MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS v TEOH

HIGH COURT OF AUSTRALIA

MASON CJ, DEANE, TOOHEY, GAUDRON and MCHUGH JJ

24, 25 October 1994 — Perth; 7 April 1995 — Canberra

Administrative law — Immigration — Respondent married to Australian citizen and father of Australian children — Respondent convicted of serious drug offences — Minister's delegate refused application by respondent for resident status and decided to deport respondent — Whether delegate required to consider hardship to respondent's wife and children — Whether respondent had legitimate expectation that delegate would act in conformity with international agreement signed by Australia — (Cth) Migration Act 1958 ss 6(2), 6A(1), 16(1)(c), 60 — United Nations Convention on the Rights of the Child.

Foreign relations — Australia a party to international convention — Agreement not implemented by legislation in Australia — Status of convention obligations in Australian law — Relevance to exercise of statutory discretion — United Nations Convention on the Rights of the Child.

The respondent entered Australia in May 1988 on a temporary entry permit and, in July 1988, married an Australian citizen who had four children, including three fathered by the respondent's deceased brother. Three further children were born of the marriage. The respondent then applied for a grant of resident status. In November 1990, while that application was pending, the respondent was convicted of nine offences involving importation and possession of heroin and sentenced to six years' imprisonment.

In January 1991, a delegate of the minister refused the respondent's application for resident status on the ground that he was not of good character. The respondent applied for review of the delegate's decision, and submitted testimonials referring to the close relationship between the respondent, his wife and the children and the impact on the family if the respondent were to be deported.

An Immigration Review Panel recommended against allowing the respondent's application because the "compassionate grounds" raised by the respondent were not sufficient to displace his conviction for a very serious crime. In July 1991, a delegate of the minister accepted the panel's recommendation and, in February 1992, another delegate made an order that the respondent be deported.

The respondent applied to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) for an order of review of the delegates' decisions. The application was dismissed by the trial judge.

The Full Court of the Federal Court allowed the respondent's appeal on grounds added during the hearing of the appeal — namely that the delegate had failed to give proper consideration to a relevant factor, the effect of the respondent's deportation on his family; and that Australia's accession to the United Nations Convention on the Rights of the Child (the Convention) had given rise to a legitimate expectation in the respondent's children that the respondent's application for resident status would be treated in accordance with the terms of the convention. The Full Court set aside the decision to refuse resident status to the respondent, remitting the matter to the minister for reconsideration: see *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436.

The Convention was ratified by the Commonwealth Executive on 17 December 1990

undertaken by administrative bodies, "the best interests of the child shall be the primary consideration". By special leave, the minister appealed to the High Court of Australia.

Held, per Mason CJ, Deane, Toohey and Gaudron JJ (McHugh J dissenting): The appeal should be dismissed.

Per Mason CJ, Deane and Toohey JJ:

(i) The provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been incorporated into municipal law by statute and cannot operate as a direct source of individual rights and obligations under that law.

Chow Hung Ching v R (1948) 77 CLR 449; *Bradley v Commonwealth* (1973) 128 CLR 557; *Simsek v MacPhee* (1982) 148 CLR 636; 40 ALR 61; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; 39 ALR 417; *Kioa v West* (1985) 159 CLR 550; 62 ALR 321; *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, followed.

(ii) However, the ratification of a convention is a positive statement by the Executive Government of Australia to the world and to the Australian people that the Executive Government and its agencies will act according to the convention.

(iii) It followed that the ratification of the Convention on 17 December 1990 was an adequate foundation for a legitimate expectation, in the absence of statutory or executive indications to the contrary, that administrative decision-makers, including the minister's delegate, would act in conformity with the Convention and treat the best interests of the child as a primary consideration.

(a) It was not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it was enough the expectation was reasonable in the sense that there were adequate materials to support it.

(b) Although it would be preferable for the children affected to make the claim that the expectation was legitimate, there was no objection to a parent or guardian making the claim on behalf of a child.

(iv) The existence of a legitimate expectation that the delegate would act in a particular way did not compel the delegate to act in that way. However, if the delegate proposed to make a decision which did not accord with the principle that the best interests of the children were the primary consideration, procedural fairness required the delegate to give the children notice and an adequate opportunity of presenting a case against the taking of such a course.

(v) The evidence showed that the Immigration Review Panel and the delegate treated the requirement that the respondent be of good character as the primary requirement when considering his application for resident status and there was no indication that the best interests of the children had been treated as a primary consideration. It followed that there had been a want of procedural fairness in the making of the decision to refuse resident status to the respondent.

Per Gaudron J:

(vi) Apart from the Convention, any reasonable person considering the matter would have assumed that the best interests of the children would be a primary consideration and taken into account as a matter of course when considering the respondent's application for resident status. That assumption would be made because of: (a) the special vulnerability of children, particularly where family break-up may be involved; and (b) the expectation that a civilised society would be alert to its responsibilities to children who may be in need of protection.

(vii) The Convention was significant because it gave expression to a fundamental human right which is valued and respected here as in other civilised countries. Because the Convention gave expression to an important right valued by the Australian community, it was reasonable to speak of an expectation that the Convention would be given effect.

(viii) Procedural fairness required that, if the delegate were considering proceeding on some other basis, she should inform the respondent and give him an opportunity to persuade her otherwise.

(ix) As the delegate did not proceed on the basis that she was to take the interests of the children into account as a primary consideration, there was a want of procedural fairness.

Obiter, per Mason CJ, Deane and Gaudron JJ:

(x) There may be a common law obligation imposed on decision-makers to take account of the best interests of the child taken in all exercises of statutory discretions which directly affect a child's interests.

Appeal

This was an appeal, by special leave, from a decision of the Full Court of the Federal Court of Australia, which had set aside a decision of the appellant that the respondent not be granted resident status and remitted the matter to the appellant for reconsideration.

J J Spigelman QC, H C Burmeister and *C R Staker* for the appellant.

R R S Tracey QC and *S C Churches* for the respondent.

R C Kenzie QC and *L S Katz* for the Human Rights and Equal Opportunity Commission, intervening.

Mason CJ and Deane J. This appeal, which is brought by the minister from a unanimous decision of the Full Federal Court (Black CJ, Lee and Carr JJ) allowing an appeal by the respondent from a decision of French J, raises an important question concerning the relationship between international law and Australian law.

Factual background

The respondent, Mr Teoh, a Malaysian citizen, came to Australia on 5 May 1988 and was granted a temporary entry permit. On 9 July he married Jean Helen Lim, an Australian citizen, who had been the de facto spouse of his deceased brother. At the time of the marriage Mrs Teoh had four children, the eldest being the child of her first marriage, the other three being children of her de facto relationship with the respondent's brother. There are, in addition, three children of the marriage.

In October 1988 the respondent applied for and was granted a further temporary entry permit which allowed him to remain in Australia until 5 February 1989. Before that permit had expired the respondent applied for a permanent entry permit, otherwise referred to as a grant of resident status. In November 1990, when his application for resident status was still pending, the respondent was convicted of six counts of being knowingly concerned in the importation of heroin and of three counts of being in possession of heroin. He was sentenced to six years' imprisonment with a non-parole period of two years and eight months. The sentencing judge accepted that Mrs Teoh's addiction to heroin played a part in the respondent's actions.

In January 1991, the respondent received a letter informing him that an officer authorised under the Migration Act 1958 (Cth) (the Act) had refused his application for the grant of resident status. The application was refused for the following reasons:

1.1 It is a policy requirement for grant of resident status that applicants be of good character.

1.2 Amongst other points, one of the basis [sic] of assessment is whether the applicant has a criminal record.

1.3 All applicants aged 16 years or over are subject to the character requirement. In this case [the respondent] cannot meet the character requirement as he has a criminal record. [He] is currently serving six years' imprisonment with a two year eight month non parole period.

The reasons given reflected policy instructions issued by the department to decision-makers, to which we shall refer later.

The Act (as it then stood) provided that, upon the expiration of a temporary entry permit, the holder became a prohibited non-citizen unless a further entry permit came into force.[1] The respondent was therefore told that he was an "illegal entrant" but that he could apply for a review of the decision refusing his application for resident status.

The respondent made such an application under reg 173A of the regulations made under the Act in 1989. His wife supported this application. A number of documents were annexed to the application. Among the documents was a copy of a character reference from the respondent's former employer, Mr R Deng. That reference included the following observations:

> Since knowing [the respondent] and his family, I found he is a good father and very responsible family man. Despite his many hardships, he always placed his wife and children before his own interests. He cares for them and provide their needs.

Also among the documents was a handwritten testimonial from Mrs P D Grant, the respondent's mother-in-law, which referred to the respondent as a concerned father and a great help to his wife who was a drug addict. According to Mrs Grant, the respondent was hardworking, had tried very hard to keep his wife out of trouble and to care for his children, and only wanted what was best for his family. She added that it would be a "great tragedy for the whole family" if he were to be deported, noting that he was the only person who could keep them together. The respondent's wife also included a letter in support of the application, stressing the need that the family had for the respondent's continued presence. At that time Mrs Teoh had six children living with her. They were all under 10 years old. The youngest child was born later on 20 March 1992.

On 25 July 1991, the Immigration Review Panel recommended that the respondent's application for reconsideration be rejected. The Panel noted that Mrs Teoh, Mrs Grant and Mr Deng had made claims on compassionate grounds that the respondent's application be approved. The Panel referred specifically to the respondent's statement that his wife and children would suffer great financial and emotional hardship if he were deported. The Panel went on to make its recommendation for the following reasons:

> All the evidence for this application has been carefully examined, including the claims of Ms Teoh. It is realised that Ms Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However, the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency. The compassionate claims are not considered to be compelling enough for the waiver of policy in view of [Mr Teoh's] criminal record.

A delegate of the minister accepted this recommendation on 26 July 1991 and, on 17 February 1992, another delegate of the minister made an order under s 60 of the Act that the respondent be deported. The respondent applied to the Federal Court to have these two decisions reviewed.

The decision at first instance

The respondent challenged the delegate's decision to refuse reconsideration of the refusal of the grant of resident status on three broad grounds:

(1) the delegate had failed to comply with the rules of procedural fairness because the respondent was not given an opportunity to contradict or otherwise deal with the finding that he was not of good character;
(2) the decision involved an improper exercise of power in that the delegate had failed to take relevant considerations into account; and
(3) the decision involved an improper exercise of power in that the delegate exercised her discretionary power in accordance with a policy without regard to the merits of the respondent's case.

French J rejected the challenge on these grounds. As the application to review the decision to deport was inextricably linked with the challenge to the decision refusing resident status, the respondent's application for review of the two decisions was dismissed.

The decision on appeal

At the hearing of the appeal to the Full Court of the Federal Court, the respondent sought leave to amend the grounds stated in his application for judicial review of the decision refusing resident status by adding the following further particular of procedural unfairness:

> [T]he [Minister's delegate] failed to make appropriate investigations into the hardship to the [respondent's] wife and her children were the [respondent] refused resident status.

The respondent also sought leave to amend his notice of appeal by adding the following additional ground:

> The court erred in fact and in law in finding that the hardship to the [respondent's] wife and her children had been taken into relevant consideration.

The Full Court unanimously allowed both amendments notwithstanding the fact that, as Carr J pointed out, the respondent's counsel at first instance had expressly abandoned the ground that the minister's delegate failed to take into account the hardship to the respondent's wife and her children were he refused resident status.

Black CJ concluded that the minister's delegate did not properly consider the effect of the break-up of the family when she made her decision to refuse the grant of resident status to the respondent. Counsel for the minister having conceded that the effect of the break-up of the family was a matter that the delegate was bound to take into account, her failure to do so involved an error of law.

Lee J considered that the Executive's ratification of the United Nations Convention on the Rights of the Child (the Convention) was a [illegible] national [illegible]

be a primary consideration". Although noting that the Convention had not been incorporated into Australian law, his Honour stated that its ratification provided parents and children, whose interests could be affected by actions of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention. This meant that, in such a context, the parents and children who might be affected by a relevant decision had a legitimate expectation that the Commonwealth decision-maker would act on the basis that the "best interests" of the children would be treated as "a primary consideration". His Honour held that the delegate had not exercised her power consistently with that expectation because she failed to initiate appropriate inquiries and obtain appropriate reports as to the future welfare of the children in the event that the respondent were deported. That failure involved an error of law.

Carr J's approach was similar to that adopted by Lee J. Carr J also considered that, although the Convention was not part of Australian municipal law, the children in this case had a legitimate expectation that their father's application would be treated by the minister in a manner consistent with its terms.

In the result, the court ordered that the delegate's decision of 26 July 1991 to refuse the respondent's application for the grant of resident status be set aside and that the application be referred to the minister for reconsideration according to law. The court also ordered that the other delegate's decision to deport the respondent be stayed until the minister reconsidered and determined that application.

The minister contends that the Full Court's decision is wrong on a number of grounds. It is only necessary to outline three of them for the purposes of this appeal:

(1) Lee and Carr JJ erred in holding that Australia's ratification of the Convention created a legitimate expectation in parents or children that any action or decision by the Commonwealth would be conducted or made in accordance with the principles of the Convention;

(2) even if ratification of the Convention created such an expectation, Lee and Carr JJ erred in holding that, in the circumstances of this case, procedural fairness required the minister's delegate to initiate appropriate inquiries and obtain appropriate reports concerning the children; and

(3) Black CJ erred in holding that the minister's delegate did not properly consider the break-up of the family when she made her decision to refuse the grant of resident status to the respondent.

The relevant statutory provisions

The respondent's application for a permanent entry permit was governed by the provisions of the Act as it stood before it was amended in 1989, as was the respondent's application for reconsideration of the refusal of a permanent entry permit. Section 6(2) then provided:

> An officer may, . . . at the request or with the consent of a non-citizen, grant to the non-citizen an entry permit.

An entry permit might be temporary or permanent.[2] The word "officer" was defined by s 5 of the Act so as to include a person authorised by the minister to discharge certain functions.

In order to qualify for the grant of a permanent entry permit conferring resident status, the respondent was required to satisfy one of the conditions set out in s 6A. So far as it is relevant, that section provided:

> (1) An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say:
>
> . . .
>
> (b) he is the spouse, child or aged parent of an Australian citizen or of the holder of an entry permit; . . .
>
> (c) he is the holder of a temporary entry permit which is in force and there are strong compassionate or humanitarian grounds for the grant of an entry permit to him.

In his application for resident status, the respondent had relied on satisfaction of condition (b) alone even though, at the time of the application, he also clearly satisfied condition (c). It has not, however, been suggested that anything turns upon that for the purposes of the present case since it is common ground that the "strong compassionate or humanitarian grounds" which were required to satisfy condition (c) were a relevant consideration supporting a grant of resident status based on satisfaction of condition (b). In these circumstances, it is unnecessary to consider whether the fact that the respondent's temporary entry permit expired during the period between the time when his application for resident status was made and the time when it was dealt with would have precluded reliance upon satisfaction of condition (c) as an independent ground. As it was, satisfaction of condition (b) enabled the delegate to grant resident status in the exercise of a statutory discretion to grant or refuse the respondent's application.

It is convenient to refer now to s 16(1)(c) of the Act and to a policy requirement of good character contained in departmental instructions entitled "Integrated Departmental Instructions Manual, Grant of resident status, Number 17". Section 16(1)(c) provided:

> (1) Where . . . a person who enters or entered Australia is not, or was not, at the time of that entry, an Australian citizen and who:
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> . . .
>
> (c) at the time of entry is or was a person of any of the following descriptions, namely:
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> . . .
>
> (ii) a person who has been convicted of a crime and sentenced to death, to imprisonment for life or to imprisonment for a period of not less than 1 year;
>
> (iii) a person who has been convicted of 2 or more crimes and sentenced to imprisonment for periods aggregating not less than 1 year; . . .
>
> that person shall, notwithstanding section 10, be deemed to be a prohibited non-citizen unless he is the holder of an entry permit endorsed with a statement that the person granting that permit recognizes him to be a person referred to in this sub-section.

Because the respondent sustained his convictions after his entry into Australia, s 16(1)(c) had no effect on his application.

2. See s 6(6).

However, para 1.1 of the departmental Instructions Manual, to which we have referred, stated: "It is a policy requirement for grant of resident status that applicants be of good character." Paragraph 1.2 specifically indicated that one of the bases of assessment was "whether the applicant has a criminal record". Paragraph 3.2 stated that applicants who come within s 16(1)(c) do not meet the good character requirement and their applications would normally be refused unless they could show "strong cause why policy should be waived in their case". Paragraph 3.3 stated:

> Applicants who do not come within s 16(1)(c) of the Act may also fail to meet this good character requirement. The nature, number or recency of the offences or activities concerned and the potential for continuance or recidivism may be such as to warrant refusal on the overall merits of the case.

As understood in the light of the reasons stated by the chairperson, the recommendation of the Immigration Review Panel that the respondent's application for reconsideration be rejected was based on an acceptance of the department's character objections, presumably grounded on paras 1.1, 1.2 and 3.3 of the departmental instructions, and on a conclusion that the serious nature of the respondent's offences outweighed the compassionate factors on which he relied. This recommendation, as stated above, was accepted by the minister's delegate.

The scope of the statutory discretion

Apart from the prescription by s 6A that one of the conditions shall be satisfied and the restriction arising from s 16(1)(c), the statutory discretion to grant or refuse resident status is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view", to use the words of Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning*.[3] There is no provision in the Act which makes the provisions of the Convention, assuming them to be otherwise relevant, extraneous to a decision-maker's considerations of an application for resident status and for review of a refusal of such an application. Nor has it been suggested that there is anything in the scope and purpose of the statute which would have that effect. It follows that the Immigration Review Panel and the minister's delegate who accepted the recommendation of the Panel were entitled to have regard to the provisions of the Convention so long as they were a legitimate subject matter for consideration and were relevant to the issues for determination.

The Convention

The Convention was ratified by the Commonwealth Executive on 17 December 1990 and it entered into force for Australia on 16 January 1991. These events occurred before the rejection of the respondent's application for reconsideration of the decision refusing resident status and before the minister's delegate made the decision to deport him. On 22 December 1992, after those decisions had been made, the Attorney-General declared the Convention to be an international instrument relating to human rights and freedoms. This declaration was made pursuant to s. 47(1) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth).

Articles 3 and 9 of the Convention provide as follows:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

The status of the Convention in Australian law

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute.[4] This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall

4. *Chow Hung Ching v R* (1948) 77 CLR 449 at 478; *Bradley v Commonwealth* (1973) 128 CLR 557 at 582; 1 ALR 241; *Simsek v MacPhee* (1982) 148 CLR 636 at 641-2; 40 ALR 61; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211-12, 224-5; 39 ALR 417; *Kioa v West* (1985) 159 CLR 550 at 570; 62 ALR 321; *Dietrich v R* (1992) 177 CLR

within the province of parliament, not the Executive.[5] So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to s 47(1) of the Human Rights and Equal Opportunity Commission Act has this effect.

But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party,[6] at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because parliament, prima facie, intends to give effect to Australia's obligations under international law.

It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.[7] The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph should be stated so as to require the courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.[8]

Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.[9] But the courts should act in this fashion with due circumspection when the parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to

5. *Simsek v MacPhee* (1982) 148 CLR at 641-2 [illegible]
6. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; 110 ALR 97 [illegible]
7. *Polites v Commonwealth* (1945) 70 CLR 60 at 68-9, 77, 80-1 [illegible]
8. *R v Home Secretary; Ex parte Brind* [1991] 1 AC 696 at 748 [illegible]
9. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J [illegible] h whom Mason CJ and McHugh J agreed); *Dietrich v R* (1992) 107 ALR 1; 177 CLR at [illegible] per Brennan J, 360 per Toohey J; *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 569 per Kirby P; *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770

statutory policy and statutory materials.[10] Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.

In the present case, however, we are not concerned with the resolution of an ambiguity in a statute. Nor are we concerned with the development of some existing principle of the common law. The critical questions to be resolved are whether the provisions of the Convention are relevant to the exercise of the statutory discretion and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention. The foregoing discussion of the status of the Convention in Australian law reveals no intrinsic reason for excluding its provisions from consideration by the decision-maker simply because it has not been incorporated into our municipal law.

The relevance of the Convention

Lee and Carr JJ evidently considered that Art 3 of the Convention had an application to the exercise of the discretion, though their Honours did not express any cogent reasons for that conclusion. The respondent did not rely on Art 9, no doubt because it does not seem to address decisions to deport or, for that matter, decisions to refuse permanent entry. The crucial question is whether the decision was an "action concerning children". It is clear enough that the decision was an "action" in the relevant sense of that term, but was the decision an action "concerning children"? The ordinary meaning of "concerning" is "regarding, touching, in reference or relation to; about".[11] The appellant argues that the decision, though it affects the children, does not touch or relate to them. That, in our view, is an unduly narrow reading of the provision, particularly when regard is had to the grounds advanced in support of the application and the reasons given for its rejection, namely that the respondent's bad character outweighed the compassionate considerations arising from the effect that separation would have on the family unit, notably the young children. A broad reading and application of the provisions in Art 3, one which gives to the word "concerning" a wide-ranging application, is more likely to achieve the objects of the Convention.

One other aspect of Art 3 merits attention. The concluding words of Art 3.1 are "the best interests of the child shall be *a* primary consideration" (our emphasis). The article is careful to avoid putting the best interests of the child as *the* primary consideration; it does no more than give those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight. The impact of Art 3.1 in the present case is a matter to be dealt with later in these reasons.

The Full Court's use of the Convention as a foundation for a legitimate expectation and the creation of an obligation to initiate inquiries and reports in conjunction with procedural fairness

What is significant about the reasoning of Lee and Carr JJ is that, having used the Convention as a foundation for generating an expectation that its provisions would be implemented, their Honours held that, in the light of the Convention, procedural fairness required the initiation of appropriate inquiries and the

10. *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12; 74 ALR 188
11. *New Shorter Oxford English Dictionary on Historical Principles*, 3rd ed (1993), p 467

obtaining of appropriate reports as to the future welfare of the children in the event that the respondent were deported. In taking this approach, Lee and Carr JJ acted in accordance with views expressed by some judges of the Federal Court in earlier cases. In *Videto v Minister for Immigration and Ethnic Affairs*,[12] Toohey J, after observing that "[a]s a broad proposition, I do not think that the Act imposes an obligation on a decision-maker to initiate inquiries", went on to indicate that in some situations such an obligation might arise. In *Prasad v Minister for Immigration and Ethnic Affairs*,[13] Wilcox J, with reference to s 5(2)(g) of the Administrative Decisions (Judicial Review) Act 1977 (Cth), said:[14]

> The most restrictive view is that para (g) applies only to a case in which the court is able to hold that, upon the material actually or constructively before the decision-maker, the decision was unreasonable. At the opposite extreme it is arguable that the question is whether, upon the evidence before the court as to the facts at the date of decision, and whether or not all of those facts were known to, or reasonably ascertainable by, the decision-maker, his decision, objectively considered, was unreasonable. An intermediate position is that the court is entitled to consider those facts which were known to the decision-maker, actually or constructively, together only with such additional facts as the decision-maker would have learned but for any unreasonable conduct by him.

His Honour went on to express a tentative preference for the intermediate position, based on the view that under s 5(1)(e) and s 5(2)(g) the court is concerned with the manner of exercise of the power. Just as a power is exercised in an improper manner if it is, upon the material before the decision-maker, a decision to which no reasonable person could come, so it is exercised in an improper manner if the decision-maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course.

Accepting the correctness of this approach in an appropriate case, it does not seem to us that the present case was argued on the ground of s 5(2)(g) or on the basis of "*Wednesbury*" unreasonableness. And we do not see how the suggested failure to initiate inquiries can be supported on the footing that there was some departure from the common law standards of natural justice or procedural fairness. Nothing in the two cases to which we have referred, or in Luu v *Renevier*[15] or in *Lek v Minister for Immigration, Local Government and Ethnic Affairs*,[16] the other cases mentioned by Lee J, supports that view. Another difficulty with the approach taken by Lee and Carr JJ is that the requirement that the minister's delegate initiate inquiries and obtain reports as to the future welfare of the children appears to stem from an assumption that the minister's delegate was bound to exercise the statutory discretion in conformity with the Convention as if its provisions formed part of our municipal law. That assumption appears to have arisen from the finding that ratification of the Convention generated a legitimate expectation that its provisions would be applied.

Junior counsel for the appellant contended that a convention ratified by Australia but not incorporated into our law could never give rise to a legitimate

12 (1985) 60 ALR 342 at 353
13 (1985) 65 ALR 549

expectation. No persuasive reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention do not form part of our law are a less than compelling reason — legitimate expectations are not equated to rules or principles of law. Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act,[17] particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention[18] and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

But, in the present case, who is entitled to claim that the expectation was legitimate? Lee J held that "parents and children" affected could do so, whereas Carr J held that only the children could make such a claim. Although it would be preferable for the children to make the claim directly, we can see no objection to a parent or guardian making the claim on behalf of a child. It seems that the present case has been conducted on the footing that the respondent, with the mother's support, has been asserting the children's claim.

The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door. And that, as we have already said, is what Lee and Carr JJ seem to have done because the obligation to initiate inquiries and reports appears to stem from a view that the minister's delegate was bound to apply Art 3.1.

But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated.

Did the minister's delegate comply with the Convention?

The question which then arises is whether the delegate made her decision without treating the best interests of the child as a primary consideration. There is nothing to indicate that the Panel or the minister's delegate had regard to the

terms of the Convention. That would not matter if it appears from the delegate's acceptance of the Panel's recommendation that the principle enshrined in Art 3.1 was applied. If that were the case, the legitimate expectation was fulfilled and no case of procedural unfairness could arise.

It can be said that the delegate carried out a balancing exercise in which she considered the plight of Mrs Teoh and the children and recognised that they would face a "very difficult and bleak future" if the respondent were deported. On the other hand, she considered that the respondent had been convicted of very serious offences and this factor outweighed the "compassionate claims". However, it does not seem to us that the Panel or the delegate regarded the best interests of the children as a primary consideration. The last sentence in the recommendation of the Panel reveals that, in conformity with the departmental instructions, it was treating the good character requirement as *the* primary consideration. The Panel said:

> The compassionate claims are not considered to be compelling enough for *the waiver of policy* in view of Mr Teoh's criminal record [emphasis added].

The language of that sentence treats the policy requirement as paramount unless it can be displaced by other considerations. There is no indication that the best interests of the children are to be treated as a primary consideration. A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it. The decision necessarily reflected the difference between the principle and the instruction.

That view entails the conclusion that there was a want of procedural fairness. It may also entail, though this was not argued, a failure to apply a relevant principle in that the principle enshrined in Art 3.1 may possibly have a counterpart in the common law as it applies to cases where the welfare of a child is a matter relevant to the determination to be made.

In other respects, we do not consider that there was any failure to take relevant matters into account. It cannot be said that the delegate either failed to turn her mind to the hardship the family would face or failed to have regard to the consequences of the break-up of the family unit. She had a considerable amount of detailed information about the respondent's wife and children before her. As Carr J noted, her assessment of their plight was very gloomy indeed.

Conclusion

In the result the appeal should be dismissed though for reasons which differ from those given by the Full Court of the Federal Court. The appellant should pay the costs of the respondent.

Toohey J. These proceedings began as an application by the present respondent against the present appellant under the provisions of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act). Two decisions were sought to be reviewed:

> 1. A decision made the 26th July 1991 by the respondent's delegate Christine Rushworth to refuse the grant of resident status to the applicant pursuant to s 6A(1) (as it was) of the Migration Act 1958;
>
> 2. The decision made the 17th February 1992 by the respondent's delegate Graham Alexander Broome to order the deportation of the applicant pursuant to s 60 of the Migration Act 1958

French J dismissed the application. The Full Court (Black CJ, Lee and Carr JJ) allowed an appeal, set aside the decision of the delegate made 26 July 1991, referred the application for a grant of resident status to the appellant "for reconsideration according to law" and stayed the decision made 17 February 1992 to order deportation until the appellant had "reconsidered and determined the said application according to law".[19] The minister appeals from the judgment of the Full Court.

The background

What follows is largely taken from the judgment of French J.

The respondent is a Malaysian citizen who arrived in Australia on 5 May 1988 as a visitor. He was granted a temporary entry permit, valid until 5 November 1988. On 9 July 1988 the respondent married Helen Jean Lim, an Australian citizen. She had four children. The eldest was a child of an earlier marriage. The other three were children of her de facto relationship with the respondent's brother who, at the time of the marriage of the respondent and Mrs Lim, was deceased. Thereafter the respondent obtained an extension of his entry permit until 5 February 1989. On 5 January 1989 a child was born to the respondent and his wife and, later, two other children.

On 3 February 1989 the respondent lodged an application with the department of Immigration and Ethnic Affairs (the department) for a grant of resident status. The application was supported by character references and included a bail recognisance for the respondent's appearance at the Central Law Courts in Perth on charges of dangerous driving and driving without a motor driver's licence. The respondent was convicted of driving without a licence and was fined $200.

On 16 November 1989, while the application for resident status was pending, the respondent was arrested and charged with a number of offences relating to the importation and possession of heroin. He had been involved in the sending of heroin from Malaysia to Australia over a period of about four months from August 1989. He was convicted on nine counts and, overall, he received a sentence of six years' imprisonment, with a non-parole period of two years and eight months. The respondent was sentenced on 30 November 1990. At about this time Mrs Teoh pleaded guilty to charges relating to heroin and was given a suspended sentence of 18 months. She had a serious drug addiction.

On 2 January 1991 the department wrote to the respondent to tell him that his application for a grant of resident status had been refused. As his entry permit had expired, he was therefore an illegal entrant. The letter contained reasons for decision which pointed to a policy requirement for the grant of resident status that "applicants be of good character" and said that the respondent could not meet this requirement because of his criminal record.

On 29 and 30 January 1991 the respondent and his wife completed an application for reconsideration of his application for resident status by the Immigration Review Panel (the Panel). Again, character references were included. In one of these mention was made of the drug addiction of the respondent's wife and she described in a letter her hardships and the need for the respondent's continued presence.

On 25 July 1991 the Panel recommended that the application for reconsideration of the grant of resident status be rejected. Because of the

[19] *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 121 ALR 49.

significance the reasons for the recommendation assumed in the proceedings that followed, it is necessary to quote certain passages:[20]

> Mrs Teoh, the applicant's sponsor and a former employer have made claims on compassionate grounds for the application for reconsideration to be approved. Mrs Teoh states that she and the five children will suffer great financial and emotional hardship if the applicant is deported. Mrs Teoh is receiving community support during her husband's imprisonment and will be dependent on social services if he is forced to leave Australia.
>
> All the evidence for this application has been carefully examined, including the claims of Ms Teoh. It is realised that Ms Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However, the applicant has committed a very serious crime and failed to meet the character requirements for the grant of permanent residency. The compassionate claims are not considered to be compelling enough for the waiver of policy in view of Mr Teoh's criminal record [and] it is recommended that this application is rejected.

This recommendation was endorsed as accepted by Christine Rushworth, a delegate of the appellant, on 26 July 1991. Ms Rushworth's decision is the first of the two decisions challenged under the ADJR Act. Following the decision of 26 July 1991 there were communications and approaches made by the respondent to the appellant and various bodies; it is unnecessary to detail them.

The proceedings in the Federal Court

The application under the ADJR Act sets out a number of grounds. In essence they are that there was a breach of the rules of natural justice, an improper exercise of power in failing to take into account relevant considerations and an improper exercise of power in exercising a discretionary power in accordance with a policy without regard to the merits of the case. French J held that the respondent failed to make good any of these grounds. The Full Court upheld an appeal against dismissal of the application. The members of the Full Court did not all take the same approach and, as the appellant complains of the approach each took, it will be necessary to say something about each judgment. But it should be said now that the role accorded by two of their Honours to Australia's ratification of the United Nations Convention on the Rights of the Child (the Convention) was at the forefront of the appellant's attack on the decision of the Full Court.

The Convention

The provisions of the Convention which featured most prominently before the Full Court were as follows:

> Article 3
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration . . .
>
> Article 5
>
> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

The Convention was ratified by Australia on 17 December 1990 and entered into force for Australia on 16 January 1991.[21] By an instrument of declaration made 22 December 1992 the Attorney-General of the Commonwealth declared the Convention to be an international instrument relating to human rights and freedoms for the purpose of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (the HREOC Act).[22] The decisions with which this appeal is concerned were made after Australia ratified the Convention but before the instrument of declaration.

The judgments of the Full Court

Black CJ approached the matter in light of the appellant's concession "that in a case such as the present the breaking up of a family unit is a consideration of major significance and one which the decision-maker was relevantly bound to take into account".[23] The point at issue for his Honour was what was required of the decision-maker in order to give effect to this requirement. This, he said, involved not a question of the weight to be given to this aspect, but whether the decision-maker had given proper consideration to it. His Honour held that, in the circumstances of the case, proper consideration required that further inquiry be made as to the implications for the respondent's family if he were deported.

Black CJ referred only briefly to the Convention. In his opinion it formed part of the general background against which decisions affecting children are made. While it was not part of Australian domestic law, it reflected "the standards to which Australia is seen by the international community to aspire as a mature and civilised nation".[24] His Honour continued:

> Those standards emphasise that special care should be taken when decisions are made that may profoundly affect the lives of young children by parting them from a parent and exposing their family to the risk of disintegration.

By contrast, Lee J placed emphasis on the Convention. His approach was that it was unnecessary to determine to what extent the common law has been affected by ratification of the Convention. The question, his Honour said,[25] is "whether the exercise of decision-making powers of an administrative kind import cognisance of the provisions of the Convention by reason of the executive's ratification of the Convention". His Honour's approach is encapsulated in the following paragraph:[26]

> In my opinion ratification of the Convention by the executive was a statement to the national and international community that the Commonwealth recognised and accepted the principles of the Convention. That statement provided parents and children, whose interests could be affected by actions of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention.

21. See Art 49.2
22. See s 47 of the HREOC Act
23. (1994) 121 ALR at 440-1

It followed, in his Honour's view,[27] that "persons exercising delegated administrative powers to make decisions which concerned children were expected to apply the broad principles of the Convention in so far as it was consonant with the national interest and not contrary to statutory provisions to do so".

Applying this approach, Lee J concluded that the decision to refuse an entry permit to the respondent failed to give effect to a legitimate expectation on the part of the parents and children that the principles of the Convention required the best interests of the children to be a primary consideration. There was a legitimate expectation that "appropriate inquiries" would be made and "appropriate reports" would be obtained as to the future welfare of the children in the event that the respondent was deported.[28] This was not done.

In light of the material before the court, Carr J held[29] that it was apparent that the decision-maker "specifically considered the plight of Mrs Teoh and her children were the [respondent] to be deported". The decision-maker had extended procedural fairness and had given proper consideration to the effect of a deportation order on the family. However, his Honour allowed the appeal on the basis that the Convention forms part of the context in which Australian decision-makers have to determine how to carry out their duty to act fairly. Although it was not part of municipal law, the children had "a legitimate expectation that their father's application should be treated by the minister in a manner consistent with the Convention".[30] While the decision-maker worked on the assumption that deportation was going to make the future bleak for the children and their mother, it is possible that the initiation of appropriate inquiries and the obtaining of appropriate reports would have revealed the children's situation to be far worse, and she may have come to a different conclusion.[31]

The appellant criticised the approach taken by each of the members of the Full Court.

The role of the Convention

It being common ground that the Convention is not part of Australian municipal law, what role should it have played in the decisions which have given rise to this appeal? In posing the question in this way, there is an underlying assumption that if the Convention were part of municipal law Arts 3 and 5 would indeed have an impact on the decisions that were made.

The appellant said that it was axiomatic that treaties (other than treaties terminating a state of war) do not impose obligations on individuals or invest individuals with additional rights or otherwise affect the rights of individuals under Australian law except in so far as the treaty is effectuated by statute. There is an abundance of authority to this effect.[32]

27. ibid at 450
28. ibid at 451
29. ibid at 466
30. ibid
31. See generally ibid at 468
32. *Chow Hung Ching v R* (1948) 77 CLR 449 at 478 per Dixon J; *Bradley v Commonwealth* (1973) 1 ALR 241; 128 CLR 557 at 582 per Barwick CJ and Gibbs J; *Sim v MacPhee* (1982) 40 ALR 61; 148 CLR 636 at 641-2 per Stephen J; *Koowarta v Bjelke-Pe n* (1982) 39 ALR 417; 153 CLR 168 at 193 per Gibbs CJ; *Dietrich v R* (1992) 109 ALR 385; 177 CLR 292 at 305 per Mason CJ and McHugh J, 359-60 per Toohey J. See also *Minister for Foreign Affairs and Trade*

But it does not follow that the Convention has no role in the present case. It is important to see the way in which the respondent relied upon the Convention. It played no part in the hearing before French J. It is not mentioned in the notice of appeal to the Full Court. It seems to have surfaced during the hearing of the appeal to the Full Court and was relied upon by the respondent as an aspect of natural justice, in particular as giving rise to a legitimate expectation that the Panel would act consistently with the Convention and, in particular, not act in a manner inconsistent with Australia's obligations under the Convention without giving the respondent an opportunity to be heard. Coupled with this expectation was an obligation to provide procedural fairness to the respondent, an obligation which required the decision-maker to obtain further information about the respondent's family before making a decision.

If the matter is approached in terms of legitimate expectation, it is no answer for the appellant to argue that the Convention does not give rise to individual rights and obligations in municipal law. The question rather is whether Australia's ratification of the Convention results in an expectation that those making administrative decisions under the aegis of the Executive Government of the Commonwealth will act in accordance with the Convention wherever it is relevant to the decision to be made.

In the appellant's submission the Convention had no bearing on and was irrelevant to the rights of the respondent and the obligations of the appellant. Ratification did not amount to adoption or incorporation of the Convention in the municipal law of Australia. Declaration for the purposes of the HREOC Act did no more than identify an international instrument as a guide to the Human Rights and Equal Opportunity Commission in fulfilling its functions of inquiring into and reporting on any act or practice that may be inconsistent with or contrary to human rights declared in the instrument. The appellant drew attention to the fact that the Convention receives no mention in the Migration Act 1958 (Cth). By way of contrast, s 6A(1)(c) of that Act (now repealed) referred specifically to the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees.

Concepts such as natural justice, procedural fairness and legitimate expectation are sometimes applied as if they were labels, somehow determining the outcome of a particular matter. But they have to be seen for what they are, in their particular context. It is one thing to say that natural justice demanded that the respondent be given every opportunity to present his case; certainly natural justice demanded that much. It is another thing to say that procedural fairness dictated that no decision adverse to his application be made without pursuing further the implications of deportation for his family. It is another thing again to say that the respondent had a legitimate expectation that the decision-maker would act in accordance with the Convention.

It was not part of the respondent's case that he was denied an opportunity to present the case in support of his application for resident status. The department gave him the opportunity to provide whatever material he wished in support of his original application and his application for reconsideration. I shall defer the question of whether the delegate should have made further inquiries until I have dealt with the matter of the Convention and legitimate expectation. In doing this

v Mayne (1992) ALR 529; *R v Sandford* (1994) 33 NSWLR 172 at 177 per Hunt CJ; *Re Raynes (Mansing cane) Ltd v Department of Trade and Industry* [1993] 2 AC 418 at 501 per Lord Oliver

I recognise that legitimate expectation is often treated as an aspect of procedural fairness, though generally in the context of an expectation that a decision-maker should afford a person the opportunity to be heard on a particular matter.[33] As has been observed:[34] "The two broad categories into which the content of a legitimate expectation can be divided are those related to a benefit and those expressly directed to a hearing." In the present case the respondent contends for an expectation that the delegate would deal with his application in light of the criteria to be found in the Convention, particularly the principle that "the best interests of the child shall be a primary consideration". Accordingly, it was submitted, procedural fairness required that if the delegate proposed to act inconsistently with Australia's obligations under Arts 3 and 5 of the Convention, she should first have afforded the respondent the opportunity of persuading her that she should act consistently with its terms.

In *R v Home Secretary; Ex parte Brind*[35] the House of Lords rejected the broad proposition that the Secretary of State should exercise a statutory discretion in accordance with the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was not part of English domestic law. That decision was considered by the New Zealand Court of Appeal in *Tavita v Minister of Immigration* [36] where a deportee argued that those concerned with ordering his deportation were bound to take into account the Convention and the International Covenant on Civil and Political Rights, both of which had been ratified by New Zealand. In the end the court did not have to determine the point. But it said of the contrary proposition:[37]

> That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing ... there must at least be hesitation about accepting it.

In *Minister for Foreign Affairs and Trade v Magno*[38] Gummow J essayed an analysis of the relationship between an instrument embodying an international obligation of Australia and a municipal statute dealing with that subject matter. His Honour looked at various aspects of that relationship, concluding that:[39]

> difficult questions of administrative law and of judicial review arise where, whilst the international obligation ... is not in terms imported into municipal law and the municipal law is not ambiguous, nevertheless, upon the proper construction of the municipal law, regard may be had by a decision maker exercising a discretion under that law to the international agreement or obligation.

In *In the Marriage of Murray and Tam; Director, Family Services (ACT)*[40] Nicholson CJ and Fogarty J referred to Gummow J's analysis. The Family Court of Australia was concerned with an appeal from orders made pursuant to the Family Law (Child Abduction Convention) Regulations which in turn derived from the Hague Convention which Australia had ratified. Their Honours noted

33. See for instance *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 655, 670-1, 679-80, 684-5; 93 ALR 51
34. Tate, "The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice" (1988) 14 *Monash University Law Review* 15 at 50
35. [1991] 1 AC 696
36. [1994] 2 NZLR 257
37. Ibid at 266

what Nicholson CJ had said earlier in his dissenting judgment in *Re Marion*[41] in relation to the Declaration on the Rights of Mentally Retarded Persons, incorporated as Sch 4 to the HREOC Act, namely, that:

> it [is] strongly arguable that the existence of the human rights set out in the relevant instrument ... have been recognised by the parliament as a source of Australian domestic law by reason of this legislation.

Whether this is so is a matter which does not arise in the present case.

Returning to what was said in *Tavita*, certainly a submission by a decision-maker that no regard at all need be paid to Australia's acceptance of international obligations by virtue of ratification of a convention is unattractive. What is the next step? Ratification of itself does not make the obligations enforceable in the courts; legislation, not executive act, is required. But the assumption of such an obligation may give rise to legitimate expectations in the minds of those who are affected by administrative decisions on which the obligation has some bearing. It is not necessary for a person in the position of the respondent to show that he was aware of the ratification of the Convention. legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned.[42] The matter is to be assessed objectively, in terms of what expectation might reasonably be engendered by any undertaking that the authority in question has given, whether itself or, as in the present case, by the government of which it is a part.[43] A subjective test is particularly inappropriate when the legitimate expectation is said to derive from something as general as the ratification of the Convention. For, by ratifying the Convention Australia has given a solemn undertaking to the world at large that it will: "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies" make "the best interests of the child a primary consideration".

The appellant complained that the proliferation of conventions which Australia had ratified would impose an impossible task on decision-makers if they were to be the basis for legitimate expectations. But particular conventions will generally have an impact on particular decision-makers and often no great practical difficulties will arise in giving effect to the principles which they acknowledge. In any event it is not that decision-makers must give effect to the precept that "the best interests of the child shall be a primary consideration". There may be other interests carrying equal weight. Rather, a decision-maker who does not intend to treat the best interests of a child as a primary consideration must give the person affected by the decision an opportunity to argue that the decision-maker should do so.

The touchstone in Art 3 is "actions concerning children". The scope of the provision can be gauged if the word "concerning" is given its ordinary meaning of "relating to; regarding; about"[45] or "regarding, touching, in reference or

41. (1990) 14 Fam LR 427 at 451
42. *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR at 670
43. cf *Attorney General of Hong Kong v Ng Yuen Shiu* (1983) 2 AC 629 at 638 where the Privy Council said that "when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and implement its promise, so long

relation to; about".[46] The refusal of an application for resident status to a parent of dependent children living in Australia, with the direct consequence of deportation for the parent and the breaking up of the family, is an action concerning children.

It follows that while Australia's ratification of the Convention does not go so far as to incorporate it into domestic law, it does have consequences for agencies of the Executive Government of the Commonwealth. It results in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course. It may be said that such a view of ratification will have undue consequences for decision-makers. But it is important to bear in mind that we are not concerned with enforceable obligations, but with legitimate expectations, and that there can be no legitimate expectation if the actions of the legislature or the executive are inconsistent with such an expectation.[47]

It was argued that proper consideration of the respondent's application necessitated further inquiries by the delegate. Indeed, a failure to make such inquiries underlies the judgments of Lee J and Carr J. Generally speaking, it is not the decision-maker's duty to initiate inquiries.[47] But in endorsing the Panel's recommendation, the delegate must be taken to have accepted that "Ms Teoh and family are facing a very bleak and difficult future". Before deciding that these considerations did not warrant "the waiver of policy in view of Mr Teoh's criminal record", inquiries could have been made at least of Parkerville Children's Home which had the children in its care and the Department of Community Welfare which had an ongoing involvement with them. The point is not that the delegate was obliged by the Convention to do so but that, had she done so, she might have been in a better position to meet the legitimate expectation to which the Convention gave rise. It is apparent that the delegate did not approach the matter on the footing that the interests of the children were a primary consideration. Instead, she appears to have treated the policy requirement that applicants for the grant of resident status be of good character as the primary consideration. It need hardly be said that the decision-maker might treat the best interests of the children as a primary consideration yet, in all the circumstances, refuse the application for resident status.

Conclusion

Before allowing the scales to come down against the respondent by reason of his criminal record, some more detailed assessment of the position of his family could have been undertaken. However, I would dismiss the appeal, not by reason of any failure by the delegate to initiate inquiries and obtain reports, but rather because she did not meet the respondent's legitimate expectation that she would give the best interests of the children the consideration required by the Convention or inform the respondent of her intention not to do so in order that he might argue against that course.

Accordingly, I would dismiss the appeal.

Gaudron J. The facts, the issues and the relevant legislative provisions are set out in the judgments of Mason CJ and Deane J and of Toohey J. It is necessary

46. *New Shorter Oxford English Dictionary on Historical Principles*, 3rd ed (1993), p 467
47. *Videto v Minister* (1985) 69 ALR 342 at 353

only to emphasise the consequence to the seven young children who constituted Mr Teoh's immediate family (the children) of a decision refusing or confirming the refusal of his application for resident status. In that event, Mr Teoh would be required to leave the country and the children would be placed in a position where they grew up either fatherless or in another country, denied an upbringing in the country of which they are citizens.

As appears from the judgment of Mason CJ and Deane J, the case was argued in this court primarily by reference to Art 3.1 of the United Nations Convention on the Rights of the Child (the Convention) which provides that "[i]n all actions concerning children ... the best interests of the child shall be a primary consideration". It was argued for the appellant that, although his delegate was bound to have regard to the interests of the children, she was neither bound to proceed on the basis that their best interests were a primary consideration nor obliged as a matter of procedural fairness to give Mr Teoh an opportunity to persuade her of that course if she were minded to proceed on some other basis. In particular, it was argued that the Convention did not give rise to an obligation on the part of the delegate to act in accordance with its terms nor a legitimate expectation that she would act in that way. The argument emphasised that the Convention formed no part of municipal law at the time the decisions were made.

I agree with Mason CJ and Deane J as to the status of the Convention in Australian law. However, I consider that the Convention is only of subsidiary significance in this case. What is significant is the status of the children as Australian citizens. Citizenship involves more than obligations on the part of the individual to the community constituting the body politic of which he or she is a member. It involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability. And there are particular obligations to the child citizen in need of protection. So much was recognised as the duty of kings,[48] which gave rise to the parens patriae jurisdiction of the courts. No less is required of the government and the courts of a civilized democratic society.

In my view, it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare, particularly decisions which affect children as dramatically and as fundamentally as those involved in this case. And it may be that, if there is a right of that kind, a decision-maker is required, at least in some circumstances, to initiate appropriate inquiries, as Carr and Lee JJ held should have happened in this case. However, it was not argued that there is any such right and, thus, the case falls to be decided by reference to the requirements of natural justice.

Quite apart from the Convention or its ratification, any reasonable person who considered the matter would, in my view, assume that the best interests of the child would be a primary consideration in all administrative decisions which

48. See, in relation to the "direct responsibility of the crown" which founds the "parens patriae" jurisdiction originally conferred on the English Court of Chancery, *Secretary, Department of Health and Com[illegible]ty Services v JWB and SMB (Marion's case)* (1992) 106 ALR 385, 175 CLR 218 at 258-[illegible] the cases there cited; cf at 279-80. See, in relation to the paramountcy of the child's welfare in the exercise of that jurisdiction, *Marion's case* at CLR 292-3 and the cases there cited

directly affect children as individuals and which have consequences for their future welfare. Further, they would assume or expect that the interests of the child would be taken into account in that way as a matter of course and without any need for the issue to be raised with the decision-maker. They would make that assumption or have that expectation because of the special vulnerability of children, particularly where the break-up of the family unit is, or may be, involved, and because of their expectation that a civilised society would be alert to its responsibilities to children who are, or may be, in need of protection.

The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries. And if there were any doubt whether that were so, ratification would tend to confirm the significance of the right within our society. Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations.

There is a want of procedural fairness if there is no opportunity to be heard on matters in issue. And there is no opportunity to be heard if the person concerned neither knows nor is in a position to anticipate what the issues are. That is also the case if it is assumed that a particular matter is not in issue and the assumption is reasonable in the circumstances. In my view and for the reasons already given, it is reasonable to assume that, in a case such as the present, the best interests of the children would be taken into account as a primary consideration and as a matter of course. That being so, procedural fairness required that, if the delegate were considering proceeding on some other basis, she should inform Mr Teoh in that regard and give him an opportunity to persuade her otherwise. It did not, however, require her to initiate inquiries and obtain reports about the future welfare of the children and, in this respect, I agree with the judgment of Mason CJ and Deane J.

I also agree with Mason CJ and Deane J, for the reasons that their Honours give, that the delegate did not proceed on the basis that she was to take the interests of the children into account as a primary consideration. There was, thus, a want of procedural fairness. The appeal should be dismissed.

McHugh J. The principal question in this appeal from an order of the Full Court of the Federal Court is whether Australia's ratification of the Convention on the Rights of the Child gave rise to a legitimate expectation on the part of the respondent or his children that a decision made under the Migration Act 1958 (Cth) concerning the grant of resident status to him would be made in accordance with Art 3 of the Convention. That Article requires that, in "all actions" concerning children, their "best interests" shall be a primary consideration.

If the principal question is answered in the negative, a further question arises as to whether, in the circumstances of this case, the decision-maker was under an obligation to make further inquiries about the future of the children if the respondent was refused resident status.

In my opinion, no legitimate expectation arose in this case because:

(1) the doctrine of legitimate expectations is concerned with procedural fairness and imposes an obligation on a decision-maker to give

(2) the doctrine of legitimate expectations does not require a decision-maker to inform a person affected by a decision that he or she will not apply a rule when the decision-maker is not bound and has given no undertaking to apply that rule;

(3) the ratification of the Convention did not give rise to any legitimate expectation that an application for resident status would be decided in accordance with Art 3.

Accordingly, the appeal should be allowed because the judgment under appeal held that the respondent had a legitimate expectation that Art 3 would be applied.

In addition, the appeal should be allowed because the decision-maker did regard the best interests of the children as a primary consideration in determining the application for resident status and the circumstances did not give rise to any duty to make further inquiries about the welfare of the children.

The Convention on the Rights of the Child

The instrument ratifying the Convention on the Rights of the Child was deposited for Australia on 17 December 1990. The Convention entered into force generally on 2 September 1990 and for Australia on 16 January 1991.[29] Article 3 provides:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

The implementation of the Convention is dealt with in Pt II of the Convention.[30] Article 43 establishes a Committee on the Rights of the Child made up of "ten experts of high moral standing and recognized competence" in the field covered by the Convention. Article 44 provides that parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted to give effect to the rights recognised in the Convention and any difficulties "affecting the degree of fulfilment of the obligations" under the Convention. This must be done within two years of the entry into force of the Convention and thereafter every five years.

The factual background

Mr Ah Hin Teoh, the respondent, is a Malaysian citizen who arrived in Australia on 5 May 1988. He was granted a temporary entry permit which was valid until 5 November 1988. In July 1988, he married Helen Jean Lim who is an Australian citizen. At the time of the marriage, Ms Lim had four children. Following the marriage, Mr Teoh obtained an extension of his entry permit until 5 February 1989. On 3 February 1989, Mr Teoh lodged an application with the Department of Immigration and Ethnic Affairs seeking a grant of [illegible]

To qualify for the grant of a permanent entry permit conferring resident status, Mr Teoh had to satisfy one of the conditions set out in s 6A of the Migration Act. Relevantly, that section provided:

> (1) An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say:
>
> (b) he is the spouse, child or aged parent of an Australian citizen or of the holder of an entry permit.

Mr Teoh made his application on the basis that he was the spouse of an Australian citizen. He did not rely on s 6A(1)(e) which provides for applications on humanitarian or compassionate grounds. Although the Migration Act was extensively amended in 1989, transitional provisions allowed the application to continue to be treated through the reconsideration process as an application to which s 6A and other relevant provisions of the pre-amendment Act applied.

On 5 January 1989, prior to the lodging of the application, a child was born to Mr Teoh and his wife. Since that time, Mrs Teoh has given birth to two more children, who were born on 7 June 1990 and 20 March 1992 respectively. While the application for resident status was still pending, Mr Teoh was convicted in November 1990 on six counts of being knowingly concerned in the importation of heroin and three counts of being in possession of heroin contrary to the Customs Act 1901 (Cth). He was sentenced to a term of six years' imprisonment with a non-parole period of two years and eight months. Mrs Teoh was also charged with offences in relation to heroin to which she pleaded guilty and in respect of which she was given an 18 month suspended sentence in July 1990. In November 1990, Mrs Teoh was charged with further drug related offences. In December 1991, she was sentenced to a term of imprisonment and not released until October 1992. Meanwhile, the children were placed in the care of the State.

On 2 January 1991, Mr Teoh was notified by letter that an officer authorised under the Migration Act had decided to refuse his application for the grant of resident status. Attached to that letter was a document entitled "Reasons for Decision" which stated:

> 1.1 It is a policy requirement for grant of resident status that applicants be of good character.
>
> 1.2 Amongst other points one of the basis [sic] of assessment is whether the applicant has a criminal record.
>
> 1.3 All applicants aged 16 years or over are subject to the character requirement.
>
> In this case applicant cannot meet the character requirement as he has a criminal record. Is currently serving 6 years imprisonment with a 2 yr 8 month non-parole period . . . On completion of sentance [sic] it is likely he will be considered for deportation under section 14(1) of the Migration Act.

On 5 February 1991, Mr Teoh lodged an application for reconsideration of his application for resident status by the Immigration Review Panel. On 25 July 1991, the Panel recommended that the application for reconsideration of the grant of resident status be rejected.

In its reasons the Panel said:

> Mrs Teoh, the applicants [sic] sponsor and a former employ[illegible]ave made claims on Compassionate Grounds for the application for Reconside[illegible]n to be approved. Mr [sic] Teoh states that she and the 5 children will suffer great financial and emotional hardship if the Applicant is deported. Mrs Teoh is receiving Community support during her husband's imprisonment and will be dependent on Social Services if he [is] forced to leave Australia.
>
> All the evidence for this Application has been carefully examined, including the claims of Ms Teoh. It is realised that Mrs Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However, the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency. The Compassionate claims are not considered to be compelling enough for the waiver of policy in view of Mr Teoh's criminal record it is recommended that this application is rejected.

Among the documents considered by the Panel was a document, dated 13 June 1991, apparently from within the department which stated, inter alia:

> *Reasons for my recommendation*
>
> Mr Teoh has claimed that if his residence application is refused it will cause hardship to his wife and children as he will not be able to provide them with assistance.
>
> While it is reasonable to accept that there are compassionate factors present in this case, it must also be considered that Mr Teoh has been found guilty of committing a serious offence. The claim that he will be unable to provide assistance to his family is discounted by the fact that he is presently in prison, and will remain in prison at least until July 1993. He therefore is not in a position to provide assistance to his family at present.
>
> Mr Teoh's family are receiving community support while he is in prison and this situation may have to continue if he is required to leave Australia. However, I believe that the serious nature of his offences outweighs the compassionate factors therefore I recommend that refusal of this application.

The recommendation of the Panel was accepted by the minister's delegate on 26 July 1991. On 17 February 1992, a delegate of the minister made an order under s 60 of the Migration Act that Mr Teoh be deported from Australia.

In 1993, Mr Teoh sought judicial review of the decision of 26 July 1991 that refused the grant of resident status and of the decision of 17 February 1992 that ordered his deportation. French J rejected Mr Teoh's application, but an appeal to the Full Federal Court succeeded. The minister, pursuant to the grant of special leave to appeal, now appeals to this court.

Departmental policy

Departmental policy concerning the grant of resident status was contained in a document entitled "Integrated Departmental Instructions Manual, Grant of resident status, Number 17".

Paragraphs 1.1 to 1.3 of that document stated:

> 1.1 It is a policy requirement for grant of resident status that applicants be of good character.
>
> 1.2 There is a three-fold basis of assessment:
>
> - whether the applicant is likely to be a threat to Australia's security by being reasonably likely to engage in or be involved in acts of espionage, sabotage, politically motivated violence or foreign interference, or in promotion of communal violence
> - whether the applicant has a criminal record
> - whether the applicant has other history of criminal activity, anti-social behaviour or immigration offences.
>
> 1.3 All applicants [illegible]d 16 years or over are subject to the character requirement

Paragraphs 3.2 and 3.3 of that document provided:

3.2 *Penal or other aspects:* Applicants who come within Section 16(1)(c) of the Migration Act ... are not considered to meet the good character requirement and their applications would normally be refused unless they could show strong cause why policy should be waived in their case. Decisions on such cases would normally be taken only by Regional Directors. Some may warrant Ministerial consideration.

3.3 Applicants who do not come within Section 16(1)(c) of the Act may also fail to meet the good character requirement. The nature, number or recency of the offences or activities concerned and the potential for continuance or recidivism may be such as to warrant refusal on the overall merits of the case. Similar considerations apply to applicants who have been dishonourably discharged from military service.

Section 16 of the Migration Act 1958 provided that:

> (1) Where, after the commencement of this Part or before the commencement of this Part but after the commencement of the Immigration Restriction Act 1901, a person who enters or entered Australia is not, or was not at the time of that entry, an Australian citizen and who:
>
> ...
>
> (c) at the time of entry is or was a person of any of the following descriptions, namely:
>
> ...
>
> (ii) a person who has been convicted of a crime and sentenced to death, to imprisonment for life or to imprisonment for a period of not less than 1 year;
>
> (iii) a person who has been convicted of 2 or more crimes and sentenced to imprisonment for periods aggregating not less than 1 year;
>
> ...
>
> that person shall, notwithstanding section 10, be deemed to be a prohibited non-citizen unless he is the holder of an entry permit endorsed with a statement that the person granting that permit recognizes him to be a person referred to in this sub-section

Neither s 16(1)(c) nor para 3.2 of the departmental policy was directly applicable to the present case because Mr Teoh was convicted of his offences after his entry into Australia. But together with para 3.3 they indicate that an applicant will ordinarily be refused resident status when he or she has been given a lengthy prison sentence.

The doctrine of legitimate expectations

For over 25 years, the courts have held that the rules of natural justice protect the legitimate expectations as well as the rights of, persons affected by the exercise of power invested in a public official. The doctrine of legitimate expectations was invented by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*.[51] In its original form, it was a device that permitted the courts to invalidate decisions made without hearing a person who had a reasonable expectation, but no legal right, to the continuation of a benefit, privilege or state of affairs. It, therefore, helped to protect a person from the disappointment and often the injustice that arises from the unexpected termination by a government official of a state of affairs that otherwise seemed likely to continue. In *Attorney-General of Hong Kong v Ng Yuen Shiu*,[52] the Judicial Committee of the Privy Council extended the application of the doctrine of legitimate expectations

to cases where a public official had undertaken that he or she would act in a certain way in making a decision. So in *Haoucher v Minister for Immigration and Ethnic Affairs*,[53] this court held that, if a public official had undertaken to exercise a power only when certain conditions existed, a person affected by the exercise of the power had a right to be informed of the matters that called for the exercise of the power.

After this court's decisions in *Kioa v West*[54] and *Annetts v McCann*,[55] however, a question must arise as to whether the doctrine of legitimate expectations still has a useful role to play. Those cases decided that, where a statute empowers a public official or tribunal to make an administrative decision that affects a person, then, in the absence of a contrary legislative indication, the critical question is not whether the doctrine of natural justice applies but "what does the duty to act fairly require in the circumstances of the particular case?".[56] In *Haoucher*,[57] Deane J expressed the view that the law seemed "to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making".

I think that the rational development of this branch of the law requires acceptance of the view that the rules of procedural fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials. In the absence of a clear contrary legislative intention, those rules require a decision-maker "to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it".[58] If that approach is adopted, there is no need for any doctrine of legitimate expectations. The question becomes, what does fairness require in all the circumstances of the case?

Since *Kioa*, however, cases in this court[59] have continued to use the concept of legitimate expectation to enliven the rules of procedural fairness. Furthermore, both in this court and in the Full Court of the Federal Court, the argument in the present case proceeded upon the basis that, in so far as the right to procedural fairness depended upon Art 3 of the Convention, it was necessary to establish that the terms of the Convention gave rise to a legitimate expectation that the minister's delegate would comply with the requirements of Art 3 in reaching a decision concerning the residential status of Mr Teoh. Accordingly, I will deal with the appeal on the basis that the respondent must establish that the terms of the Convention gave rise to a legitimate expectation that the minister's delegate would comply with the terms of the Convention.

Hitherto, the view has been taken that circumstances do not give rise to a legitimate expectation sufficient to enliven the rules of procedural fairness unless the decision-maker has given an express or implied undertaking to persons such

51. (1969) 1 All ER 904
52. (1983) 2 AC 629, [1983] 3 All ER 346
53. (1990) 169 CLR 648, 93 ALR 51
54. (1985) 159 CLR 550, 62 ALR 321
55. (1990) 170 CLR 596, 92 ALR 171
56. *Kioa* (1985) 159 CLR at 585
57. (1990) 169 CLR at 653
58. *Kioa* (1985) 159 CLR at 587
59. See, for example, *Haoucher* (1990) 169 CLR at [illegible]

as the person affected or unless that person enjoys a benefit, privilege or state of affairs that seems likely to continue in the absence of special or unusual circumstances.[60] In 1988, one writer summarised the cases in which legitimate expectations have been held to arise as follows:[61]

> [F]or an expectation to be "legitimate" in the required sense there must be positive grounds which are sufficient to render it objectively justifiable ...
>
> Our analysis of the cases suggests that there are four principal sources which the courts recognise as capable of rendering expectations legitimate or reasonable: (1) a regular course of conduct which has not been altered by the adoption of a new policy; (2) express or implied assurances made clearly on behalf of the decision-making authority within the limits of the power exercised; (3) the possible consequences or effects of the expectation being defeated especially where those consequences include economic loss and damage to reputation, providing that the severity of the consequences are a function of justified reliance generated from substantial continuity in the possession of the benefit or a failure to be told that renewal cannot be expected; and (4) the satisfaction of statutory criteria [footnotes omitted].

Prior to the present case, that summary seemed an accurate statement of the circumstances that could give rise to a legitimate expectation sufficient to enliven the rules of procedural fairness. None of them is present in this case. If Mr Teoh is to succeed, the doctrine of legitimate expectations will have to be extended. The Convention was not an instrument that the delegate was required to consider. Nor had the delegate undertaken to consider or apply its provisions. Moreover, neither Mr Teoh nor any member of his family had asked the delegate to take the provisions of Art 3 into account. It is only too obvious that they were oblivious of its existence.

A legitimate expectation may give rise to a requirement of procedural fairness but it does not give substantive protection to any right, benefit or privilege that is the subject of the expectation.[62] So even if the respondents had a legitimate expectation concerning the Convention, the delegate was not obliged to apply the Convention.

The next question is whether the rules of procedural fairness required the delegate to inform the respondents that Art 3 would not be applied even though reasonable persons would expect it to be applied. In my opinion, the delegate was not required to notify the respondents that Art 3 would not be applied. As long as a decision-maker has done nothing to lead a person to believe that a rule will be applied in making a decision, the rules of procedural fairness do not require the decision-maker to inform that person that the rule will not be applied. Fairness does not require that a decision-maker should invite a person to make submissions about a rule that the decision-maker is not bound, and has not undertaken or been asked, to apply. Indeed, in those circumstances, a person cannot have a *reasonable* expectation that the rule will be applied.

If a person *asks* a decision-maker to apply a rule which the decision-maker is not bound to apply, the rules of procedural fairness do not require the person affected to be informed that that rule will not be applied. It seems anomalous, therefore, to insist that a decision-maker must inform a person that a rule will not

60. *Kioa* (1985) 159 CLR at 583; *Haoucher* (1990) 169 CLR at 682
61. Tate, "The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice" (1988) 14 *Monash University Law Review* 15 at 48-9
62. See, for example, *Quin* (1990) 170 CLR at 21-2 per Mason CJ, J[illegible] per Brennan J; *Haoucher* (1990) 169 CLR at 651-2 per Deane J; see also *Reference re Canada Assistance Plan (BC)* [1991] 2 SCR 525 at 557-8; (1991) 83 DLR (4th) 297 at 319

be applied merely because, objectively, reasonable persons have an expectation that such a rule would be applied. It seems even more anomalous that a person should have to be notified that a rule will not be applied if he or she is not even aware of the rule's existence. In my opinion, neither fairness nor good administration requires a decision-maker to inform a person that a rule will not be applied when the decision-maker has not led that person to believe that it would be applied.

Furthermore, the doctrine of procedural fairness is concerned with giving persons the opportunity to protect their rights, interests and reasonable expectations from the adverse effect of administrative and similar decisions. If the doctrine of legitimate expectations were now extended to matters about which the person affected has no knowledge, the term "expectation" would be a fiction so far as such persons were concerned. It is true that an expectation can only give rise to the right of procedural fairness if it is based on reasonable grounds.[63] It must be an expectation that is *objectively reasonable* for a person in the position of the claimant. But that does not mean that the state of mind of the person concerned is irrelevant. If the statement of Toohey J in *Haoucher*[64] that "[l]egitimate expectation does not depend upon the knowledge and state of mind of the individual concerned" is meant to maintain the contrary proposition, I am unable to agree with it. If a person does not have an expectation that he or she will enjoy a benefit or privilege or that a particular state of affairs will continue, no disappointment or injustice is suffered by that person if that benefit or privilege is discontinued. A person cannot lose an expectation that he or she does not hold. Fairness does not require that a person be informed about something to which the person has no right or about which that person has no expectation

Even if a legitimate expectation did arise in a case such as the present, all that procedural fairness would require would be for the decision-maker to inform the person affected that the decision-maker would not be acting in the manner expected. As I have indicated, a legitimate expectation gives rise to a requirement of procedural fairness but it does not give substantive protection to any right, benefit or privilege that is the subject of the expectation.[65] Once the person was notified, the decision-maker would seem to have discharged his or her duty of procedural fairness. It may be that procedural fairness would also require the decision-maker to consider any subsequent submission that the rule should be applied. If it does, it merely shows how artificial is the doctrine of legitimate expectations in cases such as the present. Since the decision-maker is under no obligation to apply the rule, he or she would be at liberty to act in disregard of any subsequent submission that the rule should be applied.

It seems a strange, almost comic, consequence if procedural fairness requires a decision-maker to inform the person affected that he or she does not intend to apply a rule that the decision-maker cannot be required to apply, has not been asked or given an undertaking to apply, and of which the person affected by the decision has no knowledge.

63. *Ng Yuen Shiu* [1983] 2 AC at 636
64. (1990) 169 CLR at 679
65. See, for example, *Qu[illegible]*90) 170 CLR at 21-2 per Mason CJ, 39-41 per Brennan J; *Haoucher* (1990) 169 CLR at 6[illegible]2 per Deane J; see also *Reference re Canada Assistance Plan (BC)* [1991] 2 SCR at 557-8; (1991) 83 DLR (4th) 297 at 319

The terms of the Convention did not give rise to a legitimate expectation in this case

However, if, contrary to my opinion, the doctrine of legitimate expectations is to be extended to cases where a person has no actual expectation that a particular course will be followed or a state of affairs continued, the terms of the Convention did not give rise to any legitimate expectation that the minister or his delegate would exercise their powers under the Act in accordance with Australia's obligations under the Convention.

Conventions entered into by the federal government do not form part of Australia's domestic law unless they have been incorporated by way of statute.[66] They may, of course, affect the interpretation or development of the law of Australia. Thus, in interpreting statutory provisions that are ambiguous, the courts will "favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty".[67] In that respect, conventions are in the same position as the rules of customary international law.[68] International conventions may also play a part in the development of the common law.[69] The question in this case, however, is not concerned with the interpretation of a statute or with the development of the common law. It is whether the ratification of the Convention on the Rights of the Child gave rise to a legitimate expectation that its terms would be implemented by the decision-maker in this case.

In exercising the discretion under the Migration Act in circumstances such as the present case, the terms of the Convention were matters which the minister or his delegate could take into account.[70] Nothing in the Act indicates that the terms of the Convention were outside the range of matters that a decision-maker could properly take into account. Furthermore, the minister conceded that, in the circumstances of this case, the break up of the family unit was a matter of major significance. But that does not mean that the residents of Australia had a legitimate expectation that, upon the ratification of the Convention, federal officials and statutory office holders would act in accordance with the Convention.

In international law, conventions are agreements between States. Australia's ratification of the Convention is a positive statement to other signatory nations that it intends to fulfil its obligations under that convention. If it does not do so, it is required to disclose its failure in its reports to the Committee on the Rights of the Child.[71] I am unable to agree with the view expressed by Lee J in the Full

66. *Chow Hung Ching v R* (1948) 77 CLR 449 at 478; *Bradley v Commonwealth* (1973) 128 CLR 557 at 582; 1 ALR 241; *Simsek v MacPhee* (1982) 148 CLR 636 at 641-2; 40 ALR 61; *Kioa v West* (1985) 159 CLR at 570-1, 604; *Dietrich v R* (1992) 177 CLR 292 at 305-6, 321, 348-9, 359-60; 109 ALR 385; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 476-7, 500; *Young v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262 at 272-4; *In the Marriage of Murray and Tinn; Director, Family Services (ACT)* (1993) 16 Fam LR 982 at 997-8

67. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; 110 ALR 97

68. *Polites v Commonwealth* (1945) 70 CLR 60 at 68-9, 77, 80-1

69. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42; 107 ALR 1; *Dietrich* (1992) 177 CLR at 321, 360; *Jago v District Court of NSW* (1988) 12 NSWLR 558 at 569; *Bulloo Shire Council*

Court that the "ratification of the Convention by the Executive was a statement to the *national* and international community that the Commonwealth recognised and accepted the principles of the Convention"[72] (my emphasis). The ratification of a treaty is not a statement to the national community. It is, by its very nature, a statement to the international community. The people of Australia may note the commitments of Australia in international law, but, by ratifying the Convention, the Executive Government does not give undertakings to its citizens or residents. The undertakings in the Convention are given to the other parties to the Convention. How, when or where those undertakings will be given force in Australia is a matter for the federal Parliament. This is a basic consequence of the fact that conventions do not have the force of law within Australia.

If the result of ratifying an international convention was to give rise to a legitimate expectation that that convention would be applied in Australia, the Executive Government of the Commonwealth would have effectively amended the law of this country. It would follow that the convention would apply to every decision made by a federal official unless the official stated that he or she would not comply with the convention. If the expectation were held to apply to decisions made by State officials, it would mean that the Executive Government's action in ratifying a convention had also altered the duties of State government officials. The consequences for administrative decision-making in this country would be enormous. Junior counsel for the minister informed the court that Australia is a party to about 900 treaties. Only a small percentage of them has been enacted into law. Administrative decision-makers would have to ensure that their decision-making complied with every relevant convention or inform a person affected that they would not be complying with those conventions.

I do not think that it is reasonable to expect that public officials will comply with the terms of conventions which they have no obligation to apply or consider merely because the federal government has ratified them. There can be no reasonable expectation that State government officials will comply with the terms of a convention merely because the Executive Government of the Commonwealth has ratified it. In many cases, State governments will be strongly opposed to the federal government's ratification of an international convention. Further, many federal administrative decisions are made by public officials and tribunals that are independent of the Executive Government of the Commonwealth. I do not think that there can be a reasonable expectation that these officials and tribunals will necessarily act in accordance with the terms of a convention which does not have the force of law. Even in the case of decisions made by officers employed in federal government departments, it seems difficult, if not impossible, to conclude that there is a reasonable expectation that the terms of a convention will be complied with forthwith upon ratification. The nature of the obligations undertaken may make it impracticable to implement them forthwith. Total compliance with the terms of a convention may require many years of effort, education and expenditure of resources. For these and similar reasons, the parties to a convention will often regard its provisions as goals to be implemented over a period of time rather than mandates calling for immediate compliance. That being so, I do not think that members of the Australian community can hold a reasonable expectation that, upon the ratification of a convention, its provisions will thereafter be applied to any decision falling within

the scope of the convention. Unless a minister or his or her officials have given an indication that the provisions of a convention will henceforth be applied to decisions affecting that ministry, it is not reasonable to expect that the provisions of that convention apply to those decisions.

Even when federal statute law recognises, or provides the means for recognising, an international convention, I do not think that a legitimate expectation arises that federal officials will apply the terms of the convention. The mechanism by which the federal government has chosen to implement many conventions relating to human rights including the present Convention, for example, is through the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (the HREOC Act). Upon a convention being declared an "international instrument relating to human rights and freedoms" under s 47(1) of that Act, the convention becomes a "relevant international instrument".[73] Consequently, the rights outlined in the convention become "human rights" for the purposes of the Act.[74] This enlivens those provisions of the Act concerning human rights and allows the Commission to examine enactments or proposed enactments to ascertain whether they are, or would be, inconsistent with or contrary to any human right;[75] to inquire into acts or practices that may be inconsistent with any human right;[76] to report to the minister as to the action that needs to be taken by Australia in order to comply with the convention;[77] to prepare and publish guidelines for the avoidance of acts or practices that may be inconsistent with or contrary to the rights in the convention;[78] and to intervene (as the Commission did in this case) in proceedings that involve human rights issues.[79] The HREOC Act recognises that there may exist acts and practices that are inconsistent with or contrary to Australia's human rights obligations as defined by the Act.[80] The mechanisms for remedying those inconsistencies are those provided in the Act. I find it difficult to accept that parliament intended that there should be remedies in the ordinary courts for breaches of an instrument declared for the purpose of s 47 of the HREOC Act when such remedies are not provided for by the Act.

At the relevant times in the present case, the Convention had not been declared to be an international instrument under the HREOC Act or otherwise acted on or been recognised by the parliament. In January 1993, however, the Convention was declared to be an international instrument for the purposes of that Act.[81] Thus, if the decision affecting Mr Teoh and his family had occurred after the Convention was declared to be an international instrument, either he or someone on behalf of his children could have made a complaint to the Commission that the minister was in breach of the Convention. They would be entitled to seek redress through the mechanism of the HREOC Act for breach of the Convention. If, after due inquiry under Pt II, Div 3 of the Act, the Commission considered that the complaint was made out, it could take steps to have the matter settled or report the breach to the minister. But I do not think that they could contend that the

73. s 3(1)
74. s 3(1)
75. s 11(1)(e)
76. s 11(1)(f)
77. s 11(1)(k)
78. s 11(1)(n)
79. s 11(1)(o)
80. See Pt II, Div 3 of the HREOC Act
81. See *Commonwealth of Australia Gazette* GN 1, 13 January 1993 at 85

decision of the minister and his delegate was void. That is because neither the ratification of the Convention nor its declaration under s 47 gave rise to any legitimate expectation that the minister or his delegates would comply with the Convention. There is no legitimate expectation that a federal official will act in accordance with a rule that that official is at liberty to disobey and about which the official has given no promise or undertaking.

Furthermore, the terms of the departmental policy referred to above leave little room for a reasonable expectation that the best interests of an applicant's children would be a primary consideration in an application for resident status. Paragraph 3.2 of the policy, although not directly applicable in this case, makes it plain that an application by a person who falls within s 16(1)(c) of the Act will "normally be refused unless they could show strong cause why [the] policy should be waived in their case". This strong and specific statement leaves no room for a reasonable expectation that the best interests of an applicant's children will be a primary consideration in determining an application. Other provisions of the policy make it plain that an applicant's involvement in violence, espionage, sabotage, general criminal or anti-social behaviour will ordinarily result in the rejection of an application. There is, therefore, little, if any ground, in the policy for a reasonable expectation that the best interests of an applicant's child will always be a primary consideration in the decision-making process. Its terms are not consistent with the alleged legitimate expectation.

Even if Art 3 is generally applicable to actions under the Migration Act, I do not think that Art 3 was intended to apply to an action that has consequences for a child but is not directed at the child. Article 3 will have enormous consequences for decision-making in this country if it applies to actions that are not directed at but merely have consequences for children. It seems unlikely, for example, that it was the intention of the article that a court must make the best interests of a child a primary consideration in sentencing a parent. And there are many other areas of administration where it could hardly have been intended that the best interests of the child were to be a primary consideration in actions that have consequences for a child. Must a public authority make the best interests of a child a primary consideration in determining whether to acquire compulsorily the property of a parent? Must the Commissioner of Taxation make the best interests of a child a primary consideration in exercising his powers under the Income Tax Assessment Act 1936 (Cth)? Questions of this sort make it likely that the provisions of Art 3 were intended to apply to "actions" that were directed at children and not those that merely have consequences for children.

In my opinion, therefore, Art 3 was not intended to apply to an application by an adult person for resident status. Here the action was directed at Mr Teoh. It was not directed at the children. I do not think that Art 3 required the minister's delegate to make the best interests of the children a primary consideration in deciding Mr Teoh's application any more than that article required the judge who sentenced him to make the best interests of the children a primary consideration in the sentencing process.

In my view, neither Mr Teoh nor the members of his family had any legitimate expectation that his application for resident status would be decided by reference to what were the best interests of the children as stipulated in Art 3 of the Convention. But in any event, even if, contrary to my view, such an expectation did arise, I think that only a very literal reading of Art 3, the decision of the

delegate and the departmental documents would require a conclusion that the best interests of the children were not a primary consideration in the decision to refuse Mr Teoh resident status.

Did the delegate fail to act in accordance with the principle in Art 3?

The exact application of Art 3 is far from clear. What Lord Denning MR said in *R v Chief Immigration Officer, Heathrow Airport; Ex parte Salamat Bibi*[82] concerning the European Convention for the Protection of Human Rights and Fundamental Freedoms applies to the Convention and its provisions. His Lordship said:

> The Convention is drafted in a style very different from the way which we are used to in legislation. It contains wide general statements of principle.

Article 3(1) insists that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". But no guidance is given as to what weight is to be given to those interests in an "action". In the context of an application for resident status, it cannot require any more than that the delegate recognise that the interests of the children are best served by granting the parent resident status. But that does not mean that those interests must be given the same weight as the bad character of the applicant. The use of the word "a" indicates that the best interests of the children need not be *the* primary consideration. And, as Carr J recognised, a primary consideration may have to accommodate itself to other overriding interests.[83]

On the evidence, the future of the family and the children was a primary consideration of the delegate. Both in the recommendation of the Immigration Review Panel and the departmental document prepared for the Panel, the welfare of the children and the break up of the family were regarded as constituting the compassionate grounds which could justify the grant of resident status, notwithstanding the bad character of Mr Teoh. In addition, those making decisions had before them letters from the applicant's wife arguing that a refusal of resident status would have a devastating effect on the children. I find it difficult to accept that the delegate in considering the compassionate grounds did not consider what the best interests of the child required. The effect that refusal of the application would have on the family was the principal matter relied on in support of the application after the application was initially refused on 2 January 1991. The whole case for the respondent was that the interests of the children and Mrs Teoh required the grant of the application. I cannot accept that the delegate did not consider the application with that in mind. On the assumption that there was a legitimate expectation of compliance with the terms of the Convention, the substance of the expectation was not denied. Accordingly, no denial of procedural fairness occurred.

Obligation for further inquiries

It therefore becomes necessary to examine the other question raised in this appeal — whether "the proper consideration of the break-up of the family unit as

82 [1976] 1 WLR 979 at 985

a relevant matter that the decision-maker was bound to take into account necessarily involved the making of further inquiry into the facts by the decision-maker".

In a number of cases, the Federal Court has found that a failure to make further inquiries constituted an improper exercise of the power granted by the statute or a failure to take into account a relevant consideration in exercising that power. In those cases, the Federal Court has held that further inquiries should have been made because (1) a specific matter was raised by an applicant or was within the knowledge of the minister and that matter could not be properly considered without further inquiry,[84] (2) the information before the minister was not up to date[85] or (3) the absence of information before the minister resulted from the minister's officers misleading the applicant.[86] This case does not fit into any of those categories.

The impact of the deportation on the family of Mr Teoh was fully considered by the minister's delegate. Indeed, apart from Mr Teoh's criminal convictions, his lies to the family and his role in supporting his and his wife's children were the principal issues in the application. There is no ground for concluding that the delegate failed to consider the matter properly. It may be that further inquiries about the plight of the family may have led the delegate to place more weight on what would happen to the children if the application were refused. But this is a matter of weight. The weight that is given to a particular consideration is a matter for the decision-maker, not for the courts in an application for judicial review. This is not a case where the minister's delegate simply discounted the assertions of hardship to the family. The delegate was asked to consider the position of the family, had information about the family, and made her decision on that basis. That she gave greater weight to the requirement of good character than to the welfare of the children is irrelevant for present purposes. The Migration Act entrusts the weighing of such considerations to administrative officials. It is a consequence of the doctrine of separation of powers that the decisions of administrative officials acting within their powers must be accepted by the courts of law whatever the courts may think of the merits of particular administrative decisions.

For these reasons, further inquiries were not required to fulfil any of the delegate's statutory or common law obligations.

Conclusion

The appeal should be allowed. The decision of the Full Federal Court should be set aside. There should be no order as to the costs of the proceedings in this Court or the Federal Court.

Order

Appeal dismissed with costs.

Solicitor for the appellant: *Australian Government Solicitor.*

84. For example, *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455; 45 FCR 418; *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363; *cf Singh v Minister*

Solicitor for the respondent: *S A Walker*.

Solicitor for the intervener: *Human Rights and Equal Opportunity Commission*.

ESSO AUSTRALIA RESOURCES LTD and OTHERS v PLOWMAN (MINISTER FOR ENERGY AND MINERALS) and OTHERS

HIGH COURT OF AUSTRALIA

MASON CJ, BRENNAN, DAWSON, TOOHEY and McHUGH JJ

8, 9 March 1994, 7 April 1995 — Canberra

Arbitration — Private — Confidentiality of documents and information — Whether party under obligation of confidence.

In 1991, the appellants (Esso/BHP) sought from the Gas and Fuel Corporation of Victoria (GFC) and the State Electricity Commission of Victoria (SEC) an increase in the price of gas supplied to them since 1 July 1990. GFC and SEC refused to pay. Pursuant to arbitration clauses in the sales agreements, Esso/BHP referred the disputes to arbitration.

On 1 June 1992, the predecessor of the first respondent, the minister, brought an action against Esso/BHP and GFC and SEC seeking a declaration that any and all information disclosed to GFC in the course of its arbitration with Esso/BHP was not subject to any obligation of confidence and a similar declaration in relation to the information disclosed to SEC in the course of its arbitration. By way of counter-claim, Esso/BHP sought declarations, based on implied terms, that each arbitration was to be conducted in private and any documents or information supplied by any of the parties to any other party was to be treated in confidence. Both GFC and SEC brought a cross-claim against Esso/BHP seeking declarations in the same terms as the declarations sought by the minister.

The claims for confidentiality arose out of Esso/BHP's response to requests by the minister, GFC and SEC for details of the calculations on which the claims for price increases were based. Esso/BHP declined to give details unless GFC and SEC entered into agreements that they would not disclose the information to anyone else including the minister, the Executive Government and the people of Victoria. Esso/BHP asserted that the details sought were commercially sensitive. On the other hand, the Executive Government wanted the details and claimed that, if GFC and SEC obtained them, GFC and SEC were under a statutory duty to pass them on.

The Appeal Division of the Supreme Court of Victoria allowed an appeal by Esso/BHP but the majority left the following declarations on foot:

"6C [GFC] is not restricted from disclosing information to the minister and third persons by reason only that:

(a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the 1975 sales agreement; and

(b) the information has not otherwise been published.

6F SEC is not restricted from disclosing information to the minister and third persons by reason only that:

(a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the 1981 sales agreement; and

(b) the information has not otherwise been published.

Held:

The appeal would be dismissed except in so far as it related to declarations 6C and 6F. The matter would be remitted to the Supreme Court of Victoria to reformulate declarations 6C and 6F or to make such orders as may be appropriate in the light of the reasons of the majority.