party before the Court has not expressly propounded. On this basis, and in terms of the grounds of the order nisi filed by Mr White, and referred to the Full Court, Mr White's application for constitutional relief should be rejected.

Orders

174 In Mr Jia's proceedings I favour the following orders:

1. Appeal allowed with costs. Set aside the orders made by the Full Court of the Federal Court of Australia on 15 July 1999. In lieu thereof, order that the appeal to that Court be dismissed with costs;
2. Extend time for the bringing of the application. Make absolute, in the first instance, the order nisi for prohibition directed to the Minister for Immigration and Multicultural Affairs to prohibit the carrying into force of the decisions of the Minister made on 10 June 1997:
   (a) To cancel the Transitional (Permanent) Visa issued to the applicant Jia LeGeng; and
   (b) To determine, and so declare, that the applicant be an excluded person; and
3. Order that certiorari issue to quash the said decisions and order that the Minister pay the applicant's costs of the said proceedings in this Court.

175 In Mr White's proceedings, both in respect of the Minister's appeal and of Mr White's application for constitutional relief, I agree in the orders proposed by Gleeson CJ and Gummow J.

176 HAYNE J. I agree with Gleeson CJ and Gummow J that, for the reasons they give, each of the appeals by the Minister should be allowed and that in each case the orders of the Full Court of the Federal Court should be set aside. I also agree that each of the applications for prohibition, certiorari and injunction should be dismissed. Consequential orders should be made as their Honours propose. I wish to add something about the application of rules about bias in cases such as these.

177 Mr Jia and Mr White each contended that the Minister's decision to

(146) cf reasons of Gleeson CJ and Gummow J at 539 [102] by reference to reasoning of Brennan J in *South Australia v O'Shea* (1987) 163 CLR 378 at 411 expressed in terms of "the public interest" not "the national interest".

(147) cf *Ashby v Minister of Immigration* [1981] 1 NZLR 222.

cancel his visa should be set aside because the Minister had prejudged the question which the statute required him to consider. The contention that a decision-maker has prejudged a question, or that there is a reasonable apprehension that the decision-maker may have done so, contains a number of separate elements which should be identified. When that is done, it is apparent that there can be no automatic application of rules developed in the context of judicial decision-making to administrative decisions.

178 Courts in this country make decisions by procedures that are both formal and adversarial. They do so by the application of rules for decision-making which, although not always defined with absolute certainty, are generally discernible before the contest is joined and are set by legislative or judicial processes which are external to the judge. The process of adjudication is generally conducted in open court. The judge must give reasons for the decision that is reached.

179 Importantly, the rules about judicial prejudgment recognise that, subject to questions of judicial notice, judges, unlike administrators, must act only on the evidence adduced by the parties and must not act upon information acquired otherwise. No less importantly, the rules about judicial prejudgment proceed from the fundamental requirement that the judge is neutral. That requirement for neutrality is buttressed by constitutional and statutory safeguards. Those safeguards include not only the provisions for security of terms of office and remuneration (148) but also extend to statutory provisions prohibiting interference with the course of justice (149). A judge can have no stake of any kind in the outcome of the dispute (150). The judge must not "[descend] into the arena and ... have his vision clouded by the dust of the conflict" (151). The central task and, it may be said, the only loyalty, of the judge is to do justice according to law.

180 Decisions outside the courts are not attended by these features. Reference need only be made to a body like the Refugee Review Tribunal established under Pt 7, Div 9 of the *Migration Act* 1958 (Cth) to show that this is so. The procedures for decision-making by that body are much less formal than those of a court (152). There is no provision for any contradictor and the procedures are, therefore, not adversarial. The decision-maker has little security of tenure (153) and, at least to that extent, may be thought to have some real stake in the outcome. The decision-maker, in a body like the Refugee Review Tribunal, will bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or

(148) For federal judges, see Constitution, s 72.
(149) See, eg, *Crimes Act* 1914 (Cth), Pt III.
(150) *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
(151) *Yuill v Yuill* [1945] P 15 at 20, per Lord Greene MR.
(152) *Migration Act*, s 420 and Pt 7, Div 4.
(153) *Migration Act*, Pt 7, Div 9.

formed in the course of deciding other applications. A body like the Refugee Review Tribunal, unlike a court, is expected to build up "expertise" in matters such as country information. Often information of that kind is critical in deciding the fate of an individual's application, but it is not suggested that to take it into account amounts to a want of procedural fairness by reason of prejudgment.

181 The analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm. It is trite to say that the content of the rules of procedural fairness must be "appropriate and adapted to the circumstances of the particular case" (154). What is appropriate when decision of a disputed question is committed to a tribunal whose statutorily defined processes have some or all of the features of a court (155) will differ from what is appropriate when the decision is committed to an investigating body (156). Ministerial decision-making is different again.

182 Does this mean that principles about bias or apprehended bias require some "[adaptation] to the circumstances of the particular case"? In particular, does the fact that a decision is committed to a Minister affect the content or application of rules about prejudgment? Are the rules about prejudgment affected by the fact that a Minister administers a department of State of the Commonwealth but must sit in Parliament (157) and is thus part of, and subject to, the political and parliamentary processes? Does it matter that a Minister is subject to all the conventions of Cabinet government, including the inherent fragility of tenure of office as Minister and the pressures of Cabinet and party solidarity?

183 To examine those questions it is necessary to consider more closely what is meant by "bias" and "apprehension of bias". "Bias" is used to indicate some preponderating disposition or tendency, a "propensity; predisposition *towards*; predilection; prejudice" (158). It may be occasioned by interest in the outcome, by affection or enmity, or, as was said to be the case here, by prejudgment. Whatever its cause, the result that is asserted or feared is a deviation from the true course of decision-making, for bias is "any thing which turns a man to a particular course, or gives the direction to his measures" (159). This

(154) *Kioa v West* (1985) 159 CLR 550 at 585, per Mason J. See also *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504, per Kitto J; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-553.

(155) *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

(156) *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296; *Mahon v Air New Zealand Ltd* [1984] AC 808.

(157) Constitution, s 64.

(158) *The Oxford English Dictionary*, 2nd ed, (1989), "bias" sense 3a.

(159) Johnson's *Dictionary* quoted in *The Oxford English Dictionary*, "bias" sense 5a.

matter concerns only bias by prejudgment and I confine my reasons to that subject. The questions that may be presented by an allegation of bias for other reasons do not arise and are not considered.

184 The development and application of a test of reasonable apprehension of bias avoids any need for a court, which is asked to prohibit a decision-maker from going further or to set aside a decision which has already been made, to attempt some analysis of the likely or actual thought processes of the decision-maker. It objectifies what otherwise would be a wholly subjective inquiry and it poses the relevant question in a way that avoids having to predict what probably will be done, or to identify what probably was done, by the decision-maker in reaching the decision in question. As was said in *Ebner v Official Trustee in Bankruptcy* (160), "[t]he question is one of possibility (real and not remote), not probability".

185 Saying that a decision-maker has prejudged or will prejudge an issue, or even saying that there is a real likelihood that a reasonable observer might reach that conclusion, is to make a statement which has several distinct elements at its roots. First, there is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. Secondly, there is the contention that the decision-maker will apply that opinion to that matter in issue. Thirdly, there is the contention that the decision-maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. Most importantly, there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.

186 Often enough, allegations of actual bias through prejudgment have been held to fail at the third of the steps I have identified. In 1894, it was said that (161):

> "preconceived opinions — though it is unfortunate that a judge should have any — do not constitute such a bias, nor even the expression of such opinions, for *it does not follow that the evidence will be disregarded.*" (Emphasis added.)

Allegations of apprehended bias through prejudgment are often dealt with similarly (162).

187 In the case of a court, it will usually be self-evident that the issue, if an issue of fact, is one which ought to be considered afresh for the purposes of the particular case by reference only to the evidence advanced in that case. Other decision-makers, however, may be under

(160) (2000) 205 CLR 337 at 345 [7], per Gleeson CJ, McHugh, Gummow and Hayne JJ.

(161) *R v London County Council; Re Empire Theatre* (1894) 71 LT 638 at 639, per Charles J.

(162) See, eg, *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13].

no constraint about taking account of some opinion formed or fact discovered in the course of some other decision. Indeed, as I have already pointed out, the notion of an "expert" tribunal assumes that this will be done. Conferring power on a Minister may well indicate that a particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject. It is critical, then, to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker.

188 Section 501(2) of the *Migration Act* (in the form in which it stood at the time of the Minister's decisions concerning these visa holders) was engaged if "having regard to" either "the person's past criminal conduct" or "the person's general conduct" the Minister was "satisfied that the person is not of good character". The subject about which the Minister was required to be satisfied was a subject which required the formation of a value judgment. It required the development of a view about what kinds of conduct are, or may be, inconsistent with being of good character. It obviously permitted the formation of a view that, in the absence of some countervailing consideration, certain kinds of past criminal conduct would sufficiently demonstrate that a person was not of good character. If the Minister formed such a view, and announced that this was the view that had been formed and would be applied in the administration of the Act, there could be no suggestion that the Minister had thereby prejudged any application which was to be made. The most that could be said is that the Minister had stated an understanding of what was meant by the statutory expression "is not of good character" and had indicated how the Act would be administered. So long as the meaning adopted revealed no error of law (which it would if the meaning assigned lay outside the permissible range of circumstances that could be embraced by the expression) there could be no challenge to what was done. Given that the decision-maker is the Minister, the expression can be seen to embrace a wide range of permissible views.

189 Moreover, the Act, by authorising the Minister to reach the relevant value judgment by having regard to "the person's past criminal conduct", as opposed to "the person's general conduct", permitted the Minister to form the view that certain kinds of past criminal conduct *necessarily and inevitably* demonstrated that a person was not of good character. Again, so long as the meaning which was thus assigned to the expression "is not of good character" revealed no error of law, the fact that the Minister announced that he or she proposed to administer the Act according to that understanding could not be said to constitute the prejudgment of any particular case that may later arise.

190 There is no prejudgment in such a case because of the nature of the statutory task. It is to reach a degree of persuasion (satisfaction) that a value-laden standard (is not of good character) is met. The determination of that standard is not a task which the Act requires the Minister to undertake wholly anew each time it is suggested that there may be a case for the exercise of the discretionary power, conferred by the Act, to cancel or refuse a visa. It was open to the Minister to determine the standard to be applied in a way that left little or no room for debate about its application in an individual's case.

191 Determining the standard in that way would not fetter the exercise of a discretion. The relevant discretion which falls for exercise is the discretion to refuse to grant or, in these cases, to cancel a visa if s 501(2) applied to the person. All that the Minister does, in the circumstances posited, is announce the particular construction that the necessarily imprecise statutory standard will be given in certain kinds of case.

192 Once it is recognised that there are elements of the decision-making process about which a decision-maker may legitimately form and hold views before coming to consider the exercise of a power in a particular case, it is evident that the area within which questions of actual or apprehended bias by prejudgment may arise is reduced accordingly. Indeed, in a context such as the present, if there is a cause for complaint, analysis will often reveal that the complaint is one of error of law in the construction of the relevant provision, not one of bias or apprehended bias. Neither Mr Jia nor Mr White could, or did, put his case in that way. The content which the Minister's decisions in these cases showed he gave to the expression "not of good character" was plainly open.

CALLINAN J.

Jia LeGeng

193 In this case the Court has to decide whether the Minister for Immigration and Multicultural Affairs (the Minister) was disqualified from exercising a statutory power under the *Migration Act* 1958 (Cth) (the Act) by reason of actual or apprehended bias. The respondent's case is that bias, in either form, is to be inferred from a letter which the Minister wrote to the President of the Administrative Appeals Tribunal (the Tribunal) in reply to a letter to him from her, remarks that he made during a radio broadcast, and his adoption of some statements in a briefing paper prepared and submitted to him by an official of the Department of Immigration and Multicultural Affairs (the Department) that he administered. The same issues, but in respect of a later date and occasion, fall to be resolved in the case of *Minister for Immigration and Multicultural Affairs v White* which was argued concurrently, and in which the parties both relied on the arguments in this case and presented some additional arguments on the facts of that case.

Factual background

194 Jia LeGeng (the respondent) was born on 17 November 1962 in Beijing in the People's Republic of China. He was granted a student visa on 17 August 1991. On 12 September 1991 he applied for refugee status in Australia and a Domestic Protection (Temporary) Entry Permit. The Minister's delegate refused that application on 30 November 1992. The respondent sought a review of that decision by the Refugee Review Status Committee. That Committee recommended that he be granted status as a refugee on 17 March 1993. The Minister's delegate again determined that he did not qualify for refugee status on 17 May 1993. On 8 September 1993 the respondent was detained as an illegal entrant under the Act.

195 The respondent then made a request for an extension of time within which to lodge an application for an entry permit, reconsideration and review.

196 On 20 September 1993 the respondent was released from detention upon conditions, including restrictions on employment and the provision of a bond of $5,000. A delegate of the Minister, on 24 September 1993, ordered that the respondent be deported pursuant to s 60(1) of the Act.

197 In October 1993 the respondent sought and obtained employment under a false name. When this was discovered he was taken into custody for committing a breach of his conditions of release. The bond of $5,000 was forfeited.

198 On 1 November 1993 a predecessor in office of the Minister adopted and promulgated special criteria for residence, on permanent entry permits "Special (Permanent) Entry Permits" for Chinese nationals, of whom the respondent is one, in Australia. On 19 November 1993 a Custody Review Officer of the Department determined that the respondent satisfied the threshold criteria for an application for such a permit. The respondent applied for the permit on 5 April 1994. Subsequently the respondent was released from custody on an undertaking to abide by conditions of release.

199 On 11 January 1994 the respondent pleaded guilty to a charge of performing work without permission whilst he was an illegal entrant, contrary to s 83(2) of the Act, and to using another person's tax file number in a manner connecting it with that person's identity contrary to s 8WB(1)(b) of the *Taxation Administration Act* 1953 (Cth). The respondent served a period in detention in lieu of paying fines of $600 and costs, as a result of his conviction for those offences.

200 On 18 February 1994 the respondent was granted permission to work in Australia. He applied for a Special (Permanent) Entry Permit (Class 816 or 818) (the application). On 11 August 1994 a case officer wrote to the respondent advising that he had been granted a Class 830 Processing Entry Permit to maintain his legal immigration status in Australia whilst the application was being processed.

201 In December 1993, Mr Jia was arrested and charged with a number

of offences, allegedly committed in November 1993. On 10 February 1995 the respondent was convicted by the Supreme Court of Western Australia, after a trial by Walsh J with a jury, of the following crimes: one count of unlawful assault causing bodily harm, one count of unlawful detention, one count of making a threat to do unlawful harm, and one count of sexual penetration without consent. He was sentenced to a term of imprisonment of six years and three months after allowance was made for a period of three months that he had spent in prison on remand.

202 In sentencing the respondent Walsh J said (163):

> "It is clear from the evidence adduced before the jury that you had an association with [the complainant] during 1993 which developed initially into one of love and affection between both of you. Subsequently, however, it became clear on the evidence that [the complainant] determined that she no longer wished to continue with the relationship. It's apparent that difficulties had been caused over, amongst other things, gambling and moneys said to have been taken and no doubt your emotional state was compounded by worry over immigration and by two periods of detention.
>
> Be that as it may, in my view you became obsessed with her and were not prepared to accept her choice to not have anything further to do with you. Against that background you detained her in the flat, threatened to harm her and sexually penetrated her. In relation to the sexual penetration, whilst you did not inflict any injury to her as such, nonetheless that does not mitigate your actions having regard to the fact that you obtained her consent, to use the word 'consent' in an inept way, by reason of a threat. 'By consent' — I withdraw that; 'submission' would be the more appropriate word — by reason of the threat that you made to her, and I accept that she was in genuine fear of you ... Having said that, there is much in your background to your credit. You were educated in China and obtained a degree, you came to this country as a refugee and it is clear that within the limits of your capabilities you worked hard and endeavoured to make this country your home.
>
> I have emphasised that you were under a great deal of emotional strain at the time by reason of the difficulties you had with immigration, compounded with the obsessive attitude you had to your former partner. Having said all that, at the end of the day I am still required to impose a substantial custodial sentence. However, because of the particular circumstances of this case, I impose a sentence which I would have thought is at the lower end of the scale for these types of offences."

(163) *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87 at 90, per French J, quoting Walsh J.

203 An appeal against those convictions was dismissed by the Court of Criminal Appeal of Western Australia on 4 August 1995.

204 The next relevant event occurred on 14 September 1995 when a case officer of the Department considered the application and recommended that the respondent be found to be not of good character on the basis of the crimes of which he had been convicted and that the application be refused. A delegate of the Minister agreed with these recommendations and refused the application.

205 On 5 October 1995 the respondent applied to the Migration Internal Review Office for a review of that decision to refuse the application. An officer of the Department on 27 October 1995 determined that the decision-maker who had refused the application had made a mistake in applying s 180A of the Act rather than s 501. On 22 November 1995, the respondent's case was reassessed. An officer of the Department recommended that the Minister exercise his power under s 501 of the Act to refuse to grant the respondent a Transitional (Permanent) Visa and that the application accordingly be refused. On 1 December 1995 a delegate of the Minister agreed with the officer's recommendations and refused to grant a Transitional (Permanent) Visa or a Resident Return Visa Class 154.

206 On 8 January 1996 the respondent applied to the Tribunal for review of the decision. The review was conducted by Deputy President Barnett on 25 and 26 June 1996.

207 On 23 July 1996 the Tribunal set aside the decision and remitted it to the Minister with a direction that the respondent be treated as entitled to a Transitional (Permanent) Visa. It is relevant to notice that the Tribunal made an affirmative finding that the respondent was a person of good character. In reaching that conclusion the Tribunal, in effect, reheard the charges against the respondent in the sense that some of the events leading to, and constituting his criminal conduct were again canvassed in some but not complete detail there.

208 During the course of the hearing by the Tribunal this exchange occurred:

> "MR MCINTYRE (Counsel for the appellant): I was intending to call Mr Ji as well just to talk about the allegation concerning, his sexual involvement with [the complainant], because that seems to be one issue which is not covered in the trial, of course, so that —
>
> DEPUTY PRESIDENT: How far down this route can we go?
>
> MR MCINTYRE: Well, I mean, if I am content, if you indicate to me that you do not think that will be helpful to you, then I perhaps would not be bothered calling —
>
> DEPUTY PRESIDENT: Well, Mr Jia has said that eventually he became suspicious of Ji. But where is the relevance for this matter? I mean, there is a whole lot of interaction that has gone on between these people. I do not see how it is going to help me with my decision as to what sort of person Mr Jia is now and what weight I should put to the fact that he has been convicted of rape. It does

not surprise me that in a relationship like this, of the type which both parties are describing, really that there is going to be thrust and counter-thrust and truths and untruths and distortions and whatever. But the fact is, Mr Jia has been convicted of the offences that he was convicted of.''

209 The Tribunal did not, as the jury at the criminal trial must have done, accept the complainant as a witness worthy of any substantial credit. The Deputy President said that she was manipulative and argumentative and that some of her evidence to the Tribunal was inherently unbelievable and in conflict with the transcript of her evidence at the criminal trial. The Tribunal found that ''she was clearly lying''. The respondent, on the other hand, was described as an intelligent person with a good reputation: he had a record of good conduct in prison. He was not required to participate in the sex offenders' treatment program because his offence was considered, by whom it is not clear, to be a ''situation'' offence although he did undertake a course for the control of aggression. His prospects of employment were found by the Tribunal to be reasonably good. The Tribunal also said that the migration offences relating to illegal employment and the use of another person's tax file number in connection with that employment were not relied on by the Minister before the Tribunal as evidence of a lack of good character and they should be given little weight.

210 The Minister appealed to the Federal Court from the Tribunal's decision and on 20 December 1996 Carr J ordered that the decision of the Tribunal be set aside and remitted, by agreement, to an identically constituted Tribunal for further consideration.

211 His Honour found that there was nothing in the Tribunal's reasons to suggest that it had misdirected itself about the meaning of ''good character'' or that it had approached the task of considering whether it was satisfied that Mr Jia was not of good character in any manner inconsistent with what was said by the Full Court of the Federal Court in *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (164).

212 The setting aside of the Tribunal's decision by Carr J depended upon procedural unfairness in two respects. The first was that the Tribunal relied to a significant extent on a finding of a relationship between the complainant and a Mr Ji who could corroborate the complainant on relevant matters, whereas during the hearing the Tribunal, in the exchange that I have quoted, lead counsel for the Minister to believe that it did not, and would not, regard the evidence that Mr Ji could give as being of any relevance to its decision. The second was the use by the Tribunal of a file from the Corrective Services Department which had not been made available to the

(164) (1996) 68 FCR 422.

Minister for consideration and submission before or during the Tribunal's proceedings. Carr J referred to the outcome as a "fairly limited degree of success on the applicant's part". The Tribunal's findings about the credibility of the complainant, however, were not merely material to the Tribunal's conclusion that the respondent was of good character. They were, as an examination of the Tribunal's decision shows, decisive on the issue of the respondent's character. The statements of the Tribunal in the exchange that I have quoted were quite misleading and gave rise to procedural unfairness of a serious kind (165).

213 On 14 March 1997 the Tribunal reconsidered the application in the light of the reasons of Carr J and made the same recommendation as it had after the first hearing. After referring to, and using the evidence adduced to the Tribunal on the previous occasion, as well as the further evidence, the Tribunal said this:

> "The Tribunal is confirmed in its belief that part of the applicant's underlying motivation was confusion and jealousy caused by the [complainant's] relationship with other men, including Mr Ji. The Tribunal therefore reaffirms its previous finding that the applicant's criminal offences, serious though they were, arose out of the unusual circumstances of the situation with [the complainant] at that time and do not indicate a likelihood that he will reoffend in the future."

Once again the finding was an affirmative one of good character.

214 On 14 April 1997 the Department prepared a briefing paper titled "Le Geng Jia — Question of Good Character" for the use of the Minister as required. It was an agreed fact between the parties in these proceedings that at the time the briefing paper was prepared, the Minister held the following opinions reflecting some of the statements made in it:

1. That most Australians would find it difficult to reconcile a six and a half year jail sentence for rape with a finding by a Deputy President of the Administrative Appeals Tribunal that the person concerned is of good character.
2. That "this latest AAT decision has essentially rejected the court's finding of culpability by finding Mr Jia's behaviour leading to the offences justifiable because of the rape victim's conduct towards him and his own reasonable or unreasonable feelings of jealousy".
3. That "the government is concerned about emerging trends for tribunals to discount the importance the government attaches to character issues".

215 On 14 April 1997 the Minister was interviewed by members of the

(165) *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 152-153 [205]-[208], per Callinan J; *Stead v State Government Insurance Commission* (1986) 161 CLR 141.

media. One such interview was conducted by Mr Robertson and broadcast on radio on that date at 7.30 am. The full text, omitting irrelevant matters, and the paragraphs of which I number, was as follows:

"1. ROBERTSON: I've only got the paper to go by but let me just read you the salient things here. There's a person called Legeng Jia. He's a Chinese so I assume he's Mr Le. He was sentenced in February 1995 to six and a half years jail and while still in prison, I'm informed that Mr Le with convictions on charges of sexual penetration without consent, withholding a person's liberty, threatening to kill and assault was given legal aid — that is paid for by us — to fight the deportation attempt.
2. There was a time when you had to be a person of good character to come to Australia. If you are born here that's different but if you wanted to come here you had to show good character. And it appears the Administrative Appeals Tribunal has now declared the thirty-two year old Mr Le to be of good character.
3. Well, he is charged and went to jail for — and came out early, I might mention — a charge of sexual penetration without consent, withholding a person's liberty, threatening to kill and assault and this is considered a person who would not re-offend. I don't know how one ever establishes these things.
4. Now, I'm not there and I'm not a judge so I don't know. However, I wonder whether (a) we should be paying for, you know, someone's defence when they do that, and (b) whether someone is actually convicted of something like that that, in fact, tells the community, sends a clear message that this person isn't perhaps the sort of person that we should choose. We wouldn't say 'this person's attempted rape, yes, we'll take him. Right, this person's done a bit of embezzling'. No, no, no, bit lame. Well, of course, it isn't terribly funny.
5. Mr Philip Ruddock is the Federal Immigration Minister ... I'm only going by what's reported. Am I clear, am I fairly close to the mark?
6. MINISTER: I understand they are the facts.
7. ROBERTSON: Well, I mean, who are these people then? Who are these Administrative Appeals Tribunal?
8. MINISTER: Well, we have a system of administrative review in Australia in a whole host of areas where government officials exercise discretions and because over time they have developed some discretions in relation to first the decision as to whether the person is of good character and secondly as to whether or not you waiver the decision it made.
9. The Administrative Appeals Tribunal has been given the authority to look at and review the decisions taken by officials. I'm very unhappy about the way in which the Administrative Appeals Tribunal has been dealing with numbers of matters involving the

Immigration Department in the way in which these discretions have been exercised by members of the Tribunal.

10. Well, I've asked the Joint Committee on Migration of the Parliament to look at the whole question of criminal deportation as to ways and means in which we can strengthen the provisions to have them operating as they, I believe, they were originally intended and as, I think, the public would expect them to operate.

11. ROBERTSON: Some of us originally tend to believe that the person would go back home in this. Would that be right?

12. MINISTER: Essentially, if people come here and they are not citizens of Australia and they commit serious criminal offences, we don't regard them as being the sorts of people that we wanted to get through our Migration Program. We try to exclude criminals from coming in the door and we do have criminal deportation in relation to those that have come here. The sort of difficult cases are those where there may be compassionate circumstances, particularly in relation to family members who are here and so on.

13. But what's happened is that they seem to be overturning a very large number of cases and what you'd get from it is the development of a framework of law that my officials then have to follow in a wider number of cases. What disappoints me is that I think criminal deportation which was quite significant a number of years ago has come down to a point, I think, where now only about forty or fifty people are in fact deported in any one year.

14. ROBERTSON: And I assume, Mr Ruddock, that it's the softening in a treatment of a case becomes the precedent for the next one, doesn't it?

15. MINISTER: That's what happens and my officials are obliged to take those into account.

16. ROBERTSON: Is it written down anywhere exactly what a person of good character is? Is it actually termed in law?

17. MINISTER: What we are looking at here is the commission of offences. I don't believe you are of good character if you've committed significant criminal offences involving penal servitude. The law does actually write down that that is the test and it adds another test, of course — we used it in the case of Adams from the Sinn Fein organisation — if you are known to associate with organisations that are involved in criminal activity, you can be found to be of not good character.

18. ROBERTSON: What powers have you got to overturn this? Can you ask for a report? Can you appeal or what?

19. MINISTER: I'm considering what steps I can take and there are some avenues. One of the suggestions that's been made is that I could in fact grant the visa and then cancel it on character grounds. I have to weigh up whether or not that is a proper course for me to follow and I also have to look at the issue as to what the potential cost might be to the community if it opens up a whole host of other possible appeals to the Federal Court.''

216 Following the filing of a notice of appeal by the Minister in the Federal Court, a minute was prepared, signed and provided by Mr Abul Rizvi, the Assistant Secretary of the Department's Migration and Temporary Entry Branch to the Minister advising him of courses he could adopt in relation to the respondent. An alternative version of a departmental brief was prepared for the Minister on 24 April 1997.

217 On 30 April 1997 the Minister sent a letter to Justice Mathews, the President of the Tribunal, in response to a letter that the Minister had received from her. In his letter the Minister expressed concern about a number of decisions of the Tribunal in relation to criminal offences. The Minister wrote:

> "Thank you for your letter of 16 April 1997 bringing to my attention your concerns about comments attributed to me in an article in *The Daily Telegraph* on Monday 14 April 1997, relating to immigration decisions by the Administrative Appeals Tribunal (AAT).
>
> As published in *The Daily Telegraph*, I am concerned about a number of recent decisions made by the AAT allowing convicted offenders to remain in Australia. According to figures held by my Department, nine criminal deportation cases have been remitted or set aside by the AAT (other than with the consent of the Department), out of a total 76, between 1 July 1993 and 30 April 1997. A further 6 were withdrawn by the Department, as it was expected that some would be overturned by the AAT.
>
> Of nine cases set aside by the AAT, four have re-offended since the deportation orders signed against them were set aside or remitted by the Tribunal. In these four cases, the Tribunal had considered that there was a low risk of recidivism or the prospect of rehabilitation was high even though the persons were convicted of serious offences. I am particularly concerned where such cases involve serious drug related offences.
>
> While the number of cases overturned by the AAT are not large these cases are sensitive and significant, in that they:
>
> - set standards of decision making by other Tribunal members and officers,
> - undermine the confidence of the community,
> - are against the Government's requirements for which I am responsible for and accountable to Parliament,
> - appear to indicate a tendency to afford greater weight to the interests of the individual and their family relative to the seriousness of the offence,
> - raise the question of what arrangements need to be considered by me so that I can intervene where the Government's requirements are undermined.
>
> There have been two recent decisions by the AAT of decisions refusing a visa on the basis of character, involving Mr Jia and Mr Ram which raised concerns about the adequacy of current

legislative powers to refuse visas and the application of those provisions.

In the case of Mr Jia, the Tribunal member appears to have confused the fact that decisions made under s 501 involve a two-step consideration. The first is to determine if the person is, or is not of good character. If determined not to be of good character, [the] second determination is whether to exercise the discretion to refuse to grant (or cancel), the visa. The Tribunal finding was that Mr Jia is of good character, and thus eligible for a visa. The Tribunal incorrectly exercised the discretion under s 501 to grant him a visa, despite Mr Jia's sentence to six and half years imprisonment. Before the discretion at s 501 is exercised the person must first be determined to not be of good character, and this was not the case when the AAT purported to exercise the discretion in favour of Mr Jia. The Tribunal incorrectly exercised the discretion under s 501 to grant him a visa.

That persons such as Mr Jia can be found to be of 'good character', despite his recent conviction for a serious crime undermines the Government's ability to control entry into Australia on character grounds. I am concerned that this may set a precedent for decisions by the AAT in the future. To allow this to pass without condemnation would increase the threshold for decisions relating to character considerations. Although I recognise that AAT decisions are not precedential, as a matter of law, such decisions may be viewed by the Tribunal and officers in determining the character requirements under s 501 as the acceptable standard. It would undermine the Government's desire to protect the Australian community.

The other case involved Mr Ram, whose wife (Ms Lata) was refused a spouse visa in 1995 under s 501 on the basis of serious immigration malpractice. In the Ram case the malpractice involved two couples, Mr Ram and his wife Ms Lata and Mr and Mrs Prasad. Mr Prasad and Mrs Prasad (an Australian citizen) divorced. Mr Ram entered Australia and married Mrs Prasad. Mr Ram later divorced Mrs Prasad. Ms Lata entered Australia on the basis of her proposed marriage to Mr Prasad and immediately took up residence with her defacto husband, Mr Ram. Ms Lata subsequently married Mr Ram, not Mr Prasad. Ms Lata applied for a spouse visa and later admitted to knowing of the scheme. Her application was refused on character grounds. Ms Lata left Australia voluntarily in 1993 under threat of removal as an illegal non-citizen. Ms Lata and Mr Ram have three children. Mr Ram appealed to the AAT. Initially the AAT set aside the delegate's decision on the basis of the best interests of Ms Lata's child, however, after the matter was successfully appealed to the Federal Court, a differently constituted Tribunal found that Ms Lata was not of good character. Hill J's judgment confirmed that decisions under s 501 involve a two-step approach and only if a

person is not of good character does the exercise of the discretion become a relevant consideration.

The significance of these two cases is that they show that the AAT has on occasion misconstrued the tests involved in character decisions. They also illustrate, to my mind, a tendency on the part of the Tribunal to afford greater weight to the interests of the individual and their family than to the protection of the Australian community and the integrity of Australia's entry programs.

Abuse of the migration program through such practices as sham marriages is unacceptable and steps have been taken to increase the screening of applicants to ensure the genuineness of claimed relationships. The integrity of such endeavours can be undermined unless supported by mechanisms such as the use of the refusal powers in s 501.

I acknowledge that the AAT is an independent Tribunal, which must satisfy itself of the correct and preferable decision on the merits. However, it is difficult to maintain public confidence in the Government's ability to control entry into Australia in the face of decisions like that taken in Mr Jia's case, or where those who have been allowed to remain, following the AAT's overturning of the Government's decision to deport, have re-offended within a fairly short period of time of the AAT's setting aside of the deportation order.

The seriousness of the crime, which is an important consideration, does not appear to have been given sufficient weight in the Tribunal's deliberations. Where the courts have determined that a substantial period of imprisonment was appropriate for the crime committed, the seriousness of the crime is a primary consideration. Crimes involving violence and drugs are regarded as particularly abhorrent and are viewed as significant in the consideration under the character and deportation provisions of the Act.

The community's expectations of the Government to prevent entry or remove or deport will not be met if the Tribunal overturns the Government's decisions in relation to those who are not of good character or have committed serious crimes. The recent decisions of non-citizens convicted of serious criminal offences who have had their deportation orders overturned, as well as decisions to overturn the refusal of visas on character grounds, have heightened community concerns especially where a number of these have re-offended. The community looks to me as the Minister to ensure that criminals who are non-citizens are not permitted to remain in Australia.''

218 On 23 May 1997 the respondent was granted a Transitional (Permanent) Visa subclass 816.

219 On 26 May 1997 a letter was sent by a departmental officer advising that the Minister proposed to give personal consideration whether to cancel the respondent's visa under s 501 of the Act and to declare him

to be an excluded person under s 502 of the Act. On the next day the Minister discontinued the appeal that had been filed in the Federal Court.

220 On 4 June 1997 the respondent's solicitor sent a letter to the Department enclosing a statement from the respondent which then formed part of the material available to him for the making of the decision that he was to make under the Act.

221 On 6 June 1997, a minute from the Assistant Secretary of the Department's Migration and Temporary Entry Branch, was provided to the Minister for his consideration whether to cancel the respondent's visa and to declare him to be an excluded person under ss 501 and 502 of the Act.

222 On 10 June 1997 the Minister decided to cancel the respondent's Transitional (Permanent) Visa and to declare him to be an excluded person.

223 On 16 June 1997 application was made for judicial review of those decisions to the Federal Court.

Proceedings in the Federal Court

224 The application for judicial review was heard by French J. The respondent's proposition was, effectively, that the Minister's decision was affected by actual bias in that he acted on a preconceived, mistaken view of the relevant law. That proposition necessarily contained within it a further proposition that an erroneous view of the law was held by him before he exercised his powers under the Act in relation to the respondent, and that he was not open to any different persuasion in considering, and deciding whether the respondent was not a person of good character and that his visa should be cancelled.

225 Before discussing his Honour's reasons for judgment it is convenient to set out the various sections of the Act under which the Minister was acting.

> "501(1) The Minister may refuse to grant a visa to a person, or may cancel a visa that has been granted to a person, if:
>
> (a) subsection (2) applies to the person; or
>
> (b) the Minister is satisfied that, if the person were allowed to enter or to remain in Australia, the person would:
>
> (i) be likely to engage in criminal conduct in Australia; or
>
> (ii) vilify a segment of the Australian community; or
>
> (iii) incite discord in the Australian community or in a segment of that community; or
>
> (iv) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or violence threatening harm to, that community or segment, or in any other way;
>
> (2) This subsection applies to a person if the Minister:
>
> (a) having regard to:

(i) the person's past criminal conduct; or
(ii) the person's general conduct;
is satisfied that the person is not of good character; or
(b) is satisfied that the person is not of good character because of the person's association with another person, or with a group or organisation, who or that the Minister has reasonable grounds to believe has been or is involved in criminal conduct.
(3) The power under this section to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person, is in addition to any other power under this Act, as in force from time to time, to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person.

502 (1) If:
(a) the Minister, acting personally, intends to make a decision:
(i) under section 200 because of circumstances specified in section 201; or
(ii) under section 501; or
(iii) to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2):
in relation to a person; and
(b) the Minister decides that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person;
the Minister may, as part of the decision, include a certificate declaring the person to be an excluded person.
(2) A decision under subsection (1) must be taken by the Minister personally.
(3) If the Minister makes a decision under subsection (1), the Minister must cause notice of the making of the decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the decision was made."

226 The respondent contended that the Minister had erred in law in that he had exercised his discretionary power to cancel the respondent's visa "in accordance with a rule or policy" that criminal convictions of the kind recorded against the respondent negatived "good character" without regard to the merits of his case. This contention reflected the provisions of s 476(3)(c) of the Act which provides that an improper exercise of power as a ground for review under s 476(1)(d) includes "an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case". Various other arguments were advanced by the respondent and dealt with by French J at first instance. Because it is unnecessary to explore these in this Court his Honour's reasons for rejection of them will need no

reference. The live issue in this case is bias and it is to his Honour's reasons on that matter that I now go.

227 French J examined the material that the Minister had before him in making his decision and concluded that the Minister did not fail to have regard to the merits of the case.

228 His Honour pointed out that the respondent was required to show that the decision in question "was induced or affected by fraud or by actual bias", an expression to be construed by reference to its ordinary meaning which was not to be extended to a breach of the rules of natural justice as their application was expressly excluded by s 476(2)(a) of the Act. In particular, an apprehension of bias would not, his Honour said, suffice to vitiate a decision. What must be demonstrated was actual bias. The word "actual" in the opinion of French J in this collocation did not limit or qualify the meaning of bias but rather emphasised the exclusion of apprehension of bias as a ground of review. His Honour said that (166):

> "The onus of demonstrating actual bias lies upon an applicant for judicial review and it is a heavy onus. The fact that an applicant may have demonstrated that on the decision-maker's provisional views he has an uphill job to persuade him away from those views is not enough to demonstrate actual bias."

229 The correct question, French J said, was whether, by his mental state, the Minister was disabled from, or unwilling to have regard to other relevant circumstances. The answer that his Honour gave to that question was that, notwithstanding the imprudent nature of some of the Minister's remarks on radio, because he had accepted the need to weigh the various choices before him and did consider other comprehensive materials, the answer should be a negative one. It was also relevant to have regard, French J said, to these matters: that the Minister as an elected official was accountable to the public and the parliament; and, that it was not only permissible, but also commendable for the Minister to be forthright about the way in which he performed his public duties.

230 Accordingly the application to the Federal Court at first instance was rejected.

231 The respondent appealed to the Full Court (Spender, Cooper and R D Nicholson JJ). Spender J agreed with the reasons of R D Nicholson J for holding that French J should have found that the Minister was actually biased. His Honour did however, give some additional reasons for his decision. Two statements in particular selected by Spender J from the numerous statements made by the Minister on radio, and extracts from the Minister's letter, dictated, his Honour held, that the respondent's appeal be upheld.

232 One of these was that the Minister held the view that a person with

(166) *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87 at 106.

a recent conviction for a serious crime *could not be* a person of good character. I interpolate that this is not in fact what the Minister said. Nor is it the substance of what he said. The Minister said on radio (par 17) "I don't *believe* you are of good character if you've *committed significant criminal offences involving penal servitude*" (emphasis added) and referred to the offences of which he was speaking as "significant offences". He used the plural "offences". The Minister was speaking of his belief not of the discharge of his statutory obligations. He spoke in terms of what he currently believed and his perception of the balance of public opinion. He accepted however that neither of these constituted the legal test, and that there was another legal test. The other statement to which Spender J pointed was (167) "[t]hat persons such as the [respondent] can be found to be of 'good character', despite his recent conviction for a serious crime undermines the Government's ability to control entry into Australia on character grounds." It was his Honour's opinion that the fact that the Minister had "fixed preconceptions" about this case also appeared from his direct reference to the respondent in the broadcast. I will set out one passage in full from his Honour's reasons because it will require later reference (168):

> "In my respectful opinion, the Minister, who is after all frequently one party to a hearing in the Tribunal, is not entitled to pressure the Tribunal into accepting his view, particularly one which is in my opinion so fundamentally mistaken. The Tribunal is supposed to be independent, and that independence is put seriously at risk if a Minister thinks and acts as if he is entitled to lobby the Tribunal to reach a conclusion which is his preferred (and in this case mistaken) view of the law."

233 The reasons of R D Nicholson J are more extensive than those of Spender J but they do not differ from his Honour except that perhaps the former attached more weight to the Minister's letter to the President of the Tribunal than Spender J did and emphasised that the Minister's stated opinions effectively denied the possibility of rehabilitation and reformation of a person convicted of crimes. He also relied for his conclusion upon the abstention of the Minister from giving evidence personally as a basis for drawing inferences adverse to him (169).

234 In his dissenting judgment Cooper J said that whatever the view of the Minister, as expressed on radio and in the letter to the President of the Tribunal, the context in which the decision was made was quite different from either of those. His Honour pointed out that the Minister

(167) *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556 at 566.
(168) *Jia* (1999) 93 FCR 556 at 568-569.
(169) *Jia* (1999) 93 FCR 556 at 602-603.

by then had other and further material before him (170). He went on to hold that French J had stated the test with which he agreed, and which he would apply in the same way (171).

235 Finally, Cooper J dealt with the argument that the Minister's abstention from giving evidence required that an adverse inference be drawn against him with respect to his "biased" state of mind (172). His Honour held that inferences of that kind did not necessarily have to be drawn: whether they should be depended upon all of the evidence in the case (173). His Honour concluded that French J was not shown to be wrong in not drawing any adverse inferences in this case (174).

The appeal to this Court

236 In addition to the appeal, this Court has before it an application under s 75 of the Constitution by the respondent for prerogative writs seeking certiorari to quash the Minister's decision, and prohibition prohibiting him from acting on it, on grounds of bias or apprehended bias. The particulars of the grounds upon which the respondent relies for his claim of apprehended bias are the same as those relied upon to support the claim of actual bias.

237 The Minister's grounds of appeal are relevantly as follows:

1. The majority of the Full Court of the Federal Court (Spender and R D Nicholson JJ) erred in holding that the decision made by the Minister on 10 June 1997 to cancel the respondent's Transitional (Permanent) Visa under s 501 of the Act and to declare him to be an excluded person, in accordance with s 502(1) of the Act was induced or affected by actual bias;

2. The majority of the Full Court erred in drawing inferences from all the relevant circumstances that the Minister had prejudged the issue and whether the respondent was a person not of good character such that, at the time of making his decision on 10 June 1997, the Minister "had a closed mind" or such that his view "was not open to change by the relevant facts falling for consideration"; and

3. The majority of the Full Court erred in law in, having found that the primary judge had correctly stated the test for actual bias, failed to hold that it was open to the primary judge to be satisfied that, at the time of the Minister's decision, he had not so prejudged the issue of the respondent's character that his view was not open to change on the basis of the relevant facts falling for consideration.

238 The respondent seeks to maintain the decision of the Full Court on bases other than those relied on by the majority. The first of the further

(170) *Jia* (1999) 93 FCR 556 at 584.
(171) *Jia* (1999) 93 FCR 556 at 585-587.
(172) *Jones v Dunkel* (1959) 101 CLR 298.
(173) *Jia* (1999) 93 FCR 556 at 573-574.
(174) *Jia* (1999) 93 FCR 556 at 586-587.

bases is that the Full Court should have found the correct test for actual bias in the circumstances of the Minister's decision of 10 June 1997, was whether the Minister had "prejudged" the issue in the sense that he had reached a firm conclusion, or "held strong views" in relation to the matter prior to its submission to him for decision, that caused him to be predisposed to the conclusion previously reached.

239 The second contention is that the Full Court erred in law in determining that the learned trial judge had correctly held that the seriousness of the circumstances giving rise to the making of a decision under s 502 of the Act and the question of the national interest thereunder were matters peculiarly for assessment by the Minister.

240 There was a third contention, that the Full Court erred in determining that the learned trial judge had correctly determined, that there was material before the Minister on which the Minister could base a decision to declare the respondent an excluded person pursuant to s 502 of the Act.

241 In order to test the first step in the respondent's argument, that the Minister's view of the relevant law was erroneous, it is necessary to construe s 501 of the Act.

242 In construing the section, it is important to keep in mind that the Minister may act under it on his own initiative, that is to say, an occasion for its possible application may arise simply because the Minister has become aware of a person's past, perhaps as here, recent past, criminal conduct. In other words, the occasion for the Minister to apply the section is likely to arise only in circumstances in which there is, in the nature of a prima facie case for its application, the coming to the notice of a person's past criminal conduct. At that stage the Minister, as Minister, will at least have to decide, as a preliminary matter, that there is a question whether the person is not of good character having regard to that person's past criminal conduct.

243 Each of the paragraphs in s 501(2)(a) and (b) is disjunctively stated. Accordingly, in considering whether a person is not of good character under s 501(2)(a)(i) the initial focus is upon the person's past criminal conduct just as, under s 501(2)(a)(ii) it would be upon the person's general conduct. And under s 501(2)(b) that focus would be upon the person's association with another or others, or upon the person's involvement in criminal conduct. In each case express reference has been made to one particular matter or matters only. The express reference therefore, particularly in the absence of reference to other matters, evinces a clear legislative intent that the particular matter stated is a matter of primary importance, and may be the dominant or most important matter to which the Minister should have regard in satisfying himself that the person is not of good character. Otherwise the legislation would simply have referred to character and not to any particular indicia of it. Neither par (a) nor (b) uses expressions such as "in all the circumstances of the case". Furthermore, the sections may be contrasted with the subordinate legislation which was examined by

this Court in *R v Anderson; Ex parte Ipec-Air Pty Ltd* (175) which placed no limit upon the guiding considerations and gave "no clue to any intended limitations" upon the performance of the statutory functions to be performed there. There is no indication that "character", either good or bad, is to be understood in exactly the same way as the criminal law ordinarily regards it. If it were, there could hardly be any argument that the respondent is not of good character having regard to his recent convictions involving dishonesty, rape and associated criminal conduct (176). The fact however, that the word "satisfied" as used in the sections is not expressly modified by the adverb "reasonably" would not relieve the Minister of the requirement of reaching a state of reasonable satisfaction (177); that is to say, not one which no reasonable person could reach. This must be so because the legislature would hardly contemplate that a state of satisfaction of mind might be reached capriciously.

244 It is also relevant, as both French J and Cooper J observed, to the construction of the sections that the power exercised by the Minister is conferred upon him, and is exercisable by him as a member of the Executive and not as a Court or Tribunal in respect of which rules of procedure and conduct are prescribed by statute or regulations. His is also an exercise of power not reviewable under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) on a ground of either a breach of the rules of natural justice (s 476(2)(a)), or that the decision was so unreasonable that no reasonable person could have made it (s 476(2)(b)). The Minister as a Minister is obliged to wear two hats, one as a member of the Federal Executive, and another as a person to whom a power as a decision-maker is entrusted. The performance of his duties of office when he is wearing one of them, however, should not be too readily taken to be an indication of the way in which he thinks about, or will discharge his duty when he is wearing the other of them.

245 Other observations may be made about the Minister's dual roles. As a Minister of State he will have a role and involvement in the formulation and implementation of government policy. That policy may be to seek to change existing laws, because, in his or the government's opinion, those laws do not reflect government policy or they are not readily capable of application, or because they are being misapplied. One important and conventional means of effecting such a change is to draw public attention to the current operation of the existing laws. This is a legitimate public function of an elected

(175) (1965) 113 CLR 177 at 198, per Taylor and Owen JJ.

(176) For a discussion of "character" in the criminal law, see *Melbourne v The Queen* (1999) 198 CLR 1.

(177) cf *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 436; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 57-58.

member of the Executive. That he may have another role requiring him faithfully to give effect to the existing laws should not, and in my opinion, does not disable him from expressing dissatisfaction with, and advocating change to them (178). To say so much is merely to point to the difference between a Minister and a judge, and indeed, a Tribunal or member. The role of none of these is identical with the roles of the others. And different considerations requiring the application of different rules in relation to each of them are involved in a judgment whether one of them is affected by disqualifying bias. The Minister is, it should be noted, in a different position from a Tribunal such as the Australian Broadcasting Tribunal. It was not, and has no role as a protagonist (179). The Minister, on the other hand is, and necessarily so, a contradictor and protagonist in curial and other proceedings under the Act.

246 It is also significant that the Minister is obliged, if he makes a decision under s 502(1) to report that matter to the Parliament within fifteen days of the making of the decision in s 502(3). In short the Act by its terms contemplates that a decision (under s 502) may have political ramifications for the decision-maker.

247 The Minister, in exercising his powers under ss 501 and 502 of the Act must have regard to, and is entitled to place great, indeed dominant, weight upon past criminal conduct in deciding whether a person is not of good character. It is open for him, under the Act, to take the view (so long as that does not involve any automatic or impermissible application of policy) that past criminal conduct, particularly recent criminal conduct, and criminal conduct attracting a relatively long period of imprisonment is the most important matter to which regard should be had in satisfying himself that a person is not of good character: that strong — very strong — countervailing considerations would ordinarily need to be operating to displace a prima facie, but not intransigently unalterable view, that such a person is not of good character. The opinion of French J was that some of the matters to which I have referred were relevant to a proper understanding of the discharge of the Minister's duties and exercise of powers under the Act. I agree with his Honour in that regard and it is with that understanding of the Act that I turn to a consideration of the facts, beginning with the agreed statement of facts.

248 Paragraph one of the agreed statement does not express or disclose a view about the law. It is no more than an expression by a politician, in ministerial office, of his opinion of how most of the electorate would

(178) cf the role of an Australian Attorney-General as a member of Cabinet as discussed by Gaudron, Gummow and Kirby JJ in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262-263.

(179) *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36, per Gibbs, Stephen, Mason, Aickin and Wilson JJ.

regard a finding of the Tribunal that the respondent was a person of good character. It is relevant that the finding of the Tribunal, made twice, was not a finding that the Minister erred in deciding that the respondent was not of good character which was the matter that both the Tribunal and he had to decide. The Tribunal went further than that to make an affirmative finding of actual good character.

249 The second paragraph of the statement of facts is no more than that, a statement of fact. It is, I also observe, an entirely accurate one. The paragraph does not purport to be, or reflect in any way, the Minister's understanding of the law. The Minister was not speaking of the way in which he was committed to deal with the respondent at a subsequent time and on the basis of further or other materials before him. The Tribunal did essentially reject, or treat as of little account, the jury's finding of culpability by the respondent. And it is a fair reading of the Tribunal's decision that it did that by finding that the respondent's behaviour leading to the offences was justifiable or almost so, because of the complainant's conduct towards him and his feelings of jealously towards her. The Tribunal's reasons are almost tantamount to an approbation of the respondent's conduct. They contain a clear implication that the unfortunate victim, the complainant, "got what she deserved", a long discredited and completely unacceptable concept, at the hands of the respondent. The Minister was entitled to express strong condemnation of such an approach. It is true that the verdict of the jury in the rape trial was not conclusive as to the issues that the Tribunal had to decide (180). This Court examined for itself and formed its own view of a convicted person's conduct in *Ziems' Case* (181). This Court in that case also made it clear that in some circumstances a conviction for a serious crime was not necessarily decisive on the issue of character (182). It was unusual, to say the least however, for a Tribunal to do what the Tribunal twice did here, purporting to regard the verdict, and the experienced trial judge's decision (which were both affirmed by the Full Court of the Supreme Court of Western Australia) to treat the offence as serious enough to warrant a substantial term of imprisonment, as being of little or no account. It is in a sense ironic that there is implied in the reasons of the majority in this case, an accusation against the Minister that he wrongly "went behind" two decisions of the same Tribunal to form a view contrary to it, the very course adopted in effect by the Tribunal itself in relation to the two holdings of the Supreme Court of Western Australia. The Minister was, in the circumstances, entitled to form the

(180) Compare the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 27, as discussed in *Cross on Evidence*, 5th Aust ed (1996), par 5180.

(181) *Ziems v Prothonotary of the Supreme Court (NSW)* (1957) 97 CLR 279 at 288, per Fullagar J.

(182) *Ziems* (1957) 97 CLR 279 at 289, per Fullagar J.

view, and state it, whether it might be the only one open or not, that the Tribunal's decision did, in the circumstances miscarry.

250 The third agreed fact was that the Minister held the view that the government was concerned about emerging trends for Tribunals to discount the importance that the government attached to character issues. In a democratic society in which free speech is lauded, and, the Parliament has conferred upon a member of the Executive a statutory power to regulate immigration and residence by foreign nationals by reference to the character of those foreign nationals, it is not only permissible but also appropriate for a government, or its representatives, to hold concerns and to state them about the way in which Tribunals may be approaching matters particularly discretionary matters to which the government attaches importance and for which the government has responsibility. But it is not just the government which had concerns about the character of foreign nationals. The Parliament, by its statutory reference to past criminal conduct as a highly relevant measure of character, obviously also held similar serious concerns.

251 The agreed statement of facts discloses no legal preconceptions let alone any erroneous legal preconceptions. Nor does it disclose any disposition to apply a policy without regard to the merits of the respondent's case.

252 I come next to the interview which was conducted by Mr Robertson, the paragraphs of the transcript of which I have already, for convenient reference, numbered.

253 It was Mr Robertson who introduced the topic of the respondent. Paragraph one is a statement by him, and a substantially correct one, of factual matters. The second paragraph is also substantially correct. The third paragraph repeats some of those facts and contains an expression of Mr Robertson's own opinions.

254 The fourth and fifth paragraphs contain some further opinions of Mr Robertson and raise some questions for the Minister, including whether, he, Mr Robertson, had fairly stated the facts so far. In the sixth paragraph, the Minister responded by saying that he *understood* that those were the facts.

255 Paragraphs 7, 8 and the first part of par 9 are taken up with the Minister's explanation of the role of administrative review tribunals including the Tribunal that reviewed decisions by the Minister. He said that he was unhappy, not about the way in which that Tribunal dealt with a number of matters, and the way in which the law had been applied, but by the way in which discretions had been exercised by the Tribunal. He went on to say in par 10 that he had asked a joint committee to look at the sorts of questions that Mr Robertson had raised including means of strengthening the provisions to be applied, and gave an opinion as to the underlying, original intention of the Legislature in enacting the current provisions. He also again spoke of his perception of the public's expectations with respect to these matters.

256 All people do not necessarily exercise discretions in the same way. Appellate courts frequently say that they would not have exercised discretions in the way in which primary judges have. The very nature of a discretion is that its exercise may vary from person to person. People who would exercise it differently are quite entitled to criticise the way in which another has exercised it. Furthermore, here, the Minister accepted that in order for, what he took to be, the original legislative intent, to be implemented, the legislation might have to be strengthened by amendment.

257 Paragraph 12 is no more than a reasonable summary of the government's preferred position, the effect of the legislation, and a reference to some difficult and exceptional cases.

258 The first sentence of par 13 contains an acknowledgment on the part of the Minister that officials in his department have to follow and apply the law in a variety of cases as it is developed by the Tribunal. The Minister then questioned why fewer people were being deported for criminal conduct than in the past.

259 In par 14 Mr Robertson suggested that the softening of treatment in one case might become the precedent for the next one. The Minister agreed with that suggestion and expressly accepted that his officials were obliged to take the Tribunal's "precedents" into account.

260 It is par 17 upon which the respondent particularly seises for its case. What the Minister said there was what his personal belief was, and that he would not allow it to prevail over his statutory obligations. He did not say that he had applied, and would continue to apply s 501 by reference to the belief that he had. The statement of his belief certainly falls well short of an unalterable disposition to apply the law by reference to it and in conflict with the Act. But in any event, in the very next sentence the Minister accepted that his belief did not provide the legal test, because, as he said, "the law does actually write down that [his belief as to good character] is the test".

261 Finally, in further acceptance of his statutory obligations, in the last paragraph of the transcript, the Minister states that it is his obligation to weigh up what is a *proper* course for him to follow, and that he has to do that having regard to a number of other matters of public interest and concern.

262 The broadcast does not disclose any preconceptions of law on the part of the Minister, let alone any preconceptions that would operate to close his mind to persuasion otherwise. Apart from verifying the uncontradicted facts regarding the respondent, the Minister made no further reference to him, and discussed in general terms only, the matters which were raised by Mr Robertson which were matters of broader and legitimate public interest.

263 I come next to the letter written to the President of the Tribunal. The letter of the President to which it responds was not in evidence. The first paragraph of the Minister's reply may give an indication of the nature of some of its contents but not of all of them or the terms in which it was expressed. Nor was the article in *The Daily Telegraph*

newspaper, which was also apparently referred to in the President's letter, in evidence in these proceedings. No attempt was made to prove what the Minister had earlier said and which *The Daily Telegraph* purported to repeat. The absence of these materials means that it is impossible to know precisely to what the Minister was actually responding when he wrote to the President.

264 Leaving aside any question of any possible undue sensitivity on the part of the President, as both a Judge of the Federal Court and President of the Tribunal, to remarks made by a Minister, and the desirability of such a communication to a Minister, the Minister can hardly be criticised for attempting to make as responsive a reply as possible in answer to the President's stated concerns. To describe, as Spender J did, the letter in pejorative terms as "quite extraordinary" was, in the circumstances, itself rather extraordinary.

265 And it was equally erroneous to refer to the letter, as Spender J did, as an attempt to "pressure the Tribunal" into accepting his view. That error on the part of Spender J was compounded by his Honour's unjustified reference to the letter as an attempt to "lobby the Tribunal", an expression redolent of political accommodations made in secret in the by-ways of corridors of power, and not appropriate to a robust exchange of correspondence initiated by a Judge and Tribunal President. Such a view is simply not reasonably available on a fair reading of the letter. It attributes to the Minister both the highly improbable hope that a Judge of the Federal Court would be susceptible to pressure from a member of the Executive branch of the government, and would in turn apply that pressure to Tribunal members to do other than their duty according to law and, worse, an intention on the part of the Minister to achieve that end. Such a charge against the Minister goes beyond even a charge of tendentiousness. It comes close to attributing to the Minister a desire to pervert the course of justice (183). It is an entirely unwarranted attribution made without due regard to the seriousness of the charge implicit in it (184), or to the fact that if a finding of such a serious kind is to be made by a court, clear notice of it should first be given to the person against whom it might be made or those who represent that person.

266 Spender J was also in error in attributing to the Minister, an attempt to impose upon the Tribunal, by writing to the President of it in terms which he did, an erroneous view of the law. The letter simply does not do that.

267 The first three paragraphs of the letter contain no more than some statistics with respect to "criminal deportation cases". The Minister

(183) See *R v Machin* [1980] 1 WLR 763 at 767; [1980] 3 All ER 151 at 153: "The particular acts or conduct in question [constituting the offence of attempting to pervert the course of justice] may take many different forms . . ."

(184) *Briginshaw v Briginshaw* (1938) 60 CLR 336. See also *Rejfek v McElroy* (1965) 112 CLR 517.

then wrote that the decisions which had been reversed by the Tribunal had been sensitive and significant for five reasons. The first accepts that the decisions of the Tribunal set standards. The second is a statement, in effect, of his opinion of the impact of them upon the community. The third contains a reference to the government's requirements, and might, if taken alone suggest that these were more relevant than, indeed were to prevail over, legal requirements. But it does not stand alone and needs to be read, as the majority in the Full Court failed to do, in the context of the letter as a whole. The fourth is no more than an expression of the Minister's opinion of the tendency of the decisions. The fifth reason is not clearly expressed but raises a question, as I read it, of how, whether by legislation or otherwise, effect might be given to the government's preferred position.

268 The next paragraph refers in terms to the respondent. There, the Minister does not say that he will not comply with the law. He says that he is concerned that current legislation may not be adequate for the implementation of government policy, thereby acknowledging that there is a difference between what the government would prefer and what the legislation requires.

269 The following paragraph contains a discussion of the respondent's case and the Tribunal's decision. It is largely factual.

270 The Minister wrote that the Tribunal confused the fact that decisions made under s 501 involve "a two-step consideration". He was correct in that. Even if a person be found to be not of good character there is still a discretion to grant or not to grant a visa. It was his opinion, he then implied, that it was an incorrect exercise of the Tribunal's discretion, to grant the respondent a visa, despite the respondent's sentence of six and a half years imprisonment. That was a view that was open. It is also a view that is not inconsistent with s 501(2), the operation of which may be dependent upon past criminal conduct as the most relevant and important measure of the absence of good character in many cases.

271 The paragraph may not have been expressed as logically or as clearly as it might have been in a deed or statute, but it is not an unreasonable statement of the effect of the sub-section and the Tribunal's application of it in a particular case.

272 The first sentence of the next paragraph is factually correct. The respondent was recently convicted of a serious crime. The finding of actual good character might well have undermined the government's ability to control entry into Australia on character grounds; as an objective fact that is possibly so. The Minister was speaking of the government's ability, however, not the government's legal rights and obligations in respect of entry into and residence in Australia on character grounds. The decision of the Tribunal in this case and others could set a precedent for future decisions. Administrative Tribunals do defer to previous decisions of differently constituted Tribunals from time to time.

273 When the Minister said that the decisions ought not be allowed to

pass without condemnation the reference could have been as much to condemnation by a properly constituted court as to himself or anyone else. That he might condemn the Tribunal's decision did not mean that, on different materials, acting under different statutory provisions, at a different time and conscious of his legal obligations, he would not perform his statutory duties properly. The last sentence of the condemnatory paragraph also refers to the government's desire, not the government's statutory obligation.

274 After some further paragraphs which it is unnecessary to discuss, the Minister expressly acknowledged that the Tribunal was an independent Tribunal. He made clear that the seriousness of the crime was *an important consideration*, not, it may be noted, exclusively so. He said, and I agree, for the reasons I have stated that the past criminal conduct of the respondent did not appear to have been given sufficient weight in the Tribunal's deliberations. There is a clear difference between attaching sufficient weight to a factor and treating it as the exclusive factor to be taken into account in reaching a decision. It was also open for him to say, as he did, and having regard to the express words of s 501(2), that the seriousness of the crime was a primary consideration, particularly, as he later put it, in the case of crimes involving violence and drugs, when it would be a significant, (but again not the exclusive) consideration.

275 The last paragraph states the Minister's opinion of the expectations of the community. To say that community concerns had been heightened was not only something that he was entitled to say, but also something of which he, as a responsible Minister, was, as a practical matter, expected to know, and perhaps reflect so far as the law might permit him to do so.

276 The letter does not contain any erroneous statements of law. It does not disclose any irremovable preconceptions about the relevant legal position. It was not an attempt to "pressure" or "lobby" the Tribunal. Nor may the matters relied upon by the respondent, the agreed statements of facts, the radio broadcast and the letter, in combination, be so regarded. And it was a further error on the part of the majority in the Full Court to be selective of passages in, rather than to read the whole of each of the statements of fact, the radio broadcast and the letter, or the three of them in combination. So read they do not reveal bias.

277 It follows that the first step in the respondent's argument fails and that no case of actual bias is made out. Accordingly the appeal should be upheld.

278 I turn to the claim for prerogative relief based upon the allegation of apprehended bias. At first sight it might seem incongruous that a ground of apprehension of bias might be available when a claim of actual bias has been rejected. But the possibility of the former does remain. The degree of satisfaction of mind as to actual bias may be different from that required to establish the less serious matter of

apprehended bias. And, as I explained in *Johnson v Johnson* (185), the community has an interest in the appearance of justice, as well as, and separate from that of the parties.

279 But in this case exactly the same matters are relied upon to establish apprehended bias as for the claim of actual bias. Those matters have not been made out for the reasons I have given. The three sets of material either alone or together do not convey an appearance of bias. The claim of apprehended bias therefore also fails and the applications for prerogative relief on grounds of it should be refused.

280 Some additional comments should be made. The fact that a person has criticised, albeit in strong language, the decision of a tribunal or a court, particularly a decision involving discretionary considerations does not mean that that person regards himself or herself as not being bound by the decision of that Court or Tribunal, or that when the occasion comes to reconsider the matter with which the decision deals, or a like matter, the critic will remain obdurately committed to a different, wrong view. And it should also be pointed out that many people, including many lawyers who hold views, even strong views about the law on a particular topic, would hold them provisionally only in the sense that they will be open to dissuasion by a different view upon proper instruction or argument. Informed lawyers often hold strong, differing views on many legal questions. A judge or magistrate might hold strong views about and, indeed might even say publicly that he or she does not believe in it, but if a legislature, within power, legislates for it, the magistrate or judge, no matter how distasteful he or she finds it, will have no choice but to give effect to that legislation. This Court itself is no stranger to division on difficult legal questions but a dissenting judge will be bound to apply the decision of the majority of the Court. Courts and people who are bound by the decisions of superior courts (particularly in a common law system in which the doctrine of stare decisis holds strong sway) and by legislation generally, have to accept that to be so and can be expected to abide by the law as it is stated in legislation or declared by the courts.

281 The majority in the Full Court were of the opinion that the Minister's abstention from giving evidence more readily allowed them to infer bias against the Minister. In view of my conclusions on other matters it is unnecessary for me to deal with the respondent's submission in that regard. What I have said, however, in relation to it in *White's* case applies with equal force here.

282 I should also say that I agree with what Gleeson CJ and Gummow J have said, that the powers conferred upon the Minister by ss 501 and 502 are not to be qualified by an unexpressed limitation that they not be exercised differently from the Tribunal's exercise of power unless

(185) (2000) 201 CLR 488 at 517-518 [80], per Callinan J.

circumstances have changed. Nor, I agree, does an exercise of the power differently, involve an abuse of power by the Minister.

283 In dealing with the matters that I have and in the way in which I have dealt with them, I have said all that it is necessary to say about the respondent's contentions except perhaps for the contention that both the primary judge and the Full Court erred in holding that there was material before the Minister upon which he could declare that the respondent was an excluded person pursuant to s 502 of the Act. All of the materials before the Minister, including the evidence of all of the convictions were materials sufficient for that. The Minister was not estopped, for example, in exercising his powers under ss 501 and 502, from relying upon the convictions other than those for rape and associated conduct.

284 I would summarise my reasons in this way. Past convictions, especially for very serious crimes, are highly relevant matters of primary importance but not exclusively so, under ss 501 and 502 of the Act. The Full Court erred in holding that the Minister was biased. No case of apprehended bias has been made out. A Minister may, in his or her ministerial capacity speak freely about government policy, the operation of current law, and the government's desire and policy to change the law, without compromising his or her right and obligation to exercise a power conferred to decide a matter under current law, so long as he or she appreciates the different nature of his or her respective functions and legal obligations in discharging ministerial duties. Any obligations of restraint he or she may owe in speaking and acting are different from, and less onerous than, those owed by courts, judges and tribunals, the last of which may, I express no concluded opinion on it, be different again from the others. Adverse inferences may not be so readily drawn against a Minister in this type of litigation as might be drawn against a party who avoids the witness box in other proceedings.

Orders

285 I would allow the Minister's appeal with costs and order that the respondent pay the Minister's costs of the appeal to the Full Court of the Federal Court. The decisions and orders of French J at first instance should be restored. I would refuse the application by the respondent for relief under s 75(v) of the Constitution with costs.

Te Whetu Whakatau White

286 Te Whetu Whakatau White (the respondent) is a foreign national, who was born in New Zealand in 1968. By the time of his first arrival in Australia in 1987 he had been convicted of a number of offences, including two of common assault and one each of disorderly behaviour and wilful damage. Within two and a half years after his arrival in Australia he had accumulated convictions and penalties as follows:

PLACE & DATE	OFFENCE	RESULT
Perth WA, 12/12/88	Damage	Convicted Fined $200
	Assault Common	Convicted Fined $300
Perth WA, 23/1/89	Damage	Convicted Fined $50
Perth WA, 17/3/89	Disorderly, Obscene Language	Convicted 40 Hrs Community Service Order
	Assault Common	Convicted 40 Hrs Community Service Order
Perth WA, 15/9/89	Falsely Acknowledging Recognisance	Convicted Fined $50
	False Name & Address	Convicted Fined $50
CLC, 15/9/89	Exceed .08%	Convicted Fined $300 Motor Driver's Licence disqualified & cancelled 3 months
Margaret River WA, 26/10/89	False Name & Address	Convicted Fined $150, Motor Driver's Licence disqualified & cancelled 3 months
	No Motor Driver's Licence Under Suspension (Probationary)	Convicted Fined $300, Motor Driver's Licence disqualified & cancelled 12 months
Perth WA	False Name & Address	Convicted Fined $150
26/10/89	Breach of Bail	Convicted Fined $300
Perth WA 30/10/89	Breach of Bail	Convicted Fined $300

287 He added to that list a conviction for driving as an unlicensed driver with an excessive level of alcohol in his blood during a brief visit to New Zealand in September 1991. Warrants for his arrest for similar offences in May 1991 are outstanding, as well as one of possession of a knife in a public place.

288 On 31 January 1992 the respondent was granted a Special Category Visa. In June 1993 he was working as a meatworker in Katherine in the Northern Territory. On the twenty-fourth of that month, he was one of several participants in a violent altercation at a Katherine hotel. During it he left the hotel to find and drive his brother's car back to the affray. He had also armed himself with a bat that he intended to use, and did use as a weapon in the fight that he then rejoined. After being struck to the ground he returned to the car. He drove it away and at one of the men who had been engaged in the fight. He drove on, made a U-turn and ran the same man down again. He then drove on to the other side of the road and ran down another of the men who had been fighting. Not content with the injuries that he had inflicted upon the two men, he again turned the car around and ran down two women, one of whom was seriously injured, and the other of whom was killed instantly. The car then struck a pole. The respondent got out

of the car and attempted to flee, but was beaten by the associates of those he had injured and killed. His skull was fractured. On admission to hospital the level of alcohol in his blood was found to be 0.17 per cent.

289 The respondent was charged and convicted of manslaughter in the Supreme Court of the Northern Territory on 17 March 1994. He was sentenced to four years imprisonment. He was also convicted of three counts of committing an aggravated dangerous act and sentenced to two years imprisonment in respect to each of those. The Court ordered that all convictions be served concurrently, and further directed that he be released after serving twelve months imprisonment upon entering into a recognisance. The respondent remained in custody until his release from prison in Darwin on 29 June 1994.

290 Officers of the Department of Immigration and Multicultural Affairs (the Department) became aware of the respondent's possible liability for criminal deportation after March 1994. The Department conducted interviews with the respondent and sought material from various agencies concerning him for the purpose of considering whether he should be deported.

291 On 24 April 1996, while he was driving on the incorrect side of the road without a current driver's licence and with the high content of alcohol in his blood of 0.22 per cent, the respondent's car collided head-on with a vehicle travelling in the opposite direction. The passenger in that vehicle, and the passenger in the respondent's vehicle, suffered bodily harm. On 21 February 1997 the respondent pleaded guilty to two counts of dangerous driving causing grievous bodily harm. He was sentenced to a term of imprisonment of twelve months which was suspended, and was disqualified from holding a driver's licence for two years. He also pleaded guilty to, and was sentenced, on a count of driving under the influence of alcohol, a count of driving without a driver's licence, and a count of dangerous driving causing grievous bodily harm. The sentencing Court was not informed, and therefore did not have regard, in sentencing the respondent, to the earlier convictions of manslaughter and aggravated dangerous acts in Katherine.

292 A submission recommending the deportation of the respondent was put to a delegate of the Minister on 22 December 1997. That recommendation was accepted by the delegate acting under ss 200 and 201 of the Act, on 9 January 1998 (186).

(186) "200. The Minister may order the deportation of a non-citizen to whom this Division applies. 201 Where: (a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence; (b) when the offence was committed the person was a non-citizen who: (i) had been in Australia as a permanent resident: (A) for a period of less than 10 years; or (B) for periods that, when added together, total less than 10 years; or (ii) was a citizen of New Zealand who had been in Australia as an exempt non-citizen or a special category visa holder: (A) for a period of less than 10 years as

293 On 28 January 1998, the respondent applied to the Tribunal for review of the decision that he be deported.

294 The respondent was apprehended, served with a deportation order and taken into custody at the Immigration Detention Centre in Perth on 23 January 1998. He applied to the Federal Court to be released from detention. That Court made an interim order for his release on 16 February 1998.

295 On 21 May 1998 the Tribunal set aside the deportation order and remitted the matter to the Minister with a direction that the respondent not be deported.

296 On 13 August 1998 a letter was sent to the respondent advising him that his visa might be cancelled and inviting him to respond.

297 On 14 October 1998 a minute was prepared by the Department and provided to the Minister seeking his decision on the possible cancellation of the respondent's visa and a declaration that he be regarded and treated as an excluded person. On the same day the Minister decided to cancel the respondent's visa on the ground that he was not of good character, and to issue a certificate declaring him to be an excluded person. The respondent then applied to the Federal Court for review of those decisions of the Minister. On 18 November 1998 the respondent filed a revised application which included actual bias as a ground of review. Two weeks later he again amended his application so as to exclude actual bias as a ground of review.

298 The respondent's application was heard and rejected by French J. There was no current ground of review before him alleging bias in any form so that his Honour did not need to consider any question of it.

299 The respondent appealed to the Full Court of the Federal Court. Subsequently he filed a minute of amended grounds of appeal which included a ground as follows:

> "The Minister's decision was induced or affected by fraud as a direct consequence of the evident absence of the whole of the Learned Trial Judge's comments, substantially in favour of the applicant, not being submitted by the Department of Immigration for the Minister's particular consideration."

300 The respondent's appeal was heard on 20 August 1999 by Ryan, North and Weinberg JJ who pronounced judgment on some of the respondent's grounds but adjourned the appeal for further hearing in relation to actual bias. In that regard, their Honours said this:

(186) *cont*

an exempt non-citizen or a special category visa holder; or (B) for periods that, when added together, total less than 10 years, as an exempt non-citizen or a special category visa holder or in any combination of those capacities; and (c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year; section 200 applies to the person."

"What the appellant has sought to do on the appeal, however, is to revive his original claim of bias, but upon a completely different basis. He has relied in support of his revived contention upon the very recent judgment of the Full Court in *Jia Le Geng v Minister for Immigration and Multicultural Affairs* (187). In that case, the Full Court, by majority, held that the relevant Minister (who is also the respondent in the present proceedings) had displayed actual bias in the exercise of his statutory powers under ss 501 and 502 of the Act. The Minister's decision to cancel the appellant's visa and his decision to declare him an excluded person were therefore set aside."

301 They then discussed the reasons for judgment of the majority of the Full Court in *Jia*. Their Honours acknowledged that there was a pending application by the Minister for leave to appeal to this Court. They went on to say this:

"The difficulty which presents itself in the present case is that there is a judgment of a Full Court of this Court, delivered as recently as 15 July 1999, in which that Full Court, by majority, held that the very Minister who is the respondent to the present proceedings had displayed actual bias in a decision taken by him on 10 June 1997 in relation to the same sections of the same Act as are the subject of this appeal. Findings of actual bias are rarely made. If actual bias vitiated the Minister's decisions taken in *Jia Le Geng* on 10 June 1997, might it also vitiate the Minister's decisions taken in the present case on 14 October 1998?"

302 Counsel for the Minister had submitted, that merely because the Minister had displayed actual bias in the manner in which he approached ss 501 and 502 of the Act on 10 June 1997 could not mean that he had also been guilty of actual bias when he considered the respondent's position on 14 October 1998.

303 Of that submission their Honours said this:

"That submission may well be correct, as a matter of logic. There are, however, several countervailing considerations. There is nothing to suggest that the Minister would have understood, at any time before the Full Court published its reasons in *Jia Le Geng* on 15 July 1999, that his approach to ss 501 and 502 of the Act was erroneous. There is no reason to believe that he would not have approached those provisions in exactly the same erroneous manner when, on 14 October 1998, he decided to cancel the appellant's visa, and to declare him an excluded person."

304 The Full Court then stated this:

"As at November 1998, when the appeal to the Full Court in *Jia*

(187) (1999) 93 FCR 556.

Le Geng was argued, the Minister continued to maintain that he had not erred in cancelling Mr Jia's visa, and in declaring him an excluded person. That hardly suggests that the Minister had changed his views between June 1997 and October 1998.

Counsel for the respondent quite properly drew attention to the fact that in *Jia Le Geng* there had been a body of evidence placed before the Court, both at first instance and on appeal, in support of the contention that the Minister had displayed actual bias in arriving at the relevant decisions. Indeed, in *Jia Le Geng* there were agreed facts which facilitated the resolution of the question whether there had been such bias.''

305 Then the Full Court added this:

> ''It is appropriate, in our view, in the unusual circumstances of this case, where the appellant relies entirely upon findings of fact made by the Full Court in *Jia Le Geng*, that the respondent file and serve any affidavits upon which he wishes to rely before the appellant is required to file additional material in support of his claim.''

306 An affidavit of the solicitor acting for the Minister was then filed on behalf of the Minister. The same statement of facts as was agreed in *Jia* was exhibited to it and was asserted to be true and correct for the purposes of this case also. Materials in relation to other decisions taken by the Minister were also exhibited for the affidavit.

307 After argument, and when the Full Court came to consider the matter further they said this:

> ''This is an unusual case in that the appellant relies on the reasoning of the majority in *Jia*, not as establishing some applicable principle, in the sense of what is traditionally called the ratio decidendi, but rather to draw an inference as to what the Minister's state of mind was on 10 June 1997. That reliance is available to the appellant only because a conclusion as to the same fact is relevant to what he asserts was the Minister's state of mind on 14 October 1998, and because there is no significant difference between the evidence from which the majority in *Jia* drew the inference they did and the evidence before this Full Court.''

308 Ultimately the Full Court held that:

> ''continuously between 10 June 1997 and 14 October 1998 [the Minister's mind] was closed to the possibility of a decision favourable to a person in the respondent's circumstances [by reason of] a perception that, as a matter of policy or sound administration, rather than law, a person who had been sentenced to more than one year's imprisonment could not be of good character.''

Their Honours reached this conclusion notwithstanding that during this period the Minister had before him Departmental submissions in

respect of two other criminals which made it clear that the fact of a conviction attracting a term of imprisonment of a year or more, did not conclude the issue of character against those criminals.

The appeal to this Court

309 The Minister appeals to this Court on the grounds, inter alia, as follows: a. The Full Court of the Federal Court erred in holding that the decision made by the Minister on 14 October 1998, that he was satisfied that the respondent was not of good character, and that the respondent's visa be cancelled under s 501 of the Act, was induced or affected by actual bias. b. The Full Court erred in drawing the inference on the same facts as were before the Full Court in *Jia v Minister for Immigration and Multicultural Affairs* that, as at 10 June 1997, the Minister had prejudged the issue of whether Jia was a person not of good character. c. The Full Court erred in drawing the inference that at the time of making his decision on 14 October 1998, the Minister had prejudged the issue of whether the respondent was a person not of good character.

310 The respondent seeks prerogative relief pursuant to s 75 of the Constitution against the Minister on grounds of actual bias, or apprehended bias, and unreasonableness.

311 A useful starting point for the resolution of this case is to analyse the steps in the reasoning of the Full Court.

312 First the Full Court defined bias. They said that a ''closed mind'' would constitute bias, if that mind were not open to persuasion otherwise: or that there has been a prejudgment of an aspect of the case. Their Honours then cited several passages in the judgments of Spender J and R D Nicholson J in *Jia* (188).

313 The next step was effectively to approve and adopt the finding of the Full Court in *Jia*, that the Minister ''was incapable of persuasion that the [Tribunal's] line of reasoning was acceptable when he came to decide, about six weeks after making the statement, whether Mr Jia was of good character''. The language in which the Full Court couched this approval and adoption, ''that it was plainly open to the majority in *Jia* to infer that ... [the Minister] was incapable of persuasion ...'' does not put a different complexion upon the reality of what the Court was doing: accepting as established by a finding of fact in one case, an important factual matter in this case.

314 This was an unusual step to take. Whether a person is biased is a question of fact. The Full Court's reasoning in this case involves finding that fact (the Minister's state of mind when he made his decision in *Jia*) when there was no evidence specifically directed to that fact at first instance, and the evidence on appeal was different from what was before the Court in *Jia*. This factual finding was derived from the factual finding of the differently constituted earlier

(188) *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556.

Full Court in which that was the principal fact to be decided. It was almost as if the Full Court in this case regarded the finding of fact in the earlier case, between different parties, as creating in the nature of an issue estoppel with respect to that fact in these proceedings. Parties are entitled to have the factual issues between them decided on the facts adduced, and the arguments presented in their case, and on their behalf. A previous factual finding in different proceedings between non-identical parties and on different facts has no binding, and indeed should have little, or no persuasive effect upon the minds of a subsequent court whose obligation is to consider the matter afresh and reach its own conclusions about it. To do what the Full Court did here was effectively, to do that of which the Minister is accused, to treat a particular view as conclusive of a decision-maker's view on a different occasion in respect of different facts and a different person.

315 Their Honours found it easier, they said, to reach the same conclusion as to the Minister's state of mind as the Full Court in *Jia*, because, in this case, as there, the Minister did not give evidence of his state of mind when he acted under ss 501 and 502 of the Act in relation to *Jia*.

316 The Federal Court has held on a number of occasions (189) that the principle laid down in *Jones v Dunkel* (190) can be invoked against a Minister of the Crown. In *Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (191) Pincus J with some apparent hesitation did so. His Honour said (192):

> "The respondent did not give evidence. His senior counsel argued with, as it seems to me, some cogency that performance of his Ministerial duties would be impractical if he were to spend substantial amounts of time in courts being cross-examined about his decisions. It may be thought that the argument just mentioned justifies a departure from the ordinary principle laid down in *Jones v Dunkel* ... as to the results of failing to give evidence. On the other hand, in the absence of their author, it is hard to resist drawing from the notes just quoted two inferences which may assist the applicants ..."

317 It is unnecessary to decide in this case whether the rule should have application to a Minister in modern times. But on any view it cannot

(189) *ARM Constructions Pty Ltd v Federal Commissioner of Taxation* (1986) 10 FCR 197 at 205; *Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 11 FCR 543; *Citibank Ltd v Federal Commissioner of Taxation* (1988) 83 ALR 144 at 159; *Dahlan v Minister for Immigration, Local Government and Ethnic Affairs* (unreported; Federal Court of Australia (Hill J); 12 December 1989); *Pattanasri v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 34 ALD 169 at 178.

(190) (1959) 101 CLR 298.

(191) (1986) 11 FCR 543.

(192) *Lebanese Moslem Association* (1986) 11 FCR 543 at 548.

be applied in any unqualified way to a modern Minister of State, and not just for the reasons that Pincus J described as cogent. Considerations of public interest immunity may loom large in some cases. A Minister is a policymaker and policy advocate as well as a decision-maker. Furthermore, the statement of principle in *Jones v Dunkel* is no more than a particular instance of the old rule stated by Lord Mansfield in *Blatch v Archer* (193) and cited recently by this Court in *Vetter v Lake Macquarie City Council* (194), that evidence has to be weighed according to the circumstances of, as well as the capacity of, a party to adduce it.

318 The next step in the Full Court's reasoning was to find that the Minister's preconception of 10 June 1997 remained sixteen months later on 14 October 1998.

319 It is not entirely clear to what reasons the Court was referring immediately before their Honours drew the inference that they did as to the Minister's unchanged state of mind during the sixteen months up until 14 October 1998. The judgment was, to that point, largely taken up with the Court's power to receive evidence on appeal, and the respondent's application to amend his ground of appeal.

320 It is necessary to go to the next paragraph to find the matters upon which the Court relied to hold that the Minister's mind remained closed to the correct legal position. The first of those matters was stated to be that "[n]o other facts have emerged which tend to support an inference that the Minister's view had changed in any relevant respect in the sixteen months that had elapsed". Let it be assumed as counsel for the Minister apparently did, that the Minister was acting, on 10 June 1997, under a misconception as to the correct legal position. It by no means follows that the misconception endured for the next sixteen months. But in any event there were facts, indeed their Honours had already stated them, which tended to show what in fact was the Minister's state of mind from time to time, in that period and earlier, and that it was different from the state of mind that both Full Courts attributed to him, of, in effect, an inflexible determination to deport anyone convicted of a serious crime that attracted a substantial term of more than twelve months imprisonment, without regard to his obligations to apply the statute according to its terms.

321 The references to the facts that had emerged were as follows:

> "We have not disregarded the fact that the Minister, between 10 June 1997 and 14 October 1998, made two further decisions in relation to persons who had been sentenced to terms of imprisonment in excess of one year. When making those decisions, the Minister had the benefit of Departmental submissions which did not suggest that no other course than refusal of a visa was open. The

(193) (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].
(194) (2001) 202 CLR 439.

submissions directed the Minister to the need to consider any recent good conduct of the respective applicants.''

322 The Full Court's reasons do not disclose how their Honours had regard to those relevant matters and why they gave them little or no weight. The unqualified application of *Jones v Dunkel* by reason of what I have already said was misconceived and could not in any event justify the Court's failure to explain why or how, if they had not disregarded them, those facts would not displace the inferences they were disposed to draw and did draw.

323 It can be seen that there were flaws in each step of the Full Court's reasoning except, perhaps, in the initial one of defining bias. The combination of these flaws alone requires that the Minister's appeal be upheld.

324 However, more fundamental reasons why the appeal should be allowed are those reasons I have stated in *Jia*, that the Minister did not express, and has not been shown to hold, an erroneous view of the law, much less an unalterable one. Nor did he seek to apply policy instead of the Act at any material time. And, as I pointed out in *Jia*, nor did the Minister's conduct and statements give rise to any apprehension of bias. For the same reasons, the application for prerogative relief should also be refused.

325 Because of the conclusions that I have reached on the grounds of appeal that I have considered it is unnecessary for me to deal with the other grounds relating to amendment and the reception of evidence by the Full Court of the Federal Court. Nor is it necessary for me to give any detailed consideration to the contention of the respondent relied on to support the decisions of the Full Court which depend on the erroneous view that the decision of the Tribunal of 21 May 1998 under s 500 of the Act bound the Minister (presumably for all time) from acting as he did under ss 501 and 502 of the Act in October 1998.

326 The ground for seeking prerogative relief asserting unreasonableness (assuming its availability under s 75 of the Constitution) can equally be quickly disposed of. That the Minister made a decision that no reasonable person could make, as to the absence of good character of this persistent offender, with the long criminal record that he has in two countries, is a preposterous proposition.

Orders

327 I would allow the Minister's appeal with costs. The decisions made by the Full Court of the Federal Court should be set aside and, in place of the orders made by the Full Court, it should be ordered that the appeal to that Court be dismissed with costs. The application for relief under s 75(v) of the Constitution should be dismissed with costs.

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v JIA

1. *Appeal allowed with costs.*
2. *Set aside the orders made by the Full Court of the Federal Court on* 15 *July* 1999 *and in place thereof, order that the appeal to that Court be dismissed with costs.*

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS; EX PARTE JIA

Application dismissed with costs.

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v WHITE

1. *Appeal allowed.*
2. *Appellant to pay respondent's costs of the appeal.*
3. *Set aside the orders made by the Full Court of the Federal Court on* 8 *March* 2000 *and in place thereof, order that the appeal to that Court be dismissed with costs.*

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS; EX PARTE WHITE

Application dismissed with costs.

Solicitor for the appellants, *Australian Government Solicitor.*

Solicitor for the respondents, *Director of Legal Aid, Legal Aid Western Australia.*

DWB