

*Shauna Roeger**

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v WZARH (2015) 326 ALR 1

I INTRODUCTION

In *Minister for Immigration and Border Protection v WZARH*,¹ the High Court considered whether WZARH, a Sri Lankan Tamil who arrived by boat on Christmas Island in 2010, had been denied procedural fairness in the Independent Merits Review of his Refugee Status Assessment. The Minister was granted special leave to appeal after two judges of the Federal Court invoked the concept of ‘legitimate expectations’ to find in favour of WZARH. The High Court dismissed the appeal, but, usefully, provided a succinct statement of the current principles on procedural fairness. This case note analyses the implications of the decision on the role of ‘legitimate expectations’ at both the threshold- and content-stage of the inquiry.

II THE DECISION IN *WZARH*

A The Facts

The respondent, WZARH, was a Sri Lankan national of Tamil ethnicity. Upon arriving by boat at Christmas Island in November 2010, WZARH became an ‘offshore entry person’ within the meaning of s 5(1) of the *Migration Act 1958* (Cth) (‘the Act’), and was taken into detention.

As it then stood, s 46A of the Act prevented an offshore entry person from making a valid application for Protection (Class XA) visa. The only way WZARH could make a valid application for a visa was if the Minister exercised his or her power under s 46A(2) to ‘lift the bar.’² Thus, on 21 January 2011 WZARH requested a Refugee Status Assessment (‘RSA’), claiming that he was a person to whom Australia owed protection obligations under the Refugees Convention.³ WZARH argued that he had a well-founded fear of persecution due to his Tamil ethnicity, and both his perceived

* Student editor, *Adelaide Law Review*, The University of Adelaide.

¹ (2015) 326 ALR 1 (‘*WZARH*’).

² *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 336 [13].

³ For an overview of the RSA and IMR processes see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 343 [41]–[49]. This description was approved by the High Court in *WZARH* (2015) 326 ALR 1, 3 [2] (Kiefel, Bell and Keane JJ), 11 [51] (Gageler and Gordon JJ).

and actual political activities. The Minister’s delegate made an adverse assessment of WZARH’s claim to refugee status.

WZARH then sought an Independent Merits Review (‘IMR’), and was interviewed by a reviewer (‘the First Reviewer’), who explained that she would ‘undertake a fresh re-hearing’ and then make a recommendation to the Minister. The First Reviewer subsequently became unavailable for undisclosed reasons, and without notification to WZARH, a second person (‘the Second Reviewer’) became responsible for completing the IMR.

The Second Reviewer considered the written materials, such as WZARH’s original application, a transcript of an interview with an officer on Christmas Island, submissions made on his behalf, country information, and the audio recording and transcript of his interview with the First Reviewer, but did not undertake a second oral hearing. The Second Reviewer formed an adverse view as to WZARH’s credibility due to ‘inconsistencies’ in the factual evidence on his political activities, and recommended to the Minister that WZARH not be recognised as a person to whom Australia owed protection obligations.

WZARH applied for judicial review of the decision in the Federal Circuit Court, arguing that he had been denied procedural fairness.

B The Lower Court Decisions

The primary judge dismissed WZARH’s application,⁴ holding that it was not procedurally unfair for the Second Reviewer to make his recommendation to the Minister based on the written material and audio recordings.⁵

On appeal, the Full Federal Court (Flick and Gleeson JJ, Nicholas J in a separate concurring judgment) overturned the decision of the primary judge and declared that WZARH had been denied procedural fairness.⁶ Justices Flick and Gleeson observed that WZARH had a ‘legitimate expectation’ that the reviewer who interviewed him would be the same person to make the recommendation to the Minister, and, as such, he would be given the opportunity to personally ‘impress upon the person ... the merits and genuineness of his claims.’⁷ Procedural fairness thus required that WZARH at least be afforded an opportunity to make submissions on how the IMR should proceed.⁸ Justice Nicholas reached the same conclusion, but without recourse to the concept of ‘legitimate expectations’.⁹

The Minister appealed this decision to the High Court.

⁴ (2013) FCCA 1608.

⁵ Ibid [16].

⁶ (2014) 230 FCR 130.

⁷ Ibid 142 [28].

⁸ Ibid 142 [29].

⁹ Ibid 146 [48], 148–9 [57].

C *The High Court Decision*

The High Court unanimously dismissed the appeal, delivering two judgments: the plurality of Kiefel, Bell and Keane JJ, and a concurring joint judgment of Gageler and Gordon JJ.

It was not contentious that WZARH was entitled to procedural fairness in the IMR.¹⁰ The key issue on appeal was whether the Federal Court majority had erred by relying on WZARH's 'legitimate expectation' to reach the conclusion that he had been denied procedural fairness.¹¹

The plurality considered the significant criticisms levelled against the concept of 'legitimate expectations' by the High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*¹² and *Plaintiff S10/2011 v Minister for Immigration and Citizenship*.¹³ The plurality considered that these cases made the position 'sufficiently clear':¹⁴ legitimate expectations do not provide a basis for determining to whom procedural fairness applies, and nor do they provide a basis for determining the content of such procedural fairness.¹⁵ The plurality were critical of the reliance on the concept by Flick and Gleeson JJ, and preferred the reasoning of Nicholas J, who reached the correct conclusion without engaging in a 'distract[ing]'¹⁶ discussion of legitimate expectations. According to the plurality, the content of procedural fairness is simply what is required 'in order to ensure that the decision is made fairly in the circumstances'.¹⁷

Justices Gageler and Gordon were less dismissive of the concept of 'legitimate expectations' but confined its role to a supplementary function. Their Honours held that it was relevant *only* to the extent it informs the opportunity a reasonable administrator ought fairly have given in the totality of the circumstances,¹⁸ and is not a basis for determining the content of procedural fairness in itself.

Both judgments acknowledged that the 'practical requirements' of procedural fairness did not require an administrative decision-maker to afford a person affected by a decision an oral hearing in every case.¹⁹ However, an oral hearing was particularly important in the circumstances because the IMR process raised potential issues of

¹⁰ Minister for Immigration and Border Protection, Submission in *Minister for Immigration and Border Protection v WZARH*, S85/2015, 22 May 2015, 10 [37]; *WZARH* (2015) 326 ALR 1, 8 [33] (Kiefel, Bell and Keane JJ), 11–12 [51] (Gageler and Gordon JJ).

¹¹ *Ibid* 6 [23].

¹² (2003) 214 CLR 1 ('*Lam*').

¹³ (2012) 246 CLR 636 ('*Plaintiff S10/2011*').

¹⁴ *WZARH* (2015) 326 ALR 1, 7 [30].

¹⁵ *Ibid* 8 [30].

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Ibid* 13 [61].

¹⁹ *Ibid* 8 [33] (Kiefel, Bell and Keane JJ), 14 [63] (Gageler and Gordon JJ).

WZARH's credibility²⁰ and his subjective state of mind.²¹ The plurality emphasised that the ability of the decision-maker to directly question the applicant, clarify areas of confusion or misunderstanding, and personally observe the applicant's demeanour, was especially valuable where the applicant could only communicate through an interpreter.²² Given these benefits, the plurality concluded that WZARH had suffered a 'practical injustice', in the sense that it could not be said that he lost no opportunity to advance his case.²³

Similarly, Gageler and Gordon JJ considered that unfairness lay in the fact that the variation of procedure changed the 'nature' of WZARH's opportunity to be heard, from the opportunity to personally convince an identified reviewer who would make the assessment, to the opportunity to present a case through recorded oral evidence and written submissions to an unknown reviewer.²⁴ The change in procedure would be reasonably expected to impact the 'coverage, detail and emphasis' of the submissions and the evidence presented.²⁵

Both judgments concluded that in the circumstances, procedural fairness required that WZARH be informed of the change in process, given an opportunity to be heard on how the review process should proceed, and given the chance to at least request a second oral hearing.²⁶ The plurality approved the obiter remark by Nicholas J that the Minister would have been 'hard pressed to resist' an application for a second hearing.²⁷ Justices Gageler and Gordon were more ambivalent; noting that whether procedural fairness dictated the Minister granting a second hearing would depend on the justifications given for the request and, possibly, other 'logistical considerations.'²⁸ Ultimately, resolving this 'hypothetical inquiry'²⁹ was not required in order to reach the conclusion that WZARH had been denied procedural fairness.

III ANALYSIS

The significance of *WZARH* lies in the Court's discussion of 'legitimate expectations'. This analysis seeks to place the decision in the context of the previous case law on legitimate expectations, and then assess how it has altered the law on procedural fairness, at the threshold- and content-stage of the inquiry.

²⁰ Ibid 10 [41] (Kiefel, Bell and Keane JJ), 14 [65] (Gageler and Gordon JJ).

²¹ Ibid 14 [65] (Gageler and Gordon JJ).

²² Ibid 10 [41].

²³ Ibid 10 [42].

²⁴ Ibid 14 [64].

²⁵ Ibid 14 [66].

²⁶ Ibid 11 [45]–[46] (Kiefel, Bell and Keane JJ), 14 [67] (Gageler and Gordon JJ).

²⁷ Ibid 11 [45].

²⁸ Ibid 15 [68].

²⁹ Ibid.

A Legitimate Expectations: A Troubled Concept

Despite being the subject of judicial discourse for over 45 years, the concept of ‘legitimate expectations’ is poorly understood. Since its ‘invention’³⁰ by Lord Denning in *Schmidt v Secretary of State for Home Affairs*,³¹ the task of delineating its precise meaning, scope and purpose has frequently troubled the minds of judges.³²

In Australia, the concept has been restricted to a strictly procedural operation³³ but has been put to various uses within these procedural confines.³⁴ It was included in Mason J’s seminal statement of the threshold test in *Kioa v West*: that procedural fairness must be accorded ‘in the making of administrative decisions which affect rights, interests and legitimate expectations’.³⁵ The notion of legitimate expectations has also been deployed on occasion to ascertain the content of the obligation of procedural fairness. The ‘high water mark’³⁶ of this use of the concept is in the High Court’s 1995 decision in *Teoh*,³⁷ where a majority of the High Court held that Australia’s ratification of the *Convention on the Rights of the Child* provided a basis for the existence of a ‘legitimate expectation’ in a father facing deportation, that the government decision-maker would treat the best interests of his children as a ‘primary consideration.’³⁸

The High Court’s 2003 decision in *Lam* marked a significant change in direction away from reliance on the concept. The judgments of McHugh and Gummow JJ, Hayne J and Callinan J each doubted the correctness of *Teoh* without expressly overruling it.³⁹ In this case, the department had requested that an applicant, who was

³⁰ To adopt the disparaging characterisation used by McHugh J in his Honour’s dissenting judgment in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 310 (‘*Teoh*’); see also *Lam* (2003) 214 CLR 1, 140 [45] (Callinan J).

³¹ [1969] 2 Ch 149, 170–1.

³² See, eg, *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 509 (Aickin J); *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 651–2; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 54 (Dawson J), 67 (Toohey J).

³³ See, eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 23–4 (Mason CJ), 41 (Brennan J), 60 (Dawson J); *Lam* (2003) 214 CLR 1, 21 [67] (McHugh and Gummow JJ); *WZARH* (2015) 326 ALR 1, 12 [55] (Gageler and Gordon JJ). This is in contrast to the United Kingdom, where the doctrine of ‘legitimate expectations’ has been given substantive operation: *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.

³⁴ *Lam* (2003) 214 CLR 1, 36 [116] (Hayne J).

³⁵ (1985) 159 CLR 550, 584, endorsed by a majority of the High Court in *Annetts v McCann* (1990) 170 CLR 596, 598.

³⁶ *Lam* (2003) 214 CLR 1, 46 [141] (Callinan J).

³⁷ (1995) 183 CLR 273.

³⁸ *Ibid* 291–2 (Mason CJ and Deane J), 301–2 (Toohey J), 305 (Gaudron J).

³⁹ *Lam* (2003) 214 CLR 1, 28–34 (McHugh and Gummow JJ), 37–8 (Hayne J), 45–9 (Callinan J). Chief Justice Gleeson did not express a view on the correctness or otherwise of *Teoh* (1995) 183 CLR 273.

facing possible visa cancellation, provide the contact details of his children's carer, so the department could assess his relationship with his children, and the possible effects the visa cancellation would have on them. The applicant provided the details, but the department did not contact the carer before cancelling his visa, and did not notify the applicant of this fact. The High Court held that there was no denial of procedural fairness, as the failure by the department to follow its statement did not affect the fairness of the process.⁴⁰ Importantly, the concept of legitimate expectations was criticised variously as: 'an unfortunate one, apt to mislead',⁴¹ as a phrase that 'poses more questions than it answers'⁴² and a concept of 'limited utility'.⁴³

Almost a decade later, in *Plaintiff S10/2011*, Gummow, Hayne, Crennan and Bell JJ remarked that 'the phrase ... when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded.'⁴⁴ Given this sweeping statement and the abundance of judicial misgivings in prior case law, it is surprising that the Court was compelled to reaffirm the correct principles a mere three years later. Nonetheless, the decision of *WZARH* warrants close analysis to examine whether the Court has imparted any new insights into the law on procedural fairness.

B *The Irrelevance of Legitimate Expectations to the Threshold Test*

The plurality, in obiter, replaced the traditional 'rights, interests and legitimate expectations' threshold test as articulated by Mason J in *Kioa v West*,⁴⁵ with the broad test that administrative decision-makers must accord procedural fairness to those who are affected by their decisions, unless there is clear contrary legislative intention.⁴⁶

The plurality's clear revocation of the 'rights, interests and legitimate expectations' test is to be commended. In light of the expansive approach to procedural fairness in modern times, maintenance of this formulation has been at best, unhelpful, and at worst, misleading. As described by Aronson and Groves, Mason J's formulation continued a 'paradox' — implicitly maintaining the existence of some logical distinction between the different elements of the phrase.⁴⁷ The Court had already indicated a shift away from this phrase in *Lam*,⁴⁸ and *Plaintiff S10/2011*,⁴⁹ but the absence of a clear statement of the current principle carried the risk that lower courts would

⁴⁰ *Lam* (2003) 214 CLR 1, 9, 13–14 (Gleeson CJ), 34–5 (McHugh and Gummow JJ), 36–9 (Hayne J), 48–9 (Callinan J).

⁴¹ *Ibid* 45 [140] (Callinan J).

⁴² *Ibid* 38 [121] (Hayne J).

⁴³ *Ibid* 16 [47] (McHugh and Gummow JJ).

⁴⁴ *Plaintiff S10/2011* (2012) 246 CLR 636, 658 [65].

⁴⁵ (1985) 159 CLR 550, 584.

⁴⁶ *WZARH* (2015) 326 ALR 1, 8 [30].

⁴⁷ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 2013) 491.

⁴⁸ *Lam* (2003) 214 CLR 1, 16 [47] (McHugh and Gummow JJ).

⁴⁹ (2012) 246 CLR 636, 658 [66].

continue to intermittently apply the *Kioa* formulation. In *WZARH*, the Court appears to have conclusively accepted that whatever assistance ‘legitimate expectations’ may have provided to the evolution and expansion of the circumstances that attract the rules of procedural fairness, the concept has no ongoing utility in this inquiry.⁵⁰

However the plurality’s straightforward formulation is vulnerable to the criticism that it achieves simplicity by sacrificing precision. Although a lengthy consideration of the threshold test was clearly beyond the scope of the case, it is undeniable that the plurality’s reformulation leaves a number of issues still unresolved. For example, is the ‘those who are affected’ test to be interpreted as referring to persons whose ‘rights and interests’ are affected, and is there still a distinction between these two elements? Are those persons previously entitled to procedural fairness by their ‘legitimate expectation’ now outside its reach, or has this aspect been subsumed by a broader conception of ‘interest’?⁵¹ What is the relationship between the current threshold test and the standing tests for common law writs or equitable remedies, acknowledging that procedural fairness has historically been given a more restricted application?⁵²

Ultimately, these questions may be of primarily academic interest given the evident trend towards a near-universal application of the rules of procedural fairness.⁵³ Nonetheless, it will be interesting to observe whether the plurality’s test proves to be a source of confusion in future cases, or whether the declining emphasis on the threshold test will render the reformulation inconsequential.

C Legitimate Expectations and the Content of Procedural Fairness

The critical question in most cases considering procedural fairness is not whether the duty applies, but what the *content* of the duty is in the circumstances. Procedural fairness has no fixed content, but rather ‘conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case’.⁵⁴ In *WZARH*, the High Court clarified the role of ‘legitimate expectations’ in this inquiry.

As noted previously, both judgments clarified that the ‘legitimate expectation’ of a person affected by an administrative decision does not provide a basis for determining the content of such procedural fairness. The plurality found reference to the concept

⁵⁰ *Lam* (2003) 214 CLR 1, 16 [47] (McHugh and Gummow JJ).

⁵¹ See, eg, Sir Anthony Mason, ‘Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation’ (2005) 12 *Australian Journal of Administrative Law* 103, 106.

⁵² See, eg, Elliott Cook, ‘Natural Justice: For Every Man and his Dog’ (2016) 23 *Australian Journal of Administrative Law* 102, 104.

⁵³ Aronson and Groves, above n 47, 491; Bannister et al, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2014) 464.

⁵⁴ *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

‘both unnecessary and unhelpful.’⁵⁵ Justices Gageler and Gordon were also critical of the concept, noting that ‘focussing on the opportunity expected, or legitimately to have been expected ... can distract from the true inquiry into the opportunity that a reasonable administrator ought fairly to have given.’⁵⁶

However, both judgments left open the possibility that legitimate expectations may have a supplementary role in informing the content of the duty of procedural fairness. Despite their Honours’ dismissive language, the plurality endorsed the statement of Gleeson CJ in *Lam* to the effect that the rules of procedural fairness *may* be breached where a decision-maker resiles from a statement of intention as to the procedure to be followed *if* this results in unfairness.⁵⁷ Although this reasoning does not expressly invoke the term ‘legitimate expectation’, it is difficult to conceptualise the unfairness other than by reference to the expectation created by the decision-maker. This interpretation is supported by the judgment of Gageler and Gordon JJ, who quoted a later part of Gleeson CJ’s judgement in *Lam* which stated that the creation of an expectation may ‘bear on the practical content of the obligation’ without ‘supplant[ing]’ it.⁵⁸

Several months before the High Court decision in *WZARH*, the Full Federal Court stated that *Lam* had ‘pivot[ed] the underlying analytical jurisprudence away from a doctrinal reliance on legitimate expectation towards an examination of the fairness of the process.’⁵⁹ The High Court’s movement in *WZARH* may be described as more than a ‘pivot’ — to be generous, it may be a full step forward towards conceptual clarity — but the essence of the Full Court’s analysis still rings true.⁶⁰ The common thread between the two judgments in *WZARH* is that a person’s ‘legitimate expectation’ does not provide a basis for the content of procedural fairness in itself, but it may play a subsidiary role by informing considerations of fairness and its practical requirements in the circumstances. In reality, the controversy surrounding the term is likely to deter counsel in future cases from mounting arguments based on ‘legitimate expectations.’ Expectations generated by an administrative decision-maker may still be relevant to identifying what amounts to a fair procedure on the facts of a particular case, but any future judicial engagement with the notion is likely to occur without reference to the ‘technical and loaded’⁶¹ term that is ‘legitimate expectation’.

⁵⁵ *WZARH* (2015) 326 ALR 1, 8 [30] (Kiefel, Bell and Keane JJ), 13 [61] (Gageler and Gordon JJ).

⁵⁶ *Ibid* 13 [61].

⁵⁷ *Ibid* 11 [47] citing *Lam* (2003) 214 CLR 1, 9 [25].

⁵⁸ *WZARH* (2015) 326 ALR 1, 13 [61] citing *Lam* (2003) 214 CLR 1, 12–13 [34].

⁵⁹ *SZSSJ v Minister for Immigration and Border Protection* (2015) 234 FCR 1, 27 [92].

⁶⁰ Cf Greg Weeks, ‘What Can We Legitimately Expect From the State?’ in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2016) (forthcoming).

⁶¹ Aronson and Groves, above n 47, 425.

IV CONCLUSION

The decision of *WZARH* is an important case on the law of procedural fairness. It is now clear that the concept of ‘legitimate expectations’ has no role to play in the threshold test, and has only supplementary relevance at the content-stage to the extent that expectations generated by decision-makers inform the practical requirements of fairness in the circumstances. Ultimately, the Court’s decision has confirmed the trend over the past decade that the doctrine of ‘legitimate expectations’ will not be an enduring feature of Australian administrative law.

