DEVELOPMENTS IN JUDICIAL REVIEW IN THE CONTEXT OF IMMIGRATION CASES

A Comment Prepared for the Judicial Conference of Australia's Colloquium 2003

DARWIN - 30 MAY 2003

John Basten QC

Dr Crock has provided an insightful account of the development of immigration law in Australia, as it relates to persons seeking protection in this country under the Refugees Convention. This comment addresses three developments in administrative law in recent years which have occurred to a significant extent in judicial review cases of refugee applications.

Procedural fairness

The first concerns the modern development of procedural fairness as a factor conditioning the valid operation of administrative decision-making. In two cases handed down in 1977, the High Court held that the absolute discretion conferred on the Minister to deport prohibited immigrants was not conditioned by any obligation to accord procedural fairness.[1] That approach was reversed, some 8 years later, in *Kioa v West*.[2] The primary basis on which those in the majority in *Kioa* felt able to distinguish *Salemi* and *Ratu* was that the *Migration Act* 1958 (Cth) had been amended in the intervening years so as to permit the grant of a visa on particular grounds, the effect of which would be to remove the person affected from the category of a prohibited immigrant. Some members of the Court also placed weight on the commencement of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), which had commenced shortly after the decisions in *Salemi* and *Ratu* and which imposed on the Minister an obligation to provide reasons for his or her decisions.[3] Broadly speaking, the Court in *Kioa* rejected an argument that the inclusion of breach of natural justice as a ground of review in s.5(1) of the AD(JR) Act rendered decision-making generally subject to an obligation to accord natural

---

1 *Salemi v MacKellar [No. 2]* (1977) 137 CLR 396 and *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461.
2 (1985) 159 CLR 550.
3 AD(JR) Act s.13.

justice or procedural fairness. However, a reading of the judgments of the majority, taken together, suggests in clear terms that changes in the membership of the Court over the intervening years (and perhaps other factors) had resulted in a more vigorous recognition of the importance of procedural fairness as a condition of valid decision-making. As Aronson and Dyer note[4] *Kioa* was a "seminal decision" in the sense that it established a broad "threshold test" for the operation of procedural fairness. Indeed, the authors suggest that by the time of *Haoucher v Minister for Immigration and Ethnic Affairs*,[5] only 5 years later, the threshold test had virtually disappeared as a constraint on the operation of the requirement. They refer to the passage in the judgment of Deane J in *Haoucher*, quoted with approval by the joint judgment in *Annetts v McCann*[6] in support of that view. His Honour had said in *Haoucher*:[7]

> *"The law seems to me to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making … ".*

Legitimate expectations

The second point is, at least in part, a sub-set of the first. The judgments in *Kioa* set in motion a debate as to the usefulness of the concept of "legitimate expectation" as a basis for invoking an obligation to accord procedural fairness. Reliance on that concept is sometimes thought to have reached its high point in the judgments of three members of the Court in *Minister for Immigration and Ethnic Affairs v Teoh*.[8] Thus, three members of the Court (Mason CJ, Deane J and Toohey J) relied on Australia's accession to the Convention on the Rights of the Child for the contention that a decision-maker could not fail to take the best interests of the child into account as a "primary consideration" without giving the persons affected an opportunity to be heard in relation to that issue.

That approach was seen as revolutionary at the time, in part because it imposed an objectively determined obligation on the decision-maker, in circumstances where the

---

4 *Judicial Review of Administrative Action* (2000, 2nd ed) at pp.310-313.
5 (1990) 169 CLR 648.
6 (1990) 170 CLR 596 at 598.
7 Ibid at 653.
8 (1995) 183 CLR 273.

persons concerned had no subjective expectation of the kind.[9] The terminological dispute, however, is not at the centre of the debate: rather, the critical issue, which was reagitated quite recently in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,[10] was the question whether, as in England, the concept of legitimate expectation might have "a substantive, as distinct from procedural, operation".[11]

As noted by Hayne J, the concept of a "legitimate expectation" has been used to identify cases in which a decision-maker should give a person an opportunity to make representations,[12] to oblige a decision-maker to receive representations before departing from a policy or intended course of conduct which had been announced,[13] to identify the matters the decision-maker should take into account in making a decision and even to identify the decision to which the decision-maker should come.[14] In reference to the second category, his Honour made reference to *Ng Yuen Shiu*[15] and, in relation to the third category, *Teoh*.[16] Classification of cases as falling into one or other category may be problematic: however, the authority of *Teoh*, though questioned, has been left for reconsideration on another day.

Nature of material to be disclosed

This discussion leads to the third point referred to above, namely the concept of "relevant considerations" as a matter conditioning validity of decision-making. However, before turning to that topic, there are two further lines of authority concerning procedural fairness, arising from migration cases, which deserves attention. *Kioa* itself had involved adverse material concerning the activities of Mr Kioa personally, in relation to assistance said to have been provided to other illegal immigrants. The case left open the question whether an applicant for a visa should be accorded an opportunity to comment on material which might be adverse to his or her claim, but which did not relate to his or her personal circumstances. That question arose in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah.*[17] The Court upheld the existence of the obligation in the circumstances

---

9 The point was made in clear terms by McHugh J in dissent at 183 CLR, 314.
10 (2003) 77 ALJR 699.
11 Ibid at [66] (McHugh and Gummow JJ).
12 Ibid at [116] - in effect the threshold test.
13 Ibid at [117].
14 Ibid at [118].
15 [1983] 2 AC 629 at 637.
16 Ibid at [120].
17 (2001) 206 CLR 57.

presented, although different views were taken as to the operation of the statutory scheme in relation to the primary decision which was under review in that case.[18] The analysis accepted by the majority was revisited by McHugh J in *Muin and Lie v Minister for Immigration and Multicultural Affairs*.[19]

Finally, a challenge based on an alleged breach of procedural fairness formed the basis of the questions raised for the High Court in *Plaintiff S157/2002 v Commonwealth of Australia*.[20] In that case, the plaintiff sought to challenge the validity of ss.486A and 474 of the *Migration Act*. He sought relief on the basis that the time limitation in s.486A and the privative clause contained in s.474 would otherwise preclude his application for relief under s.75(v) of the Constitution. As was noted by the joint judgment:[21]

> *"A draft Order Nisi attached to the case stated reveals that he would have challenged, or would challenge, the decision on the ground that it was reached in breach of the requirements of natural justice and would have sought, or would seek, relief by way of prohibition, certiorari and mandamus, but not by way of injunction. Breaches of the requirements of natural justice found a complaint of jurisdictional error under s.75(v) of the Constitution."*[22]

In that context, their Honours ultimately noted:[23]

> *"Decisions which are not protected by s.474, such as that in this case, where jurisdictional error is relied upon, will not be within the terms of the jurisdictional limitations just described; jurisdiction otherwise conferred upon federal courts by the law specified in s.476(1)*[24] *in respect of such decisions will remain, to be given full effect in accordance with the terms of that conferral."*

---

[18] The *Migration Act* contains a two-level process for considering the merits of visa applications: primary decisions (made by the Minister's delegates) are reviewable by a Tribunal. Judicial review is generally only available in relation to Tribunal decisions.

[19] (2002) 76 ALJR 966.

[20] (2003) 77 ALJR 454.

[21] Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [45].

[22] The last proposition is footnoted by reference to *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

[23] At [96].

[24] Which included s.39B of the *Judiciary Act*.

To similar effect, Gleeson CJ noted:[25]

> *"Subject to any such statutory provision, denial of natural justice or procedural fairness will ordinarily involve failure to comply with a condition of the exercise of decision-making power, and jurisdictional error."*

His Honour continued:[26]

> *"In the present context, there is a question whether a purported decision of the Tribunal made in breach of the assumed requirements of natural justice, as alleged, is excluded from judicial review by s.474. The issue is whether is such an act on the part of the Tribunal is within the scope of the protection afforded by s.474. Consistent with authority in this country, this is a matter to be decided as an exercise in statutory construction, the determinative consideration being whether, on the true construction of the Act as a whole, including s.474, the requirement of a fair hearing is a limitation upon the decision-making authority of the Tribunal of such a nature that it is inviolable."*

His Honour answered the question so posed in the following terms:[27]

> *"The principles of statutory construction stated above lead to the conclusion that Parliament has not evinced an intention that a decision by the Tribunal to confirm a refusal of a protection visa, made unfairly, and in contravention of the requirements of natural justice, shall stand so long as it was a bona fide attempt to decide whether or not such a visa should be granted. Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness."*

Relevant considerations

The principles governing what are relevant considerations may be sourced, for present purposes, to the judgment of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.[28] There, his Honour identified the relevant ground of review as a

---

[25] Ibid at [25].
[26] Ibid at [26].
[27] Ibid at [37].
[28] (1986) 162 CLR 24 at 39.

failure to take into account "a consideration which [the decision-maker] is bound to take into account in making that decision … ." Such a failure may readily be identified as an error of law, because it will be a legal constraint which has been contravened, a factor which needs to be borne in mind given the imprecision of the concept of "relevant consideration". Thus, mandatory considerations cannot helpfully be identified in the abstract by reference to, for example, the requirements of the Refugees Convention. Those requirements have no immediate content until they are invoked by an applicant, either expressly, or by implication, by the reliance on asserted facts. As noted by the joint judgment in *Minister for Immigration and Multicultural Affairs v Yusuf* [29] following *Craig v South Australia,*[30] where an administrative tribunal *"falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material … and the Tribunal's exercise or purported exercise of power is thereby effected, it exceeds its authority or powers."*

As their Honours noted:

> *"The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material."*

Gaudron J made a similar point:[31]

> *"For example, the failure to make a finding on a particular matter raised by the applicant may, in some cases, reveal an error of law for the purposes of s.476(1)(e) of the Act."*

However, immediately it is accepted that a decision can be invalid for failure to give proper consideration to a matter raised by the applicant, there is a risk that a court exercising the powers of judicial review, may stray into the area of merit review of the decision. That error will be avoided if the focus of the court remains squarely upon the underlying principle, namely that failure to consider particular material reveals an error of law, and, depending on the jurisdiction being exercised, an error which may go to the validity of the purported exercise of power.

---

[29] (2001) 206 CLR 323 at [82].
[30] (1995) 184 CLR 163 at 179.
[31] Ibid at [37].

As Hayne J noted in *Lam*, reference to "legitimate expectations" has been used as a means of providing substantive content to the matters for consideration by a decision-maker. While the concept may provide no useful guidance in that context, the exercise nevertheless remains an integral part of judicial review. Where the legislation does not identify, exhaustively, the relevant considerations, the standard approach has been that identified by Mason J in *Peko-Wallsend* in the following terms:[32]

> *"If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act."*

Teoh was not in terms a case about relevant considerations: the best interests of the child were not a required primary consideration; rather, the requirement was that notice be given before their status be downgraded. Thus the case was not a relevant consideration case.[33] In a separate judgment in *Teoh*, Gaudron J expressed the view that it was at least arguable that "citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration … ".[34] However, her Honour did not pursue the point because the case had been argued and therefore fell to be decided by reference to the requirements of natural justice. Accordingly, it remains to be determined whether the best interests of the child should properly be understood, at least in certain contexts, as a relevant consideration, which must be taken into account by a decision-maker. That is not to say that the concept of "legitimate expectations" can, or should, be used to answer that question.

The relevance of a privative clause

Further questions now arise, after *S157*, concerning the extent to which the operation of s.474 (being the standard *Hickman*-type privative clause) may condition the operation of principles enunciated in *Craig* and *Yusuf*.

---

[32] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-86) 162 CLR 24 at 39-40.
[33] A closer analogy may be found in *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374.
[34] Ibid at 304.

The reasoning in *S157* was, at one level, straightforward, but at another replete with ambiguity. At a straightforward level, the Court held that the definition of a "privative clause decision" in the *Migration Act* should be taken at face value. Section 474(2) identified such a decision as "a decision … made … under this Act". That terminology was not apt to include decisions purportedly made under that Act, but in fact made in excess of power or in breach of the legal constraints imposed on the exercise of the relevant power. The joint judgment stated, by reference to an earlier judgment in *Minister for Immigration and Multicultural Affairs v Bhardwaj*:[35]

> *"This Court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'. Thus, if there has been jurisdictional error because, for example, of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the decision in question cannot properly be described in the terms used in s.474(2) as 'a decision … made under this Act' and is, thus, not a 'privative clause decision' as defined in ss.474(2) and (3) of the Act."*

On this basis, the privative clause was saved from constitutional invalidity, because it did not purport to interfere with the jurisdiction conferred on the High Court by s.75 of the Constitution. The effect of s.474 is thus to require "an examination of limitations and restraints found in the Act … to determine, in those proceedings, whether, as a result of the reconciliation process, the decision of the Tribunal does or does not involve jurisdictional error … ".[36] However, their Honours appear to have answered that question by identifying a complaint of breach of procedural fairness as an appropriate "jurisdictional error" sufficient to invalidate the decision, if the allegation were made good at a factual level.

This approach leaves open an unresolved question as to the extent to which jurisdictional errors, of the kind identified in *Craig,* have operation so as to invalidate decisions made under the *Migration Act*. Insistence in the joint judgment that this question requires reference to the operation of s.474 suggests that there may be circumstances in which the operation of those principles will need to be adjusted. However, adjustment can occur in one of three ways. On the one hand, one can

---

[35] *S157* at [76], referring to (2002) 76 ALJR 598 at [51] (Gaudron and Gummow JJ), [63] (McHugh J), [152] (Hayne J).

[36] Ibid at [78].

simply dismiss a ground, such as failure to take into account a relevant consideration as being inconsistent with the kind of protection sought to be accorded by the privative clause. That was the kind of approach attempted in a statutory manner by s.476 of the old Part 8 of the *Migration Act*, which purported to have precisely that effect. It efficacy was always doubtful, and was ultimately demonstrated to be built on sand by the judgment in *Yusuf*. The problem was that the categories of error between which distinctions were drawn in the old s.476 were not mutually exclusive. Accordingly, an attempt to limit the operation of the improper purpose ground was undermined by the ability, in most cases, to recategorise the challenge as one involving an error of law.

Secondly, it may be possible to reconstrue what might have been mandatory considerations, so as to treat them as directory. Again, because the concept of a relevant consideration, can be addressed at different levels, this approach is theoretically open. However, it runs into difficulties when one seeks to identify relevant considerations by reference to the highly detailed and specific statutory criteria. Those criteria, at least when combined with the non-discretionary obligations contained in s.65 of the *Migration Act* in relation to the grant or refusal of a visa, make it doubtful that such an approach would have a significant effect. Indeed, the decision in the companion case of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*[37] gives some support to that view. Thus, the approach of the majority judgment was to inquire whether the decisions of the Tribunal and the Minister "were infected by jurisdictional error" and were therefore not privative clause decisions.[38] The particular ground turned on the construction of certain provisions in the Regulations, which were deemed to involve alternative bases upon which a protection visa might be sought. The majority placed reliance on the failure of the prosecutors (through ignorance) to base their application on family membership, rather than pursuing primary claims under the Convention. The conclusion was, accordingly:[39]

> *"There was no misapplication of the relevant criteria by the Tribunal and no jurisdictional error."*

---

[37] (2003) 77 ALJR 437.
[38] Ibid at [15].
[39] Ibid at [32].

In relation to an alleged failure to take account of a relevant consideration, namely the content of documents on the Tribunal file which demonstrated the alternative basis for a visa, the majority held:[40]

> *"By contrast, the relevant considerations in the present case concern the satisfaction by the prosecutors (or otherwise) of the criteria for the grant of temporary protection visas. That returns one to the issue considered above, namely whether there was a failure to exercise jurisdiction by the absence of consideration of the allegedly material fact that the spouse of the first prosecutor held a temporary protection visa and was an applicant for a permanent protection visa. As indicated, that issue should be decided adversely to the prosecutors."*

The minority (Gaudron and Kirby JJ) who adopted a different construction of the regulation, accepted that s.474 did not operate to preclude relief, for the reasons given in *S157*.[41]

A third approach to the operation of s.474 is to look for a "manifest" defect in jurisdiction. This approach was discussed, and at least impliedly adopted, by the Chief Justice in *S157*. While noting a level of imprecision in the kinds of labels adopted in earlier judgments dealing with privative clauses, his Honour noted that they conveyed an idea which had been accepted in relation to appellate judicial power, that required differing degrees of strictness in the scrutiny of lower court decisions. Similar ideas have been applied in relation to constitutional review in the US Supreme Court and in relation to judicial review generally, by the Canadian Supreme Court, over long periods. Those Courts in particular have developed a significant jurisprudence in relation to the appropriate level of scrutiny in different circumstances. However, it was not a matter which called for detailed exposition in *S157* and will no doubt be developed further in later cases.

The joint judgment did not give express consideration to that issue. Callinan J did so, significantly, by reference to procedural fairness. Thus his Honour noted:[42]

---

[40] Ibid at [40].
[41] Ibid at [61].
[42] Ibid at [159]: see also [160].

> *"It may be, for example, that to attract the remedies found in s.75(v) of the Constitution when jurisdictional error is alleged, no less than a grave, or serious breach of the rules of natural justice will suffice, a matter which it is unnecessary to decide at this stage of these proceedings."*

This comment may require consideration of the limits of the doctrine of procedural fairness enunciated in *Aala*, where degrees of seriousness were not countenanced. However, that decision did not involve legislation containing a privative clause.

The jurisprudence surrounding the Refugees Convention in Australia is far from settled in several important areas. Further, it has provided the focus for significant developments in related areas, particularly constitutional review of administrative decisions and judicial review generally. In part that has been because, until the new Part 8 took effect, the jurisdiction of the Federal Court was limited in particular respects. In the 13 years from the decision in *Kioa* until the appointment of the present Chief Justice there was, on average, one decision of the High Court each year, involving immigration matters. In the last four years the numbers of Full High Court judgments have increased several-fold. For example, there were four Full Court judgments handed down in the first three months of this year, a figure which is not out of line with the numbers in the previous two years. There have also been numerous decisions of single justices in the Court's original jurisdiction.

Finally, to turn from the specific focus on migration decisions, it is clear that some of the principles developed in this area will have operation beyond the particular field of judicial review. For example, the obverse of the failure to take account of relevant considerations, namely reliance upon irrelevant considerations, was identified some years ago as having operation in fields as disparate as constitutional and discrimination law.[43] Similarly, the relevance of equitable principles in the operation of judicial review has also been the subject of comment over the years.[44] These are not topics for comment tonight. However, the development of a coherent national jurisprudence requires a recognition of the relevance of developments in one area of

---

[43] See *Street v Queensland Bar Association* (1989) 168 CLR 461 at 571 (Gaudron J) and at 581 (McHugh J); see also *Castlemaine Tooheys Ltd v South Australia* (1989-90) 169 CLR 436 at 478.6 (Gaudron and McHugh JJ).

[44] See, eg, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [24]-[31] and *City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at [17]-[22].

the law to developments in other areas. Which is not, of course, to ignore the limitations of analogical reasoning.