

ADMINISTRATIVE LAW

CASE NOTES



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Contents

<i>Kioa v West</i> (1985) 159 CLR 550.....	3
<i>Re Minister for Immigration and Multicultural Affairs; Ex parte Lam</i> (2003) 204 CLR 1.....	8
<i>Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship</i> [2011] HCA 32	13
BIBLIOGRAPHY	17

Sample

***Kioa v West* (1985) 159 CLR 550**

Source: <http://www.austlii.edu.au/au/cases/cth/HCA/1985/81.html>

Court details: High Court of Australia

Procedural history: A decision was made under the *Migration Act* 1958 (Cth) that Mr and Mrs Kioa (illegal immigrants) were to be deported. Mr and Mrs Kioa appealed this decision under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) in the Federal Court of Australia. The Federal Court upheld the decision of the delegate under the *Migration Act*, dismissing the Kioas' appeal. The decision was once again affirmed on appeal to the Full Court of the Federal Court of Australia. The Kioas' then appealed to the High Court of Australia.

Facts:

Mr Kioa, a Tongan citizen, arrived in Australia in September 1981 with a student visa, permitting him to stay in Australia until 8 December 1981. Mrs Kioa, also a Tongan citizen, arrived in Australia in November 1981, also on a temporary permit, which allowed her to stay in Australia until 31 March 1982. Mr and Mrs Kioa's second child, Elvina was born in Australia.

Upon the expiration of Mr Kioa's permit, he applied to the Department of Immigration and Ethnic Affairs (the Department) for an extension of his permit. After a period of delay, an officer of the Department attempted to contact Mr Kioa at the address that he had given the department, but was unable to do so. It later transpired that Mr Kioa had left the address he had given the department, but still remained in Australia illegally. In breach of the conditions of his original temporary visa, he had also commenced employment in Victoria. At no point did Mr Kioa attempt to contact the Department and inform them of the changes in his address and circumstances.

Mr Kioa was arrested on 25 July 1983. A delegate of the Minister for Immigration and Ethnic Affairs then ordered the deportation of Mr and Mrs Kioa (whose visa had also expired and was not renewed) under s 18 *Migration Act*. Mr Kioa appealed this decision to the High Court of Australia.

In making his decision, the Minister's delegate relied on a written submission by an officer of the Department recommending Mr Kioa's deportation for the following reasons:

- Mr Kioa was heavily involved in interacting with, and assisting other illegal immigrants, which was very concerning for the Department and also seemed to indicate an intent undermine Australia's border protection laws;
- Mr Kioa claimed that he became an illegal immigrant because a cyclone in Tonga necessitated him supporting his family there to rebuild, which he was better able to do from Australia. However this cyclone hit Tonga at least three months after his original permit had expired;
- Mr Kioa's actions in failing to notify the Department of his change of address indicated he had no desire to seek a legitimate extension of his stay;
- Mr Kioa did not honour his undertakings contained in his student visa (to leave the country after its expiration); and
- Mr Kioa and his wife could not be said to have been absorbed into the Australian community.

Mr Kioa sought the reasons for the decision under s 13(1) *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('The *ADJR Act*'). In the reasons given, no mention was made of his alleged involvement with other illegal immigrants.

Issues:

Mr Kioa appealed the decision on the basis that the delegate failed to observe the rules of natural justice, by not giving Mr Kioa the chance to answer the negative allegations against him. He argued that the enactment of the *ADJR Act* s 5(a), which stipulates that a breach of the rules of natural justice amounts to a ground of review; and s 13(1) which facilitates the giving of reasons by the decision maker, necessarily means that a decision maker must now always follow the rules of natural justice.

The High Court was tasked with first determining whether the rules of natural justice had to be followed in the given situation, and if so, whether they had been breached.



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