PART 8 OF THE *MIGRATION ACT 1958*: THE NEW JUDICIAL REVIEW REGIME TAKES HOLD

*Refugee Review Tribunal**

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The decision of the High Court in *MIEA v Wu Shan Liang & Ors*[1] has already been referred to for the important guidance it has provided on substantive aspects of refugee law. The High Court also made some important comments on the proper role of courts when engaged in judicial review.

The former Chief Justice, Sir Anthony Mason, in his recent address to an AIAL seminar entitled "Life in Administrative Law outside the ADJR Act" predicted that the decision would have a considerable impact on the course of judicial review. Sir Anthony stated that the decision was:

> First and foremost, a clear and specific warning ... against transforming judicial review generally, not merely review under ADJR Act, into merits review.[2]

In *Wu* the judicial review proceedings were brought under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). It is clear that the legislature shared the High Court's concern, and this was one of the reasons for the introduction of a new judicial review regime for decisions made under the Migration Act, which is more restrictive than the regime which has developed under the ADJR Act.

The new judicial review regime

Part 8 of the Migration Act was introduced on 1 September 1994 by the *Migration Reform Act 1992*, together with a number of other amendments to the Act. Part 8 sets out a distinct judicial review regime for "judicially reviewable decisions" as defined under section 475 of the Migration Act. These include decisions of the Refugee Review Tribunal, but not decisions of the Department of Immigration and Multicultural Affairs which are reviewable by the Tribunal.

Part 8 of the Migration Act effectively removes a section of administrative decision-making from the general framework of judicial review and constructs another mechanism for judicial review for those decisions.

In the second reading of the Migration Reform Act, the then Minister for Immigration, Gerry Hand, stated that the intention of Part 8 was to "make the application of the legal concepts of migration decision-making predictable".

To summarise the changes:

- First, the Federal Court does not have any other jurisdiction in relation to "judicially reviewable decisions" as defined, including under section 39B of the *Judiciary Act 1903*, or under the

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* *Paper prepared by Sue McIlhatton, Member of the Refugee Review Tribunal, and the Legal Research Section of the Tribunal - Michael Bliss, Sue Burton, Sobet Haddad, Cheryl Isles, Steve Norman and Laraine Roberts. With thanks to Cathy Lam.*

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ADJR Act except as provided for under section 44 of the Judiciary Act.[3]

- Secondly, there is a strict time limit as to when an application for judicial review must be made, which the Federal Court has no power to extend.[4]

- Thirdly, the grounds of review are significantly limited in comparison with the grounds available under the ADJR Act. In particular:

  - review on the grounds of relevant and irrelevant considerations is excluded[5]

  - review on the ground of denial of natural justice is excluded,[6] although actual bias has been introduced as a separate ground[7]

  - review on the ground of unreasonableness is excluded[8]

  - there is no residual ground of "other" abuse of power or "otherwise contrary to law"[9]

In a comprehensive paper entitled "Judicial Review and Part 8 of the Migration Act - Necessary Reform or Overkill"[10] Dr Mary Crock set out the changes and discussed the reasons for the changes in some detail.

This paper will address a few of the recent judicial developments in relation to two aspects of the new regime - first, when it applies, and secondly, how it applies.

To which decisions does Part 8 apply?

After 1 September 1994, when Part 8 was introduced, the Federal Court proceeded on the basis that applicants could bring applications for review of refugee related decisions under the ADJR Act and section 39B of the Judiciary Act. This was presumably because of the view that there were accrued rights where the application to the Refugee Review Tribunal had been made prior to 1 September 1994. Neither the Minister nor the applicants took issue with this approach.

The jurisdictional question was finally considered in *Mahboob v MIEA & Anor*,[11] even though both parties had argued that the court had jurisdiction under the ADJR Act.

In *Mahboob,* the new provisions for judicial review had commenced after the applicant had applied to the Refugee Review Tribunal but before the Tribunal had made its decision. The question was whether the applicant had an accrued right to have his application determined in accordance with the law in force at the time his refugee application was made.

The Court found that where a Refugee Review Tribunal decision had been made on or after 1 September 1994, the applicant had no accrued right to make an application for judicial review under the ADJR Act. Despite the fact that both parties argued that there was jurisdiction, the Court found that it had no jurisdiction in this matter as the application to the Court was lodged out of time according to Part 8.

The issue of the applicability of Part 8 of the Migration Act was considered more recently by the Full Federal Court as a case stated in *Dai Xinh Yao v MIEA & Anor.*[12] Mr Dai was in a similar situation to Mr Mahboob, as he had applied to the Refugee Review Tribunal before Part 8 came into effect, and the Tribunal decision was made after Part 8 came into effect.

The Court did not find it necessary to decide whether the ability to seek judicial review could be an accrued right, as section 39 of the Migration Reform Act clearly expressed an intention that no rights were to accrue. Section 39 is a transitional provision which provides that refugee related applications made before 1 September 1994 and not finally determined at that time are to be treated as protection visa applications. The Court stated that

section 39 disclosed an unambiguous intention to rebut the presumption against retrospectivity and the presumption against the ousting of the court.[13] The decision in *Mahboob* was followed.

It is now clear that Part 8 applies to all decisions made by the Refugee Review Tribunal after 1 September 1994, regardless of when the primary decision was made, or the application for review to the Tribunal was lodged.

As a result of the uncertainty of the application of the review regimes of the ADJR Act and the Migration Act, a number of practitioners prepared parallel applications under both. In *Lal v MIEA*[14] the applicant did so, later abandoning the ADJR argument at trial. Although the applicant was successful, Madgwick J awarded part costs against him on the basis that he had put the respondent to the unnecessary extra expense of preparing the ADJR issue.

Judicial consideration of substantive grounds for review under Part 8 of the *Migration Act 1958*

As the scope of the application of Part 8 has only recently been settled, judicial consideration of the substantive grounds of review under Part 8 is only now starting to occur.

Unreasonableness no longer available as a ground of review (paragraph 476(2)(b)).

In *Velmurugu v MIEA*[15] Olney J confirmed that the Court had no jurisdiction to review a decision on the basis of unreasonableness under Part 8.

Natural justice (procedural fairness) no longer available as a ground of review (paragraph 476(2)(a))

Paragraph 476(2)(a) provides that denial of natural justice is not a ground of review. The Explanatory Memorandum (EM) notes that the rules of natural justice have been replaced by a codified set of procedures which will provide greater certainty in the decision-making process. This suggests that the "procedures" ground of review is likely to be relevant where a breach of the rules of natural justice is alleged.

Procedures not observed (paragraph 476(1)(a))

Paragraph 476(1)(a) provides a ground of review "where procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed".

The EM indicates that this ground of review is "complementary" to paragraph 476(2)(a) which provides that an application for judicial review cannot be made for a breach of the rules of natural justice.

The EM points out that the new decision-making scheme sets out:

> with greater certainty the procedural requirements to be followed to ensure that applicants are provided with the protection necessary to receive a fair consideration when decisions are made.

It was thought that the common law rules of natural justice were uncertain; so those rules were replaced by a codified set of procedures which would afford the same level of protection to individuals but would also have the advantage of greater certainty in the decision-making process.

The code of procedures to which the EM refers here is clearly the code of procedures under Part 2, Division 3, Subdivision AB of the Migration Act - "Code of procedure for dealing fairly, efficiently and quickly with visa applications". But this subdivision does not apply to the Tribunal's decision-making process, and decisions to which the subdivision does apply are not judicially reviewable.

It is understandable therefore that applicants have looked elsewhere for procedures which **do** apply to the Tribunal, and which might be covered by the "failure

to observe procedures" ground. The provision which applicants have generally sought to rely on is section 420.

Section 420 requires that:

(1) The Tribunal, in carrying out its functions under the Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case.

These statutory requirements are an obvious means by which applicants for judicial review can attempt to reintroduce procedural fairness as a ground of review under the "procedures" umbrella.

Although a number of recent cases have dealt with this issue, the relationship between section 420 and the grounds of review under Part 8 is not yet clear.

In *Velmurugu v MIEA*,[16] the applicant argued that the Tribunal had not acted according to substantial justice and the merits of the case as required under paragraph 420(2)(b), and therefore had not observed a required procedure in making the decision (para 476(1)(a)).

Olney J found that the Tribunal did not fail to observe procedures required by the Act in failing to act according to the merits of the case. His Honour stated:

> The exclusion of the unreasonableness ground and the limitations placed upon the circumstances in which the no evidence ground can be relied upon are clear indications of an intention to restrict the opportunity to seek review on a basis which would involve a consideration of the merits of a case. A decision on the merits of a case does not involve a procedure and thus could not give rise to review on the ground described in s.476(1)(a).[17]

In *Wannakuwattewa v MIEA & Anor*[18] it was argued that the Tribunal had failed to observe the procedures required by section 420, in particular paragraph 420(2)(b). His Honour found that he did not need to determine whether section 420 establishes "procedures" for the purposes of paragraph 476(1)(a), because on any view the Tribunal had made no error.

In *Zakinov v Gibson & Anor*,[19] North J considered the same argument, and agreed with the conclusion of Olney J in *Velmurugu* that:

> a challenge to a decision on the merits does not involve a contravention of any procedure set out in s.420(2)(b) and thus cannot give rise to a review under s.476(1)(a)".[20]

In the more recent case of *Kulwant Singh v MIEA & Anor*,[21] North J added that it was doubtful that paragraph 476(1)(a) related to procedures which were not expressly stated in the Act - examples of expressly stated procedures being the obligation of the Tribunal to give an applicant the opportunity to appear (para 425(1)(a)) or the requirement for the Tribunal to give written reasons (section 430).

However, in the decision of the Full Federal Court in *Dai v MIEA* Davies J noted, *obiter*, that the procedures adopted by the Refugee Review Tribunal must be "fair" and "just" under paragraph 420(1)(a), and that if this did not occur in a particular case an applicant would be entitled to relief under paragraph 476(1)(a) of the Act (on the ground that the procedures required by the Act to be observed in connection with the making of the decision had not been observed).[22] This case suggests that the Court may be prepared to take a broad view of the "failure to observe procedures" ground in order to permit a consideration of procedural fairness issues.

Most recently, Drummond J in *Ma v Billings & Anor,*[23] firmly stated that section 420 imposed an obligation on the Tribunal to comply with the rules of natural justice, while paragraph 476(2)(a) prevented correction of a failure by the Tribunal to do so. He added that paragraph 476(1)(a) did not provide a ground for judicial review for breach of the rules of procedural fairness except where the Migration Act or Regulations themselves specified a particular aspect of the rules with which the Tribunal must comply - such as the obligation to provide an applicant with an opportunity to appear before it (para 425(1)(a)).[24]

The law in this area is clearly not yet settled. There appears to be a degree of tension between the judiciary's traditional attachment to the concept of procedural fairness as a central element of judicial review, and the intention of the legislature to ensure procedural fairness is complied with by setting out the requirements in a statutory framework rather than allowing a general ground of review. Put simply, there appears to be some tension between the power of the court and the power of the legislature to determine what is procedurally fair.

Error of law - error in interpreting the law or in applying the law to the facts (paragraph 476(1)(e))

The Federal Court has also considered whether a failure to comply with section 420 of the Migration Act may fall within the ground of review under paragraph 476(1)(e) - that the decision involved an error of law, being an error in interpreting the applicable law, or an error in applying the law to the facts as found.

In *Asrat v Vrachnas & Anor,*[25] the applicant claimed that the Tribunal had failed to put adverse information to him to allow him an opportunity to respond. His Honour dismissed the application, finding that there was no such failure on the part of the Tribunal. His Honour did observe that if adverse information came to the attention of the Tribunal, it was incumbent on the Tribunal to bring it to the attention of the applicant. If the Tribunal did not do so, and subsequently used that information against the applicant, this would be a failure to accord substantial justice (under paragraph 420(2)(b)). This would amount to an error of law under paragraph 476(1)(e) of the Act, being an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. His Honour expressly stated that such action would not constitute an error under paragraph 476(1)(a) - that is, it would not be a failure to observe procedures required to be observed.

In *Cruz v MIEA,*[26] the applicant sought to rely on paragraph 476(1)(e) but the Court found that the submissions were inviting the Court to enter into a reconsideration of the merits, and were based on "a complete misconception of the proper role of the Court and the practical restraints on judicial review".[27]

Whilst some of the decisions are in conflict as to which ground might cover a failure to accord procedural fairness, they do disclose a willingness on the part of the Federal Court to view a failure to accord procedural fairness as a reviewable error under the restricted grounds of review contained in Part 8.

Actual bias (paragraph 476(1)(f))

As stated above, reasonable apprehension of bias, available under the ADJR Act as part of the natural justice ground of review, has been excluded under Part 8. However bias remains available as a ground of review in the more limited form of "actual bias".

In *Wannakuwattewa v MIEA,*[28] North J found that to establish actual bias, the applicant had to show that the Tribunal had a closed mind to the issues raised and was not open to persuasion. Mere expression of doubt was not actual bias.

In *Sarbjit Singh v MIEA*[29] Lockhart J found that a preliminary conclusion about a particular issue involved in an enquiry is not sufficient to establish actual bias. His Honour also found that irritation, impatience, or even sarcasm do not establish actual bias. As in *Wannakuwattewa*, the Court found that actual bias exists only where evidence shows that preliminary views are incapable of being altered because the decision-maker has unfairly and irrevocably prejudged the case. These decisions confirm that the test for actual bias is very difficult to satisfy.

While it is now apparent which decisions fall within the ambit of Part 8 of the Migration Act, it is not yet clear how the Court will interpret the grounds of review. The EM to the Migration Reform Act spoke of the introduction of Part 8 as a move toward greater certainty. However, the few cases that have already dealt with the new judicial regime indicate that that certainty is yet to come.

Endnotes

1 (1996) 185 CLR 259.
2 Mason, Sir Anthony, *Life in Administrative Law outside the ADJR Act*, Australian Institute of Administrative Law Seminar, 17 July 1996, p.2.
3 *Migration Act*, s.485.
4 *Migration Act*, s.478.
5 *Migration Act*, s.476(3)(d) and (e).
6 *Migration Act*, s.476(2)(a).
7 *Migration Act*, s.476(1)(f).
8 See eg *Migration Act*, s.476(2)(b).
9 *Migration Act*, s.476(3)(g).
10 Australian Institute of Administrative Law Forum, 11-12 April 1996.
11 (1996) 135 ALR 693 [see also supplementary judgment of 15 April 1996].
12 Federal Court of Australia, Black CJ, Davies and Sundberg JJ, 18 September 1996, unreported.
13 Federal Court of Australia, Black CJ, Davies and Sundberg JJ, 18 September 1996, unreported, at 16 per Black C.J and Sundberg J.
14 Federal Court of Australia, Madgwick J, 24 September 1996, unreported.
15 Federal Court of Australia, Olney J, 23 May 1996, unreported.
16 Ibid.
17 Federal Court of Australia, Olney J, 23 May 1996, unreported, at 7.
18 Federal Court of Australia, North J, 24 June 1996, unreported.
19 Federal Court of Australia, North J, 26 July 1996, unreported.
20 Federal Court of Australia, North J, 26 July 1996, unreported, at 14-15.
21 Federal Court of Australia, North J, 21 November 1996, unreported.
22 Federal Court of Australia, Black CJ, Davies, Sundberg JJ, 18 September 1996, unreported at 17.
23 Federal Court of Australia, Drummond J, 13 December 1996, unreported.
24 at 15-18
25 Federal Court of Australia, O'Loughlin J, 23 August 1996, unreported.
26 Federal Court of Australia, Whitlam J, 31 October 1996, unreported.
27 at 5, referring to *MIEA v Wu* (1996) 185 CLR 259.
28 Federal Court of Australia, North J, 24 June 1996, unreported.
29 Federal Court of Australia, Lockhart J, 18 October 1996, unreported.

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