NARROWING OF JUDICIAL REVIEW IN THE MIGRATION CONTEXT

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Introduction

I thank the Australian Institute of Administrative Law for the invitation to speak on the topic of "Narrowing Judicial Review in the Migration Context", an issue which has the potential to be very significant in the area of administrative law.

My paper details the history of attempts by governments to limit judicial review of migration decisions, why narrowing has been considered necessary and reasonable, and why the government now seeks a further narrowing of judicial review by means of the enactment of a privative clause.

Today movement of people between the countries of the world is occurring on a scale never before seen. There are massive numbers of people who seek to resettle in Australia and they seek to do so for a wide variety of reasons.

The issue of human population movement is an issue that governments and communities cannot ignore.

Under our humanitarian program Australia has an outstanding record in fulfilling its international humanitarian obligations by resettling refugee and humanitarian entrants within our borders.

But our ability is finite. It is essential in the context of specific funding in the budget for humanitarian entrants for a limited number of places, that these places go to persons genuinely in need of Australia's protection. It is my intention that bona fide applicants will be accepted. I do not intend to see refugees refouled and I expect my Department and the Refugee Review Tribunal to discharge this responsibility.

But I am concerned about abuse of the onshore refugee/asylum application process. I have particular concerns in relation to those who travel to Australia on a visitor visa, with the necessary documents issued by their own government to travel here, and who seek to claim refugee status in Australia merely to enable them to gain work rights or access to Medicare.

To give you an idea of the increasing problem, this year, we expect in the order of 10,000 onshore claims for refugee status and yet ten years ago, under the former government, we saw in the order of 500 claims a year.

Immigration is probably the only area of administrative law where delaying a final determination is beneficial to the applicant, as they remain in Australia while the case is being processed. Delay is therefore an end in itself.

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Decisions made in relation to applicants are frequently being reviewed by both the tribunal and the courts, resulting in what amounts to five tier decision making in a large number of cases:

- primary decision made by the Department
- Refugee Review Tribunal
- Federal Court
- Full Federal Court
- High Court

And at the end of the process the applicant is still able to access my ministerial discretion.

Given that around 49% of all migration cases withdraw before hearing, there are clearly a substantial number using the legal process as a means to extend their stay in Australia.

Much of the growth in applications for judicial review has come from the refugee area. I see this high level of litigation, particularly by onshore asylum seekers, as highly undesirable given the associated costs and delays, and for those in detention, significantly longer periods of detention.

Since 1993-94 there have been 10,008 decisions taken by my Department to refuse refugee status that have been affirmed by the Refugee Review Tribunal.

979 of these applicants have appealed to the Federal Court. 143 were sent back to the Tribunal for reconsideration and this resulted in 21 favourable decisions - only 21 decisions over a four period.

To give you an idea of the cost involved, over this four year period litigation would have cost my Department approximately $20 million. That does not include the cost of running the courts or of legal aid.

This means that each successful application cost around $1- million.

Suffice to say my non-compellable ministerial discretion costs far less than $1-million a case! I am also able to address the full merits of the particular case - a far wider power than the role of the courts in judicial review.

The assumption from these figures is that, while there are genuine applications, most applications are simply not bona fide. The abuse cost taxpayers millions of dollars, undermines public trust and disadvantages genuine applicants.

In part to address problems of abuse, a series of changes is proposed to both the merits and judicial review systems in the migration area. These changes are contained in the Migration Legislation Amendment Bills (nos. 4 and 5), which have passed through the House of Representatives and are currently awaiting debate in the Senate. Bill no 4 includes measures relating to merits review, and Bill no.5 contains a privative clause in relation to visa decisions.

History

The pre-1989 situation

I would like to now look at moves that have occurred in the past in an attempt to limit judicial review of migration decisions, beginning with an outline of the decision-making powers under the *Migration Act 1958* and the changes which have been made to the Act since 1989. The pre-December 1989 Act provided for very broad general discretions to grant and refuse visas and entry permits to applicants. These broad provisions were supplemented by departmental manuals which set out government policy and provided decision-makers with instructions on how to make decisions.

After substantial criticism by such bodies as the Administrative Review Council, Human Rights Commission (as it was then), the Committee to Advise on

Australia's Immigration Policies (CAAIP)[1] as well as the courts, that these provisions were too vague and did not set out the basis on which a person would be granted a visa, the legislation was significantly changed. In 1989 the government at that time amended the *Migration Act* to provide for a system of entitlements to visas and entry permits where an applicant met the criteria spelt out in regulations made under the Act. The policy manuals were replaced by the Migration Regulations, which for the first time set out the criteria for a visa or entry permit in legislative form, thus providing a fairer and more certain system for both applicants and decision-makers.

The 1989 amendments to the Act also provided, for the first time, a statutory merits review procedure for most migration decisions, by the Migration Internal Review Office (MIRO) and the Immigration Review Tribunal (IRT).

It was envisaged that, by removing the broad discretion of decision-makers, and replacing it with codified criteria for grant of visas, in conjunction with statutory merits review of certain decisions, recourse to judicial review would be less attractive. This did not prove to be the case. In the early 1980s the Federal Court received only about 30 applications for review of migration decisions each year. By the end of that decade this had increased to about 100 applications each year, and by 1992 it was almost 200 per year.

The *Migration Reform Act (1992)*

Since 1989 the process of reform has continued. The most significant recent reforms came into operation on 1 September 1994 with the commencement of the *Migration Reform Act 1992* or MRA. The most important features of this Act were:

- The introduction of a detailed statutory code of procedures for most primary decisions, setting minimum standards for dealing with visa applications;

- Replacement of the judicial review scheme under the *Administrative Decisions (Judicial Review) Act 1977* as well as s.39B of the *Judiciary Act* with a *Migration Act* specific judicial review scheme, which removed certain grounds of review such as the grounds of natural justice and unreasonableness;

- The extension of merits review to many decisions previously not covered by merits review - most significantly, the creation of the Refugee Review Tribunal (RRT) to provide merits review of refugee determinations.

The aim of these amendments was to provide a system which was, for both decision makers and applicants, fairer and more certain. It was also intended to increase the accountability of decision-makers as well as providing clarity for all on how applications would be dealt with.

It is useful to re-emphasise the previous government's expressed intentions in making these amendments. In his second reading speech the then Minister for Immigration and Ethnic Affairs, Mr Gerry Hand, said this:

> Under the reforms, decision making procedures will be codified. This will provide a fair and certain process in which both applicant and decision maker can be confident. Decision makers will be able to focus on the merits of each case knowing precisely what procedural requirements are to be followed. These procedures will replace the somewhat open ended doctrines of natural justice and unreasonableness.

The most important feature of the reform insofar as it related to judicial review was

the removal of the common law grounds for challenging decisions, of breach of the rules of natural justice and unreasonableness. Part 8 of the *Migration Act*, after the MRA and currently, now sets out the means and the grounds for the challenge to visa eligibility and cancellation decisions, and is the sole source of Federal Court jurisdiction in migration matters. However, the High Court retains its original jurisdiction to review decisions under the Constitution.

Section 475 provides that only certain decisions are judicially reviewable under the scheme. These are decisions of the IRT and the RRT, as well as any decisions relating to visas which are non-merits reviewable. This was designed to ensure that applicants with merits review rights exercised those rights prior to seeking judicial review.

Section 476 sets out the grounds for challenge. These are the *only* grounds on which a decision under the Act can be challenged in the Federal Court, and codify existing common law grounds of review. It is this section that removes the common law grounds of review of failure to comply with the rules of natural justice and unreasonableness from review by the Federal Court.

Common law natural justice has been replaced with the ground that procedures required by the Act were not followed. Critical to this ground is the prescription in the Act and regulations of a code of procedures to replace the common law principles of procedural fairness. The prescribed procedures contained in sections 44 to 140 of the *Migration Act* now set out the procedural standards for the grant and refusal of visas, consideration of an application for a visa and cancellation of a visa.

The MRA extended merits review to virtually all decision categories - in fact non-refugee cases currently get two tiers of merits review, a situation which will be altered by Migration Legislation Amendment Bill (no.4), which, as already noted, is currently before Parliament. As mentioned before, the judicial review scheme requires that applicants have exhausted all merits review options prior to challenging legality. Currently applicants have the opportunity of at least three considerations of their case for ordinary visa eligibility decisions and two for protection visa decisions. In most situations the person will have received an oral hearing at least once.

Provisions setting out the code of procedure, in conjunction with the disclosure provisions and merits review, would provide, the former Government believed, effective and comprehensive protection of the applicant's interests as well as providing decision makers with a standardised framework within which to operate. Again it was envisaged that with increased merits review, a more certain procedural framework, and reduced grounds of judicial review, there would be less need for applicants to seek judicial review, and hence fewer actual applications.

Problems with Part 8

The hope that increased merits review, in conjunction with more certain procedures and reduced grounds for judicial review, would decrease the number of applications for judicial review has not been fulfilled - applications for judicial review have in fact *increased* in number since the MRA was passed, and *continue* to trend upwards - 378 cases in 1994-5, 630 in 1995-6 and approximately 640 in 1996-7. Migration matters now make up 65% of the Federal Court's administrative law caseload.

The most recent figures indicate that litigation costs my Department in the vicinity of $7 million each year, and this does not include the cost of legal aid, nor

the courts' running costs. There is also evidence that delays associated with litigation are also growing - the average number of days between the date of application and judicial decision is now 337 for refugee cases as compared with 107 days in 1993-4, and 288 for non-refugee cases as compared with 259 days in 1993-4.

Much of the growth in applications for judicial review has come from the refugee area; that is, appeals from the RRT to the Federal Court. I see this high level of litigation, particularly by onshore asylum seekers, as highly undesirable given the associated costs and delays, and for those in detention, significantly longer periods of detention. I am also concerned that, given around 49% of applicants in all migration cases withdraw before hearing, there are a substantial number using the legal process as a means to extend their stay in Australia.

Further, all has not turned out as expected with respect to the operation of Part 8, as the Federal Court appears to be finding the means to incorporate common law grounds of review back into decisions of the Tribunals. This is despite the clear intentions of the Act. The means for doing this is via certain provisions, which were inserted into the Act with the 1989 and 1992 reforms (creating the merits review tribunals).

The most significant of these are sections 353 and 420 of the Act. These provisions require that the IRT and RRT respectively are to act according to "substantial justice and the merits of the case" when conducting their functions.

Since the introduction of Part 8, a large number of refugee-related cases have examined whether the requirement to provide "substantial justice" is a "procedure" which must be observed for the purposes of the Act. The argument has been that the "substantial justice" provision effectively requires that the RRT observe procedural fairness in making its decisions. This is despite the fact that the Act specifically excludes "natural justice" as a ground of review.

The Explanatory Memorandum for the *Migration Reform Act* states the following in relation to s.420 (then s.166C):

> Substantial justice" is used to emphasise that it is the issues raised by the case, rather than the processes of deciding it, which should guide the RRT in making its decisions. It is intended that the RRT will operate in an informal non-adversarial way that will facilitate applicants putting their own case in their own words.

In other words, s.420 was intended *to remove* RRT and judicial attention from "processes", and ensure that the RRT focuses on the merits of the case, allowing the applicant to tell *his or her* story. It was certainly not intended that s.420 be used as a "back door" method of requiring that procedural fairness be observed by the RRT.

Until the recent decision of the Full Federal Court in *Eshetu v MIMA*[2], judicial authority on the matter was nearly evenly split, perhaps with a slight majority of Federal Court authority favouring the position that provision of substantial justice was *not* a "procedure" for the purposes of the Act. The Full Federal Court in *Eshetu* appears to have found that this *is* such a "procedure", and found that the RRT had denied substantial justice to the applicant. While later cases have accepted *Eshetu* as being authoritative on this issue, special leave to appeal to the High Court has been sought.

The case of *Amarjit Singh v MIMA*[3] also extended the operation of s.420 to instances of apprehended bias, and found that in the case of an applicant with a second application before the RRT, "substantial justice" required that the RRT for the second hearing be constituted by a

different Member. This decision was made despite the fact that the Act removes the ground of apprehended bias from judicial review, replacing it with actual bias, which was not alleged against the Member who heard both cases.

Thambythurai v MIMA[4] may have expanded the scope of these provisions even further. Finkelstein J confirmed the position that provision of substantial justice is a "procedure" for the purposes of the Act. Regarding the content of "substantial justice", His Honour preferred the view that it imposes only one obligation, and that is "an obligation to act in a manner Deane J in *Australian Broadcasting Tribunal v Bond*[5] referred to as 'acting judicially'." The exact extent of this duty would vary from case to case, but it would normally include:

- the absence of actual or apprehended bias
- according an appropriate opportunity to be heard
- regard be paid to material considerations and immaterial or irrelevant considerations be ignored, despite the fact that this ground is also excluded by the Act
- decisions be made on the basis of logically probative evidence, despite the fact that this ground is limited by the Act.

In summary, the current position is that the reforms made by the MRA and the restrictions upon judicial review contained in Part 8 of the Act have not been effective in reducing judicial review. In addition, the common law grounds of review Part 8 sought to exclude as grounds of review of migration decisions are being given new life, but in the guise of the allowable grounds of review under Part 8.

What the Coalition Government is doing

The Government is determined to review and improve Australia's administrative law system. To do this requires a critical appraisal of the current situation, what Australia needs and what Australia can afford.

Any appraisal must broadly view administrative law in the wider context of Government policy making and implementation. This is particularly so in the area of immigration, where the most direct beneficiaries of the administrative law system are not members of the Australian community.

It should also be remembered that the privative clause is only one measure in a number of initiatives put forward by this government, to ensure the integrity of, and restore the Australian public's confidence in, the migration programme.

These reforms include:

- Measures contained in Bill no.4 which involve:
  - The merger of the Migration Internal Review Office (MIRO) with the IRT. This means that all visa applicants will now have one tier of merits review.
  - Greater power will be given to the Principal Members of the IRT and RRT to ensure efficient processing of cases brought to these Tribunals.
- The imposition of a $1000 post-decision fee on unsuccessful applicants before the RRT. This will reduce the number of unmeritorious cases brought to this Tribunal. (I should stress, this is not an upfront fee.)

- Restrictions on work rights for people lodging Protection Visa applications.

  - People making Protection Visa applications will not have work rights unless they have applied within 45 days of arriving in Australia.

  - Many people overstay their visa and only make a protection claim when they are located by my Department.

- Increased testing of the bona fides of many classes of visa applicants, particularly those wishing to enter Australia on marriage grounds.

All of these reforms seek to ensure that only genuine applicants for visas are granted permission to enter and remain in Australia, and that unmeritorious applicants are dissuaded from making applications, or that such applications are quickly finalised, removing the benefit of a delayed decision.

The Privative Clause

I will deal now with the privative clause. The Migration Legislation Amendment Bill (No 5) 1997 was introduced into the House of Representatives on 3 September 1997. This Bill, if enacted, will insert a "privative clause" into the *Migration Act*, replacing the current Part 8.

The privative clause is merely another step towards achieving the overall aim of reforms to the decision making process.

Unlike Part 8, the privative clause will apply to both the High Court and the Federal Court. The new s.474 provides that decisions made under the Act are final and not subject to any judicial review or remedies. The word "decision" is widely defined, and includes all decisions relating to the entry and stay of non-citizens. The Government decided to legislate for a privative clause on the basis of advice received from several eminent legal practitioners that the privative clause is the best way of implementing our policy on the judicial review of migration decisions.

The clause, which closely reflects other such clauses in Commonwealth legislation, is expressed to broadly oust the jurisdiction of the courts. As you are no doubt aware, the High Court's jurisdiction given under the constitution cannot be ousted without amendment to the Constitution. Paragraphs 75(iii) and 75(v) of the Constitution provide that the High Court shall have original jurisdiction in all matters in which the Commonwealth is a party, or when writs of mandamus, injunction or prohibition are sought against the Commonwealth. Other such clauses have in practice been interpreted by the High Court as providing that a *decision is valid* and not subject to being set aside by the courts as long as:

- It is a bona fide exercise of power by the decision-maker;

- The decision relates to the subject matter of the enabling legislation;

- It is within constitutional power.

The decision will be valid as long as it is within the decision-maker's power to make it; that is, as long as the error was not a jurisdictional error. So ruled Dixon J in *R v Hickman, ex parte Fox and Clinton*[6], which has been broadly upheld in several subsequent cases, the most recent being *Darling Casino Ltd v NSW Casino Control Authority*[7].

The privative clause, regardless of the manner in which it is expressed, is therefore *not* an ouster of the jurisdiction of the courts. Applicants will still be able to apply to the courts to challenge a decision, and a remedy will be available if the error identified fits within those

described by Dixon J in *Hickman*. The operation of a privative clause is easy to comprehend if you think of it in terms of it not restricting the jurisdiction of the courts, but expanding what is considered as the lawful actions of a decision-maker.

Objections to the privative clause

It is useful to note and address some of the objections to the privative clause raised by legal practitioners and academics during the Senate Legal and Constitutional Committee hearings, dealing with Bill No 5.

It was suggested that the privative clause is unconstitutional and possibly in breach of the separation of powers required by the Constitution.

My Department obtained extensive and detailed advice on this matter, and all the advice received from eminent legal practitioners was that the privative clause was not unconstitutional, and did not offend the important principle of the separation of powers.

It was suggested to the Senate Committee that a leave requirement would achieve the government's aims of restricting judicial review to "exceptional circumstances" and remove unmeritorious cases at an early stage.

However, while the government does have the power to place a leave requirement on the Federal Court, it does not have this power with respect to the High Court. Further, such a requirement could effectively double the number of hearings before the Federal Court. On this basis, a leave provision was not viewed as a viable option.

The risk that a genuine refugee could be refouled without access to judicial review was also raised. However, the Government considers that any increased risk is minimal, the RRT will act knowing that it is the last level of review and decide the applicant's case accordingly. The Minister also retains a special power to intervene and grant a visa where the public interest warrants this step.

Conclusion

In conclusion, migration decision-making is integral to the whole migration program. As Minister, I am determined to ensure that the decision-making process is effective, and efficient in terms of cost, time and quality of outcomes. The planned changes to judicial review to narrow its operation are an important part of achieving this goal. They are part of a wide range of measures in place, or to be put in place, to ensure that the government has effective management and control over migration to Australia.

In my view, the challenge to the system of administrative law, and its practitioners, is to not simply focus on particular aspects of the system - such as whether there is "full" judicial review of decisions available, whether the ADJR Act applies to decisions, and minor technical matters of this nature - but on the wider system of which they are a part.

There must be an ongoing process of properly balancing the interests of individuals with the interests of the wider community, and it is the government's opinion that the planned changes to judicial review of migration decision-making achieve that goal.

Endnotes

1 Administrative Review Council, *Review of Migration Decisions*, ARC report No. 25, AGPS, 1986; Human Rights Committee *Human Rights and the Migration Act* 1958, HRC report No. 13, AGPS, 1985; Committee to advise on Australia's Immigration Policies, *Immigration A Commitment to Australia*, AGPS, 1988.

2 (1997) 145 ALR 621

3 Unreported, Federal Court, Mansfield J, 19 August 1997
4 Unreported, Federal Court, Finkelstein J, 16 September 1997
5 (1990) 170 CLR 321 at 366-367; (1990) 94 ALR 11 at 46
6 (1945) 70 CLR 598
7 (1997) 143 ALR 55