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The road back from Kafka's castle: Towards a better system of visa application and review in Australia

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Abstract
The processes for administrative, judicial and appellate challenges to a visa refusal are difficult, time consuming and costly. It is not uncommon for an applicant to be involved in processes in excess of five or 10 years. The cost to the public purse can be exorbitant. This article suggests a system whereby the process would be confined to a two-stage judicial process. As such it would be much more discernible to the litigant, many of whom are unrepresented. It would also result in significant savings to the litigant and to the taxpayer.

Keywords
Immigration/refugees, judicial review, law reform, merits review

The administrative and judicial processes for challenging a visa refusal are difficult and time consuming.[1] What's more they are apt to repeat themselves, on an unending loop, that could make *Jarndyce v Jarndyce*[2] look quick, cheap and efficient. The cost to the public purse can be astronomical.

This Comment suggests a smarter, cheaper way – a system where decision-making is, from the beginning, in the hands of the judiciary. It is a more direct and consistent way to serve the interests of justice, and one which is comprehensible to the applicant, the public and the legal profession.

It has been suggested that such an idea would meet with stiff resistance in government circles. Shifting visa decision-making to the judiciary seems to deprive the government of its power over the implementation of its immigration policy. On the other hand, the government, having set its agenda through legislation, may be pleased to hand over the difficult and otherwise politically charged matter of determining visa applications to an impartial judiciary. One must wait to see.

The current system

The road to where we are now

While the struggle between the executive and the judiciary, in the area of migration law, can be traced back to earlier times, for current purposes one need only go back to the turn of the 21st century. Having already removed most classes of migration decisions from the *Administrative Decisions (Judicial Review) Act 1977* (Cth),[3] in

[1]This Comment deals with protection visa applications, but virtually all of its observations apply, *mutatis mutandis*, to other visa applications.
[2]The interminable litigation which features as the backdrop to the novel *Bleak House* by Charles Dickens.
[3]*Migration Reform Act 1992* (Cth) (commenced 1 September 1994).

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2001 Parliament attempted to entirely exclude judicial review by the introduction of a privative clause provision into the *Migration Act 1958* (Cth) (the Act): s 474.[4] It provides that a privative clause decision is 'final and conclusive and must not be challenged, appealed against, reviewed, quashed or called in question in any court'.[5] A privative clause decision is 'a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act. . .'.[6]

As noted by Nick Poynder, 'the potentially devastating prohibition to access to judicial review was almost entirely neutralised' by the decision of the High Court in *Plaintiff S157/2002*.[7] In that case, the High Court found that, while the privative clause is valid under the *Constitution*, on its proper construction, it does not apply to decisions affected by jurisdictional error.

In other words, if the administrative decision maker exceeds their power, 'it may involve a conclusion that a purported decision is not a "decision. . .**under this Act**" so as to attract the protection given by s 474'.[8] But, of course, the question then becomes when and how does the administrative decision maker exceed their power, such that they fall into jurisdictional error and such that their decision is not protected by the privative clause?

In the last decade and a half, the area of immigration law has seen a steady widening of the concept of jurisdictional error. As each new decision pushes the boundaries further, this gives rise to a spate of litigation seeking to confine or extend its precedential worth.[9] But even if the boundary fence is, in some places, obscured by the shrubbery, the broad distinction between the role of the administrative decision maker and the judicial reviewer is, at least in theory, clear. It is that the former is to be concerned with the merits of the application (applications in the Administrative Appeals Tribunal are often called 'merits review'), and the latter is concerned with whether the former, in assessing the merits, acted 'illegally' and thus fell into jurisdictional error.[10]

A long and winding road

So, what does the asylum seeker confront, when applying for a protection visa?[11] For most, the steps are as follows:

Step 1: The applicant arrives in Australia, seeking asylum. They typically undergo an arrival interview which is recorded.[12]

Step 2: Next the applicant applies to the Minister for Home Affairs (the Minister) for one of the forms of a protection visa.[13]

Step 3: A recorded interview/hearing is conducted by a delegate of the Minister (the delegate).[14] This is typically detailed and may take several hours. The delegate is required to form a decision on whether the applicant meets the criteria for refugee status.[15] The delegate must reduce that decision to writing.[16] This may take several months, during which time the applicant may or may not be confined in immigration detention.[17] If the delegate forms the view that the applicant is not a refugee, he will refuse the visa application.

Step 4: The applicant then has the opportunity to apply to the Migration and Refugee Division of the Administrative Appeals Tribunal (the Tribunal) for 'merits review' of the delegate's decision – that is, a review whereby all matters before the delegate can be re-considered.[18] A hearing date will take many months to secure, though if the applicant is in detention it may be as little as two to four months. Then the Tribunal, constituted by a single member, will conduct a hearing, where the applicant may be represented by a migration agent, and where submissions and new information may be considered.[19] The Tribunal may affirm, or vary the decision of the delegate, overrule the delegate and substitute a new decision, or remit the matter to the delegate to reconsider.[20] The decision is typically reduced to writing,[21] and may take many months to become available.

Step 5: If the Tribunal affirms the decision of the delegate to refuse a protection visa, the applicant may, under s 417 of the Act, apply directly to the Minister to

[4]Introduced by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).
[5]*Migration Act* s 474(1).
[6]*Migration Act* s 474(2).
[7]Nick Poynder, *Judicial Review*, in *Australian Immigration Law* (LexisNexis, April 2017) referring to *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
[8]*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, *per* Gleeson CJ at 488. Many have questioned why the Parliament would seek to introduce such a clause when the High Court has a long history of restricting the protection offered by them. See *per* Gleeson CJ at 484, and the cases there cited.
[9]See, eg, perhaps the most influential decision in this regard in recent years: *Minister for Immigration and Border Protection v Li* (2013) 249 CLR 332 and also the leading decision of *SZRKT v Minister for Immigration and Citizenship* (2013) 212 FCR 99.
[10]*Attorney-General (NSW) v Quin* (1990) 170 CLR 1 *per* Brennan at 35–36.
[11]There are some variations on the theme. For example, if one arrived by boat between 13 August 2012 and 1 January 2014, one is dealt with under the fast track provisions. See s 5 and Part 7AA of the *Migration Act*.
[12]*Migration Act* s 257.
[13]*Migration Act* s 35A.
[14]*Migration Act* Part 2, Div 3, Subdivision AB, especially s 59.
[15]*Migration Act* ss 5 & 36.
[16]*Migration Act* s 66(2)(c).
[17]By s 189 of the Migration Act, an officer must detain an unlawful non-citizen. However, pursuant to s 197AB of the Migration Act, the Minister may determine that a certain person or persons may reside at a specified place rather than in detention (known as a 'community detention' order).
[18]*Migration Act*, Part 7, Divs 3 & 4.
[19]Ibid.
[20]*Migration Act* s 415(2).
[21]*Migration Act* s 430, although oral decisions are possible: s 430D.

substitute a more favourable decision than that made by the Tribunal (Ministerial intervention).[22]

The trap here, however, is that the applicant only has 35 days after the Tribunal decision to apply to the Federal Circuit Court of Australia (the FCCA) for judicial review,[23] and if that time elapses, they need to seek leave from the FCCA to apply.[24] The application for Ministerial intervention does not stop the clock. However, the unrepresented litigant is usually unaware of this. They find it difficult to conceive that the Ministerial intervention step is available simultaneously with the judicial review step, and not sequentially prior to it. So they often wait for the result of the Ministerial intervention before they apply to the FCCA. As a result, they may be out of time and are required to seek leave.

The authorities have held that failure to apply to the FCCA in time, because one is waiting for the s 417 decision, is not enough, in and of itself, to require the Court to grant leave.[25] Furthermore, if the Court refuses leave, there is no right of appeal from that decision.[26] Fortunately, however, the Federal Court of Australia (the FCA) has held that a person in that situation, whilst not being able to appeal to the FCA, can still seek judicial review of the decision of the FCCA under s 39B of the *Judiciary Act 1901* (Cth).[27]

Step 6: As mentioned above, if an applicant is unsuccessful in the Tribunal, they may apply to the FCCA for judicial review of the decision of the Tribunal.[28] At the time of writing, applicants are waiting about 18 months to get a hearing date, though if in immigration detention, the applicant may get on within 6 months.

Those representing the applicant will then seek to establish to the satisfaction of the FCCA judge that the Tribunal, in one way or another, fell into jurisdictional error, and that the Court should issue a writ of certiorari directed to the Tribunal, quashing its decision, followed by a writ of mandamus directing it to re-consider the matter according to law.

However, the majority of applicants are self-represented, and totally incapable of grasping the concepts of privative clause and jurisdictional error. Hence, they simply repeat their factual 'merits' claims as made to the delegate and the Tribunal, and possibly to the Minister under s 417. The Court, limited as it is to reviewing for illegality, cannot consider such merits claims. The majority of applicants therefore inevitably fail. What is more they do so without understanding why the judge simply 'wouldn't' listen to their claims.

The process takes around half a day each of the Court's time. While most applicants cannot afford representation, the costs to the public include for the judge, Associate, court staff, interpreter, and solicitor and counsel for the Minister, as well as, of course, all attendant overheads.

In *MZAIB v Minister for Immigration and Border Protection*[29] Mortimer J said:

> At some stage, courts may have to confront more squarely the increasing disparity of resources and capacities attending the way judicial review proceedings in the migration jurisdiction are conducted. They may have to confront what needs to be done to ensure that what occurs in Ch III courts does not appear to be but a veneer of fairness.

Overall, around 12 per cent of applicants are successful in establishing jurisdictional error in the FCCA, almost all of whom are legally represented.[30] If successful, the applicant cannot be granted a visa by the FCCA. As mentioned, all the Court can do is issue constitutional writs to require a differently constituted Tribunal to hear the matter again.

Step 7: For the 88 per cent who are unsuccessful in the FCCA, they may appeal to the FCA.[31] It may take as much as six to nine months to get a hearing date on appeal, though those in detention will probably get on in three to four months. The default position is an appeal to a single judge of the FCA,[32] but if a judge thinks it is appropriate, they can refer the matter to a Full Court.[33] Most unrepresented litigants appear before a single judge.

One can readily see that the confusion, for an unrepresented applicant, which arises by virtue of the limitations placed upon what they can plead in the FCCA, is compounded by the appellate limitations then placed upon them in the FCA. Unaware of any of this, they typically try to argue the facts all over again in the FCA.

And yes, the majority of appellants in the FCA in migration matters are unrepresented, take a half day of the FCA's time and incur costs of judge, Associate, court staff, solicitor and counsel for the Minister and attendant costs.

Step 8: An unsuccessful appellant in the FCA may apply for special leave to appeal to the High Court of Australia (HCA).[34] The limitations placed upon what an unrepresented litigant can plead in the FCCA and the FCA are compounded by the well-known difficulties of

[22]There is also provision under s 195A of the Act, for the Minister to grant a visa to a person in detention, if they consider it in the public interest to do so, whether or not the person has applied for the visa.
[23]*Migration Act* s 477(1).
[24]*Migration Act* s 477(2).
[25]See, eg, *M211 v Refugee Review Tribunal* [2004] FCAFC 293 and *VU v Minister for Immigration and Citizenship* [2008] FCAFC 59.
[26]*Migration Act*, s 476A(3)(a).
[27]See *MZAIB v Minister for Immigration and Border Protection* (2015) 238 FCR 158; *Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55 and *SZTES v Minister for Immigration and Border Protection* [2015] FCA 719.
[28]*Migration Act*, s 476.
[29](2015) 238 FCR 158 at [124]
[30]2014-15 Report of the Migration Review Tribunal and Refugee Review Tribunal.
[31]See s 24(1)(d) of the *Federal Court of Australia Act 1976 (Cth)*.
[32]*Federal Court of Australia Act 1976 (Cth)*, s 25(1AA)(a).
[33]*Federal Court of Australia Act 1976 (Cth)*, s 25(1AA)(b).
[34]*High Court Rules 2004 (Cth)*, Part 41.

convincing the HCA to take on their appeal. However, still nowhere near comprehending how the system works, the unrepresented litigant inevitably decides to have one more go, hoping this lot of judges will be more reasonable than the others.

So numerous is this group of unrepresented hopefuls, that they were clogging the special leave lists, and the HCA was forced to introduce a rule that a special leave application could be refused on the papers, without listing it for hearing, by order of any two Justices.[35] So now the unrepresented asylum seeker's hopes are often disappointed by the discovery that the matter has been determined in their absence, which must be seen from their perspective as profoundly unjust.

Step 9: For the lucky few, their matter is heard by the Full High Court.

Rolling the boulder up for the 'right' to have it roll down

Even poor old Sisyphus[36] was better off than the migration litigant. He had no choice, when he got his boulder to the top of the hill, but to watch it roll down again. But at least he didn't have to suffer the indignity of the migration litigant, who must ask for the privilege of a downhill roll. Having got to the HCA on the top of the hill, that is far from the end. Success there means only that they have gained the 'right' to let the boulder roll to the bottom of the hill, to start all over again in the Tribunal.

One example will suffice to illustrate the Kafkaesque nature of the road ahead for asylum seekers. I have chosen *Li's case*[37] because it is one of the most influential and most cited migration cases of the 21st century.[38] But there are thousands of other, lesser known cases, where the applicant has had to endure the same, or worse, procedures and timeframes.

The issue in *Li* turned on whether the Tribunal had been unreasonable in refusing the visa applicant an adjournment to obtain further and better evidence to put before it, and had thus fallen into jurisdictional error.

Its administrative and litigation history was as follows: the applicant applied for her visa in February 2007. The delegate refused the application, two years later, in January 2009. The applicant applied to the Tribunal for merits review later that month, and was finally refused by the Tribunal in January 2010. She then applied to the FCCA (then called the Federal Magistrates Court of Australia) for judicial review of the decision of the Tribunal. In August 2011, the FCCA held that the Tribunal's failure to allow the adjournment was so unreasonable that it constituted jurisdictional error. It ordered the matter be remitted to the Tribunal for re-hearing.[39] However, the Minister appealed to the FCA, which constituted itself as a Full Court. In May 2012, it unanimously upheld the decision of the FCCA, though for different reasons.[40] The Minister then sought special leave to appeal to the HCA, and this was granted in November 2012.[41] In May 2013, the HCA dismissed the Minister's appeal.[42] Thus, the decision of the FCCA was affirmed and the matter was able to be remitted to the Tribunal for re-hearing. By the time that hearing took place, around seven years would have passed from the time of the visa application.

No further litigation history is available. Thus, in the second Tribunal, Ms Li either succeeded, or failed again but decided not to take the matter further. However, had she failed, and decided to continue, it is altogether possible that she could have found herself rolling the boulder up the hill for another six or seven years ... and so on.

The proposed alternative

This Comment proposes an alternative: the establishment of a federal Migration Court of Australia (MCA).[43] Its constitutional underpinnings would be the same as for the FCA, the FCCA and the Family Court of Australia (FamCA).[44] It would be a superior court of record and its proceedings would be adversarial in nature. There would be a trial division and an appellate division.

[35] *High Court Rules 2004 (Cth)*, r 41.08.1.
[36] In Greek mythology, the king who was punished for his self-aggrandising and cunning behaviour by being forced to roll a boulder up a hill, only to watch it roll down again, repeating this action for eternity.
[37] *Minister for Immigration and Border Protection v Li* (2013) 249 CLR 332.
[38] It arguably establishes, inter alia, a 'domestic' form of legal unreasonableness, which liberates Australian administrative law from the remnant shackles of *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[39] *Li v Minister for Immigration and Citizenship* [2011] FMCA 625, at [64]–[65].
[40] *Minister for Immigration and Citizenship v Li* (2012) 202 FCR 387 (Greenwood, Collier and Logan JJ) at [39]–[40], [119]–[120].
[41] *Minister for Immigration and Citizenship v Xiujuan Li* [2012] HCATrans 295.
[42] *Minister for Immigration and Border Protection v Li* (2013) 249 CLR 332, *per* French J at [32], *per* Hayne, Kiefel and Bell JJ at [87] and *per* Gageler at [125].
[43] The proposed alternative could be accommodated within the framework of the FCA and/or the FCCA, but the author is of the view, that given the sensitive nature of the proceedings, and the vulnerability of the litigants, a separate court dedicated to the area of practice would be preferable – much like the Family Court of Australia.
[44] *Constitution of the Commonwealth* ss 51 (xix), 51 (xxvii), 71 and 77.

The asylum seeker would apply to the court for a visa, such application being served on the Minister. If the Minister felt that the applicant met all the requirements for the visa, that would be communicated to the Court, and the visa would be granted by the Court, without the need for either party to appear, in much the same way as undefended divorces are dealt with in the FamCA and the FCCA.

If the Minister felt that the applicant did not meet the necessary requirements for a visa, the matter would go for trial before a trial division judge. That judge would be empowered to consider all matters of fact and law, to rule on both, and to accordingly grant, or not grant a visa to the applicant.

The unsuccessful party would have a right of appeal to the appeal division, but only on a question of law. Once the trial and, if applicable the appeal, was complete, the matter would be finished.[45]

Detailing for the new MCA process is beyond the scope of this work. However, there would almost certainly be provision for basic pleadings. Rules of evidence might be applied strictly, by way of guide, or not at all. This author's view is that, given the sensitive nature of such litigation, and as so many of the litigants would be unrepresented, a flexible 'guide only' approach, where the judge would have a wide discretion, depending on the circumstances of the case, would be best.

The applicant would probably be the moving party, carrying the onus of establishing their entitlement to the visa. Alternatively, the Minister might be the moving party carrying the onus of showing that the applicant was not entitled to a visa. This author's own preference, again given the nature of this sort of litigation, would be for the enabling legislation to specifically do away with the onus of proof, and give the trial judge a wide discretion to determine all matters of practice and procedure in each case.

There would be many benefits to the new process. First, it would be discernible to even the unrepresented litigant, who would not have to deal with counterintuitive judicial processes which barred them from pleading and arguing the factual substance of their case. A judge would listen to them and make decisions on the basis of what they said, not on the basis of impenetrable concepts like 'privative clause' and 'jurisdictional error'. They would also not have to deal with the other counterintuitive concept that they could win in a court, but the court still could not grant them a visa.

They would not have to pass through up to nine processes, only to be granted the right to start all over again. They would not have to grapple with why they might have to go back to the Tribunal two or three times, or pass through the same court more than once. They would not find themselves locked in an unfathomable system for five or 10 years, or more. The litigation would be over in a normal timeframe which would be predictable and controllable, and which legal advisors or court officials could anticipate and explain to an applicant. Legal advisors would also be able to explain all the other aspects of the process to the litigant without any more difficulty than any lawyer to any client in any 'normal' sort of litigation.

The MCA process would not ameliorate other well-known difficulties arising from the trauma of seeking asylum in a strange land, following upon possible trauma in the land they have fled, and having to deal with an unknown legal system, in a language most do not have. But these barriers would not be compounded by the arcane, frustrating and Kafkaesque nature of the current system. Justice would be seen to be done by the applicant, who would be far less likely to feel confused or ignored.

Judges would not be hamstrung by the artificiality of always having to distinguish merits from legality, and of carrying the impossible burden of trying to explain that distinction to unrepresented litigants. They, and those who appear before them, would have the benefit of knowing that decisions are final. And last, but not least, savings to the applicant and to the public purse would be significant.

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[45]Subject of course to the well-known but rare circumstances where a matter may be re-opened, such as pursuant to the slip rule or for fraud on the Court. Subject also to a party seeking special leave to appeal to the High Court.