

HIGH COURT OF AUSTRALIA

Kioa

Vs.

West

(Gibbs C.J., Mason, Wilson, Brennan and Deane JJ.)

18.12.1985

JUDGMENT

GIBBS C.J.

1. The appellants are Mr and Mrs Kioa, who are not Australian citizens, and their daughter Elvina, who was born in Australia and is accordingly an Australian citizen. By an amended application made under the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth), as amended ("the AD(JR) Act") on 29 October 1983 the appellants sought an order to review a decision made on 6 October 1983 by a delegate of the respondent, the Minister for Immigration and Ethnic Affairs, to order the deportation of Mr and Mrs Kioa under [s.18](#) of the [Migration Act 1958](#) (Cth), as amended ("the [Migration Act](#)"). Involved in that decision, and logically anterior to it, were two further decisions - to refuse to issue to Mr and Mrs Kioa further entry permits under [s.7](#) of the [Migration Act](#) and to refuse thereafter to issue them a (permanent) entry permit under [s.6A\(1\)\(e\)](#). The application was refused by Keely J., whose decision was affirmed by the Full Court of the Federal Court.

2. Mr Kioa, a Tongan citizen, arrived in Australia early in September 1981 with a student visa in order to attend a three months training course and was granted a temporary entry permit valid for a period of three months. Mrs Kioa, and her daughter Elitisi, arrived in Australia on 7 November 1981 and were granted temporary entry permits valid until 31 March 1982. Mr Kioa's permit expired on 8 December 1981 and on 15 December 1981 he approached the Melbourne office of the Department of Immigration and Ethnic Affairs ("the Department") and applied for an extension of his permit to enable him to have a holiday before returning to Tonga. He then produced airline tickets which showed that he was booked to depart from Australia on 31 March 1982 en route to Tonga. His application was not dealt with at that time because some further information had to be obtained but he was told that he would be given an extended visitor's temporary entry permit if his application was approved and the necessary fee paid. After some delay an officer of the Department tried to communicate with Mr Kioa in April 1982 at the address which he had given but was unable to do so and formed the belief that he had returned to Tonga. In fact, in March 1982 he had left the address which he had given the Department, without informing his cousin, with whom he had been staying there, of his new address (and indeed allowing his cousin to believe that he was returning to Tonga) and had commenced employment in Victoria; he remained in that employment until he was arrested on 25 July 1983, and at no time got in touch with the Department or informed it of his new address. Mrs Kioa's permit expired on 31 March 1982 and she sought no further permit. Elvina, the second child of Mr and Mrs Kioa, was born on 14 November 1982 in Australia. Mr Kioa said, in an

interview with an officer of the Department on 27 July 1983 after his arrest, that he had remained in Australia after the expiry of his permit because Cyclone Isaac had devastated parts of Tonga in March 1982 and as a consequence his family had advised him to remain in Australia so that he might earn money and send it home for their support.

3. The Legal Aid Commission of Victoria has been acting for Mr Kioa since his arrest, and on 26 July 1983 the Director of Legal Aid wrote to the Minister urging him to exercise his discretion by allowing Mr Kioa and his family to remain in Australia and giving reasons why that should be permitted. The letter contained the following paragraphs:

"Mr. Kioa has been on the Executive Committee of the Tongan Christian Fellowship and has done much in this regard. The President of the Fellowship, Mr. Ifalemi Naitoko speaks highly of him. He is also a member of the Immigration and Ethnic Committee for the United Church and only recently was in discussion with your own department concerning the difficulties of illegal immigrants from Tonga.

Naturally Mr. Kioa would like to remain in Australia and we would hope that you will exercise your discretion to allow him and his family to do so. As you know, the question of deportation in circumstances where one of the children is an Australian citizen has received a great deal of attention recently by numerous groups interested in immigration matters and I will not labour the point."

4. On 12 September 1983 an officer of the Department wrote to Mr Kioa formally refusing the application which he had made on 15 December 1981 for an extension of his temporary entry permit and requiring him to make immediate arrangements to leave Australia with his family. Mr Kioa failed to do so and on 6 October 1983 a written submission by an officer of the Department was put before the Minister's delegate, who had been appointed under s.66D of the [Migration Act](#). This submission contained a full recital of the facts, and included the following paragraphs which it is necessary to quote.

"16 While in Australia Mr Kioa has become active on the council of the Tongan Christian Fellowship, a group affiliated with the Uniting Church. He was elected as a representative on the Executive of this Council with responsibility generally for Tongan youth and the plight of other illegal immigrants. His interest extended to the situation of Tongan persons awaiting deportation.

...

20 Mr Kioa claims that the catalyst for his staying in Australia was the devastating cyclone which hit Tonga in March 1982. Yet it should be noted that this occurred at least 3 months after his TEP had expired.

21 If Mr Kioa had been genuine in his desire (in Dec 1981) to seek a legitimate extension of his stay, it would have appeared likely that he might have sought a decision on his application rather than change his address without apparently notifying the Department. Then when his wife's TEP expired around the time of the Tongan cyclone no attempt was made to lodge a formal application to regularise their status ...

22 Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern.

POSSIBILITY OF REGULARISATION OF STATUS

23 Mr and Mrs Kioa could apply for a further TEP but having regard to the applicable policy, such an application is unlikely to be approved. They do not fulfil the conditions of section 6A of the [Migration Act 1958](#) for the grant of permanent residence in Australia.

SUMMARY OF POLICY OF DEPORTATION OF PROHIBITED IMMIGRANTS

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

ASSESSMENT

25 Mr and Mrs Kioa and their daughter Elitisi are prohibited immigrants. They have committed an offence in becoming prohibited immigrants. Despite their attempts to adapt to life in Australia they cannot be said as prohibited immigrants to have been absorbed into the Australian community. Although it remains possible for their status to be regularised (by grant of a further TEP) bearing in mind the policy as it stands and taking into account the circumstances of this family as related above, you may decide to order their deportation.

RECOMMENDATION

26 If you accept the above assessment, it is recommended that you sign the attached orders for the deportation of Isileli and Fheodolena Kioa. Their children are to accompany them at Commonwealth expense. The attached responses to representations are for your signature if the terms are suitable."

The delegate accepted the recommendation in the submission and signed the deportation orders.

5. On 11 November 1983, in response to a request made under s.13 of the AD(JR) Act, the delegate furnished a written statement setting out his findings on material questions of fact, the evidence on which the findings were based (which included notes of the interview with Mr Kioa on 27 July 1983, and a number of letters written on the appellants' behalf) and the reasons for the decision. The findings include the statement that Elvina is an Australian citizen. The statement of the reasons for the decision referred to the fact that the appellants are prohibited immigrants, and continued:

"25 The applicants do not fulfil one or more of the conditions of section 6A(1) of the Act necessary for consideration for grant of a (permanent) entry permit.

26 While I accepted that it remains possible to regularize the applicants continued presence in Australia, for a limited period if they so requested, by directing the grant to them of a further temporary entry permit I was satisfied that such a grant would have been inappropriate in the circumstances by reason of the applicable policy, their breach of the undertakings made by them in connection with their visitor visa applications, their deliberate remaining in Australia as prohibited immigrants, Mr Kioa's illegal working without written permission in

Australia, and their length of stay in Australia which was well beyond that normally allowed students in similar circumstances as set down in policy guidelines.

27 While a permanent entry permit may not be granted to the applicants after their entry to Australia by reason of section 6A(1) of the Act, I accepted that it was possible to direct the grant of a further temporary entry permit to them for the purpose of allowing consideration of an application for grant of (permanent) entry permit on the basis that the conditions of section 6A(1)(e) of the Act are fulfilled. Accordingly I considered whether, apart from the fact that the applicants do not hold temporary entry permits in force, there are strong compassionate or humanitarian grounds for the grant of (permanent) entry permits to them.

28 Based upon my findings and the representations made on their behalf I considered and gave weight to the circumstances of the applicants' case and in particular to the fact that the tragedy of the March 1982 cyclone in Tonga necessitated Mr Kioa giving financial assistance to his family in Tonga (which I accept he was better able to do from Australia). However I was of the view that in all the circumstances there were no strong humanitarian or compassionate grounds for the grant to them of (permanent) entry permits.

29 In the particular case of the applicants:

(a) Mr Kioa, knowing that an application for further temporary permit had not been finalized and that, in any event, the period of extension sought had expired, deliberately chose to remain in Australia, to work without written permission contrary to s.31B(2) of the Act, and to resign his position in Tonga with the Tourist Office.

(b) The applicants made no attempt to communicate with the Department after 15 December 1981 nor advised of any change of address to enable the Department to communicate with them. In

particular they made no attempt to enquire of their earlier application or to further regularize their status following receipt of news of the cyclone on March 1982.

(c) Mr Kioa failed to honour his obligation as a student visitor to return home at the completion of his studies or permitted stay.

I considered that these actions constituted a blatant disregard for the normal migration selection procedures and the migration law. I considered nonetheless the circumstances of their case, in particular as set out in paragraphs 17 and 28 above, but decided that their expulsion from Australia was appropriate. I considered that the application of the stated policy set out in paragraph 22(b) supra was appropriate and just. In all the circumstances I decided to order their deportation."

No reference is made anywhere in the statement to Mr Kioa's alleged "active involvement with other persons who are seeking to circumvent Australia's immigration laws". The "stated policy set out in paragraph 22(b)" is the policy referred to in par.24 of the submission of 6 October 1983 which has already been quoted.

6. On behalf of the appellants two main arguments were advanced before us. First, it was submitted that the delegate was required to observe the rules of natural justice and that he failed to do so, in that he did not give the appellants a fair opportunity to answer prejudicial statements affecting them. Secondly, it was submitted that the delegate wrongly failed to take into account the detrimental effect which the order would have on the privileges and benefits which Elvina, as an Australian citizen, was entitled to enjoy, and the provisions of Arts.23 and 24 of the International Covenant on Civil and Political Rights and Principles 1-7 of the Declaration of the Rights of the Child, which appear in scheds.1 and 2 respectively to the [Human Rights Commission Act 1981](#) (Cth), and which it was said required the delegate to take into account the possibility that the family of which Elvina was a member would be broken up by the deportation order.

7. The power to make a deportation order is conferred by [s.18](#) of the [Migration Act](#), which at all material times was in the following terms:

"The Minister may order the deportation of a person who is a prohibited immigrant under any provision of this Act."

It was held in *Reg. v. MacKellar; Ex parte Ratu* [\[1977\] HCA 35; \(1977\) 137 CLR 461](#), applying *Salemi v. MacKellar* (No. 2) [\[1977\] HCA 26; \(1977\) 137 CLR 396](#), that the power conferred by [s.18](#) of the [Migration Act](#), as in force at the times material to those decisions, was not subject to any general duty to observe the principles of natural justice. On behalf of the appellants it was however

submitted that the amendments made to the [Migration Act](#) since that date, and the coming into operation of the AD(JR) Act, have rendered those decisions distinguishable and inapplicable.

8. It is now necessary for me to refer to the relevant sections of the [Migration Act](#) as in force at the material time and to show in what respects they differed from the provisions in force when Salemi and Ratu were decided in 1977. Further amendments to the [Migration Act](#) have been made by the [Migration Amendment Act 1983](#) (Cth), which was assented to on 13 December 1983, and by subsequent legislation, but we are concerned with the duty of the delegate at the time when he made his decision, and those amendments have no bearing on the case. It will be convenient to refer to the provisions in force in October 1983 as though they were still in force, although in truth many of them have since been amended. By [s.7\(3\)](#), upon the expiration or cancellation of a temporary entry permit, the person who was the holder of the permit becomes a "prohibited immigrant" unless a further entry permit applicable to him comes into force upon that expiration or cancellation. Clearly Mr and Mrs Kioa became prohibited immigrants upon the expiration of their temporary entry permits. However, [s.7\(2\)](#) provides inter alia that after the expiration of a temporary entry permit a further entry permit may, at the request of the holder, be granted to the holder. By sub-s.(1) of s.6A (a section which was inserted in the [Migration Act](#) in 1980) an entry permit (that is to say, an entry permit other than a temporary entry permit: s.6A(8)) shall not be granted to a prohibited immigrant after his entry into Australia unless one or more of the conditions set out in the section is fulfilled in respect of him. One of those conditions is the following:

"(e) 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."

There was accordingly power first to issue a further temporary entry permit to Mr and Mrs Kioa under [s.7\(2\)](#) and then, that having been done, to grant them permanent entry permits under s.6A(1)(e) if there were strong compassionate or humanitarian grounds for the grant. The combined effect of [s.6\(2\)](#), s.6(2A) (inserted in 1980), [s.6\(5\)](#) (amended in 1980), s.6A(3) and s.66D (inserted in 1979) was that in the circumstances the further entry permits might have been granted by, amongst others, the Minister or his delegate. If a further entry permit had been granted to Mr and Mrs Kioa, they would have ceased to be prohibited immigrants: [s.10](#). It was therefore right to regard the delegate's decision as involving, not only a decision to make a deportation order, but also the decision to refuse to grant a further temporary entry permit. The decision whether or not a permanent entry permit should be granted under s.6A(1)(e) would have arisen only if the temporary entry permit had been issued.

9. [Section 18](#) is not the only section of the [Migration Act](#) which gives the Minister a power to order deportation. The Minister has power to order the deportation of an alien convicted of certain crimes ([s.12](#)), an immigrant who has been convicted of certain offences committed within five years of entry into Australia or an inmate of a mental hospital or public charitable institution within that time ([s.13](#)), an alien if it appears to the Minister that his conduct is such that he should not be allowed to remain in Australia ([s.14\(1\)](#)), and an immigrant who has entered Australia not more than five years previously if it appears to the Minister that his conduct is such that he ought not to be allowed to remain in Australia or that he is (inter alia) a person who advocates the overthrow by force or violence of the established government of the Commonwealth ([s.14\(2\)](#)). Before ordering the deportation of a person under [s.14](#) the Minister is required to serve on that person a notice informing him that he proposes to order the deportation on the ground specified in the notice unless that person

requests that his case be considered by a Commissioner appointed under the section; if the person on whom the notice is served makes such a request he may not be deported unless the Commissioner reports that he considers that the ground specified in the notice has been established: [s.14\(3\)-\(8\)](#). By [s.16](#) (whose scope was expanded by amendments in 1979 and later) a person who enters or has entered Australia as an immigrant may in certain circumstances (connected with the conduct or condition of that person at or before the time of entry or at or before the grant of a further entry permit) notwithstanding [s.10](#) be deemed to be a prohibited immigrant unless he holds an entry permit appropriately endorsed; a person so deemed would of course be liable to deportation under [s.18](#).

10. The amendments on which counsel for the appellants placed particular reliance were those to [ss.6\(5\)](#), 6A, [16](#) (all of which have already been mentioned), 21A, 27(1)(ab), 27(2A) and 66E. At the time of the decision in Ratu, the Act provided for the arrest and custody ([s.39](#)) and deportation ([s.20](#)) of a person against whom a deportation order was made. By [ss.27\(1\)\(ab\)](#), [27\(2A\)](#) and 31A (all inserted in 1979) a prohibited immigrant has become liable, in addition, to criminal sanctions. By [s.27\(1\)\(ab\)](#), an immigrant who becomes a prohibited immigrant upon the expiration of a temporary entry permit is deemed to be guilty of an offence punishable by a fine not exceeding \$1,000 or imprisonment for a period not exceeding six months, but under [s.27\(2A\)](#) it is a defence to a prosecution for such an offence if the immigrant satisfies the court that, after he became a prohibited immigrant, a further entry permit applicable to him had come into force or he had ceased to be a prohibited immigrant by virtue of [s.7\(4\)](#). (That sub-section provides that, notwithstanding [s.10](#), a person who has become a prohibited immigrant by virtue of [s.7\(3\)](#) ceases to be a prohibited immigrant at the expiration of five years, unless a deportation order was in force at the expiration of that period.) By [s.31A](#) (also inserted in 1979) the Minister or an authorized officer is given power to require a prohibited immigrant to leave Australia within a specified time and a failure to comply with that requirement is an offence also punishable by a fine of \$1,000 or imprisonment for six months. Further, by [s.21A](#) (another section inserted in 1979) a person subject to a deportation order is rendered liable in certain circumstances to pay to the Commonwealth an amount equal to the passage money and other charges payable in respect of his conveyance from Australia to a place outside Australia. Section 66E was inserted by the [Statute Law Revision Act 1981](#) (Cth) but it merely took the place of the provisions of cl.22 of Pt.XXII of the Schedule to the [Administrative Appeals Tribunal Act 1975](#) (Cth). It provides that applications might be made to the Administrative Appeals Tribunal for a review of decisions of the Minister under [ss.12](#), [13](#) or [48](#) (the last of which deals with migration agents). Such an application in relation to a decision under [s.12](#) or [s.13](#) can be made only by a person who is an Australian citizen or whose continued presence in Australia is not subject to a limitation as to time imposed by law and the power of the Tribunal is limited either to affirming the decision or to remitting the matter for reconsideration in accordance with any recommendations it might make: sub-ss.(2) and (3) of [s.66E](#).

11. I have referred at some length to the amendments which have been made to the [Migration Act](#) since Salemi and Ratu, but in my respectful opinion the alterations which they have made to the statutory scheme are not such as to lead to any result different from that which was arrived at in those cases. The principles which guide the Court in deciding whether the rules of natural justice must be applied by an authority exercising a particular statutory power have been discussed frequently in this Court and it is unnecessary to engage again in a full discussion of the subject. In [F.A.I. Insurances Ltd. v. Winneke](#) [\[1982\] HCA 26; \(1982\) 151 CLR 342](#), Mason J. said, at p 360:

"The fundamental rule is that a statutory authority having power to affect the rights of a

person is bound to hear him before exercising the power (*Twist v. Randwick Municipal Council* ((1976) [\[1976\] HCA 58](#); [\[1976\] HCA 58](#); [136 CLR 106](#), at p 109); *Heatley v. Tasmanian Racing and Gaming Commission* ((1977) [\[1977\] HCA 39](#); [137 CLR 487](#), at p 499)). The application of the rules is not limited to cases where the exercise of the power affects rights in the strict sense. It extends to the exercise of a power which affects an interest or a privilege (*Banks v. Transport Regulation Board (Vict.)* ((1968) [\[1968\] HCA 23](#); [119 CLR 222](#))) or which deprives a person of a 'legitimate expectation', to borrow the expression of Lord Denning M.R. in *Schmidt v. Secretary of State for Home Affairs* ((1969) 2 Ch 149, at p 170), in circumstances where it would not be fair to deprive him of that expectation without a hearing (*Salemi v. MacKellar (No. 2)* ((1977) [\[1977\] HCA 26](#); [137 CLR 396](#), at p 419))."

The expression "legitimate expectation" means "reasonable expectation"; I respectfully prefer the opinion of the Judicial Committee in *Attorney-General of Hong Kong v. Ng Yuen Shiu* [\[1983\] UKPC 2](#); [\(1983\) 2 AC 629](#), at p 636 to that expressed by Barwick C.J. in *Salemi*, at p 404. But as I have already said (in *Salemi*, at p.419) it would be wrong to attempt to give an exhaustive classification of the cases to which the rules should be applied. The rules of natural justice are flexible, requiring fairness in all the circumstances, including the nature of the power exercised and the statutory provisions governing its exercise: *Bread Manufacturers of N.S.W. v. Evans* [\[1981\] HCA 69](#); [\(1981\) 56 ALJR 89](#), at pp 94, 101; [\[1981\] HCA 69](#); [38 ALR 93](#), at pp 102, 117; *National Companies and Securities Commission v. The News Corporation Ltd.* [\[1984\] HCA 29](#); [\[1984\] HCA 29](#); [\(1984\) 58 ALJR 308](#), at pp 314, 318; [\[1984\] HCA 29](#); [52 ALR 417](#), at pp 427-428, 434.

12. There were a number of reasons why the Court in *Salemi* and *Ratu* held that the Minister is not generally bound to afford a hearing to a prohibited immigrant before ordering his deportation under s.18, notwithstanding the very serious consequences that deportation may in many cases entail. The Court of course recognized the fundamental principle that anyone within the territory of Australia - including an alien who is a prohibited immigrant - is entitled to the protection of the laws, including, in appropriate cases, the application of the principles of natural justice (see *Salemi*, at p.420). The main considerations which led the Court to the conclusion that the rules of natural justice have in general no application to the making of an order under s.18 were the following. First, there is the nature of the power which s.18 confers. Under that section the Minister is not required to find any fact or form any opinion before he exercises the power: *Salemi*, at pp.420, 452-453; *Ratu*, at p.478. If the Minister makes an order against a person who is not a prohibited immigrant, relief appropriate to the circumstances (such as habeas corpus, a declaration or an injunction) will be available, even if the rules of natural justice do not apply. If he makes an order against a person who is a prohibited immigrant, no other reason than the fact that the person is a prohibited immigrant is necessary to justify the order; his power is in that case unfettered: *Ratu*, at p.469. Secondly, an order under s.18 does not ordinarily deprive a prohibited immigrant of any right or interest or of the legitimate expectation of any benefit. As Mason J. said in *Ratu*, at pp.478-479:

"The making of a deportation order under s.18

therefore provides lawful authority for the removal from Australia against his will of a person who has no right to remain here. It is not the case that the order terminates his right to remain; nor can it be said in the ordinary case that it deprives him of a legitimate expectation that he will be allowed to remain here. Deportation, for which the order provides, is then but a consequence of the prohibited immigrant's failure to depart when he has no right to remain."

Thirdly, there is the marked contrast between, on the one hand, the provisions of s.18 and, on the other hand, the other provisions of the [Migration Act](#) which authorize the making of deportation orders and particularly [s.14](#), which in certain circumstances gives the person threatened with deportation a right to have his case considered by an independent Commissioner: Salemi, at p.402; Ratu, at pp.464-465. Finally, there is the fact that the Minister is not obliged to give reasons: Salemi, at p.421, and see at pp.443-444; Ratu, at pp.467, 478-479.

13. Similar reasoning leads to the conclusion that a prohibited immigrant who seeks the grant of a further temporary entry permit does not necessarily have any right to be afforded an opportunity to be heard by the Minister or officer considering the application. In the nature of things, if the prohibited immigrant makes an application for the grant of a further permit he will be likely to support it with a statement of the reasons why his application should be granted, and those reasons are likely to be considered. However in such a case the Minister is entitled to regard the fact that the applicant is a prohibited immigrant as sufficient to justify refusal of the application for the grant of a further permit and the making instead of a deportation order. The fact that the Minister has an "absolute discretion" to cancel a temporary entry permit ([s.7\(1\)](#) of the [Migration Act](#)) strengthens this view. A prohibited immigrant who seeks a permanent entry permit under s.6A asks for the exercise of two discretions in his favour - first under [s.7\(2\)](#) and then under s.6A. It is to be noted that the conditions stated in s.6A(1) restrict the power to grant a permit but not the power to refuse one. Only if a condition is fulfilled may an entry permit be granted, but the fulfilment of a condition does not oblige the Minister or other authorized person to grant an entry permit.

14. Some of the amendments made to the [Migration Act](#) since 1977 are quite irrelevant to the present question. Those that are relevant reveal an intention to strengthen the provisions of the statute - to give increased powers to deal with prohibited immigrants. The fact that it has been made an offence for a person to become a prohibited immigrant upon the expiry of a temporary entry permit or for a prohibited immigrant to fail to leave Australia when required does not mean either that the Minister is obliged to prosecute the prohibited immigrant rather than to deport him or that the consequences of becoming a prohibited immigrant can be said to be so significantly more serious as to require reconsideration of Salemi and Ratu. In many cases, viewed realistically, the consequences of arrest and deportation will be just as serious as the liability to be fined \$1,000 or to be imprisoned for six months. The additional liability on a deportee to pay the costs of his removal is surely a comparatively insignificant addition to the liability to be deported. In any case, these provisions do not affect any of the four reasons which supported the decisions in Salemi and Ratu. Finally, s.66E affords no assistance to the appellants' argument, since it effected no change in the substance of the existing law. On the other hand, s.66E and the provisions which it replaced, heighten the contrast between [s.18](#), which provides a person threatened with deportation no opportunity to have his case considered before the deportation order is made effective, and other

sections under which deportation may be effected; a review procedure is available when the order is made under [s.12](#), [s.13](#) or [s.14](#), but not under [s.18](#).

15. A stronger argument that Salemi and Ratu should be reconsidered is based on the enactment of the AD(JR) Act which was assented to in 1977 but which was not in force at the times material to the decision in those two cases. Section 5(1) of that Act entitles a person who is aggrieved by a decision to which the Act applies to apply to the court for an order of review in respect of the decision on a number of specified grounds, including the following:

"(a) that a breach of the rules of natural justice occurred in connexion with the making of the decision."

Section 13(1) provides that where a person makes a decision to which that section applies, any person who is entitled to make an application to the court under s.5 in respect of the decision may request the decision maker to furnish a written statement of, amongst other things, the reasons for the decision. There is no doubt - indeed it is conceded - that decisions made under ss.6A, [7\(2\)](#) and [18](#) of the [Migration Act](#) are decisions to which ss.5 and 13 of the AD(JR) Act apply.

16. It was submitted on behalf of the appellants that s.5(1)(a) itself requires the rules of natural justice to be observed in connexion with the making of any decision to which the Act applies; in other words, that the provision itself renders the rules of natural justice applicable. Arguments of this kind have, rightly in my opinion, been consistently rejected by the Federal Court: see *Minister for Immigration and Ethnic Affairs v. Haj-Ismael* ([1982](#)) [40 ALR 341](#), at p 347 and *Smith v. Minister for Immigration and Ethnic Affairs* ([1984](#)) [53 ALR 551](#), at p 555. The plain intention of s.5(1)(a) is to give the court power, when it finds that the rules of natural justice did apply to the making of a particular decision, and that there was a failure to observe those rules, to grant the relief for which the Act provides; it does not render the rules of natural justice applicable in a case to which they would not otherwise apply. The object of s.5 was to reform procedure. The extrinsic material to which we were referred provides no support for any different view.

17. However, the provisions of s.13, which require reasons to be given for a decision under [s.18](#) of the [Migration Act](#), thus render one of the grounds for the decisions in Salemi and Ratu no longer applicable, and require a reconsideration of Salemi and Ratu. Notwithstanding the fact that one of the four principal reasons given in support of the conclusion reached in those cases is no longer applicable, there still remain three substantial reasons for holding that in general the rules of natural justice do not apply to an exercise of power under [s.18](#) and those reasons, which I have already discussed, remain sufficient to support that conclusion. The provisions of s.13 of the AD(JR) Act do not deal with the question whether the rules of natural justice apply to the making of any particular decision of an administrative nature. Reasons must be given for a decision to which that section applies, whether the person making the decision was bound to observe the rules of natural justice or not. Although the duty to give reasons now applies when a decision is made under [s.18](#) of the [Migration Act](#), it remains true to say that it will be a sufficient reason that the person proposed to be deported is a prohibited immigrant. This does not mean that the reasons supplied under [s.13](#) will be useless even when the power given by [s.18](#) has been exercised in the case of a person who is admittedly a prohibited immigrant. For example, the Minister or his delegate may have considered something completely extraneous, such as the political affiliations of the person against whom the order was made. Or, if the Minister had given an undertaking similar to that considered in *Attorney-General of Hong Kong v. Ng Yuen Shiu*, he might have failed to consider his obligation to adhere to

his undertaking. The reasons might reveal grounds of that kind for challenging the exercise of the statutory power. Where, however, the power given by [s.18](#) is exercised simply because the person to be deported is a prohibited immigrant the fact that the Minister is obliged to give reasons does not in my opinion indicate that he is bound as a matter of law to give the person concerned an opportunity to be heard in relation to matters which are legally irrelevant to the exercise of the discretion conferred by the section.

18. For these reasons I would hold that in the present case the Minister's delegate was not obliged to give the appellants any further opportunity to put before him their case against deportation. Since in the circumstances the delegate was entitled entirely to disregard arguments based on personal considerations, and to apply inflexibly the policy that illegal immigrants shall be deported, there was no legal reason why he should be bound to give the appellants an opportunity to be heard in relation to matters which he was not bound to consider.

19. However, if a contrary view be taken, and the rules of natural justice were applicable, I am satisfied that there was no breach of those rules in the present case. The Minister's delegate did, of course, have before him, and considered, the submissions made by the Director of Legal Aid which were accompanied by supporting documents. The appellants' argument is that they were entitled to respond to the statements in pars.20-26 of the submission made to the delegate on 6 October. Those statements comprise comments on the material put before the Department on behalf of the appellants and references to the policy of the Department. With two possible exceptions there was nothing in any of those paragraphs which was new and which could not have been dealt with in the material submitted on behalf of the appellants. Paragraph 20, if literally construed, is quite accurate but it is said that it is unfair. The observation that the cyclone in Tonga occurred three months after Mr Kioa's temporary entry permit had expired seems to have been intended to cast doubt on his statement that the cyclone was the reason why he remained in Australia, whereas in fact Mr Kioa had applied for an extension of his temporary entry permit until the end of March. This fact had however already been clearly brought out in the submission. Counsel for the appellants particularly relied on par.22, especially on the reference to Mr Kioa's "active involvement with other persons who are seeking to circumvent Australia's immigration laws". The fact that Mr Kioa had been involved with illegal immigrants had been brought out in the interview which Mr Kioa had with an officer of the Department on 27 July 1983. The record of that interview contains the following passage:

"Elected married man representative on Executive Council of Tongan Christian Fellowship (Uniting Church) - responsible for Tongan youth - illegal immigrants - went to meetings of Uniting Church Ethnic Affairs Committee - concerned at situation of Tongan deportees following apprehension of Tongans at Bayswater."

The letter from the Director of Legal Aid also referred to this matter, in the paragraph which has already been quoted. Paragraph 22 of the submission was the officer's comment on material put before the Department by Mr Kioa and his solicitor, and summarized in par.16 of the submission. That material showed that Mr Kioa was actively involved with persons who were illegal immigrants. The comment that those persons were seeking to circumvent Australia's migration laws reflects the departmental policy that illegal immigrants should be deported and should not be allowed to "jump the queue". However, it is not to the point to consider whether the comment was

fair and accurate. If the rules of natural justice were applicable, the appellants were entitled to a fair opportunity to correct or contradict any relevant material prejudicial to them: *National Companies and Securities Commission v. The News Corporation Ltd.*, at p 316; p 431 of ALR That does not mean that the Minister or the delegate, having received material which the appellants wished to put before him, was required to let them see, and comment on, the Department's adverse comments on that material. This case in my opinion bears no analogy to a case in which misconduct is alleged against a person who has no knowledge of the allegation. The officer who made the submission indicated his not unnatural disapproval of the conduct of the illegal immigrants with whom Mr Kioa had admittedly been involved. I find it impossible to agree that fairness required that Mr Kioa should have been allowed to show that the word "circumvent" was too strong in the circumstances. Moreover, the statement of reasons given by the delegate, although a very full one, makes no reference to the matters stated in par.22 of the submission. No attempt was made to put before the Court evidence that the delegate had in fact considered matters other than those which he mentioned in his reasons. It should in my opinion be accepted that in fact the matters referred to in par.22 did not affect the delegate's decision: see *Ratu*, at p.474, per Stephen J. Indeed counsel for the appellants very properly said that there was no reason to doubt the veracity of the delegate or to attribute to him undisclosed reasons, but submitted that there was nevertheless a risk of prejudice. Reliance was placed on *Kanda v. Government of Malaya (1962) AC 322*. In that case an officer conducting disciplinary proceedings had read a report which contained allegations of serious misconduct against the person accused in the proceedings, and the accused had not had any opportunity to correct or contradict the report. The courts in Malaysia had thought that the question was whether there was any real likelihood of bias, but the Judicial Committee held that the complaint of the accused was not that the tribunal was biased, but that he had not been given a reasonable opportunity to be heard. Lord Denning said, at p.337:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. ... It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough."

Even if (contrary to my opinion) the nature of the contents of par.22 was such that the appellants should have been given an opportunity to answer them, it cannot be said that there was a risk of prejudice once it is accepted that the comment in par.22 did not in fact form one of the reasons for the delegate's decision.

20. The submission that the delegate failed to consider the position of Elvina may be very shortly dealt with. It appears quite clearly from the statement of reasons furnished by the delegate that he was aware that Elvina was an Australian citizen. It was perfectly obvious that if her parents were

deported the likelihood was that she would accompany them, although because she was an Australian citizen no deportation order could be made against her. Indeed this was brought to the notice of the delegate by the statement that if the appellants were deported their children would accompany them at Commonwealth expense. Assuming that the delegate was bound to consider Elvina's position, it has not been shown that he failed to do so. I need not consider the decision of the New Zealand Court of Appeal in *Daganayasi v. Minister of Immigration* ([\(1980\) 2 NZLR 130](#)), whose facts are materially different from those of the present case.

21. The argument that the delegate should in some way have considered the provisions of the International Covenant on Civil and Political Rights and of the Declaration of the Rights of the Child is based on the fact that the preamble to the [Human Rights Commission Act](#) recites that "it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child ... and other international instruments relating to human rights and freedoms". It is trite to say that treaties do not have the force of law unless they are given that effect by statute: *Simsek v. Macphee* [[1982\] HCA 7; \(1982\) 148 CLR 636](#). The words of the preamble to the [Human Rights Commission Act](#) did not have the effect of making the Covenant and the Declaration part of Australian municipal law. There was no legal obligation on the Minister's delegate to ensure that his decision conformed with the Covenant or the Declaration. However, this argument is quite academic, for in any case the only relevant provisions of the Covenant and the Declaration are those which declare that the family is entitled to protection by society and the state and that this protection should inure for the benefit of a child who is a member of the family. To deport the parents of a child with the natural expectation that the child will accompany them is not in any way depriving the family or the child of the protection to which the Covenant refers. Nothing that the delegate did failed to conform with the provisions of the Covenant or those of the Declaration.

22. For these reasons I would dismiss the appeal.

MASON J.: This is an appeal by Mr and Mrs Kioa (who are citizens of Tonga) and their infant daughter Elvina (who is an Australian citizen) against the dismissal by the Full Court of the Federal Court of their appeal against the dismissal of an application for judicial review under [s.5\(1\)](#) of the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) ("the [ADJR Act](#)") of: (1) deportation orders made against Mr and Mrs Kioa by the delegate of the Minister for Immigration and Ethnic Affairs on 6 October 1983; (2) refusal of their applications for further temporary entry permits; and (3) refusal of their applications for permanent entry permits.

2. The circumstances in which the appeal arises are set out in the reasons for judgment of Northrop and Wilcox JJ. in the Full Court of the Federal Court which I now restate. Mr Kioa entered Australia on 8 September 1981 in order to attend a three month training course at the International Training Institute in Sydney. This course was related to his then employment by the Tongan Tourist Office. Mr Kioa entered Australia upon a student visa and was granted a temporary entry permit valid for a period of three months.

3. Mrs Kioa arrived in Australia on 7 November 1981 with her daughter Elitisi, who was born on 31 July 1979. They were granted temporary entry permits valid until 31 March 1982.

4. Mr Kioa was granted four months leave by his employer so that he was not expected to resume duties in Tonga until early April 1982. Having decided to spend that leave in Australia, he made

application on 15 December 1981 for an extension of his temporary entry permit until 31 March 1982, when the family was due to leave Australia to return to Tonga. In the event, and due to the necessity to obtain certain information, the application for an extension of the temporary entry permit was not determined prior to 31 March 1982.

5. In March 1982 Mr Kioa resigned his position in Tonga and commenced employment as a machine operator in Melbourne. He subsequently stated that the reason for his decision to remain in Australia with his family was that parts of Tonga had been devastated by cyclone Isaac and, as a consequence, relatives in Tonga had advised him to remain in Australia for the purpose of sending money home to them.

6. Because officers of the Department of Immigration and Ethnic Affairs believed that the Kioa family had returned to Tonga at the end of March they took no further action until July 1983 in relation either to the application for an extension of the temporary entry permit or to the continued presence of the Kioa family in Australia. In the meantime, on 14 November 1982 a second daughter, the appellant Elvina Kioa, was born.

7. Mr Kioa was apprehended at his place of work on 25 July 1983. He was released from custody on 5 August 1983, subject to daily reporting conditions. Mrs Kioa was interviewed on 26 July. She stated that she had not worked in Australia and that she wished to leave all decisions to her husband. Mr Kioa was interviewed on the following day. He stated that he wished to remain in Australia because he had a good job with an employer who wished him to continue and because he and his family had established a life for themselves here and that they wished to remain.

8. On 26 July 1983 the Director of Legal Aid, Legal Aid Commission of Victoria, wrote to the respondent Minister on behalf of Mr Kioa. The letter referred in some detail to the circumstances of the family and made express reference to the birth of Elvina and the fact that, having been born in Australia, she was an Australian citizen. The letter included this passage:

"Naturally Mr. Kioa would like to remain in Australia and we would hope that you will exercise your discretion to allow him and his family to do so. As you know, the question of deportation in circumstances where one of the children is an Australian citizen has received a great deal of attention recently by numerous groups interested in immigration matters and I will not labour the point."

The Director's letter was supported by letters from Mr Kioa's employer and from his fellow employees. Although the letter did not specifically request that further entry permits be granted to Mr and Mrs Kioa, the letter was treated by the Department and the Minister's delegate as involving a request for permanent entry permits.

9. On 12 September 1983 the Department wrote to Mr Kioa formally refusing his application of 15 December 1981 to extend his temporary entry permit and requiring him to make immediate arrangements to leave Australia with his family. He failed to do so. On 6 October 1983 a submission, prepared by the Director, Enforcement Section, of the Department was put before the Deputy Secretary, the delegate of the Minister appointed under s.66D of the [Migration Act 1958](#)

(Cth). That submission recited the facts and made reference to Elvina's Australian citizenship. The submission included the following paragraphs:

"20 Mr Kioa claims that the catalyst for his staying in Australia was the devastating cyclone which hit Tonga in March 1982. Yet it should be noted that this occurred at least 3 months after his TEP had expired.

21 If Mr Kioa had been genuine in his desire (in Dec 1981) to seek a legitimate extension of his stay, it would have appeared likely that he might have sought a decision on his application rather than change his address without apparently notifying the Department. Then when his wife's TEP expired around the time of the Tongan cyclone no attempt was made to lodge a formal application to regularise their status ...

22 Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern.

POSSIBILITY OF REGULARISATION OF STATUS

23 Mr and Mrs Kioa could apply for a further TEP but having regard to the applicable policy, such an application is unlikely to be approved. They do not fulfil the conditions of section 6A of the [Migration Act 1958](#) for the grant of permanent residence in Australia.

SUMMARY OF POLICY OF DEPORTATION OF PROHIBITED IMMIGRANTS

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

prospect of deportation when located.

ASSESSMENT

25 Mr and Mrs Kioa and their daughter Elitisi are prohibited immigrants. They have committed an offence in becoming prohibited immigrants. Despite their attempts to adapt to life in Australia they cannot be said as prohibited immigrants to have been absorbed into the Australian community. Although it remains possible for their status to be regularised (by grant of a further TEP) bearing in mind the policy as it stands and taking into account the circumstances of this family as related above, you may decide to order their deportation.

RECOMMENDATION

26 If you accept the above assessment, it is recommended that you sign the attached orders for the deportation of Isileli and Fheodolina Kioa. Their children are to accompany them at Commonwealth expense. The attached responses to representations are for your signature if the terms are suitable."

No recommendation was made in relation to the deportation of Elitisi or, of course, Elvina, but the submission envisaged that they would depart with their parents. On the same day, 6 October 1983, the delegate signed deportation orders against Mr and Mrs Kioa.

10. Pursuant to a request under [s.13](#) of the [ADJR Act](#) the delegate made a statement of reasons for his decisions on 11 November 1983. That statement, which included findings on material questions of fact, made reference to Elvina's status as an Australian citizen. The document stated the following reasons for the decision:

"24 By virtue of [section 7\(3\)](#) of the Act the applicants became prohibited immigrants following the expiration of their temporary entry permits on 8 December 1981 (Mr Kioa), and 31 March 1982 (Mrs Kioa), and both have maintained that status from these respective dates as no further temporary entry permits applicable to them have come into force.

25 The applicants do not fulfil one or more of the conditions of section 6A(1) of the Act necessary for consideration for grant of a (permanent) entry permit.

26 While I accepted that it remains possible to

regularize the applicants continued presence in Australia, for a limited period if they so requested, by directing the grant to them of a further temporary entry permit I was satisfied that such a grant would have been inappropriate in the circumstances by reason of the applicable policy, their breach of the undertakings made by them in connection with their visitor visa applications, their deliberate remaining in Australia as prohibited immigrants, Mr Kioa's illegal working without written permission in Australia, and their length of stay in Australia which was well beyond that normally allowed students in similar circumstances as set down in policy guidelines.

27 While a permanent entry permit may not be granted to the applicants after their entry to Australia by reason of section 6A(1) of the Act, I accepted that it was possible to direct the grant of a further temporary entry permit to them for the purpose of allowing consideration of an application for grant of (permanent) entry permit on the basis that the conditions of section 6A(1)(e) of the Act are fulfilled. Accordingly I considered whether, apart from the fact that the applicants do not hold temporary entry permits in force, there are strong compassionate or humanitarian grounds for the grant of (permanent) entry permits to them.

28 Based upon my findings and the representations made on their behalf I considered and gave weight to the circumstances of the applicants' case and in particular to the fact that the tragedy of the March 1982 cyclone in Tonga necessitated Mr Kioa giving financial assistance to his family in Tonga (which I accept he was better able to do from Australia). However I was of the view that in all the circumstances there were no strong humanitarian or compassionate grounds for the grant to them of (permanent) entry permits.

29 In the particular case of the applicants:

(a) Mr Kioa, knowing that an application for further temporary permit had not been finalized and that, in any event, the period of extension sought had expired, deliberately chose to remain in Australia, to work without written permission contrary to s.31B(2) of the Act, and to resign his

position in Tonga with the Tourist Office.

(b) The applicants made no attempt to communicate with the Department after 15 December 1981 nor advised of any change of address to enable the Department to communicate with them. In particular they made no attempt to enquire of their earlier application or to further regularize their status following receipt of news of the cyclone in March 1982.

(c) Mr Kioa failed to honour his obligation as a student visitor to return home at the completion of his studies or permitted stay.

30 I considered that these actions constituted a blatant disregard for the normal migration selection procedures and the migration law. I considered nonetheless the circumstances of their case, in particular as set out in paragraphs 17 and 28 above, but decided that their expulsion from Australia was appropriate. I considered that the application of the stated policy set out in paragraph 22(b) supra was appropriate and just. In all the circumstances I decided to order their deportation."

11. By an application made on 18 October 1983 which was subsequently amended, the appellants applied for a review under the [ADJR Act](#) of the deportation orders, the refusal of their application for further temporary entry permits and the refusal to grant permanent entry permits to them. The application for review was dismissed with costs by Keely J. An appeal from his decision was dismissed with costs by the Full Court of the Federal Court and it is from that decision that the present appeal is brought.

12. The case presented for the appellants is that the relevant decisions of the Minister's delegate were vitiated by failure to abide by the rules of natural justice and by a failure to have regard to relevant considerations. The appellants' case necessarily involves discussion of the judgments in *Salemi v. MacKellar* (No. 2) [\[1977\] HCA 26; \(1977\) 137 CLR 396](#) and *Reg. v. MacKellar; Ex parte Ratu* [\[1977\] HCA 35; \(1977\) 137 CLR 461](#) which examined the provisions of the [Migration Act](#), especially [s.18](#), as they stood at that time, although we are not requested to reconsider the correctness of the decisions. It is submitted that legislative developments since 1977, consisting of amendments to the [Migration Act](#) and the [ADJR Act](#), have substantially altered the basis on which in those cases the Court considered the application of the rules of natural justice.

13. The appellants' first submission is that the effect of [s.5\(1\)\(a\)](#) of the [ADJR Act](#) is to impose an obligation that the rules of natural justice be observed in relation to every decision to which the Act applies. [Section 5\(1\)](#) provides that a person who is aggrieved by a decision to which the Act applies may apply to the Federal Court for an order of review in respect of the decision on any one or more

of the grounds which it sets out. Paragraph (a) provides as a ground:

"(a) that a breach of the rules of natural justice occurred in connection with the making of the decision".

The manner in which par.(a) is expressed is to be contrasted with par.(b) of the same section. That paragraph is in these terms:

"(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed".

This contrast, according to the appellants, suggests that par.(a) proceeds on the footing that the rules of natural justice necessarily apply to the making of every decision to which the [ADJR Act](#) applies. If it were otherwise, par.(a) would be expressed in much the same way as par.(b). And, with the exception of [s.5\(1\)\(b\)](#) and of [s.5\(1\)\(h\)](#), which is expressly qualified by [s.5\(3\)](#), all the grounds in [s.5](#) including [s.5\(1\)\(a\)](#) are expressed without qualification.

14. The statutory grounds of review enumerated in [s.5\(1\)](#) are not new - they are a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law. The section is therefore to be read in the light of the common law and it should not be understood as working a challenge to common law grounds of review, except in so far as the language of the section requires it - see, for example, [s.5\(1\)\(f\)](#). It is in this respect that [s.5\(1\)](#) makes every decision to which it applies subject to review on the grounds stated and in so doing it may give a number of grounds a wider reach than they would have at common law. But it is not the primary object of the section to amend or alter the common law content of the various grounds.

15. Viewed in this light, par.(a) does not impose an obligation to apply the rules of natural justice where, apart from [s.5](#), there is no obligation on a person making a decision to comply with those rules or any of them. When the paragraph prescribes a breach of the rules as a ground of review it makes no assumption that the rules apply to every decision to which the subsection relates. Under the general law it is always a question whether the rules apply and, if so, what rule or rules apply to the making of the particular decision. The language of the paragraph according to its natural and ordinary meaning is apt to import this concept of natural justice as a ground for review. The language does not manifest an intention to work a radical substantive change in the law by attaching to every decision to which [s.5](#) applies an obligation to comply with the rules of natural justice. Accordingly, I agree with the interpretation given to [s.5\(1\)\(a\)](#) by Bowen C.J. and Franki J. in *Minister for Immigration and Ethnic Affairs v. Haj-Ismael* (1982) 40 ALR 341, at p 347.

16. The appellants rely on extrinsic materials in the form of the Minister's Second Reading Speech, the Report of the Commonwealth Administrative Review Committee (Parliamentary Paper No. 144 of 1971) and the Report of the Committee of Review of Prerogative Writ Procedures (Parliamentary Paper No. 56 of 1973) - see the [Acts Interpretation Act 1901](#) (Cth) [s.15AB](#). These materials do not support the appellants' submission. Instead they reinforce the view that the primary object of the [ADJR Act](#) was to achieve procedural reform and not to work a radical substantive change in the grounds on which administrative decisions are susceptible to challenge at common law.

17. The appellants' next submission is that in any event the rules of natural justice apply to the

making of the decisions which are challenged in the present case. The appellants contend that the making of the relevant decisions involved a departure from the rules of natural justice in that they were given no opportunity of replying to the matters stated in the Director's submission to the delegate, especially in pars.20, 21, 22, 24, 25 and 26. This submission calls for some examination of Salemi (No. 2) and Ratu. In the first of these cases, which was decided by a statutory majority, Barwick C.J., Gibbs and Aickin JJ. considered that the power of deportation conferred by [s.18](#) was not limited by a requirement to observe the rules of natural justice and that the announcement by the Minister of an "amnesty" for prohibited immigrants did not give the plaintiff an independent entitlement to a hearing before a deportation order was made against him. Stephen J. doubted that there was no obligation to accord natural justice in making a deportation order and concluded that the amnesty gave rise to a legitimate expectation requiring the observance of natural justice. Jacobs J. thought that there was no legislative intention wholly to exclude the principles of natural justice, although those principles would not apply in the ordinary case where the deportee's status as a prohibited immigrant was the reason, as well as the occasion, for the exercise of the power (pp.452-453). However, in his view the "amnesty" attracted the application of the principles. Murphy J. considered that, quite apart from the "amnesty", the power was conditioned by an obligation to accord natural justice.

18. Unlike Salemi (No. 2), Ratu was a unanimous decision, though the members of the Court differed as to the grounds for refusing relief. A majority (Barwick C.J., Gibbs, Mason, Jacobs and Aickin JJ., Murphy J. dissenting, and Stephen J. not deciding) held that the exercise in that case by the Minister of the power conferred by [s.18](#) was not subject to an obligation to observe the rules of natural justice. Barwick C.J., Gibbs, Mason and Aickin JJ. considered that the statute displaced, or left no room for, the general obligation that the common law might otherwise impose in relation to natural justice. Jacobs J., having referred to the view which he had expressed in Salemi (No. 2) about [s.18](#), went on to hold that this was a case where an order for deportation was made against the prosecutors because they were prohibited immigrants. Barwick C.J., Stephen and Murphy JJ. held that there was no denial of natural justice in any event.

19. The legislative amendments which have been made since Salemi (No. 2) and Ratu were decided in 1977 are of such significance that we should not regard those decisions as foreclosing the answers to the questions that the appellant's argument now raises. The most important change is that brought about by [s.13](#) of the [ADJR Act](#). The making of a deportation order and the other decisions now complained of are decisions to which the section applies with the consequence that there is an obligation under [s.13\(2\)](#) upon the person making a decision, following receipt of a notice under sub-s.(1), to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. The existence of this obligation is to be seen in association with the right conferred by [s.5\(1\)](#) of the [ADJR Act](#) on a person affected by a decision to apply to the Federal Court for an order of review. The absence of any obligation to give reasons was a factor relevant to the conclusion which I reached in Ratu (at p.479) though it was not expressed to be a decisive factor and it was a matter which was discussed in the judgment of Stephen J. in Salemi (No. 2), at pp.443-444. His Honour concluded by noting that Lord Reid in *Malloch v. Aberdeen Corporation* ([1971](#)) [1 WLR 1578](#), at p 1582; ([1971](#)) [2 All ER 1278](#), at p 1282, had observed that the absence of an obligation to give reasons did not necessarily predicate absence of an obligation to afford a hearing. Acceptance of this view does not deny that the existence of an obligation to give reasons, especially in association with a right in the person affected to apply for an order of review by a court of the decision, strengthens the case for saying that there is an obligation to comply with the rules of natural justice.

20. Then there are the amendments of the provisions of [s.6\(5\)](#) and s.6A(1) of the [Migration Act](#). Section 6A(1) now prescribes specifically the only grounds on which entry permits may be granted to an immigrant after his entry into Australia. These provisions replaced the general discretion to grant an entry permit for which [s.6\(5\)](#) had earlier provided. In *Salemi* (No. 2) and *Ratu* some significance attached to the circumstance that [s.18](#) left the making of a deportation order entirely to the discretion of the Minister (see *Salemi* (No. 2), at p.420; *Ratu*, at p.479). This was because an unconditional power, involving an unregulated discretion, to make a deportation order indicated that the Minister was not required to determine any question or form any judgment or opinion on any particular matter before making the order. The new provisions to be found in [s.6\(5\)](#) and s.6A(1) do not, of course, touch [s.18](#) itself, although the refusal of further entry permits under these sections leaves the Minister free to make a deportation order under [s.18](#).

21. [Section 27\(1\)\(ab\)](#) now makes it an offence for a person to become a prohibited immigrant upon the expiration of a temporary entry permit that is applicable to him. This was not an offence under [s.27](#) as it stood at the time of *Salemi* (No. 2) and *Ratu*. Associated with this amendment is the defence for which sub-s.(2A) now provides. This defence recognizes that the defendant's status as a prohibited immigrant may be terminated by the grant to him of a further entry permit or by the expiration under [s.7\(4\)](#) of a period of five years after he became a prohibited immigrant without any deportation order against him being in force. [Section 27\(1\)\(ab\)](#) attaches a criminal sanction to a person becoming a prohibited immigrant by reason of his overstaying his entry permit. And the existence of the defence under sub-s.(2A) enhances the importance of the grant or refusal of a further entry permit. The consequence of the grant of such a permit is that the immigrant is no longer in breach of [s.27\(1\)\(ab\)](#) (see [s.10](#)). The consequence of refusal is that the immigrant continues to be, or becomes, a prohibited immigrant.

22. In place of the old [s.7\(5\)](#), s.31A now confers a general power on the Minister or an authorized officer to require a person who is a prohibited immigrant to leave Australia within a time specified and the section imposes an obligation on the immigrant to comply with that requirement. The penalty prescribed is \$1,000 or imprisonment for six months. This power is an alternative to the deportation power. If exercised, it enables the immigrant to make his own arrangements for deportation from Australia. Unlike deportation, it does not expose him to arrest, detention in custody and liability under s.21A (a section introduced in 1979) for the costs of his conveyance from a place in Australia to a place outside Australia.

23. The general scheme of [Pt II](#) of the [Migration Act](#) dealing with "IMMIGRATION AND DEPORTATION" is that an immigrant's authority to enter and to remain in Australia depends on his having a current entry permit applicable to him, that he becomes a prohibited immigrant if he enters Australia without a permit or over-stays his entry permit or further entry permit ([ss.6\(1\), 7\(3\)](#)), that he thereby commits a criminal offence unless his presence in Australia is regularized by the grant of a further entry permit ([s.27](#)) and may be required to leave (s.31A) or may be deported ([s.18](#)) with the consequences which I have already mentioned. Apart from the general power which [s.18](#) confers on the Minister to "order the deportation of a person who is a prohibited immigrant under any provision of this Act" [Pt II](#) contains other deportation powers directed to specific situations. Although they have no direct relevance to this case I should briefly mention them. The Minister may deport an alien convicted of certain crimes ([s.12](#)). The Minister may deport immigrants who have been convicted of certain offences within five years of entry or who become inmates of a mental hospital or public charitable institution within that period ([s.13](#)). And there is provision for the deportation of an alien whose conduct appears to the Minister to have been such that he should not be allowed to remain in Australia ([s.14\(1\)](#)). Similar but more limited provision is made for the

deportation of prohibited immigrants by [s.14\(2\)](#). The exercise of the power is conditioned by procedural requirements which are designed to ensure that the person proposed to be deported will have an opportunity of participating in an inquiry conducted by a Commissioner appointed for the purposes of the section to consider the ground specified by the Minister. Where an inquiry is held the power may not be exercised unless the Commissioner reports that the ground specified by the Minister has been established.

24. For the purposes of the present case the statutory provisions relating to the issue of entry permits and the status of a person as a prohibited immigrant are of critical importance. Although the Act is by no means consistent in the references which it makes to them, it distinguishes between a temporary entry permit and an entry permit that is not temporary (which I have termed for the sake of convenience a "permanent entry permit"), the former being one which is expressed to be for a specified period only ([s.6\(6\)](#)). An entry permit may be granted to an immigrant upon his arrival in Australia or, subject to s.6A, after he has entered Australia ([s.6\(5\)](#)). [Section 6\(5\)](#) evidently refers to entry permits generally, that is temporary entry permits as well as permanent entry permits. On the other hand s.6A relates to permanent entry permits only (see s.6A(8)). I shall return to it shortly.

25. Subject to the reference in sub-s.(2) to "a further entry permit" which may include a permanent entry permit, [s.7](#) deals with temporary entry permits. The Minister may in his absolute discretion cancel such a permit by writing under his hand ([s.7\(1\)](#)). A further entry permit may be granted, at the request of the holder, to a person who holds or has held a temporary entry permit. Upon the expiration or cancellation of a temporary entry permit, the holder becomes a prohibited immigrant unless a further entry permit comes into force ([s.7\(3\)](#)). But a person who is a prohibited immigrant ceases to be a prohibited immigrant if and when an entry permit or further entry permit is granted to him and not otherwise ([s.10](#)). And, notwithstanding [s.10](#), a person who becomes a prohibited immigrant by virtue of [s.7\(3\)](#) ceases to be a prohibited immigrant at the expiration of a period of five years from the time at which he became a prohibited immigrant unless, at the end of that period, a deportation order in relation to him is in force ([s.7\(4\)](#)).

26. Section 6A(1) prohibits the grant of a permanent entry permit to an immigrant after his entry into Australia unless one or more of certain conditions are fulfilled in relation to him. Of the conditions set out, one only is relevant to the present case. It is par.(e) which is in these terms:

"(e) 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."

Because they did not hold temporary entry permits at the relevant time, s.6A(1) precluded the issue to Mr and Mrs Kioa of permanent entry permits on the footing that they satisfied the condition in par.(e). However, the delegate and, it seems, the Department correctly recognized that, if they were first granted further temporary entry permits, they would have been eligible for the grant of permanent entry permits provided that "strong compassionate or humanitarian grounds" for the grant of such permits existed. Paragraph 23 of the submission to the delegate states that "having regard to the applicable policy" an application for further temporary permits would be unlikely to succeed. Paragraph 26 of the delegate's statement of reasons sets out the grounds why he considered such permits would be refused and par.28 states his conclusion that there were "no strong humanitarian or compassionate grounds" for the grant of permanent entry permits.

27. In passing I note that s.6A(1) refers to the objective existence of the conditions which it enumerates, rather than to the opinion or satisfaction of some authority that the conditions or any of them are fulfilled. No doubt the existence or non-existence of many of the matters mentioned in pars.(a) to (e) inclusive may be readily established. However, "strong compassionate or humanitarian grounds" stand in a different position and may be very much a matter of opinion.

28. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it (*Twist v. Randwick Municipal Council* [1976] HCA 58; (1976) 136 CLR 106, at p 109; *Salemi (No. 2)*, at p 419; *Ratu*, at p 476; *Heatley v. Tasmanian Racing and Gaming Commission* [1977] HCA 39; (1977) 137 CLR 487, at pp 498-499; *FAI Insurances Ltd. v. Winneke* [1982] HCA 26; (1982) 151 CLR 342, at pp 360, 376-377; *Annamunthodo v. Oilfields Workers' Trade Union* (1961) AC 945). The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.

29. The reference to "legitimate expectation" makes it clear that the doctrine applies in circumstances where the order will not result in the deprivation of a legal right or interest. Take, for example, an application for a renewal of a licence where the applicant, though he has no legal right or interest, may nevertheless have a legitimate expectation which will attract the rules of natural justice. In *Salemi (No. 2)* Barwick C.J. (at p.404) expressed the view that the expression "legitimate expectation" adds little, if anything, to the concept of a right. However, later decisions demonstrate that the concept of "legitimate expectation" extends to expectations which go beyond enforceable legal rights provided that they are reasonably based (*Heatley*, at pp.508-509; *FAI*, at pp.348, 351-352, 369, 412; *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] UKPC 2; (1983) 2 AC 629, at p 636). The expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision. In the view of some members of the Court in *Salemi (No. 2)* the "amnesty" constituted an example of such an undertaking. Alternatively, the expectation may arise from the very nature of the application, as it did in the case of the application for a renewal of a licence in *FAI*, or from the existence of a regular practice which the person affected can reasonably expect to continue (*Council of Civil Service Unions v. Minister for the Civil Service* (1985) 1 AC 374, at p 401). The expectation may be that a right, interest or privilege will be granted or renewed or that it will not be denied without an opportunity being given to the person affected to put his case.

30. It has been said on many occasions that natural justice and fairness are to be equated - see, for example, *Wiseman v. Borneman* (1971) AC 297, at pp 308, 309, 320; *Bushell v. Secretary of State for the Environment* [1980] UKHL 1; (1981) AC 75. And it has been recognized that in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness. This is because the expression "natural justice" has been associated, perhaps too closely associated, with procedures followed by courts of law. The developing application of the doctrine of natural justice in the field of administrative decision-making has been very largely achieved by reference to the presence of characteristics which have been thought to reflect important characteristics of judicial decision-making. The effect of Atkin L.J.'s influential observations in *R v. Electricity Commissioners; Ex parte London Electricity Joint Committee Company (1920) Ltd.* (1924) 1 KB 171, at p 205, was to focus attention on those elements in the making of administrative decisions which are analogous to judicial determination as a means of determining whether the rules of natural justice apply in a particular case. The emphasis given in

subsequent decisions to the presence and absence of these characteristics diverted attention from the need to insist on the adoption in the administrative process of fair and flexible procedures for decision-making, procedures which do not necessarily take curial procedures as their model. See *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* ([1978](#)) [88 DLR\(3d\) 671](#), at pp.680-682.

31. The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. It seems that as early as 1911 Lord Loreburn L.C. understood that this was the law when he spoke of the obligation to "fairly listen to both sides" being "a duty lying upon every one who decides anything" (*Board of Education v. Rice* ([1911](#)) [AC 179](#), at p 182). But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly. This is because the act or decision which attracts the duty is an act or decision -

" ... which directly affects the person (or corporation) individually and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a 'policy' or 'political' decision and is not subject to judicial review."

(*Salemi* (No. 2), at p.452, per Jacobs J.).

32. Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation* [[1963](#)] [HCA 41](#); ([1963](#)) [113 CLR 475](#), Kitto J. pointed out (at pp 503-504) that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on "the particular statutory framework". What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting (*Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [[1969](#)] [HCA 10](#); ([1969](#)) [122 CLR 546](#), at pp 552-553; *National Companies and Securities Commission v. The News Corporation Ltd.* [[1984](#)] [HCA 29](#); [[1984](#)] [HCA 29](#); ([1984](#)) [58 ALJR 308](#), at pp 314, 318; [[1984](#)] [HCA 29](#); [52 ALR 417](#), at pp 427-428, 434).

33. In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations (cf. *Salemi* (No. 2), at p.451, per Jacobs J.).

34. When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case? It will be convenient to consider at the outset whether the statute displaces the duty when the statute contains a specific provision to that effect, for then it will be pointless to inquire what the duty requires in the circumstances of the case, unless there are circumstances not contemplated by the statutory provision that may give rise to a legitimate expectation. However, in general, it will be a matter of determining what the duty to act fairly requires in the way of procedural fairness in the circumstances of the case. A resolution of that question calls for an examination of the statutory provisions and the interests which I have already mentioned.

35. Notwithstanding the characteristics of the power and the elements in the statutory framework which were thought in *Salemi* (No. 2) and *Ratu* to indicate an intention to displace the principles of natural justice in relation to [s.18](#), I do not think that it can now be said that the [Migration Act](#) as it has been amended wholly displaces the duty to act fairly in accordance with the doctrine of natural justice. In one very important respect there has been a radical legislative change. The exercise of the power is susceptible of judicial review and an element in that review is the obligation, on request, to furnish a statement setting out material findings of fact, referring to the evidence and other materials, and giving the reasons for the decision. In the light of this it can scarcely be suggested now that the existence of an obligation to comply with the requirements of procedural fairness is inconsistent with the statutory framework or that it will entail administrative inconvenience which is destructive of the statutory objects. In this new setting the remaining considerations which influenced the Court in the two earlier decisions are not sufficient to displace the obligation to follow fair procedures.

36. I do not agree with the view expressed by Barwick C.J. in *Ratu* (at p.466) that the Minister has no discretion under [s.18](#) not to order the deportation of a prohibited immigrant. The Minister may decide not to make such an order for a variety of reasons. He may do so pending consideration of an application for a further entry permit or because he considers that the prohibited immigrant will in due course make his own arrangements to leave Australia or because the case is one calling for a s.31A notice rather than a deportation order.

37. But what does procedural fairness entail in its application to the exercise of the discretionary power conferred by [s.18](#)? It would be going too far to say that fairness requires that in all cases in which a deportation order is to be made notice should be given to the prohibited immigrant of the intention to make such an order and of the grounds upon which it is to be made. The [Migration Act](#) plainly contemplates that in the ordinary course of events a deportation order will be made ex parte. And the prohibited immigrant may be a person who, intent upon remaining in Australia without lawful right or title, has evaded the authorities and will continue to do so. He may even be a person who has been required under s.31A to leave, but has declined to do so. To insist that he be notified of the intention to make a deportation order would serve only to facilitate evasion and frustrate the objects of the statute. These considerations indicate that, in the case where the reason for the making of the order is that the person concerned is a prohibited immigrant, the dictates of natural justice and fairness do not require the giving of any advance notice of the proposed making of the order (*Salemi* (No. 2), at pp.452-453, and *Ratu*, at p.480).

38. But it may be otherwise where the reasons for the making of the order travel beyond the fact

that the person concerned is a prohibited immigrant and those reasons are personal to him, as, for example, where they relate to his conduct, health, or associations. And if the order is made in consequence of a refusal to grant a further entry permit to him, the reasons on which that refusal is based may require that as a matter of fairness the person affected should have the chance of responding to them.

39. However, this is not to say that fairness will necessarily, or even generally, require that an applicant for a further entry permit be given an opportunity to be heard even where deportation may follow from its refusal. The grant of an entry permit is a matter of discretion. Indeed, the cancellation of a temporary entry permit is expressed to be a matter of absolute discretion ([s.7\(1\)](#)). In the ordinary course of granting or refusing entry permits there is no occasion for the principles of natural justice to be called into play. The applicant is entitled to support his application by such information and material as he thinks appropriate and he cannot complain if the authorities reject his application because they do not accept, without further notice to him, what he puts forward. But if in fact the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter (In re H.K. (An Infant) ([1967](#)) 2 QB 617). If the application is for a further temporary entry permit and it is made in circumstances which are relevantly similar to those in which the earlier permit was granted, the applicant may have a legitimate expectation that the further entry permit will be granted or will not be refused in the absence of an opportunity to deal with the grounds on which it is to be refused. And if the refusal is to be attended by the making of a deportation order, the case for holding that procedural fairness requires that such an opportunity be given is unquestionably stronger.

40. In this respect recent decisions illustrate the importance which the law attaches to the need 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. FAI is one illustration. Cole v. Cunningham ([1983](#)) 49 ALR 123, is another, as are Reg. v. Gaming Board for Great Britain; Ex parte Benaim and Khaida (1970) 2 QB 417, at p 431; and Daganayasi v. Minister of Immigration ([1980](#)) 2 NZLR 130.

41. Of the paragraphs in the submission to the delegate of which the appellants complain, it seems to me that there are two matters only in respect of which fairness demands that the applicant should have the chance of replying. The first is the comment in par.21 that had Mr Kioa been genuine in his desire to seek a legitimate extension of his stay in Australia he might have sought a decision on his application "rather than change his address without apparently notifying the Department". The second matter is that contained in par.22, namely, the statement that Mr Kioa's concern for other Tongan illegal immigrants and his active involvement with other persons who were seeking to circumvent Australia's immigration laws "must be a source of concern". Although the statement of reasons makes no reference to the contents of par.22, it does not disavow them. As the paragraph was extremely prejudicial, the appellants should have had the opportunity of replying to it. The other material of which the appellants complain consists of policy, comment and undisputed statements of fact. It does not call for a chance to reply.

42. A separate submission is made on behalf of Elvina Kioa. It is contended that she had a legitimate expectation as an Australian citizen that she would not be deprived of, or impeded, in her enjoyment of the day to day benefits and privileges of Australian citizenship and a legitimate expectation of continued residence in her country of citizenship with her family. The suggestion is

that before a deportation order was made against her parents she should have been given an opportunity of presenting a case against the making of such an order. In my opinion the duty to act fairly does not extend so far. Certainly the making of a deportation order had consequences for her, but it would be quite unreal to suggest that as an infant ten months old she should have been given an opportunity of presenting a case beyond the case presented on behalf of her parents for an extension of their stay in Australia.

43. The appellant's final submission is that the delegate failed to have regard to a relevant consideration, namely that she was an Australian citizen and that deportation of her parents would have necessarily entailed her deportation from Australia. The short answer to this submission is that the statement under [s.13](#) made reference to Elvina's status as an Australian citizen. It is obvious that the delegate proceeded on the footing that Elvina would accompany her parents to Fiji and that this would inevitably deprive her of the privilege of residing in Australia during her infancy.

44. In the result I would allow the appeal and quash the deportation order on the ground that a breach of the rules of natural justice occurred in connexion with the making of the decision.

WILSON J.: The appellants are Mr and Mrs Kioa and their younger daughter Elvina. Mr and Mrs Kioa are citizens of the Kingdom of Tonga; Elvina was born in Australia in November 1982 and by virtue of s.10 of the Australian Citizenship Act 1948 (Cth) as amended is an Australian citizen. Mr Kioa last arrived in Australia in September 1981 on a student visa to attend a three month course at the International Training Institute in Sydney under the auspices of the Australian Development Assistance Bureau. He was granted a temporary entry permit, in accordance with the provisions of the [Migration Act 1958](#) (Cth) as then amended ("the [Migration Act](#)"), expiring on 8 December 1981. At the time he was employed by the Tongan Tourist Office. Mrs Kioa and their daughter Elitisi arrived in Australia in November 1981 and were granted temporary entry permits expiring on 31 March 1982. It was planned that, following the completion of Mr Kioa's course, the family would holiday in Australia, utilising a period of four months' leave granted to him by his employer. On completion of the course the family moved to Melbourne from where on 15 December 1981 Mr Kioa applied for a further temporary entry permit until 31 March 1982. In support of that application he produced fully-paid airline tickets for the family's departure from Australia on that date. As it happened, no decision was made on that application before the end of March and thereafter action by the department lapsed, it being believed that the family had returned to Tonga.

2. However, the family had not returned to Tonga. Mr Kioa later described the course of events. During March 1982 a hurricane devastated his parents' property in Tonga, leading to a cry for financial help from him in Australia. He thereupon decided not to return to Tonga. He resigned his position with the Tourist Office and secured steady employment in Melbourne. He made no attempt to contact the immigration authorities. Over the following fifteen months he made significant progress towards integration into Australian society: he achieved a position of some responsibility in his employment, was well regarded by his fellow workers, occupied a flat in the same building for over twelve months, acquired a motor vehicle on hire purchase and assumed a leadership role in the Tongan Christian Fellowship.

3. On 25 July 1983 Mr Kioa was taken into custody as a prohibited immigrant. The following day an application was made to the Minister on behalf of Mr and Mrs Kioa for a change of status to enable the family to remain in Australia. That application was made by the Legal Aid Commission of Victoria and included a detailed description of the circumstances surrounding the family's stay in Australia. In addition Mr Kioa was interviewed on 27 July 1983 by an officer of the Minister's

department ("the department") and an exhaustive statement of his circumstances was obtained. Written support for the application for change of status was provided by a letter from his employer, a petition signed by twenty-seven fellow employees and a letter from the Tongan Christian Fellowship.

4. On 6 October 1983 the Director of the Enforcement Section of the department addressed a submission to Mr Woodward, the Deputy Secretary and a delegate of the Minister under s.66D of the [Migration Act](#), the purpose of which was

"to recommend that you sign deportation orders in respect of Mr and Mrs Kioa and to answer representations made on their behalf by the Legal Aid Commission of Victoria".

The deportation orders, made pursuant to the authority conferred on the Minister by [s.18](#) of the [Migration Act](#), were signed by Mr Woodward on the same day.

5. Thereafter, in response to a request under [s.13](#) of the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth), as amended, ("the Judicial Review Act") Mr Woodward on 11 November 1983 furnished a statement in writing setting out his findings on material questions of fact, referring to the material on which those findings were based and giving the reasons for the decision. The history as I have already detailed it sufficiently records the substance of Mr Woodward's findings of fact and the material to which he had access save for one item of that material which appears as par.23(h) and reads as follows:

"(h) a summary of policy of deportation of prohibited immigrants as set out in Chapter 3 of the Residence Control Manual which included inter alia:

- a) persons who enter as students, or their dependents, are expected to honour the undertakings contained in visa applications signed overseas;
- b) it is in the public interest to ensure that persons abide by normal immigration selection procedures and do not queue-jump by remaining illegally in Australia to the prejudice of prospective migrants who abide by the procedures;
- c) presence of such queue-jumpers is inimical to the Government control of migration programs as well as impacting upon job availability for legal residents;
- d) prohibited immigrants who do not leave voluntarily should expect to face the

prospect of deportation when located".

The statement then concludes with a section headed "The Reasons for the Decision" which I set out in full:

"C THE REASONS FOR THE DECISION

24 By virtue of section 7(3) of the Act the applicants became prohibited immigrants following the expiration of their temporary entry permits on 8 December 1981 (Mr Kioa), and 31 March 1982 (Mrs Kioa), and both have maintained that status from these respective dates as no further temporary entry permits applicable to them have come into force.

25 The applicants do not fulfil one or more of the conditions of section 6A(1) of the Act necessary for consideration for grant of a (permanent) entry permit.

26 While I accepted that it remains possible to regularize the applicants continued presence in Australia, for a limited period if they so requested, by directing the grant to them of a further temporary entry permit I was satisfied that such a grant would have been inappropriate in the circumstances by reason of the applicable policy, their breach of the undertakings made by them in connection with their visitor visa applications, their deliberate remaining in Australia as prohibited immigrants, Mr Kioa's illegal working without written permission in Australia, and their length of stay in Australia which was well beyond that normally allowed students in similar circumstances as set down in policy guidelines.

27 While a permanent entry permit may not be granted to the applicants after their entry to Australia by reason of section 6A(1) of the Act, I accepted that it was possible to direct the grant of a further temporary entry permit to them for the purpose of allowing consideration of an application for grant of (permanent) entry permit on the basis that the conditions of section 6A(1)(e) of the Act are fulfilled. Accordingly I considered whether,

apart from the fact that the applicants do not hold temporary entry permits in force, there are strong compassionate or humanitarian grounds for the grant of (permanent) entry permits to them.

28 Based upon my findings and the representations made on their behalf I considered and gave weight to the circumstances of the applicants' case and in particular to the fact that the tragedy of the March 1982 cyclone in Tonga necessitated Mr Kioa giving financial assistance to his family in Tonga (which I accept he was better able to do from Australia). However I was of the view that in all the circumstances there were no strong humanitarian or compassionate grounds for the grant to them of (permanent) entry permits.

29 In the particular case of the applicants:

(a) Mr Kioa, knowing that an application for further temporary permit had not been finalized and that, in any event, the period of extension sought had expired, deliberately chose to remain in Australia, to work without written permission contrary to s. 31B(2) of the Act, and to resign his position in Tonga with the Tourist Office.

(b) The applicants made no attempt to communicate with the Department after 15 December 1981 nor advised of any change of address to enable the Department to communicate with them. In particular they made no attempt to enquire of their earlier application or to further regularize their status following receipt of news of the cyclone on March 1982.

(c) Mr Kioa failed to honour his obligation as a student visitor to return home at the completion of his studies or permitted stay.

30 I considered that these actions constituted a blatant disregard for the normal migration selection procedures and the migration law. I considered nonetheless the circumstances of their case, in particular as set out in paragraphs 17 and 28 above, but decided that

their expulsion from Australia was appropriate. I considered that the application of the stated policy set out in paragraph 22(b) supra was appropriate and just. In all the circumstances I decided to order their deportation".

6. An application by the appellants to the Federal Court for an order of review in respect of Mr Woodward's decision was dismissed by Keely J. and on appeal by the Full Court (Northrop, Jenkinson and Wilcox JJ.). The decisions have been reported: [\(1984\) 53 A.L.R. 658](#) and [55 A.L.R. 669](#) respectively. The appellants now appeal by special leave to this Court.

7. The point of substance argued on the appeal is whether, in considering whether to grant further entry permits to the first and second appellants or to order their deportation the Minister was under an obligation to comply with the rules of natural justice. That issue had been resolved against the appellants in the Federal Court by reason of the authority of the decisions of this Court in *Salemi v. MacKellar* (No. 2) [\[1977\] HCA 26](#); [\(1977\) 137 CLR 396](#) and *Reg. v. MacKellar; Ex parte Ratu* [\[1977\] HCA 35](#); [\(1977\) 137 CLR 461](#).

8. In *Salemi* the Court composed of six members considered the question whether, construing the [Migration Act](#) as it then stood, the Minister could issue a deportation order under [s.18](#) without first giving the person affected an opportunity to be heard. Three members of the Court (Barwick C.J., Gibbs and Aickin JJ.) answered the question in the affirmative. Of the other members of the Court, Jacobs and Murphy JJ. would have given a negative answer to the question while Stephen J., although inclined to give a negative answer to the question, found it unnecessary to express a concluded view because of the effect of the amnesty around which the argument in the case revolved.

9. In *Ratu*, the Minister made deportation orders under [s.18](#) of the [Migration Act](#) in respect of two Fijian women whose temporary entry permits had expired. It was argued for the prosecutors that they were entitled to be told the Minister's grounds for deporting them in order that they may have the opportunity to challenge them. In fact, the Minister received detailed submissions on behalf of the deportees and made lengthy replies outlining the reasons for his decision and rejecting the submissions that had been made. It was held by Barwick C.J., Gibbs, Mason and Aickin JJ. that the Minister was not obliged to observe the principles of natural justice. Jacobs J. found no such similarity with the facts of *Salemi* as would lead him to the same conclusions as he expressed in the latter case. The deportation orders having been made on the sole ground that the women were prohibited immigrants the Minister was not bound to state his reasons or to give an opportunity to make submissions. Murphy J. held the rules of natural justice to be applicable but, with Barwick C.J., Stephen and Jacobs JJ., found that in any event they had been observed.

10. The appellants do not argue that these two cases of *Salemi* and *Ratu* were wrongly decided. Their counsel, Mr Merkel, argues that the statutory context has now changed to such an extent that the exercise of the deportation power in [s.18](#) of the [Migration Act](#) is now subject to the rules of natural justice. The reason for that is that while in 1977 it was open for the Court to construe the section in its then context as reflecting a legislative intent that the power be exercised without giving the person affected an opportunity to be heard, the effect of later legislation is that such an intent can no longer be discerned. It is not necessary for the appellants to do more than demonstrate the

absence of a clear intent to exclude the operation of the rules, because as Byles J. said in *Cooper v. Wandsworth Board of Works*; [1863] EngR 424; (1863) 14 CB (NS) 180, at p 194 [1863] EngR 424; (143 ER 414, at p 420), "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". But clearly, good grounds must be shown for dislodging the authority of the decisions in *Salemi and Ratu*.

11. The first of the legislative changes upon which the appellants rely is found in the Judicial Review Act, which commenced to operate on 1 October 1980. Section 5(1)(a) reads as follows:

"5.(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision".

Mr Merkel argues that this provision affords direct authority for the present application. It is common ground that the decision under s.18 of the *Migration Act* to deport Mr and Mrs Kioa is "a decision to which this Act applies" and that the appellants are persons who are capable of being aggrieved by that decision. It is then said that par.(a) has the effect of rendering all administrative decisions to which the Judicial Review Act applies subject to observance of the rules of natural justice notwithstanding that before the Judicial Review Act came into operation such observance, on the proper construction of the enactment under which the decision is made, may have been excluded. I am unable to accept the argument. Broadly speaking, the purpose of the Judicial Review Act is to simplify the procedure of judicial review of administrative decisions made under Commonwealth Acts. The statutory context in which such decisions are made are many and diverse and it cannot be supposed that the simple formulation contained in s.5(1)(a) of the Judicial Review Act was intended to effect a substantive change to any context which prior to that time revealed a legislative intent to exclude the operation of the rules. Furthermore, the construction contended for is demonstrably untenable. As Stephen J. remarked in *Salemi* (at p.444) it is now a truism that in cases in which the rules of natural justice are applicable the procedural consequences will not necessarily be uniform. They will depend upon what Kitto J. described, in *Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475, at p 504, as "the particular statutory framework" within which they are to apply. His Honour continued:

"By the statutory framework I mean the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject-matter: cf. *Ridge v. Baldwin* [1963] UKHL 2; (1963) 2 W.L.R. 935, at p.947. As Tucker L.J. said in *Russell v. Duke of Norfolk* (1949) 1 All ER 109 (at p 118), in a passage approved by the Privy Council in *University of Ceylon v. Fernando* (1960) 1 All ER 631, at

p 637, there are no words which are of universal application to every kind of inquiry and every kind of tribunal: 'the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth'".

See also, National Companies and Securities Commission v. News Corporation Ltd. [\[1984\] HCA 29](#); [\[1984\] HCA 29](#); [\(1984\) 58 ALJR 308](#) at p 318; [\[1984\] HCA 29](#); [52 ALR 417](#) at p 434.

If the statute in question reflects a clear legislative intent to exclude the rules of natural justice it must be sheer speculation to extract from it any conclusion as to the procedural consequences that might have been intended if the rules had not been excluded. The very exclusion must extend not only to the fact of their application but also to their content. The Judicial Review Act does not invest the rules of natural justice with any particular content capable of arbitrary application to any decision made under any Commonwealth enactment. Unless the statute under which the decision is made requires observance of the rules of natural justice there cannot be any relevant breach of those rules to support an application for an order of review in accordance with s.5(1)(a). With respect I agree with the view consistently expressed by judges of the Federal Court in this regard (see, for example, Minister for Immigration and Ethnic Affairs v. Haj-Ismael [\(1982\) 40 ALR 341](#), at p 347; Smith v. Minister for Immigration and Ethnic Affairs [\(1984\) 53 ALR 551](#), at pp 54-555) and repeated in the present case.

12. The next submission for the appellants is based on s.13 of the Judicial Review Act. That section obliges the decision-maker on the request of any person who is entitled to make an application to the Federal Court under s.5 to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. The second schedule lists the classes of decisions that are not decisions to which s.13 applies and included therein are certain decisions under [s.6](#) of the [Migration Act](#), namely,

"(i) decisions under [section 6](#), other than -

(A) a decision relating to a person who, at the time of the decision, was a person in respect of whom there was in force a visa or return endorsement under that Act; or

(B) a decision relating to a person who, having entered Australia within the meaning of that Act, was in Australia at the time of the decision".

It follows, I think, that the submission gains strength from the fact that the reference to the [Migration Act](#) in the second schedule shows that the attention of the legislature was specifically directed to the question of whether any, and if so what, decisions made under that Act should be exempted from the obligation to give reasons pursuant to s.13 of the Judicial Review Act. It is noteworthy that the legislature apparently saw no reason why the Minister should not be obliged to furnish his reasons for, inter alia, cancelling in his absolute discretion a temporary entry permit at

any time (Migration Act, s.7(1)) or ordering the deportation of a person who is a prohibited immigrant (Migration Act, s.18). It may be observed that ss.13A and 14 of the Judicial Review Act ensure that s.13 may be complied with in a manner which will protect confidentiality and safeguard the national interest and Crown privilege.

13. I turn now to consider whether the impact of the Judicial Review Act affects the continued relevance of the reasoning of members of the Court in Salemi and Ratu. In Salemi, at p.402, Barwick C.J. said:

"The matter committed to the Minister by s. 18 is the deportation of a prohibited immigrant. The Parliament, by its legislation, has determined who shall fill that description. The Parliament in this legislation is dealing with a national interest of paramount importance, namely, the composition of the nation, determining who shall enter and who shall stay. The decision of those questions is not hedged, nor can it be hedged, around with principles of the kind that the judiciary are wont to consider: nor is it necessary, or convenient, or indeed desirable, that reasons be assigned for the determination of those questions".

At p.421, Gibbs J. said:

"The very security of the nation may require that the executive should have the power to decide what aliens shall be permitted to enter and remain in Australia, and to expel those who have no right to be in the country. Reasons of security may make it impossible to disclose the grounds on which the executive proposes to act. If the Minister cannot reveal why he intends to make a deportation order, it will be difficult to afford the prohibited immigrant a full opportunity to state his case, for he may not know what it is that he has to answer. This is not to say that it might not be practicable for the Parliament to provide a procedure for the review of deportation orders made under s. 18, but the Parliament has not done so".

See also per Stephen J. at pp.443-444; per Aickin J. at p.460.

14. In Ratu, at p.466, Barwick C.J. said:

"Section 7(1) gives to the Minister an absolute discretion at any time to cancel the temporary entry permit. It would be odd in the extreme if,

none the less, before an order for deportation could be made of an immigrant whose entry permit has been cancelled, that the prohibited immigrant could insist on being informed of the reasons why it was contemplated that the order should be made and have an opportunity to contest those reasons, apparently both in relation to the facts and their sufficiency to warrant a deportation order being made".

Odd though it be, that is precisely the effect of the Judicial Review Act provided it be understood that the contest is confined to the matters set out in s.5(1) of that Act. Gibbs J., at p.470, referred to his judgment in Salemi and continued:

"In that case I reached the conclusion that the power given by s. 18 of the Act is not subject to an obligation to observe the principles of natural justice, and in particular that the Minister is not bound to disclose the grounds on which he proposes to act in making a deportation order, or to afford a hearing to a prohibited immigrant before ordering his deportation. Having considered the arguments advanced in the present case I see no reason to depart from that conclusion".

At pp.479-480, Mason J. said:

"Another factor suggesting that the Minister is not under an absolute or universal obligation to give advance notice is to be found in the width of the discretion conferred by the section and in the absence of any obligation to give reasons. The discretion is unlimited in scope except in so far as the nature and purpose of the Act may possibly suggest some confinement ...

... The Minister's reasons for making the order may, and very likely will, include considerations of government policy which, whether they lend themselves to disclosure or not, the statute does not oblige him to disclose. When the statute imposes no such obligation the court is not justified in creating indirectly a like obligation by holding that the Minister is under a duty of the kind suggested".

Finally, at p.482, Jacobs J. said:

"Since the Minister made the orders because

the applicants were prohibited immigrants he was not bound to state his reason or to give an opportunity to make submissions".

15. In my respectful opinion, these citations make it evident that the obligation now resting on the Minister by virtue of s.13 of the Judicial Review Act to furnish a statement in writing setting out the material on which his decision to order a deportation under [s.18](#) of the [Migration Act](#) was based and the reasons for the decision introduces a new factor of some importance to be considered along with the other factors canvassed in Salemi and Ratu. Before taking this aspect of the matter any further it is convenient to examine a further related submission advanced for the appellants, namely, that legislative amendments since 1977 to the [Migration Act](#) itself now create a relevantly different statutory context in which the issue is to be considered. In the first place, reference is made to amending Act No.117 of 1979 by which the following changes, inter alia, were made to the Migration Act:

(a) a new s.21A was inserted, under which a deportee is made liable for the cost to the Commonwealth of keeping and maintaining him during his detention awaiting deportation and for the costs incurred by the Commonwealth, including those incurred pursuant to s.22, for the conveyance of the deportee to a place outside Australia;

(b) s.27(1) was amended to create the offence of becoming a prohibited immigrant upon the expiration of a temporary entry permit (s.27(1)(ab)). Section 27(2A) was inserted to provide:

"(2A) It is a defence to a prosecution of an immigrant for an offence against paragraph (ab) of sub-section (1) if the immigrant satisfies the Court that, after he became a prohibited immigrant a further entry permit applicable to him had come into force or he had ceased to be a prohibited immigrant by virtue of sub-section (4) of section 7".

(Under s. 7(4) a prohibited immigrant may cease to be such by reason of the expiration of a period of five years from the time at which he became a prohibited immigrant, there being in force no deportation order in relation to him).

(c) The provisions of s.7(5), which empowered an authorized officer to require a person who is a prohibited immigrant by reason of the expiry or cancellation of a temporary entry permit to leave Australia within the time specified, were repealed

and re-enacted as s.31A in a broader context. The Minister himself was given the power in addition to an authorized officer and it could be exercised in respect of any prohibited immigrant.

(d) A new section 31B was inserted dealing with offences by immigrants in relation to work. It created, inter alia, an offence for a prohibited immigrant to perform any work in Australia without the permission, in writing, of an authorized officer.

16. Mr Merkel draws attention also to the insertion of ss.6A and 66E in the Act. The first of these sections was inserted by amending Act No.175 of 1980 with the object of restricting by law the categories of immigrants eligible to be granted permanent residence subsequent to their arrival in Australia (see Hansard, House of Representatives, Vol.120 at p.151). The second was inserted by amending Act No.61 of 1981. It enables decisions of the Minister to order the deportation of a person under s.12 or s.13 of the Act to be reviewed on their merits by the Administrative Appeals Tribunal constituted under the [Administrative Appeals Tribunal Act 1975](#) (Cth) provided that the applicant is either an Australian citizen or a person whose continued presence in Australia is not subject to any limitation as to time imposed by law (s.66E(2)). [Section 12](#) empowers the Minister to order the deportation of any alien convicted in Australia of certain crimes, while [s.13](#) applies to the deportation of immigrants in respect of matters occurring within five years of entry. In each case, after reviewing the decision, the Tribunal shall either affirm the decision or remit the matter for reconsideration in accordance with any recommendations of the Tribunal (s.66E(3)).

17. I have reviewed in detail the legislative changes to the [Migration Act](#) since the decisions in Salemi and Ratu upon which the appellants rely to establish a statutory framework so significantly different as to render those decisions no longer applicable. It is true that the reasons for decision of some of the members of the Court who formed the majority in those cases reflect a view of the statute in which deportation was seen as a natural consequence of a person acquiring the status of a prohibited immigrant. As Barwick C.J. observed in Salemi, at p.406, "Deportation is the consequence prescribed" for the presence in Australia of a prohibited immigrant. In Ratu, at p.466, his Honour affirmed the view that the Minister had no discretion not to order deportation of a prohibited immigrant, given that he was not disposed to grant a further entry permit. See also, per Gibbs J. in Salemi at pp.420-421 and in Ratu at pp.468-469; per Aickin J. in Salemi at p.460 and in Ratu at pp.485-486; per Jacobs J. in Ratu at p.481. Mason J., in Ratu at p.479, acknowledged that in the case of an overstayed entrant there was no occasion in the first place to resort to [s.18](#) because of the power then available in [s.7\(5\)](#) for an authorized officer to require a prohibited immigrant to leave Australia.

18. One effect of the legislative changes to which I have referred is to emphasize the discretionary nature of the power to deport a prohibited immigrant which [s.18](#) vests in the Minister. Quite apart from the power to change the status of such a person by the grant of a further entry permit, the statutory controls over prohibited immigrants have been tightened considerably. It is now an offence for an immigrant to become a prohibited immigrant upon the expiration of a temporary entry permit, with the sanction of a substantial fine or imprisonment ([s.27\(1\)\(ab\)](#)). A prohibited immigrant commits an offence if he performs any work in Australia unless (extraordinary though it

may seem) with the permission in writing of an authorized officer (s.31B(2)). More importantly, the power to require a prohibited immigrant to leave Australia within a specified time under penalty of fine or imprisonment has been re-enacted and widened in scope (s.31A). The power to order the deportation of prohibited immigrants may now be seen as a weapon of last resort. Such an order now has added significance to the deportee because not only is he subjected to custody and a form of travel and a destination not of his own choosing, all of which formerly applied, but he is now liable to the Commonwealth for the cost of his maintenance while in custody and the passage money and other charges payable in respect of his conveyance away from Australia (s.21A).

19. It is not easy to derive any support for the appellants' argument from the insertion of s.6A, a provision the purpose and effect of which is to make it more difficult for immigrants to gain permanent resident status after they have entered Australia. While clearly relevant to the merits of the Minister's decision to order the deportation of Mr and Mrs Kioa, it would not seem to provide any direct support for a legislative intent that the decision itself should be attended with procedural fairness. As I understand the argument it is that the Minister had it within his power to grant Mr and Mrs Kioa further temporary entry permits pursuant to [s.7\(2\)](#), and then to consider their claims to permanent resident status on the basis of strong compassionate or humanitarian grounds as envisaged by s.6A(1)(e). The argument encounters the difficulty that one aspect of the [Migration Act](#) which has not changed since *Salemi and Ratu* is that the Minister's discretion to cancel a temporary entry permit at any time and, conversely, to grant a further temporary entry permit, is absolutely unfettered. Nevertheless, it is possible to discern a relevance, albeit attenuated, of strong compassionate or humanitarian grounds to the exercise of the Minister's discretion to order deportation under [s.18](#), and this may strengthen the claim to an expectation to be heard in relation to such a decision.

20. In the end, I do not have to decide whether of themselves the legislative changes to the [Migration Act](#) since the cases of *Salemi and Ratu* were decided render those decisions no longer determinative of a case such as the present. When taken with s.13 of the *Judicial Review Act*, I have no doubt that there is no longer a relevant statutory framework which evinces the intention of the legislature that in ordering the deportation of a prohibited immigrant the Minister is not obliged to observe the dictates of procedural fairness. It is therefore open to the appellants to seek a review of the deportation orders on the ground that a breach of the rules of natural justice occurred in connection with the making of the decision.

21. It is necessary now to consider what the rules of natural justice require of a decision made under [s.18](#) of the [Migration Act](#). I have spoken of the dictates of procedural fairness because in the context of administrative decisions I think that such a phrase is an apt description of what natural justice requires. What is fair will depend, as I have already indicated by referring to the statement of Kitto J. in *Mobil Oil and to News Corporation*, on the particular statutory framework within which the decision is taken. Even within the same statutory framework differing circumstances may call for a different response (cf. *Stephen J. in Salemi* at p.444).

22. When regard is had to the circumstances of the present case, it is immediately clear that save in one respect there can be no room for complaint of unfairness in the procedures followed by the Minister. The salient aspects of those circumstances are these: prior to his coming to Australia as a sponsored student for the course at the International Training Institute Mr Kioa acknowledged in his application for a visa an obligation to return to Tonga at the completion of the course; when seeking a further temporary entry permit for himself Mr Kioa produced for inspection fully paid airline tickets and represented to immigration officers in Australia that he and his wife and daughter would

leave Australia on 31 March 1982; following news of the hurricane in Tonga he did not seek further entry permits but without reference to the department he resigned his position with the Tongan Tourist Office, changed his address and secured employment in contravention of the [Migration Act](#); he knowingly accepted the status of prohibited immigrant from 31 March 1982 until his arrest on 25 July 1983; he took the opportunity of an interview on 27 July 1983 with an immigration officer to explain fully the circumstances of the extended stay in Australia of himself, his wife and Elitisi and of the birth in Australia of Elvina; at the same time the Legal Aid Commission of Victoria on his behalf made an appeal in writing to the Minister seeking permission for Mr Kioa and his family to stay in Australia and that appeal was supported by submissions in writing from both his employment and church connections. When the delegate of the Minister came to make his decision with respect to deportation on 6 October 1983 he was thus fully apprized of all the relevant circumstances and, in particular, of the grounds upon which Mr and Mrs Kioa sought the exercise of his discretion to secure their permanent residence in Australia. Thus far, as I have said, there is no room for any complaint of unfairness. However, the delegate was also furnished with a submission from the department which recommended deportation and included statements in pars.20 and 22 reading as follows:

"20. Mr Kioa claims that the catalyst for his staying in Australia was the devastating cyclone which hit Tonga in March 1982. Yet it should be noted that this occurred at least 3 months after his TEP (temporary entry permit) had expired."

"22. Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern".

Mr Merkel argues that the comment in par.20 was unjust because it was known that Mrs Kioa and Elitisi had been granted permits expiring on 31 March 1982 and there was no reason to doubt that Mr Kioa's then pending application for a further permit expiring on the same date would be approved. This may be so but I cannot attach any importance to that paragraph. In terms par.20 is strictly accurate but in any event the circumstances surrounding Mr Kioa's application in December 1981 for an extension of his entry permit is described elsewhere in the submission and the delegate's findings on material questions of fact show that he was not misled. The complaint touching par.22 is more substantial. It is argued that the reference to "his active involvement with other persons who are seeking to circumvent Australia's immigration laws" implies that Mr Kioa was not merely concerned over the plight of Tongan illegal immigrants in Australia but was actively assisting them to evade those laws as distinct from assisting them to regularize their position in accordance with those laws. The source of the allegation does not appear in the submission and there is nothing in the material submitted to the delegate on behalf of Mr and Mrs Kioa which would justify or support it. The allegation was clearly prejudicial to the application to be allowed to stay in Australia. Ordinarily, procedural fairness would require that such an allegation be put to them and they be given an opportunity to answer it before a decision was made. Unfortunately, that course was not followed. The learned Solicitor-General for the Commonwealth argues that because there is no mention of par.22 in the delegate's reasons for his decision the failure to provide Mr Kioa with an opportunity to be heard in respect of it cannot be material. But the situation must be judged in terms of the procedure followed before the decision was made. The delegate received a submission

recommending that he sign orders for deportation and it cannot be denied that the concern expressed in par.22 was a factor which contributed to and supported the recommendation. The paragraph appears as the final item in a section in the submission headed "Representations and Letters of Support" and if left uncontradicted would be calculated to discount the apparently significant body of community support for the Kioa family. In any event, it is not necessary to show that the allegation contained in par.22 did work to the prejudice of Mr and Mrs Kioa. It is enough to show that the way was open for it to do so. See *Kanda v. Government of Malaya* (1962) AC 322, at pp 337-338. In this regard, I agree with respect with the conclusion of Northrop and Wilcox JJ. in the Full Court.

23. For these reasons I conclude that the exercise by the delegate of the power conferred by s.18 of the [Migration Act](#) to order the deportation of Mr and Mrs Kioa must be set aside for want of procedural fairness. I must add that I come to this result with some reluctance because at most it awards a very slender technical victory to the appellants. Given the immigration policy outlined by the delegate in his reasons for the decision and his assessment of the case advanced for Mr and Mrs Kioa it is difficult to see how even an emphatic reversal of the imputation contained in par.22 could affect the result. However, having decided that decisions under s.18 must be attended with procedural fairness, it would frustrate the purpose of the Judicial Review Act if a breach of the rules of natural justice were to be condoned, in the exercise of the discretionary powers of disposition conferred by s.16, merely because the breach was not shown to have affected the decision. The contrary has not been contended, the case having been argued on the basis that if the rules of natural justice apply and are shown to have been breached then the decision must be set aside.

24. It is unnecessary to deal with an alternative submission that even if Mr and Mrs Kioa were not entitled to the observance of procedural fairness in relation to the deportation orders their daughter Elvina, as an Australian citizen, was so entitled.

25. A further ground for voiding the decision to order deportation is argued for the appellants. A brief reference will suffice. Mr Merkel submits that the delegate improperly exercised the power (cf. s.5(1)(e) of the Judicial Review Act) for the reason that he failed to take a relevant consideration into account, namely, the impact of the deportation upon Elvina. It is said that as a young Australian citizen Elvina is entitled, consistently with the United Nations' Declaration of the Rights of the Child (exhibited as Schedule 2 to the [Human Rights Commission Act 1981](#) (Cth)), to the concurrent enjoyment of the care of her parents and of the fruits of her citizenship in Australia. A short answer to the submission is that I am not persuaded that the delegate failed to have proper regard to Elvina's place in the family and to her status as an Australian citizen. In his findings on material questions of fact, the delegate expressly acknowledged Elvina's citizenship when he says, in par.4:

"The applicants have a second daughter born 14 November 1982 in Australia and who is thus an Australian citizen".

Although he does not thereafter in his reasons make any specific reference to Elvina's interests the evaluation of competing considerations takes place against the background of that early description of the family unit. The weight to be given to the presence in an immigrant family of an infant born in Australia is a matter for the decision-maker, not the courts. It is not suggested, nor could it be suggested, that the mere fact that prohibited immigrants have a child born to them in Australia entitles them to permanent residence in Australia. What is required is that the decision-maker, in considering all the relevant material placed before him, give proper consideration to the effect that a

deportation order if made would have on the members of the family. See, for example, *Tabag v. Minister for Immigration and Ethnic Affairs* [1982] FCA 276; (1982) 45 ALR 705. In the present case, the delegate was informed that if orders were made for the deportation of Mr and Mrs Kioa both their children would accompany them at Commonwealth expense. There was no question of the family unit being broken up. Although Mr Merkel sought to strengthen his submission in relation to Elvina by reference to the Declaration of the Rights of the Child, I do not think that the provisions of that Declaration take the matter any further. Even if the Declaration had the force of municipal law in Australia, which it does not, no conflict has been shown between its provisions and the decision. I agree with what is said on this subject by Northrop and Wilcox JJ. in the decision under appeal.

26. In the result I would allow the appeal.

BRENNAN J.: Mr and Mrs Kioa arrived in Australia from Tonga in 1981. Mr Kioa came first. As a student, he was granted a temporary entry permit which expired on 8 December 1981. Mrs Kioa and their daughter Elitisi followed. Mrs Kioa was granted a temporary entry permit which expired on 31 March 1982. When Mr Kioa's entry permit expired he applied to be allowed to remain in Australia until 31 March 1982. No decision was made on that application until 12 September 1983. Mr and Mrs Kioa and Elitisi did not leave Australia on 31 March 1982; they remained in Australia and are still in this country. Another daughter, Elvina, was born here on 14 November 1982. On 6 October 1983, orders for the deportation of Mr and Mrs Kioa were made pursuant to [s.18](#) of the [Migration Act 1958](#) (Cth) ("the [Act](#)"). As the [Act](#) stood at the time, [s.18](#) provided:

" The Minister may order the deportation of a person who is a prohibited immigrant under any provision of this [Act](#)."

The orders were made by a deputy secretary of the Department of Immigration and Ethnic Affairs, an officer to whom the Minister had delegated his power pursuant to s.66D of the [Act](#).

2. Mr and Mrs Kioa had become prohibited immigrants when their respective temporary entry permits expired ([s.7\(3\)](#)). As they had become prohibited immigrants upon the expiration of a temporary permit each of them was guilty of an offence against the Act (s.27(1)(ab)) but it was possible to avoid conviction for that offence if a further entry permit had come into force after the temporary entry permit had expired (s.27(2A)). Temporary entry permits to remain in Australia can be granted to an immigrant after his entry into Australia (s.6(3) and (5)). An entry permit other than a temporary entry permit cannot be granted to an immigrant after his entry into Australia unless he satisfies one or more of the conditions specified in s.6A(1). Neither a further temporary entry permit nor a permanent entry permit was granted to Mr or Mrs Kioa. At the time when the deportation orders were made Mr and Mrs Kioa were therefore prohibited immigrants liable to the making of a deportation order under s.18. In addition, they were liable to prosecution as for an offence under s.27(1)(ab) and they were unable to raise the defence prescribed by s.27(2A). As prohibited immigrants, they were liable to be arrested and kept in custody pending consideration of the making of a deportation order (s.38). They could have been required to leave Australia within a time specified by the Minister or an authorized officer and they would have been bound to comply with any such requirement under pain of conviction (s.31A). Upon the making of the deportation orders, they became liable to be arrested and kept in custody pending deportation (s.39) and liable to pay the Commonwealth an amount determined by the Minister to be the daily maintenance amount payable in respect of their custody (s.21A(7)). If the Commonwealth should make arrangements for

their conveyance from Australia to Tonga, they would be liable to pay the Commonwealth an amount equal to the fares and other charges of conveyance (s.21A(1)).

3. In March 1982, Mr Kioa had commenced to work at Bulleen in Victoria. He was arrested at his place of work on 25 July 1983, and kept in custody until he was released on reporting conditions on 5 August 1983. The day after his arrest the Director of the Legal Aid Commission of Victoria wrote to the Minister on behalf of Mr Kioa. After submitting a number of reasons why Mr Kioa should be allowed to remain in Australia the letter stated:

" ... Mr Kioa would like to remain in Australia and we would hope that you will exercise your discretion to allow him and his family to do so."

4. To be entitled to remain in Australia, Mr and Mrs Kioa would have to be granted permanent entry permits. They would have to satisfy one or more of the conditions specified in s.6A(1). The only condition which either Mr or Mrs Kioa might have hoped to satisfy was the condition specified in s.6A(1)(e), namely,

" 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."

But neither Mr Kioa nor Mrs Kioa held a temporary entry permit after the dates of expiry of their original permits. Mr Kioa's application for a further temporary entry permit, though made in December 1981, was not dealt with until 12 September 1983 when a decision to refuse the application was made. However, it is common ground that a further temporary entry permit could have been granted under ss.6 and 7(2). If, in order to allow the Kioa family to remain in Australia, temporary entry permits and permanent entry permits had been issued, Mr and Mrs Kioa would have shed the status of prohibited immigrant, they would no longer have been liable to arrest, they would not have been liable to conviction as for an offence under s.27(1)(ab) and they would not have been subject to the liabilities imposed by ss.31A and 21A.

5. In reaching his decision to make the deportation orders, the delegate of the Minister considered whether to refuse the grant of temporary entry permits and permanent entry permits. This appears from the reasons for his decision furnished pursuant to [s.13](#) of the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) ("the [ADJR Act](#)"). The reasons contained the following:

" 27 While a permanent entry permit may not be granted to the applicants after their entry to Australia by reason of section 6A(1) of the [Act](#), I accepted that it was possible to direct the grant of a further temporary entry permit to them for the purpose of allowing consideration of an application for grant of (permanent) entry permit on the basis that the conditions of section 6A(1)(e) of the [Act](#) are fulfilled. Accordingly I considered

whether, apart from the fact that the applicants do not hold temporary entry permits in force, there are strong compassionate or humanitarian grounds for the grant of (permanent) entry permits to them.

28 ... However I was of the view that in all the circumstances there were no strong humanitarian or compassionate grounds for the grant to them of (permanent) entry permits."

6. When the delegate was making his decision, he had a number of documents before him for consideration. One of them was the submission by the Director of the Legal Aid Commission on behalf of Mr Kioa. Another was a departmental submission which recommended deportation and which made certain observations adverse to Mr Kioa's application. In particular, the departmental submission contained the following paragraph:

" 22 Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern."

There was no oral hearing nor any exchange of correspondence between the department on the one hand and Mr and Mrs Kioa or their representative on the other before the delegate made his decision to order deportation. In his statement of reasons for decision, the delegate reviewed certain conduct of Mr and Mrs Kioa, not including the conduct attributed to Mr Kioa in par.22 of the departmental submission, but he said with reference to other conduct which he found established:

" 30 I considered that these actions constituted a blatant disregard for the normal migration selection procedures and the migration law. I considered nonetheless the circumstances of their case, in particular as set out in paragraphs 17 and 28 above, but decided that their expulsion from Australia was appropriate. I considered that the application of the stated policy set out in paragraph 22(b) supra was appropriate and just. In all the circumstances I decided to order their deportation."

The policy to which the delegate referred is not set out in par.22(b). The reference is, I think, to the policy stated in sub-par.(b) of par.23(h), namely, "it is in the public interest to ensure that persons abide by normal immigration selection procedures and do not queue-jump by remaining illegally in Australia to the prejudice of prospective migrants who abide by the procedures".

7. After the deportation orders were made the respondents applied to the Federal Court of Australia

for an order of review of the decision to make deportation orders and of the decision not to grant further temporary entry permits and not to grant permanent entry permits. The attack on the validity of the decision to make the deportation orders was made on several grounds but the chief ground which is presently material is that the Minister "failed to observe principles of natural justice in that he failed to allow (Mr and Mrs Kioa) a proper hearing in relation to matters affecting their deportation". The ground thus raised encountered the formidable obstacle that in two judgments of this Court - *Salemi v. MacKellar* (No.2) [1977] HCA 26; (1977) 137 CLR 396 and *Reg. v. MacKellar; Ex parte Ratu* [1977] HCA 35; (1977) 137 CLR 461 - it was held that requirements of natural justice did not affect the exercise of the power to order deportation under s.18 of the Act. That was the opinion of the statutory majority (Barwick C.J., Gibbs and Aickin JJ.) in *Salemi* (No.2) and that opinion was maintained by a majority in *Ex parte Ratu*, including Mason J. who had not sat in *Salemi* (No.2).

8. The argument now addressed on behalf of Mr and Mrs Kioa does not seek a reconsideration of the correctness of those cases in relation to the Act as it then stood. The argument relies on amendments to the Act in 1979 and 1980. It is submitted that the amended text and operation of the Act at the time when the impugned decision was made on 6 October 1983 compel a different conclusion from the conclusion founded on the Act as it stood in 1977. (The Migration Amendment Act 1983 (Cth) did not come into operation before the impugned decision was made.) The significant amendments which had been made in 1979 and 1980 included the insertion of s.6A which specified the conditions which had to be fulfilled before an immigrant who had entered Australia could be granted a permanent entry permit, the insertion of s.21A which exposed a deportee to pecuniary liabilities for the cost of his conveyance from Australia and for the cost of his daily maintenance during detention pending deportation, and the insertion of s.27(1)(ab) and (2A) which made a person who became a prohibited immigrant upon expiration of a temporary entry permit guilty of a criminal offence and liable to penalty unless he satisfied the court that a further entry permit had subsequently come into force or that he had remained in Australia for five years and no deportation order had been made against him. In addition, the ADJR Act had come into force prescribing a ground for an order of review to be "that a breach of the rules of natural justice occurred in connection with the making of the decision" (s.5(1)(a)) and requiring decision-makers to furnish on request a statement of reasons for decision unless the case falls within certain exceptions none of which applies in the present case (s.13). A limited jurisdiction to review decisions made under ss.12,13 and 48 of the Act was conferred on the Administrative Appeals Tribunal by s.66E of the Act, inserted in 1981, but that provision merely transposed into the Act the provision theretofore contained in Part XXII of the Schedule to the Administrative Appeals Tribunal Act 1975 (Cth). To ascertain the significance of the legislative changes made in 1979 and 1980, it is desirable to restate the relevant principles which, as Barwick C.J. said in *Salemi* (No.2) (at p.400) somewhat optimistically, "are both fundamental and, in my opinion, fairly well settled".

9. At base, the jurisdiction of a court judicially to review a decision made in the exercise of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power. That is clear enough when the condition is expressed; it is seen more dimly when the condition is implied, for then the condition is attributed by judicial construction of the statute. In either case, the statute determines whether the exercise of the power is conditioned on the observance of the principles of natural justice. The statute is construed, as all statutes are construed, against a background of common law notions of justice and fairness and, when the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that "the justice of the common law will supply the

omission of the legislature" (Cooper v. Wandsworth Board of Works [\[1863\] EngR 424](#); [\(1863\) 14 CB\(N.S.\) 180](#), at p 194 [\[1863\] EngR 424](#); [\[1863\] EngR 424](#); [\(143 ER 414](#) at p 420)). The true intention of the legislature is thus ascertained. When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention (cf. Twist v. Randwick Municipal Council [\[1976\] HCA 58](#); [\(1976\) 136 CLR 106](#), at pp 110,112-113, 118; Heatley v. Tasmanian Racing and Gaming Commission [\[1977\] HCA 39](#); [\(1977\) 137 CLR 487](#), at pp 491,498-499). The presumption may apply to powers classified as legislative or administrative as well as to powers classified as quasi-judicial (Bread Manufacturers of N.S.W. v. Evans [\[1981\] HCA 69](#); [\(1981\) 56 ALJR 89](#), at p 94; [\[1981\] HCA 69](#); [38 ALR 93](#), at pp 102-103).

10. In Salemi (No.2) Barwick C.J. (at p.401) pointed to the correspondence between legislative intention derived from the statute and the grounds on which the courts exercise their jurisdiction to review the exercise of statutory power:

" The courts by construction of the statute educe and make express the qualification of the granted power inherent in the statute. Having decided that the statute makes the exercise of the power contingent on the observance of natural justice, the courts then decide what is required in the particular circumstances to satisfy the statute so construed. But it is fundamental that what the courts do in qualifying the powers is no more than to construe the statute. Failure to meet the qualification of the power, that is to accord natural justice in the manner which the courts decide is required in the circumstances, results in invalidity of the decision or act, because neither is authorized by the statute as construed by the courts."

Gibbs J. said, at p.419:

" The question whether the principles of natural justice must be applied, and if so what those principles require, depends on the circumstances of each case. In the case of a statutory power, the question will depend on the true construction of the statutory provision in light of the common law principles (cf. Durayappah v. Fernando ((1967) 2 AC 337, at p 350))."

As Mason J. said in Ex parte Ratu, at p 475:

" Whether the rules of natural justice apply to the making of a deportation order under [s.18](#) of the [Act](#) and what those rules require is fundamentally a question of statutory construction."

And Jacobs J. in Salemi (No.2), at p.451, accepted "that in the case of statutory provisions it is always a matter of discovering the intention of the legislature". I venture to repeat what I said in F.A.I. Insurances Ltd. v. Winneke [\[1982\] HCA 26](#); [\[1982\] HCA 26](#); [\(1982\) 151 CLR 342](#), at p 409:

" The common law attributes to the legislature an intention that the principles of natural justice be applied in the exercise of certain statutory powers, and the legislature's intention provides the sole and sufficient warrant for judicial review of the exercise of those powers when an applicable rule of natural justice is not observed. And so, where a challenge to the validity of an exercise of a statutory power is made on the grounds that a rule of natural justice has not been observed, the true foundation for the challenge is that a condition imposed by the statute upon the exercise of the power, albeit an implied condition, is not fulfilled and that an exercise of the power is not efficacious unless the condition is fulfilled."

11. Observance of the principles of natural justice is a condition attached to the power whose exercise it governs. There is no free-standing common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power. There is no "right" except in the sense that a person may be entitled to apply to have a decision or action taken in purported exercise of the power set aside if the principles of natural justice have not been observed or to compel the repository of a power to observe procedures which statute obliges him to follow.

12. In England, a jurisdiction judicially to review executive action carried out in pursuance of the prerogative was asserted in Council of Civil Service Unions v. Minister for the Civil Service ([1985](#)) [1 AC 374](#) (hereafter "C.C.S.U.") although there was no statutory foundation for that jurisdiction. It may be that, as constitutional tradition favours a government of laws rather than a government of men, there is an inducement for the courts to declare the law which should govern the exercise of what would otherwise be unreviewable executive power and to exercise their ordinary jurisdiction to review executive action according to the law thus declared. It may be that the common law determines not only the scope of the prerogative but the procedure by which it is exercised. That problem does not fall for consideration here. The supremacy of Parliament, a doctrine deeply imbedded in our constitutional law and congruent with our democratic traditions, requires the courts to declare the validity or invalidity of executive action taken in purported exercise of a statutory power in accordance with criteria expressed or implied by statute. There is no jurisdiction to declare a purported exercise of statutory power invalid for failure to comply with procedural requirements other than those expressly or impliedly prescribed by statute.

13. The question whether a statutory power is conditioned on the observance of the principles of natural justice demands a universal answer for it is a question of construction. Such a condition

governs every exercise of the power including every refusal to exercise it. It is therefore possible to state - as it was stated in Salemi (No.2) and Ex parte Ratu - in reference to a given statutory power that its exercise is never conditioned on the observance of the principles of natural justice. But when the exercise of a statutory power is so conditioned, regard must be had to the circumstances of the particular case to ascertain what is needed to satisfy the condition. It is not possible precisely and exhaustively to state what the repository of a statutory power must always do to satisfy a condition that the principles of natural justice be observed. As Barwick C.J. said in Ex parte Ratu, at pp 465-466, "what would need to be done to satisfy that requirement may vary according to the circumstances, but the qualification will be universal".

14. Two distinct but closely related questions can be perceived in the cases relating to the exercise of a statutory power: the first, or threshold, question is whether the exercise of the power is conditioned upon observance of the principles of natural justice; the second question, arising when the exercise of the power is so conditioned, is what the principles of natural justice require in the particular circumstances. It is seldom possible to say that the legislature intends to exclude observance of the principles of natural justice in the exercise of a statutory power which is apt to affect individual interests and the more difficult and more frequently addressed question is what the principles of natural justice require in the particular circumstances. In Salemi (No.2) Jacobs J. said (at p.451):

" The legislature is assumed by the courts to be aware of the principles of natural justice which are a part of the common law. The application of those principles depends on the circumstances of the case. It is seldom possible to say in the case of the exercise of any particular statutory power 'All the principles which have ever been applied in ensuring natural justice will here apply' or on the other hand 'Natural justice was intended to be wholly excluded'. The questions which must be asked are - in particular circumstances such as exist in this case did the legislature intend that the principles of natural justice should be wholly excluded? If not, what particular principles should be applied? I recognize that the search for legislative intention can be described as somewhat artificial. What the courts do in the absence of express legislative intention is to ensure that power, whether it be judicial or quasi-judicial or executive, be exercised fairly, weighing the interests of the individual and the interests of society as a whole."

I would adopt this view though I should state my understanding of his Honour's question "what particular principles should be applied?". The content of the principles which the legislature intends to be applied in the circumstances of a particular case cannot be discovered by reference solely to the statute. Nevertheless, a legislative intention that the principles of natural justice apply is an intention that the principles appropriate to the circumstances of the particular case should apply.

15. The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power. The variable content of the principles of natural justice was articulated by Tucker L.J. in an oft-cited passage in his judgment in *Russell v. Duke of Norfolk* (1949) 1 All ER 109, at p 118:

" The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

In the Privy Council that passage was cited with approval in *University of Ceylon v. Fernando* (1960) 1 All ER 631 and again in *Furnell v. Whangarei High Schools Bd.* (1973) AC 660 where Lord Morris of Borth-y-Gest said, at p 679:

" Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action.'"

The same view was adopted in the House of Lords: *Wiseman v. Borneman* (1971) AC 297 (at pp 308,309,311,314-315).

16. In this Court the flexibility of the principles of natural justice was recognized by Kitto J. in *Mobil Oil Australia Pty.Ltd. v. Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475, at p 504:

" What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances. And it is not a one-sided business."

17. In *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546, at pp 552-553, the joint judgment of all members of this Court cited with approval passages I have cited from the judgments of Tucker L.J. and Kitto J. Their Honours said, (at p.553):

" It is plain that when it is necessary to consider a question of fairness in relation to a tribunal the whole of the circumstances in the field of the inquiry are of importance. The nature of the

jurisdiction exercised and the statutory provisions governing its exercise are amongst those circumstances."

Again in Salemi (No.2) Stephen J. in his dissenting judgment (at p.444) said of the principles of natural justice:

" ... not only will their effect and application thus vary depending upon the character and function of the particular statutory tribunal or person in relation to whose deliberations they are invoked (Ridge v. Baldwin per Lord Reid ((1964) AC 40, at pp 65, 72)), they may also vary from case to case although each be conducted before one and the same tribunal or person."

Gibbs C.J. added to this line of authority in National Companies and Securities Commission v. News Corporation [\[1984\] HCA 29](#); [\(1984\) 58 ALJR 308](#), at p 314; [\[1984\] HCA 29](#); [52 ALR 417](#), at pp 427- 428, saying:

" The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise."

(And see pp.318,321; pp.434,439-440.)

18. The notion of natural justice is somewhat vague because of its variable content, but it is a notion which is hallowed by time, entrenched in our jurisprudence and provocative of the definition of procedural rules governing the exercise of particular powers in the generality of cases. The reproach of vagueness was rejected by Lord Reid in Ridge v. Baldwin [\[1963\] UKHL 2](#); [\(1964\) AC 40](#), at pp 64-65:

" In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. ... It appears to me that one reason why the authorities on natural justice have been found difficult to reconcile is that insufficient attention has been paid to the great difference between various kinds of cases in which it has been sought to apply the principle. What a minister ought to do in considering objections to a scheme may be very different from

what a watch committee ought to do in considering whether to dismiss a chief constable."

(See also per Lord Hodson at p.132). To ascertain what must be done to comply with the principles of natural justice in a particular case, the starting point is the statute creating the power. By construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require. In *Wiseman v. Borneman*, at p 308, Lord Reid said:

" Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

Lord Diplock in *Bushell v. Environment Secretary* [[1980 UKHL 1](#)]; [[1981 AC 75](#)], at p 95, said:

" What is a fair procedure to be adopted at a particular inquiry will depend upon the nature of its subject matter."

19. An implication that a statutory power is conditioned on observance of the principles of natural justice does not prevent the repository of the power from modifying procedure to meet the particular exigencies of the case. Where the circumstances are such that the purpose for which the power is conferred would be frustrated if notice were given of an intention to exercise it or of the grounds on which it is intended to exercise it, the power may be exercised peremptorily without giving such notice to a person whose interests are likely to be affected (see *The Commissioner of Police v. Tanos* [[1958 HCA 6](#)]; [[1958 98 CLR 383](#)], at p 396; *Heatley*, at pp 513-515; *De Verteuil v. Knaggs* [[1918 AC 557](#)], at pp 560- 561). In such cases, a peremptory exercise of the power is valid, though the power is conditioned on the observance of the principles of natural justice. It must therefore be accepted, as one commentator points out (G. Johnson "Natural Justice and Legitimate Expectation in Australia" [[1985 15 Federal Law Review 39](#)], at p.71), that "the contents of natural justice range from a full-blown trial into nothingness". Yet Tucker L.J. said in *Russell v. Duke of Norfolk*, that there is an irreducible minimum required by the principles of natural justice, namely, that "the person concerned should have a reasonable opportunity of presenting his case". If his Lordship's view be right, it would be necessary to hold that if, in some circumstances, perhaps unusual circumstances, a power may need to be exercised peremptorily, no exercise of that power is

conditioned on observance of the principles of natural justice. But it would be wrong to attribute to a legislature such an intention. Rather, the intention to be implied when the statute is silent is that observance of the principles of natural justice conditions the exercise of the power although in some circumstances the content of those principles may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred. Accepting that the content of the principles of natural justice can be reduced to nothingness by the circumstances in which a power is exercised, a presumption that observance of those principles conditions the exercise of the power is not necessarily excluded at least where, in the generality of cases in which the power is to be exercised, those principles would have a substantial content.

20. There are occasions when, as Gibbs J. pointed out in *Salemi* (No.2) at p.421, reasons of security may make it impossible to observe the principles of natural justice in ordering deportation under [s.18](#). We shall have to examine the present statutory context of [s.18](#), but for the moment it suffices to note that the need for peremptory exercise of that power on occasions is no more than a factor to be borne in mind in determining whether the legislature intends to exclude entirely the application of the principles of natural justice. To determine whether the legislature's intention is to condition the exercise of a statutory power upon observance of the principles of natural justice - the threshold question - one must have regard to the text of a statute creating the power, the subject matter of the statute, the interests which exercise of the power is apt to affect and the administrative framework created by the statute within which the power is to be exercised (cf. *Salemi* (No.2), at p.420; *F.A.I. Insurances*, at pp.410,413, 417). In earlier times, the duty of the repository of a power to act judicially was regarded as the qualification of a power which attracted the application of the principles of natural justice but, after Lord Reid's speech in *Ridge v. Baldwin*, the distinction between quasi-judicial and administrative powers ceased to be the ground for distinguishing between powers that attract the principles of natural justice and powers that do not (see *O'Reilly v. Mackman* [[1983](#)] [UKHL 1](#); [[1983](#)] [2 AC 237](#), at p 279). In *Ridge v. Baldwin*, Lord Reid pointed out that the duty to act judicially might be inferred from the nature of the power to be exercised when the power authorized the repository of the power to interfere with an individual's legal rights. But now that qualification has been thought to be unduly restrictive. There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interests - licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials - intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights. The protected interests which do not amount to legal rights are nowadays frequently described as "legitimate expectations". This seed, which Lord Denning M.R. planted in *Schmidt v. Secretary of State for Home Affairs* ([1969](#)) [2 Ch 149](#), at p 170, has grown luxuriantly in the literature of administrative law.

21. It is one thing to acknowledge that the legislature intends the principles of natural justice to condition the exercise of statutory powers which are apt to affect interests not amounting to legal rights; it is another thing to treat "legitimate expectations" as the relevant description of the almost infinite variety of interests which are protected by the principles of natural justice. The notion of "legitimate expectations" is of uncertain connotation and, in my opinion, it may be misleading if it be treated as a criterion for determining the application or content of the principles of natural justice. In *Salemi* (No.2) Barwick C.J. said, at p.404:

" I am bound to say that I appreciate its literary

quality better than I perceive its precise meaning and the perimeter of its application. ... I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right."

His Honour's restrictive meaning of "legitimate" was rejected in *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] UKPC 2; [1983] UKPC 2; (1983) 2 AC 629 where Lord Fraser of Tullybelton, delivering the opinion of the Judicial Committee, read "legitimate" as meaning "reasonable" so as to include "expectations which go beyond enforceable legal rights, provided they have some reasonable basis" (at p.636). The description "legitimate" now seems to have returned to favour in England (see C.C.S.U., at pp.401,408-409,415). Whatever epithet is used, the importance of the term is that it connotes an interest, not necessarily amounting to a legal right, which is accorded a measure of protection: see *O'Reilly v. Mackman*, at p 275; C.C.S.U., at pp 401,408-409. But the expectation of an individual whose interests may be affected by an exercise of a power is not relevant to the construction of the statute which creates the power. The construction to be placed on the statute cannot depend on whether an individual has an expectation that the power will be exercised in his favour or that he will be consulted and given an opportunity to put a case before the power will be exercised against him. It is not the state of mind of an individual but the interest which an exercise of power is apt to affect that is relevant to the construction of the statute. A "legitimate expectation" cannot arise unless an exercise of the power is capable of affecting, for good or ill, the interests of the person who holds that expectation. Lord Fraser of Tullybelton in C.C.S.U. (at p.401) identified the circumstances which give rise to a legitimate or reasonable expectation as either "an express promise given on behalf of a public authority or ... the existence of a regular practice which the claimant can reasonably expect to continue". When either of those circumstances occur it may be unfair not to give a hearing to the person to whom the promise was made or who has relied on the practice, but neither the promise nor the practice is relevant to the legislature's intention to condition the exercise of power by the public authority on its observance of the principles of natural justice. Those circumstances may be relevant to what is required to satisfy the principles of natural justice in particular circumstances. I leave for the moment the question whether those circumstances include not only the matters which induce an expectation but also the expectation which is induced.

22. In *F.A.I. Insurances* (at p.412) I used the term "interests" rather than "rights" or "legitimate expectations" to embrace one of the factors which tend to attract the principles of natural justice, but the "interests" were qualified:

" The aptitude of the exercise of the power to affect proprietary or financial interests or reputation furnishes a surer ground for implying that the principles of natural justice are to be applied in its exercise."

I repeated the qualification in *Re Ludeke; Ex parte Customs Officers Association of Australia* [1985] HCA 31; (1985) 59 ALJR 483, at p 490; [1985] HCA 31; 59 ALR 417, at p 427).

23. The qualification "proprietary or financial" reflects what Dixon C.J. and Webb J. in *Tanos* (at p.395) described as "a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard". The reference to reputation reflects the interest protected by the law of defamation which Aickin J. in *Heatley* (at p.512) recognized as an interest which might properly be protected by the principles of natural justice (and see *Fisher v. Keane* (1878) 11 ChD 353, at pp 362-363). Although the common law has long been concerned to protect person, property and reputation, it ill accords with modern legislative intention to restrict the application of the presumption to statutory powers which affect only those kinds of interests. It cannot be said that modern legislatures intend that protection should be given only to those kinds of interests, out of the large and increasing variety of interests affected by the exercise of statutory powers. On reflection, my earlier qualification appears erroneous. The presumption that the principles of natural justice condition the exercise of a statutory power may apply to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation. It is not the kind of individual interest but the manner in which it is apt to be affected that is important in determining whether the presumption is attracted.

24. If a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large, the repository of the power will ordinarily be bound or entitled to have regard to the interests of the individual before he exercises the power. No doubt the matters to which the repository is bound or is entitled to have regard depend on the terms of the particular statute and, if there be no positive indications in its text, the subject matter, scope and purpose of the statute must be looked at to determine whether the repository is bound or is entitled to have regard to individual interests (*Water Conservation and Irrigation Commission (N.S.W.) v. Browning* [1947] HCA 21; (1947) 74 CLR 492, at p 505). When the repository is bound or is entitled to have regard to the interests of an individual, it may be presumed that observance of the principles of natural justice conditions the exercise of the power, for the legislature can be presumed to intend that an individual whose interests are to be regarded should be heard before the power is exercised. Therefore the presumption applies to any statutory power the exercise of which is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public. Of course, the presumption may be displaced by the text of the statute, the nature of the power and the administrative framework created by the statute within which the power is to be exercised. Thus in *Pearlberg v. Varty* (1972) 1 WLR 534; (1972) 2 All ER 6, when a commissioner gave leave ex parte to raise an assessment to tax, the taxpayer challenged the decision although his legal rights were unaffected by it. The decision was held to be valid. The text of the statute, the kind of limited interest that was affected and the statutory provision allowing the taxpayer a full opportunity to challenge his liability to tax at a later stage displaced the presumption.

25. The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice for the interests of all members of the public are affected in the same way by the exercise of such a power (cf. *Bates v. Lord Hailsham* (1972) 1 WLR 1373, at p 1378; (1972) 3 All ER 1019, at p 1024). But the legislature is more likely to intend the exercise of a statutory power of an executive, administrative or quasi-judicial nature to be so conditioned if an exercise of the power singles out individuals by affecting their interests in a manner substantially different from the manner in which the interests of the public at large are affected. The approach is stated by Estey J. delivering the judgment of the Supreme Court in

Attorney-General of Canada v. Inuit Tapirisat of Canada [\(1980\) 115 DLR \(3d\) 1](#), at p 19:

" The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principle ... will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a lis or where the agency may be described as an 'investigating body' ... Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the res or subject-matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise."

It does not follow that the principles of natural justice require the repository of a power to give a hearing to an individual whose interests are likely to be affected by the contemplated exercise of the power in cases where the repository is not bound and does not propose to have regard to those interests in exercising the power. If the repository of the power were authorized to exercise the power in his absolute discretion without taking account of individual interests and he proposed so to exercise the power, the repository might exercise it without hearing the individuals whose interests are likely to be affected (cf. *Coutts v. Commonwealth of Australia* [\[1985\] HCA 40](#); [\[1985\] HCA 40](#); [\(1985\) 59 ALJR 548](#); [59 ALR 699](#)). But that would be an exceptional case.

26. Once individual interests not amounting to legal rights come under the protection afforded by the principles of natural justice, the application of the presumption cannot be made to depend on the character of the interest protected; rather the application of the presumption depends on factors relevant to the individual's right to insist on an appropriate procedure for considering his interests and his standing to seek judicial review if the repository does not adopt such a procedure in exercising the power. The exercise of a power affecting a legal right singles out the possessor of the right from the public at large and the possessor has standing to challenge the validity of the exercise of the power. The exercise of a power affecting interests falling short of legal rights may single out the individual whose interests are affected but he has no standing to challenge the validity of the exercise of the power unless he has a sufficient interest to give him standing in public law. Standing is an incident of a legal right, but standing is not an incident of an interest falling short of a legal right. In *O'Reilly v. Mackman* (at p 275) legitimate expectation was treated as giving "in public law as distinguished from private law" a "sufficient interest to challenge" an impugned decision - in that case, a disciplinary decision. I would respectfully agree that it is right to equate the interest which tends to attract the protection of the principles of natural justice with the interest which, if affected, gives standing at common law to seek a public law remedy, but I am unable to accept "legitimate expectation" as the true criterion of either. At common law an "aggrieved party" has standing to seek certiorari to challenge an administrative decision, and an "aggrieved party" is one who has a "peculiar grievance" different from any grievance felt by the public at large (*Reg. v. Town of Glenelg* [\(1968\) SASR 246](#), at pp 251-252, and the cases there cited). The term includes "any person

whose interests may be prejudicially affected by what is taking place" (per Lord Denning M.R. in *Reg. v. Liverpool Corporation; Ex parte Taxi Fleet* (1972) 2 QB 299, at pp 308-309). And in cases concerned with the enforcement of public law duties at the suit of persons who had no private law right to enforce, this Court held that a plaintiff had standing if he had a special interest in the subject matter of the litigation (*Australian Conservation Foundation v. The Commonwealth* (1980) 146 CLR 493 and *Onus v. Alcoa of Australia Ltd.* (1981) 149 CLR 27). An adverse and distinctive affection of the applicant's interests by the exercise of the power which he seeks to impugn gives rise to a peculiar grievance or special interest in the subject matter of the litigation. Such an affection of interests provides a criterion of greater validity than "legitimate expectation" which focuses on the state of the applicant's mind. Take the present case. Can it be doubted that Mr and Mrs Kioa's children have such a special interest in setting aside the order to deport their parents that they have standing to sue for that relief? Surely it would be wrong to shut them out because they did not have a legitimate - or any - expectation that their parents would be allowed to remain or that they would be heard before the orders to deport their parents were made. The criterion of legitimate expectation is meaningless if it is necessary to enquire whether the baby, Elvina, had a legitimate expectation. On the other hand, the interests which an exercise of the power to order deportation is apt to affect are interests quite distinct from the interests of the public at large. They are such interests as tend to attract the protection of the principles of natural justice.

27. It does not diminish the importance of the principles of natural justice to say that they are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise - "that the procedure ... shall be fair in all the circumstances", as Lord Reid said in *Wiseman v. Borneman*. The distinction between method and merits is sometimes elusive. The merits are for the repository of the power alone, and a repository of power is not to be held in breach of the principles of natural justice merely because he has come to a decision which, to the eyes of the court, appears unjust (cf. *Chief Constable v. Evans* [1982] UKHL 10; (1982) 1 WLR 1155, at pp 1160-1161, 1173-1175; [1982] UKHL 10; (1982) 3 All ER 141, at pp 143-144,155; *Re Evershed and the Queen* (1984) 5 DLR (4th) 340, at p 344). When the legislature reposes a power in a Minister or officer of the executive government, the repository of the power is frequently intended to exercise that power bearing in mind the interests of the public. When the validity of an exercise of power is challenged in a court, the public is not a party and the interests of the public are represented, if at all, by the party seeking to uphold the exercise of power against the party who challenges its validity. The oftentimes broad considerations which weigh, and rightly weigh, with the repository of the power when he is performing executive or administrative functions are not easily evaluated by a court engaged in deciding adversary litigation. Especially is that so when the party challenging the validity of an executive or administrative decision or action is an individual whose interests are in conflict with the interests of an indeterminate number of other individuals who are not parties to the litigation but whose interests are to some extent affected by the decision or action. In the present case, the Minister's delegate placed some weight on the policy against "queue-jumping", and it would not be surprising if a court, were it to examine the merits of the decision in litigation to challenge the validity of a deportation order, might give that consideration less weight than was given it by the Minister's delegate. It is hard to place the unseen suffering of a large and innumerate group against the evident suffering of a present litigant and the difficulty is enhanced by the court's lack of familiarity with the considerations which the policy reflects. Unless the courts rigidly limit their examination of the observance of the principles of natural justice to the procedures adopted by the repository of the power, the courts trespass into a field of decision-making for which their own procedures are ill-suited (cf. per Lord Diplock in *Bushell v. Environment Secretary*, at p 95). But as the courts must rigidly limit their examination to

procedures, the policy element involved in the exercise of a statutory power which is apt to affect individual interests in the distinctive way which attracts the presumption is not necessarily a cogent reason for excluding the presumption.

28. In the light of these general principles, I turn to the question whether [s.18](#) in the form and context in which it stood when the deportation orders were made confers a power which is conditioned on the observance of the principles of natural justice. That is a question of statutory construction. Accepting the finding of the statutory majority in *Salemi (No.2)* and of the majority in *Ex parte Ratu* as to the construction of [s.18](#) in 1977, new statutory indicia must appear if the conclusion then reached no longer states the true legislative intention. The statutory majority in *Salemi (No.2)* and *Mason J. in Ex parte Ratu* identified two chief indicia of the legislature's intention to exclude the necessity to observe principles of natural justice.

29. The first indicium was the prescribing of procedures to protect the interests of aliens under other sections of the Act (ss.12,13,14) and the absence of any prescribed procedures to protect the interests of prohibited immigrants under s.18. The disparity between the provisions relating to aliens and prohibited immigrants was a factor tending to show that the Minister in exercising his power under s.18 was not bound to have regard to the interests of a prohibited immigrant whose deportation he proposed to order. Indeed, Barwick C.J. denied (though he was alone in saying so) that the Minister had no discretion to refuse to deport a prohibited immigrant. The disparity between these provisions is unaltered, and it must be counted as a factor tending to displace any presumption that the power conferred under s.18 is conditioned on the observance of the principles of natural justice. A further indication of the Minister's freedom to disregard individual interests is his unqualified power to cancel a temporary entry permit at any time (s.7(1)).

30. The second indicium was the nature and purpose of the power to order deportation under s.18. It is a power conferred for the protection of the existing Australian population which may have to be exercised peremptorily from time to time against persons who might attempt to evade apprehension. The insertion of ss.6A and 27(2A), however, makes it manifest that the question to be decided under s.18 is not simply whether the prohibited immigrant should be deported but whether he should be granted an entry permit and perhaps a permanent entry permit so that he ceases to be a prohibited immigrant with all the disabilities which that status entails. The complex of powers contained in ss.6,6A,7 and 18 are directed to the status and disposition of the immigrant. The affection of the immigrant's interests is of the very nature of those powers and the repository must have regard to those interests in exercising them. And if the legislature intended the Minister or his delegate to have regard to the interests of the prohibited immigrant, the legislature may be presumed to intend that the prohibited immigrant should be heard before those powers are exercised.

31. Moreover, a person who becomes a prohibited immigrant upon the expiration of a temporary entry permit is entitled to escape conviction as for an offence under s.27(1)(ab) if a further entry permit comes into force (s.27(2A)). Neither the offence nor the means of exculpation were in the [Act](#) as it stood in 1977. Again, the power to relieve from conviction for a criminal offence requires the interests of the person otherwise liable to conviction to be taken into account. It follows that the nature of the power to be exercised is now somewhat different from what it was in 1977. As the complex of powers conferred by [ss.6, 6A, 7 and 18](#) taken in conjunction with [s.27\(2A\)](#), now require the interests of the prohibited immigrant and his family to be taken into account, there is a substantial ground of distinction between the [Act](#) as it stood when it was construed in *Salemi (No.2)* and *Ex parte Ratu* and the [Act](#) as it stood when the deportation orders in this case were made. The significance of the Minister's power to cancel a temporary entry permit is less in the 1983 context

than it was in the [Act](#) as it stood in 1977. In my opinion, the [Act](#) as it stood at the time when the deportation orders were made did not displace the presumption that Parliament intended that an exercise of the complex of powers conferred by [ss.6](#), [6A](#), [7](#) and [18](#) should be conditioned on observance of the principles of natural justice.

32. The enactment of the the [ADJR Act](#) is, in my opinion, an entirely neutral factor. [Section 5\(1\)\(a\)](#) does not impose a condition on the exercise of every statutory power although the Parliament, in creating some of those powers, intended that no condition should govern their exercise. The chief purpose of the [ADJR Act](#) is to confer on the Federal Court a jurisdiction judicially to review administrative action taken under laws of the Commonwealth and there is no reason to construe in a novel manner provisions which state in familiar terms the well-known grounds of judicial review. I do not say that the grounds of judicial review remain wholly unchanged by the [Act](#), but the ground stated in [s.5\(1\)\(a\)](#) does not impose procedural qualifications on powers conferred by other specific enactments. I respectfully agree with the view expressed by Bowen C.J. and Franki J. in *Minister for Immigration and Ethnic Affairs v. Haj-Ismael* ([1982](#)) [40 ALR 341](#), at p 347:

" We consider [s 5\(1\)\(a\)](#) means that relief may be sought where rules of natural justice are applicable in the exercise of a power and effect has not been given to them."

Nor, in my opinion, ought [s.13](#) of the [ADJR Act](#) make any material difference. Prior to the enactment of [s.13](#) it was difficult, if not impossible, for a party who sought to challenge the validity of many administrative decisions to ascertain the reasons of the decision-maker. The absence of reasons, often irremediable by discovery, immured many administrative decisions from judicial review. [Section 13](#) provides the means by which the reasons for making an administrative decision can be ascertained, but it does not require the adoption of a different procedure from the procedure which would have to be followed if [s.13](#) of the [ADJR Act](#) had not been enacted. Nevertheless, some of the judgments in *Salemi (No.2)* and *Ex parte Ratu* pointed to the absence of a requirement to state reasons as an indicium that observance of the principles of natural justice did not govern the exercise of the power conferred by [s.18](#) of the Act (see *Salemi (No.2)*, at pp 421,443-444; *Ex parte Ratu*, at pp 478,479). Although I would not have regarded the absence of a requirement to state reasons as such an indicium, the introduction of [s.13](#) of the [ADJR Act](#) establishes a point of distinction between those cases and the present case and deprives those cases of their earlier authority.

33. Although the amendments since 1977 are sufficient, in my opinion, to warrant the conclusion that the exercise of the powers conferred by [ss.6](#),[6A](#),[7](#) and [18](#) are conditioned on the observance of the principles of natural justice, it does not follow that the Minister or his delegate is bound in every case to give the prohibited immigrant a hearing before ordering his deportation. When the purpose for which the power is conferred - control of the membership of the Australian people and their visitors - would be frustrated by giving a hearing, the principles of natural justice do not require that a hearing be given. But there is no reason to think that giving a hearing to Mr Kioa would impair the Minister's control over the disposition of the Kioa family. Mr and Mrs Kioa and Elitisi had entered Australia lawfully, Elvina had been born here and is an Australian citizen. Mr Kioa had applied for and may have qualified for the grant of an entry permit under [s.6A](#). The family was living here openly. They had not sought to evade officers of the department. It is clear that the purpose for which the power was conferred on the Minister was not frustrated by the hearing which was given to Mr Kioa and would not have been frustrated by giving him any further hearing.

34. The final and most difficult question on this aspect of the case is whether there has been a failure to observe what the principles of natural justice required in the circumstances. Once the threshold question is resolved and it is established that the exercise of a power is conditioned on the observance of the principles of natural justice, the content of the principles to be observed is determined in the light of the particular circumstances. At least the notion of "legitimate expectation" connotes a circumstance of the case in hand, so the use of that notion to determine the content of the principles of natural justice is not open to the same reproach as its use in construing the statute. If the particular circumstances of the case show that the repository of a power has made an express promise to a person or has adopted an administrative practice which that person can reasonably expect to continue and has thereby induced the person to expect that the power will be exercised in his favour or that it will not be exercised against him without a hearing, it may be unfair to exercise the power against the person without giving him a hearing. But the unfairness consists in a departure from the course which the repository of the power expressly or impliedly promised to follow without giving the person whose interests are affected an opportunity to be heard. The unfairness is not the disappointment of the expectation which the promise induced. The relevant circumstance in *Salemi (No.2)* was surely the announcement of the amnesty for prohibited immigrants, not the expectation which it induced in Mr Salemi. Perhaps legitimate expectation in this context means an expectation imputed to the person whose interests are affected. If that be so, it is best to focus on what warrants the imputation rather than on a fictional mental state.

35. I confess I am unable to find in the notion of legitimate expectation either a criterion or an indication to assist in determining what is procedurally reasonable and fair in particular circumstances. If "legitimate expectation" is treated as a criterion or indication, the notion may divert enquiry from what is procedurally reasonable and fair into an examination of the merits of an applicant's case as it is presented in court. The facts which are known to an applicant and which he proves in evidence may show that he had an "expectation" and that it was "legitimate" or "reasonable", but those facts may have been unknown to the repository of the power. What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly. As the obligation to observe the principles of natural justice is not correlative to a common law right but is a condition governing the exercise of a statutory power, the repository satisfies the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised. When the question for the court is whether the condition is satisfied, the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair. A different approach is called for when the question is whether a jurisdictional fact existed at the relevant time: jurisdiction may depend not on the circumstances perceived by the repository of the power but on the objective existence of the fact at the relevant time. In my opinion, none of the questions arising in this case is illuminated much less resolved by reference to the notion of legitimate expectation.

36. In this case, the letter sent by the Director of the Legal Aid Commission on Mr Kioa's behalf was considered by the Minister's delegate. He did not conduct an oral hearing, but a repository of a power who is bound to hear an individual before exercising a power is not necessarily bound to hear him orally (*Local Government Board v. Arlidge* (1915) AC 120, at pp 132-133, 137-138; *Jeffs v. New Zealand Dairy Production and Marketing Board* (1967) 1 AC 551, at pp 566-567, 568-569).

The repository must adopt a fair procedure having regard to the matters he is bound to take into account (*Attorney-General v. Ryan* (1980) AC 718, at p 727) and, I would add, the matters he proposes to take into account. Subject to one qualification the Minister's delegate gave Mr Kioa the fair hearing the delegate was bound to give him. In the circumstances, as Mr Kioa represented the interests of Mrs Kioa and the children as well as himself, it was not necessary to give the other members of the family a separate hearing.

37. However, there was one allegation - that contained in par.22 of the department's submission - which was damaging to the prospects of Mr and Mrs Kioa being allowed to stay in Australia. That information was never put to Mr and Mrs Kioa for their comments. Evidently the delegate did not rely on this allegation in making his decision, for his statement of the reasons for his decision provided under s.13 of the ADJR Act did not refer to it. That statement should be taken to be a true and complete statement of the delegate's reasons unless there is evidence to the contrary (see per Stephen J. in *Ex parte Ratu*, at p 474). Although it is right to conclude that the allegation in par.22 formed no part of the delegate's reasons, it was contained in the material before him which he proposed to consider in coming to a decision.

38. A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise (*Kanda v. Government of Malaya* (1962) AC 322, at p 337; *Ridge v. Baldwin*, per Lord Morris at pp 113-114; *De Verteuil v. Knaggs*, at pp 560,561). The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision-making is not to be clogged by enquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made. Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed. As Lord Diplock observed in *Bushell v. Environment Secretary*, at p 97:

" To 'over-judicialise' the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair."

Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information. He will be neither consoled nor assured to be told that the prejudicial information was left out of account. The allegation in par.22 was apparently credible, relevant and damaging. The failure to give Mr Kioa an opportunity to deal with it before making an order that Mr and Mrs Kioa be deported left a risk of prejudice which ought to have been removed. There was nothing in the circumstances of the case - neither in the administrative framework created by the Act nor in any need for secrecy or speed in making the decision - which would have made it unreasonable to have given Mr and Mrs Kioa that opportunity. The failure to give Mr Kioa that opportunity amounts to a non-observance of the principles of natural justice. The result is that the condition governing the power to make the

deportation orders was not satisfied and the orders must be set aside. If the Minister chooses to do so, a fresh decision may be made. There is nothing in these reasons which affects the merits of the decision made or of any decision which may be made in the future.

39. As the matter must be reconsidered by the Minister or his delegate, I should refer to two subsidiary matters raised by the appellants. The first matter is a submission that the delegate was bound to consider the effect of the deportation orders on Elvina, an Australian citizen, and to give her a hearing before exercising the power to deport her parents. For reasons I have earlier stated, I would agree with that submission. But, in my view, the delegate did consider the effect of the deportation orders on Elvina, assuming (and the assumption was reasonable) that she would accompany her parents. There was no need to give her a special hearing in addition to receiving the representations made on behalf of Mr Kioa which contained representations on behalf of the Kioa family. It would over-judicialize administration to regard each matter for decision as giving rise to as many lites as there are individuals whose interests are likely to be affected. Sometimes each individual should be given a hearing, sometimes a representative, sometimes a group. There is no reason to think that Elvina's interests were not reasonably and fairly protected by the procedure adopted by the delegate.

40. The second matter relates to the delegate's alleged failure to take account of certain international conventions which are scheduled to the [Human Rights Commission Act 1981](#) (Cth), the preamble to which states that "it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with" the scheduled conventions. The [Human Rights Commission Act](#) does not provide that the repositories of statutory power are bound to take the conventions into account; the preamble does no more than state what, apart from the preamble, the repositories of power were generally entitled to do, that is, to take the conventions into account. The exercise of a statutory power is not liable to be set aside merely because the repository of the power does not take into account a matter which he was entitled, but not bound, to take into account: see *Sean Investments v. MacKellar* (1981) 38 ALR 363, at p 375; *Ashby v. Minister of Immigration* (1981) 1 NZLR 222, at p 225. Without suggesting that there was any relevant provision in the scheduled conventions which the delegate might have taken into account, there is no legal foundation for this basis of attack on the orders made.

41. I would allow the appeal, set aside the judgment of the Federal Court and in lieu thereof order that the deportation orders against Mr and Mrs Kioa made by the delegate of the Minister on 6 October 1983 be set aside.

DEANE J: The facts, statutory provisions and issues involved in this appeal are set out in the judgments of Mason J. and Wilson J. I agree with their Honours that, for the reasons which they give: (i) the appellants' submission that the effect of s.5(1)(a) of the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) (the "A.D.J.R. Act") is to impose an obligation that the rules of natural justice be observed in relation to every decision to which that Act applies must be rejected; and (ii) that the decisions of this Court in *Salemi v. MacKellar* (No. 2) [1977] HCA 26; (1977) 137 CLR 396 and *Reg. v. Mackellar; Ex parte Ratu* [1977] HCA 35; [1977] HCA 35; (1977) 137 CLR 461 in relation to the [Migration Act 1958](#) (Cth) (the "Migration Act") in its 1977 form should not, in the light of subsequent amendments made in the context of the A.D.J.R. Act, be accepted in this Court as direct authority for the general proposition that the requirements of natural justice or procedural fairness do not need to be observed in relation to the making of a deportation order under the [Migration Act](#) in its present form. I turn to consider the applicability and content of those requirements of natural justice or procedural fairness with respect to the making of the deportation

orders against Mr. and Mrs. Kioa.

2. An alien who is unlawfully within this country is not an outlaw. Neither public officer nor private person can physically detain or deal with his person or property without his consent except under and in accordance with the positive authority of the law. Nor is such an alien without status or standing in the land. He can invoke the protection of the law, including the protection of the writ of habeas corpus, against any government official or private citizen who acts unlawfully against him or his property. He can look to, and demand the observance of, the ordinary restraints which control the exercise of administrative power including, unless they be excluded by reason of statutory provision or the special nature of the case, the standards of procedural fairness which are recognized as fundamental by the common law.

3. Each of Mr. and Mrs. Kioa, having lawfully entered Australia, became what the [Migration Act](#) calls a "prohibited immigrant" at the time when his or her respective temporary entry permit expired and was not renewed. An incident of his or her status as a "prohibited immigrant" was that he or she could be disadvantaged or advantaged by the exercise of the particular powers which the [Act](#) confers upon the respondent Minister and his authorized officers in relation to such persons. The nature and the content of those powers vary, to some extent, according to whether or not the prohibited immigrant has previously held a temporary entry permit (see, e.g., [Migration Act, ss.7\(1\) and 27\(1\)\(ab\) and \(2A\)](#)). More importantly for present purposes, the nature and content of those powers vary most significantly according to whether or not the prohibited immigrant is a deportee, that is to say, "a person in respect of whom a deportation order is in force" ([s.5\(1\)](#)).

4. A prohibited immigrant who is within Australia may be required to leave within a specified time ([s.31A](#)) or, subject to specific safeguards, may be arrested and held in custody ([s.38](#)). Unless the prohibited immigrant be also a "deportee" however, the Minister and his officers are as powerless as was the "owner" of the "black" in *Somerset v. Stewart* [[1772 EngR 57](#); ([1772 Lofft, 1 \(98 ER 499\)](#)] to place or have him placed upon a ship or aircraft and transported to some country to which he does not wish to go and in which he may face hardship, imprisonment or, conceivably, even death. If a person who is not a deportee has become a prohibited immigrant by reason of the expiration or cancellation of a temporary entry permit, he ceases to be a prohibited immigrant after the expiration of five years from the date he became a prohibited immigrant ([s.7\(4\)](#)).

5. The making of a deportation order against a prohibited immigrant drastically and adversely changes his rights and, to some extent, dehumanises his status. A deportee may, by administrative decision, be transported against his will to any country in the world which will receive him. *Somerset's Case* notwithstanding and regardless of what hardship or oppression may lie in wait, the master, owner, agent or charterer of a ship or aircraft bound for the specified country shall, on being duly required in writing by "an authorized officer" so to do, receive the deportee on board for conveyance thereto ([s.22](#)). The deportee is liable to pay to the Commonwealth an amount equal to the cost of his detention plus the passage money and other charges payable in respect of his transportation ([s.21A](#)). If he somehow remains within Australia, the mere existence of the deportation order will preclude him from ceasing to be a prohibited immigrant on the expiration of the five year period mentioned previously ([s.7\(4\)](#)).

6. In the absence of a clear contrary legislative intent, a person who is entrusted with statutory power to make an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity (as distinct from as a member of the general public or of a class of the general public) is bound to observe the requirements of natural

justice or procedural fairness. The making of the deportation orders in respect of Mr. and Mrs. Kioa plainly involved the exercise of a statutory power to make such an administrative decision. Each deportation order directly affected the rights, interests and status of the person (Mr. or Mrs. Kioa) in respect of whom it was made and against whom as an individual it was directed. In the context of the A.D.J.R. [Act](#) and of the amendments made to the [Migration Act](#) after the decisions in Salemi and Ratu, it is no longer possible - if it ever was - to discern in the provisions and scheme of the [Migration Act](#) a clear legislative intent excluding the applicability of the ordinary principles of procedural fairness in respect of the making of such an order. That being so, it was incumbent upon the delegate of the Minister to observe those requirements in the making of the deportation order against each of Mr. and Mrs. Kioa.

7. The precise content of the requirements of procedural fairness which must be observed by a particular administrative decision-maker is controlled by any relevant statutory provisions and may vary according to the circumstances of the particular case. Circumstances could arise in which it was impracticable to extend to a prohibited immigrant an opportunity of being heard before a deportation order was made in respect of him and in which the overall requirements of procedural fairness may, by reason of overriding necessity, be (at least arguably) satisfied notwithstanding the absence in fact of any prior opportunity of being heard. The case where the prohibited immigrant has gone into hiding and has thereby precluded any possibility of an effective hearing is an arguable example. Putting to one side cases of necessity however and in the absence of any clear legislative intent excluding or modifying the requirement of procedural fairness, it is difficult to envisage a case in which the particular circumstances would either exclude those requirements completely in relation to the making of a deportation order or so modify them that the person affected was not entitled to an adequate opportunity of being heard before he was subjected to the adverse effects of such an order. Clearly enough, the mere circumstance that there is no apparent likelihood that the person directly affected could successfully oppose the making of a deportation order neither excludes nor renders otiose the obligation of the administrative decision-maker to observe the requirements of procedural fairness. Indeed, the requirements of procedural fairness may be of added importance in such a case in that they ensure an opportunity of raising for consideration matters which are not already obvious. Thus, the fact that the basis of a deportation order is merely that the person in question is a prohibited immigrant will not deprive the potential deportee of his ordinary right to a prior and adequate opportunity of being heard and of seeking to answer or avoid the reasons which appear to favour his deportation: he might wish to dispute his status as a prohibited immigrant; he might wish to raise particular matters which might arguably warrant the exercise of some special discretion in his favour or rebut particular matters which might be taken into account as weighing against the exercise of such a discretion; he might wish to challenge the wisdom or justice of the administrative policy in pursuance of which it is proposed to order that he be deported.

8. There is nothing in the circumstances of the present case which could properly be seen as excluding or qualifying the ordinary rules of procedural fairness to the extent that either Mr. or Mrs. Kioa was not entitled to be afforded an adequate opportunity of being heard before a deportation order was made in respect of him or her. Such an opportunity of being heard included, in the circumstances of the present case, the opportunity of dealing with any matters raised against them including the particular matters raised in each of paras.21, 22 and 26 of the submission of 6 October 1983 which was placed before the delegate of the Minister. On the facts, there was a failure to extend to Mr. or Mrs. Kioa the opportunity of dealing with the matters raised by those particular paragraphs. The result was that the deportation order in respect of each of them was made in breach of applicable requirements of procedural fairness and was and is invalid. It follows that their appeals

must be allowed.

9. There remains for consideration the appeal on behalf of Mr. and Mrs. Kioa's infant daughter, Elvina. It is contended that deportation orders against her parents would deprive her of a legitimate expectation and, that being so, she was entitled to be heard before they were made. I do not accept that contention. The effects of any deportation order against Mr. and Mrs. Kioa would, in so far as Elvina is concerned, be but indirect and consequential (cf., e.g., *Re Ludeke*; *Ex parte Customs Officers Association of Australia* [1985] HCA 31; (1985) 59 ALJR 483, (1985) 59 ALR 417). She had no separate entitlement to be heard in relation to any such orders. It is true that the consequential effects which deportation orders against Mr. and Mrs. Kioa would be likely to have upon Elvina as an Australian citizen constituted a relevant consideration militating against the making of deportation orders to which the delegate of the Minister should have paid regard. The evidence indicates, however, that regard was in fact paid to that consideration.

ORDER

Appeal allowed with costs.

Order that the judgment and order of the Full Court of the Federal Court be set aside. In lieu thereof order that the appeal to the Full Court of the Federal Court be allowed with costs, and that the judgment and order of Keely J. be set aside. Further order that the deportation order made by the delegate of the Minister on 6 October 1983 be set aside and that the appellants' application to review the decision of the respondents be referred back to the first-named respondent to be considered according to law.

Order that the respondents pay the costs of proceedings before Keely J.

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