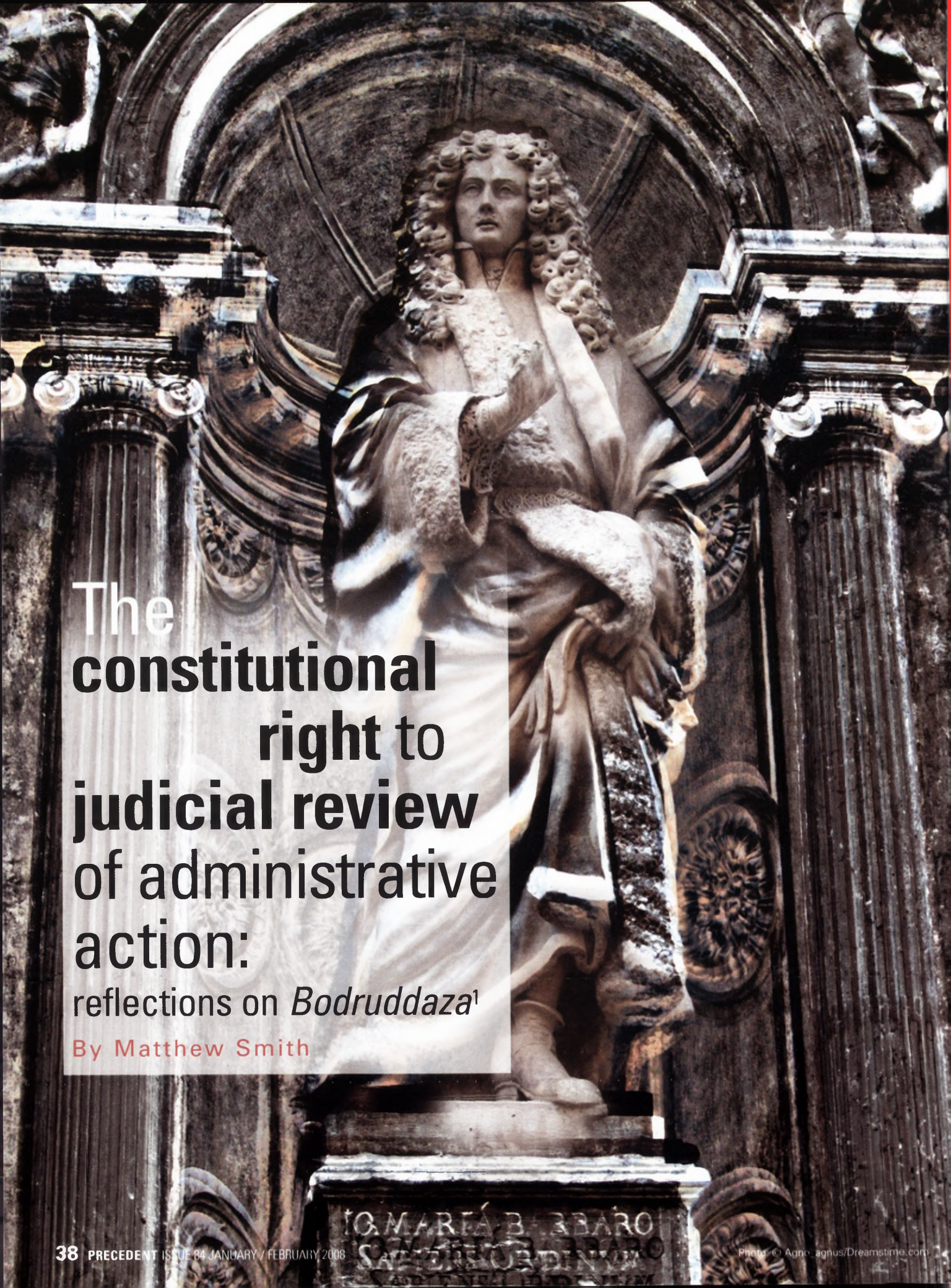

The constitutional right to judicial review of administrative action:

reflections on *Bodruddaza*[1]

By Matthew Smith

One of the few personal rights conferred by the Constitution of Australia is a right to ask the High Court to compel officers of the Commonwealth to observe the law.[2] The Constitution also allows Parliament to confer on federal and state courts a statutory jurisdiction to give judicial remedies against maladministration within Commonwealth government.[3] Parliament is able to create a reformed judicial review jurisdiction to enhance the rule of law, but it can also confine the availability, procedures, grounds and remedies of a statutory jurisdiction.

The history of the constitutional and legislated judicial review jurisdictions reveals tension between the rule of law and the policies of the parliament and the executive in many areas of government. In recent years, the implementation of immigration policy has particularly revealed this tension. *Bodruddaza* marks the latest failure by the parliament to free the executive from the uncomfortable consequences of judicial review of immigration decision-making.

ACCESS TO JUDICIAL REVIEW UNDER THE *MIGRATION ACT*

Immigration legislation prior to the *Migration Act* 1958 (Cth) produced some litigation under the High Court's constitutional jurisdiction. This explored the class of 'immigrants' who were subject to controls through a dictation test.[4] The disguised racism of the legislation survived judicial scrutiny, but the particular tests that were administered did not always do so.[5]

The *Migration Act* introduced more extensive controls over immigrants and aliens.[6] However, the volume of challenges to its administration remained low. The Act gave unfettered discretions to the minister and, as late as 1977, it was held that procedural fairness had little room to operate.[7] Until the 1980s, immigration decision-making was largely a matter of administrative practices, unhampered by legal rules or their enforcement by the courts.

Sir Anthony Mason was a member of the Kerr Committee, whose 1971 report provided the foundations for the reforms of Commonwealth administrative law that were enacted between 1975 and 1982 under governments of both complexions.[8] Recently, reflecting on the need for reform, he referred to the Immigration Department, and said: *'it is not going too far to say that … there was a culture of disrespect for the rule of law, even more pronounced in the early 1970s than in recent years'.*[9]

In the course of my work at the secretariat to the Administrative Review Council between 1979 and 1980, it was apparent that the Department of Immigration was particularly unprepared for new mechanisms for merits and judicial review. It made what, at the time, appeared wildly inflated predictions of the deleterious effects of giving rights of statements of reasons, merits review by independent tribunals, judicial review under the *Administrative Decisions (Judicial Review) Act* (ADJR Act), complaint to the Ombudsman, and access to documents. Eventually, it became subject to all of these reforms.

The ADJR Act sought to reform procedures for judicial review by removing technicalities applicable to the constitutional remedies, and by listing the grounds for obtaining relief. It established the new Federal Court of Australia as the usual forum for judicial review litigation involving the Commonwealth, and assisted applicants by allowing the procedures and reasoning of administrators to be revealed in statements of reasons and by discovery. Sir Zelman Cowan and Professor Zines were optimistic about the reforms. In 1978, they noted that Commonwealth legislation could not deprive the High Court of its constitutional jurisdiction, but said: *'if however – as is likely – the new forms of judicial review of administrative action prove more convenient and effective there are likely to be few applications for the present remedies'.*[10] Their assessment remains valid in many areas, but not in relation to immigration decisions.

It was only gradually that immigration cases came to occupy a substantial part of the Federal Court's ADJR jurisdiction. The administration still appeared to be impregnable in the absence of any legally structured decision-making procedures or policies. It was only in 1985 that the High Court held, in judgments that were significantly influenced by the administrative law reforms,[11] that a duty of procedural fairness qualified decision-making under the *Migration Act*.

Refugee law was entirely untouched by Australian courts until the late 1980s. Until 1985, there was doubt whether refugee status was being determined by reference to any judicially reviewable statutory power, even in relation to the grant of on-shore permanent residency permits.[12] I was counsel in one of the first cases brought by a refugee in the Federal Court, and recall the judge expressing dismay at the thought that the Refugees Convention might require judicial interpretation. I hastily reassured him that the case involved only an issue of procedural fairness. It was not until 1989 that the High Court took its first look at the Convention definition of a 'refugee'.[13] The Australian jurisprudence on that definition is now daunting.

The development of immigration litigation during the 1980s and 1990s occurred entirely within the ADJR Act or other equivalent statutory jurisdictions of the Federal Court. This included the review of decisions of immigration merits tribunals, which were set up during those years. By the early 1990s, the Department of Immigration had become accustomed to being accountable for the legality of its >>

decisions. An elaborate jurisprudence developed in relation to broadly expressed discretionary powers. This gave legal content to vague statutory conditions such as 'there are strong compassionate or humanitarian grounds for the grant of an entry permit', and invalidated many decisions that applied administrative policies inconsistent with the court's interpretation.[14]

In response, immigration legislation took an about-turn, and introduced detailed mandatory statutory criteria for classes of visas and entry permits. This culminated in the present legal morass which is the *Migration Regulations* 1994. The rule of law might appear to have been advanced by the codification of rules that were previously non-binding guidelines. However, when the courts are asked to interpret and enforce the regulations, they occasionally find them unpalatable. As Gummow J reflected in an early case:

> 'the greater the specificity of the fixed criteria, the greater the chance that without the existence of a "back-stop" discretion by which the law may be tempered by equity, hard cases will fall short of compliance with the letter of the law'.[15]

As a result of an exponential growth in litigation, immigration ministers of all political complexions became hostile to the Federal Court's statutory judicial review jurisdictions, and to applicants' lawyers generally. Their responses have impeded the orderly supervision of the rule of law by the courts, and led to legislative over-reactions that have been counter-productive to the intent of parliament.

Seeking to curb judicial review, Commonwealth legal aid funds for immigration litigation were closely circumscribed during the 1990s, and remain so. A recent scheme to give litigants in NSW access to free legal advice without merits and means tests has, in my opinion, provided an inefficient and unsatisfactory substitute.

Under 1992 legislation, lawyers were excluded from giving immigration advice generally, unless they were prepared to submit to a migration agents' registration scheme supervised by the Minister for Immigration.[16] Many competent lawyers who had found immigration advising difficult and unrewarding, took the opportunity to leave this area of practice. Most barristers who remain in the area attempt to follow the delicate line of advising only in relation to judicial review rights. The exclusion of lawyers has compounded the adverse effects of the procedural legislation.

The culture of immigration litigation has changed profoundly in the last ten years, particularly in NSW where it mostly occurs. No longer are most applicants assisted by lawyers, whose opinions on merits are usually respected. Now, most applicants are self-represented, and take advice from their migration agents and other unqualified helpers. Many applicants use worthless precedents, and are unable to present relevant submissions. Many of them appear unconcerned about the merits of their judicial review cases, and about the prospect of adverse costs orders. A significant number of applications at all levels of the judicial hierarchy are plainly abusive, pursued to protract eligibility for a bridging visa, or in the hope that a visa might be found at the end of an unintelligible legal procedure.[17]

Statutory rights of judicial review of immigration decisions were drastically revised by the *Migration Reform Act* 1992. A 'code' of grounds for review was devised, narrower than the grounds available under the ADJR Act and the Constitution. In particular, breach of procedural fairness and 'unreasonableness' were omitted. All other statutory judicial review jurisdictions of the Federal Court were excluded, and a non-extendable 28-day time-limit was imposed on applicants to that court.

At the time, these changes were explained officially as a sensible means of reforming first instance and merits review decision-making.[18] However, this appeared to outside observers to be disingenuous or misguided. The constitutional jurisdiction of the High Court was untouched, and remained available to those with procedural fairness arguments, or who were unfairly caught by time-limits – even if they had already pursued their limited rights in the Federal Court. It appeared obvious that the High Court would face a volume of litigation in its original jurisdiction, which would be plainly inappropriate.

The concern proved to be well-founded. The High Court upheld the constitutional right of applicants to claim relief for procedural unfairness after first pursuing other grounds of review in the Federal Court.[19] It allowed 'representative' proceedings based on such rights to be commenced in 1999, and to be joined by about 6,700 on-shore refugee applicants, who for several years gained the benefit of bridging visas without being called upon to show any merits.[20] Between 2002 and 2005, many thousands of these cases, and similar ones, were transferred to the Federal Court, ending up in a huge backlog in the Federal Magistrates Court. This was not cleared until 2007.

Undaunted by the downfall of the 1992 'reforms', parliament attempted in 2001, and again in 2005, further legislative restraints upon judicial review of immigration decisions.[21] The amendments acknowledged that it was necessary to make the statutory jurisdictions of the Federal Court and the Federal Magistrates Court uniform with the constitutional jurisdiction of the High Court. They attempted to confine all immigration litigation, by imposing a 'privative' clause on the grant of remedies in all jurisdictions, together with inflexible, short time-limits. However, the intent of the amendments failed, because the High Court construed them so as not to apply to decisions vitiated by jurisdictional error.[22] As a consequence, the constitutional remedies for such errors remained available in all courts, and they could be pursued without regard to any of the time-limits in the *Migration Act*.

The current legislation accepted the constitutional jurisdiction to remedy immigration decisions affected by jurisdictional error, and that a statutory jurisdiction in the same terms should be given to the Federal Magistrates Court. It attempted to create an effective time-limit for both jurisdictions, by applying it to applications concerning 'purported' but invalid decisions. The legislation also attempted to pre-empt a challenge to the time-limit it had imposed on the constitutional jurisdiction, by allowing a previously inflexible 28-day limit to be extended upon an application 'made within 84 days of the actual (as opposed to deemed) notification of the decision'.[23]

BODRUDDAZA AND THE ENTRENCHED RIGHT TO JUDICIAL REVIEW

In *Bodruddaza*, the High Court addressed the question of whether parliament had the power to impose this time-limit on its original jurisdiction under the Constitution. The justices were unanimous in their opinion that it did not. They held that s75(v) introduced into the Constitution of the Commonwealth 'an entrenched minimum provision of judicial review', by controlling jurisdictional error in the purported exercise of statutory power.[24] They held that:

> 'a law with respect to the commencement of proceedings under s75(v) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applicants to seek relief under s75(v) as >>

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to be inconsistent with the place of that provision in the constitutional structure'.[25]

They found s486A to be deficient, because it *'does not allow for the range of vitiating circumstances which may affect administrative decision-making'*. In particular, the time-limit could have expired before an applicant became aware of the circumstances that gave rise to a possible challenge to the decision.

As Gleeson CJ suggested during argument,[26] the invalid time-limit placed on the constitutional jurisdiction provided yet another illustration of 'legislative overkill' in parliament's efforts to place special restraints upon applications for judicial review of decisions under the *Migration Act*.

Because of *Bodruddaza*, applications for relief under the constitutional jurisdiction are subject only to the indefinitely extendable time requirements of the High Court Rules.[27] This case shows that the High Court will ensure that the constitutional right of judicial review of Commonwealth administrative decisions can be enjoyed in all circumstances where the interests of justice require a remedy to be available.[28]

Bodruddaza did not address the identically worded time-limit on the statutory jurisdictions of the Federal Magistrates Court and Federal Court. The constitutional principle upon which the case was decided has no direct application to those limitations.[29] It might therefore appear that the High Court now faces a return to the position under the 1992 amendments, because it is the only forum for judicial review applications falling foul of the restrictions on the statutory jurisdictions.

Understandably, the High Court did not allow this consideration to cloud its conclusions in *Bodruddaza*, and the future is yet to reveal whether it will receive another flood of applications in its original jurisdiction relating to old immigration decisions. This may depend upon whether the High Court overrules a recent judgment of the full Federal Court, which held that the intent of the uniform time-limit has also miscarried in relation to the statutory jurisdictions.[30]

CONCLUSION

Immigration policy in Australia has generally been non-partisan in recent decades, and the restrictions attempted by parliament on judicial review of immigration decisions have been initiated and supported by both sides of politics. The last attempt to put the genie of immigration litigation back into its bottle has failed, and new measures are now being drafted. The institutional independence of the High Court, with its inherited values favouring the rule of law, provides one guarantee that the constitutional right of judicial review will be maintained. *Bodruddaza* is a heartening confirmation of this feature of the Australian Constitution. However, of equal importance, is that the legal profession should remain vigilant and be able to identify possible infringements of that right. ■

Notes: **1** *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651. **2** Section 75(v) of the Constitution. **3** Sections 71 and 77 of the Constitution. **4** Cf *Potter v Minahan* (1908) 7 CLR 277, and *O'Keefe v Calwell* (1949) 77 CLR 261. **5** *R v Wilson, ex parte Kisch* (1934) 32 CLR 234. **6** See *R v Forbes, ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 174. **7** *Salemi v Mackellar* (No. 2) (1997) 137 CLR 396. **8** Chronologically: *Administrative Appeals Tribunal Act* 1975, *Ombudsman Act* 1976, *Administrative Decisions (Judicial Review) Act* 1977, *Freedom of Information Act* 1982. **9** *The Kerr Report of 1971: Its Continuing Significance*, delivered as the Inaugural Whitmore Lecture to the Council of Australasian Tribunals NSW Chapter, 19 September 2007. **10** See *Federal Jurisdiction in Australia*, 2nd Ed, 1978, OUP, Melbourne, p52. **11** *Kioa v West* (1985) 159 CLR 550. **12** *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290. **13** *Chan v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 379. **14** Cf *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87, and *Sacharowitz v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 33 FCR 480. **15** *Hunt v Minister for Immigration and Ethnic Affairs* (1993) 41 FCR 380 at 386. **16** See *Cunliffe v Commonwealth* (1994) 182 CLR 272. **17** See, for example, *SZGMZ v Minister for Immigration* [2005] FMCA 1549, upheld in [2005] FCA 1844; and a more recent tactic described by Moore J in *SZASP v Minister for Immigration and Citizenship* [2007] FCA 771. **18** See, for example, *Codification of Judicial Review under the Migration Act 1958 and the New Migration Merits Review Regime*, by Stephen Skehill, then Deputy Secretary, Commonwealth Attorney-General's Department, given to the 1993 AIAL annual administrative law forum. **19** See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. **20** In the *Muin, Lie,* and *Herijanto* proceedings. For an example of how Emmett J dealt with 707 of them, see *Applicant S1174 of 2002 v Refugee Review Tribunal* [2004] FCA 289. **21** *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth), and *Migration Litigation Reform Act* 2005 (Cth). **22** *Plaintiff S157/2002 v Commonwealth of Australia* (2002) 211 CLR 476. **23** *Migration Act* s486A, the same formula was applied under s477 to applications to the Federal Magistrates Court, and under s477A to the Federal Court. **24** (2007) 228 CLR 651 at [46]. **25** At [53]. **26** [2006] HCA Trans 685. **27** For example, r25.07 in relation to mandamus. **28** Cf the discretion to refuse relief on grounds of delay: see *Aala* (supra) at [51]-[53] and [148]-149]. **29** On authorities binding in the FMC: see *SZABG v Minister for Immigration* (No. 2) [2007] FMCA 1062. **30** *Minister for Immigration and Citizenship v SZKKK* [2007] FCAFC 105, and see *SZJLV v Minister for Immigration* [2007] FMCA 1501 at [2]-[6].

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