ATTORNEY-GENERAL (NSW) V QUIN AND THE LIMITS ON THE EXECUTIVE'S RIGHT TO CHANGE ITS MIND

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The High Court's decision in *Attorney-General (NSW) v Quin*[1] contains fascinating discussion on a number of issues relevant to modern administrative law. These include Brennan J's doubts whether it is appropriate to seek judicial review with respect to advice tendered to the Governor (at 26); and his stress upon the need for caution in the making of declarations in administrative law when the availability of a substantive remedy is doubtful (at 31). The case also contains strong statements against confusing administrative law review and review on the merits; and a scattergun of positions about the role of legitimate expectation in public law.

This note is however confined to the comments in the case about the legal limitations upon the Executive's right to change its mind.

The key provision in the *Local Courts Act 1982* simply stated that 'the Governor may, by commission under the public seal of the State, appoint any qualified person to be a Magistrate' (s12). Initially the Executive decided not to appoint five of the 101 former magistrates in circumstances which were held in *Macrae's Case*[2] to involve a denial of natural justice. Subsequently the Attorney-General effectively undertook to ensure that the applications of the excluded magistrates would be considered on their merits by a fresh panel and excluding the Briese allegations of particular unfitness that had led to the *Macrae* decision unless an opportunity to respond to them was given. The Government case was that the decision in *Macrae* went no further than this and the majority of the High Court so held.

In 1984 the decision had been taken to appoint all serving magistrates other than the five plaintiffs in *Macrae*. The reason for excluding those plaintiffs was that the Government acted on specific adverse comments without giving the plaintiffs any opportunity of responding. In 1987 the Government announced that it would permit the excluded magistrates to apply but that it intended to appoint the most suitable persons offering without any special regard for the position of the former magistrates. This involved a change of the criteria for exercise of the otherwise general discretion to appoint 'any qualified person'. Mason CJ and Dawson J held that the Government was able to change the ground-rules in this way since the new decision was still within the scope of the statutory discretion. In doing so their Honours discussed the extent of the Executive's right to change its mind. Each stressed the general proposition that an unfettered statutory liberty could not be fettered by reference to an earlier practice or even an earlier indication that particular criteria would be applied in the selection process. In particular the Chief Justice cited a number of cases in support of the proposition that:

> The executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or

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> exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power (at 17).

He pointed out that:

> this principle extended beyond legislative powers and duties to common law powers and functions of the Crown or the Executive when they involve the making of decisions in the public interest (at 18).

What is interesting however is that various justices noted four possible limits upon the Executive's power to change its mind notwithstanding its liberty to exercise public duties and discretions.

The first, specific to the type of case involved in *Quin*, was quickly dismissed by the Chief Justice when he noted (at 16) that 'there is nothing in the materials which would support any suggestion that the change of policy was motivated by a desire to take into account the adverse materials regard to which gave rise to the decision in *Macrae*'. This statement is slightly ambiguous in that it leaves open whether the Chief Justice was concerned about a denial of natural justice arising from the lingering effect of the Briese allegations, or about the more direct contravention of the *res judicata* established by the declaration in *Macrae* itself. Perhaps both were encompassed. Neither of the other two justices in the majority seemed to advert to this matter, although each was at pains to confine the decision in *Macrae* to a past breach of the obligation of natural justice (Brennan J at 32, Dawson J at 50).

By contrast the dissenting justices saw the Government's change of policy in 1987 as contravening the decision in *Macrae*. To them further relief as sought by Mr Quin was called for in order to provide (in Deane J's words at 48) 'partial protection from the continuing injustice of a denial of procedural fairness' (see also Toohey J at 69). Citing *FAI Insurances Ltd v Winneke*[3] the dissentients noted the capacity of the Court to mould its relief consequent upon a finding of denial of natural justice in a way which will prevent the consequences of that denial becoming entrenched. Two possible methods of such entrenchment which were mentioned by Deane J were the unavoidable delays of litigation and the unilateral decision of the Executive to change the rules of the game (at 46). It is interesting that his Honour noted, without comment, that the law had not recognised a cause of action for damages for denial of procedural fairness. This issue is discussed at length in an interesting article by Professor Enid Campbell.[4]

A second and more general limitation upon the Executive's legal right to change its policies is found in the recognition by Mason CJ (at 18 and 23) and Toohey J (at 68) that there could be circumstances in which an estoppel could arise against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. This was said to derive from the fact that the public interest necessarily comprehends an element of justice to the individual. The Chief Justice noted the observations of Lord Denning in *Laker Airways v Department of Trade*[5] which supported this notion and the criticism of it by Gummow J in *Minister for Immigration v Kurtovic*.[6] Although not cited by his Honour, this idea of some limited role for estoppel in public law matters may be traced back to his discussion in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*.[7]

In a passage that would I think be anathema to Brennan J and Dawson J,

Mason CJ (at 23) contemplated that legitimate expectations of receiving a benefit or privilege might possibly, in an appropriate case, give rise to a right to substantive protection from the court provided that the court did not thereby cause detriment to the public interest intended to be served by the exercise of the relevant statutory or prerogative power. Toohey J is also clearly of this view because he cited with approval a statement from *Attorney-General (Hong Kong) v Ng Yuen Shiu*[8] (cited in *Quin* at 68) that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty'. What is interesting is that Toohey J applied this passage outside of a case involving a promise of procedural fairness (as in the *Attorney-General (Hong Kong) Case*) to a case where the promise was of a substantive nature (ie to treat former magistrates in a special category). He, unlike the majority justices, saw no difficulty in point of public policy in holding the Executive to this promised policy: see also Deane J at 48-49. It is not clear whether Deane J would go this far, since his decision in *Quin* seems to be based on narrower notions of *res judicata* flowing from the earlier case of *Macrae*. However other indications suggest that he could give support to the notion of fairness having a substantive content.

This concession of a judicial right to perform yet another balancing act will doubtless be an encouragement for those judges who have few qualms about second-guessing the Executive. There have already been some indications that the window of opportunity thus opened in these dicta will be seized upon. In the case about the Woolloomooloo Finger Wharf[9] Cole J saw no difficulty with the proposition that the State would have been liable in damages had it been party to a contract with an implied term that the State promised to override a planning refusal of the Sydney City Planning Committee.

A third rider noted by the Chief Justice, but left for examination on an appropriate occasion, was the 'conflict of authority upon the question whether a person who is adversely affected by a change of policy has a legitimate expectation which enables him to make representations' (at 24). Dawson J expressed the view (at 60) that it would only be in circumstances of a special kind that an individual would be entitled to a hearing before a departure from an administration policy affecting his other interests occurred. This proved to be a minority position when a differently constituted High Court heard *Haoucher's Case*.[10]

A fourth possibility of putting a break upon the Executive's right to change its mind was adverted to by Dawson J when he distinguished the case where 'a particular decision involves, not a change of policy brought about by the normal processes of government decision making, but merely the selective application of an existing policy in an individual case' (at 60). That was not an issue in *Quin*. However the open-endedness of notions that are based on a court's perception of the 'normal processes of government decision making' and 'selective application' of criteria, especially coming from Dawson J, shows the fecundity of administrative law. What to one judge might be seen as unfairness, to another will be lack of proportionality, and to another unreasonableness. In any case we are light years away from the time when, as one judge wrote to Lord Atkin after *Liversidge v Anderson*:[11]

> Bacon, I think, once said the judges were the lions under the throne, but the House of Lords has reduced us to mice squeaking under a chair in the Home Office.

Endnotes

1 (1990) 170 CLR 1.

2 (1987) 9 NSWLR 268.

3 (1982) 151 CLR 341.

4 'Liability to compensation for denial of a right to fair trial', (1989) 15 *Monash Law Review* 383.

5 [1977] QB 643 at 707.

6 (1990) 92 ALR 93 at 121-122.

7 (1977) 139 CLR 54 at 75.

8 [1983] 2 AC 629 at 638.

9 *Pivot Group Ltd v State of NSW* (unreported, 17 July 1990).

10 (1990) 169 CLR 648.

11 [1942] AC 206.