



## Some myths about the differences between: Judicial Review and Merits Review Natural Justice or Procedural Fairness and Natural Law

### Myth 1

***Judicial review* by a court of a government decision is better than a *merits review* of the same decision.**

### Fact

A *merits review* of a decision permits a much wider enquiry of the correctness of a decision than *judicial review* by any court (including the High Court). Courts' powers to review executive decisions are very limited.

*Judicial review* does not extend beyond an enquiry of the exercise of a decision maker's powers and its processes. *Judicial review* is not directly concerned with the ultimate merits or outcome of a decision.

Courts do not have the power to enquire into a decision maker's findings of fact, its reasoning processes or the weight it gave to the evidence. Courts cannot take into account evidence that was not before the original decision maker. Courts cannot interfere with the decision maker's findings as to whether a person is a truthful witness, or whether one piece of country information or evidence should be accepted over another.

A merits review provides a fresh look at a person's claims to be a refugee, in the light of country and other information. A merits review may take into account any evidence, including material that was not before the original decision maker.

Example of factual errors which courts cannot cure are the use of incorrect or misleading country information (eg that return to a country is safe); findings that a person is not from the country he or she is in fact from; findings that an honest person should not be believed or findings that genuine documentary evidence provided by a person is false.

### Terms

*Judicial review* is a review by a court of a decision by the executive arm of government. *Judicial review* is limited to an inquiry of legal error in the exercise of power by the decision maker. *Judicial review* is to be distinguished from merits review. Federal courts must be given power (ie jurisdiction) by the legislative arm government (ie the parliament) to carry out *judicial review* of executive decisions. The parliament can take away any jurisdiction it has given the courts. The parliament cannot take away the High Court's power of *judicial review* as this derives from the Commonwealth Constitution.

*Merits Review* is non-judicial review of an executive decision of government. Ideally a *merits review* is

carried out by a body which is independent of the original decision maker, for example an independent administrative tribunal. *Merits review* is a review of the factual correctness of a decision and is not limited to identifying legal errors.

### Myth 2

**If a decision is made according to *natural justice* or *procedural fairness* it is fair.**

### Fact

Even if a decision is made according to the requirements of *natural justice* or *procedural fairness* it may simply be wrong (and so unfair) for being based on incorrect assumptions of fact and untruths. This kind of unfairness can only be cured by *merits review*, not by *judicial review*. This myth derives from a confusion of *natural justice* (which is the same as *procedural fairness*) with natural law.

### Terms

The terms *natural justice* and *procedural fairness* mean the same thing. The terms are used interchangeably by the courts.

*Natural justice/procedural fairness* is concerned with the processes followed by a decision maker and not with the outcome of the ultimate decision.

The basic requirement of *natural justice/procedural fairness* (where it has not been limited by the parliament) is that a person should be told of relevant issues and any adverse evidence and that the person be given a chance to make his or her case to a decision maker who has an open mind.

Even if *natural justice/procedural fairness* is observed a decision maker may still mistake facts which cannot be cured by a court on *judicial review* though these mistakes can be cured on a *merits review*.

The term *natural law* is not the same as the term *natural justice*. *Natural law* is a legal philosophy which holds there is a natural order which is governed by its own laws. As a legal philosophy *natural law* is opposed to *legal positivism*, which holds that laws are a human creation and are not a given of any natural order.

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