COMMENTARY: RECENT DEVELOPMENTS IN REFUGEE LAW

John McMillan[*]

Edited version of a paper delivered as a commentary on the address by Dr Peter Nygh to an AIAL seminar held in Canberra on 15 August 2000.

The thesis of this commentary is that the substantive principles of refugee law, and the system within which they are elaborated, are integrated and inseparable. In any analysis of the administrative system for refugee determination, it is as important to pay attention to the structure and dynamics of the administrative review framework as it is to refine the principles of refugee law. I shall develop that point by looking at three issues - the complex and sensitive nature of the legal issues that arise in refugee determination; the adequacy of the existing tribunal framework for handling those issues; and the impact of Federal Court judicial review on the role of the Refugee Review Tribunal.

The Role of Administrative Tribunals in Refugee Determination

The character of the issues arising for determination under the *1951 Convention Relating to the Status of Refugees* illustrates the need for a system of administrative review that is reputed for its professional skill and integrity. The intensity of the public debate in Australia about refugee policy and the treatment of asylum seekers provides one illustration of the importance of those issues in the spectrum of Australian public affairs. Increasingly, too, that debate is being drawn into the international community, with Australia's policies and administrative practices being measured against international law standards. It is in Australia's interests, domestically and internationally, to nurture the system of administrative review as it applies to refugee determination.

The need for a first-rate tribunal system stems also from the indeterminate nature of the issues that frequently predominate in administrative review. It is a characteristic of public administration that when the rules that regulate access to a government concession are specific and restrictive, those who fall outside the major categories of entitlement will frequently focus their attention on residual and discretionary categories of entitlement. Clearly that is one reason why refugee law has become increasingly more important in Australia: many aspiring applicants for Australian resident status fall outside the defined categories in the *Migration Act 1958* (Cth) and Regulations, and target their applications accordingly at the more discretionary body of rules that define the entitlement to a protection visa, that is, to refugee status.[1] Similarly, even within the domain of refugee entitlement, applications are often targeted at the more indefinite elements of that category. Thus, in terms of whether a person's life or freedom is threatened by reason of "race, religion, nationality, membership of a particular social group or political opinion",[2] it is the phrase "particular social group" that has become a focus of exceptional attention. Issues that have

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* John McMillan is Reader, Law Faculty, Australian National University; and Consultant, Government Services Group, Clayton Utz.

1 In the same fashion, many appeals to the Migration Review Tribunal arise under the discretionary criterion of "special need relative", by which a person otherwise ineligible for an Australian resident visa can obtain a visa to provide special assistance to a relative: Migration Regulations, reg 1.03. See, eg, *Jun v MIMA* [2000] FCA 867; *MIMA v Chan* [2000] FCA 737. (The acronym "MIMA" is used for "Minister for Immigration and Multicultural Affairs".)

2 Article 1A(2) of the *1951 Convention Relation to the Status of Refugees*, adopted in Australia in the *Migration Act 1958* (Cth) s 36(2) and Migration Regulations, Schedule 2, part 866.221.

arisen in recent litigation include whether the phrase "particular social group" extends to the targets of organised crime,[3] parents in breach of China's one child policy,[4] Chinese children disadvantaged by that policy,[5] members of a family,[6] warring clans,[7] deserters from the police force,[8] young Somali women,[9] wives who have been the subject of domestic violence,[10] homosexuals,[11] and Tamils routinely questioned under Sri Lanka's anti-terrorist strategy.[12]

Those are all important issues. They are, moreover, complex issues that turn on a mixture of factual analysis, legislative interpretation, immigration policy determination, social policy judgment, and appreciation of international comity. If, as we have chosen in Australia, those issues are to be resolved through administrative adjudication, it is essential that the adjudicatory tribunal is reputed for its professional skill and integrity.

This goes to the heart of the current debate about the restructure of the system of administrative tribunals to be undertaken by the Administrative Review Tribunal Bill 2000 currently before the Commonwealth Parliament.[13] A principle which should guide debate on the Bill is that the quality and integrity of the tribunal system should not be downgraded by the restructure. It is premature to know which rumours to trust, but there are disturbing signs. Perhaps the greatest concern is that the conditions of appointment for members of the ART will, by comparison with those existing for the AAT, be downgraded substantially in terms of level of salary, term of appointment, and other conditions of service. The generally high standard of administrative review that has hitherto characterised the Commonwealth tribunal system cannot be maintained unless appointment to the ART is an an attractive option for people with the level of professional experience and skill that is needed to undertake the complex work of legal analysis and factual inquiry that is essential in administrative review. Above all, it hardly makes sense to establish a system of administrative review unless those who undertake the review function are at least as skilled as the government agency officials whose decisions are being reviewed.

Before leaving this theme, it is interesting to observe the parallel in the public debate swirling around us at the moment concerning reparation for members of the "stolen generation". The widespread call by commentators to utilise a tribunal model, rather than a court framework, for working through the complex and contested issues that arise in the stolen generation cases - issues that go to the heart of Australia's national identity - is an interesting confirmation of the faith that many people now have in the institution of administrative tribunals. It is similarly apparent, in the lead-up to the Olympics, that many sporting codes established tribunals to conduct independent review of sporting selection decisions.

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3 Eg, *MIMA v Sarrazola* [1999] FCA 1134.

4 *Applicant A v MIMA* (1997) 190 CLR 225.

5 *Chen Shi Hai v MIMA* [2000] HCA 19.

6 Eg, *C and S v MIMA* [1999] FCA 1430; *Sarrazola v MIMA (No 3)* [2000] FCA 919.

7 Eg, *MIMA v Abdi* [1999] 87 FCR 280; *Ibrahim v MIMA* [1999] FCA 374; *MIMA v Jama* [1999] FCA 1680.

8 *MIMA v Shaibo* [2000] FCA 600.

9 *MIMA v Cali* [2000] FCA 1026.

10 Eg, *MIMA v Ndege* [1999] FCA 783; *Mendis v MIMA* [2000] FCA 114; *MIMA v Khawar* [2000] FCA 1130.

11 Eg, *F v MIMA* [1999] FCA 947; *MIMA v B* [2000] FCA 930; *MIMA v Cai* [2000] FCA

12 Eg, *Nagaratnam v MIMA* (1999) 89 FCR 569.

13 For an analysis of the Bill, see the article by Professor Dennis Pearce, "Creation of A New Tribunal" (2000) 177 *Administrative Law Bulletin* 4-8.

Adequacy of the Existing Tribunal Framework

The professionalism and integrity of a tribunal system depends in no small measure on the adequacy of the framework for determination of cases. I will not explore this issue in the depth that it deserves, other than to repeat a point I made in an earlier article,[14] that it is essential in my view to have a two-tier tribunal framework for adjudication of the complex issues of the kind that arise in refugee law. The second tier would be constituted as an appeal panel of three members who would, on a by-leave basis, review cases that raise issues of general significance or of disputed questions of law.

The concept that I referred to earlier, "particular social group", is one such example of the complex issues routinely arising before the RRT. Litigation in the past two months throws up many similar examples, most having an importance that extends beyond refugee law to administrative law and public administration generally. They include: the legal requirements for a valid statement of reasons, addressed by a five bench Full Court in *Singh*;[15] whether an administrative tribunal has jurisdiction to consider an invalid application or appeal, addressed by the Full Court in *Yilmaz*,[16] and by single judges in a host of other cases;[17] when is a tribunal *functus officio*, addressed by the Full Court in *Bhardwaj*;[18] the scope of the no evidence principle, which was the subject of inconsistent Full Court rulings in *Li Yue* and *Charaev*;[19] how far a tribunal should go in identifying issues and drawing them to an applicant's attention, addressed by the Full Court in *De Silva*;[20] the scope of the duty of inquiry of an administrative tribunal post-*Eshetu*, addressed in *Candyah* and *Khoury*;[21] and the implications of the bias rule for tribunals, addressed (once more) in *Yit*.[22]

Each of those issues has been the subject of conflicting jurisprudence in the Federal Court, and no doubt in the tribunals as well. It is folly to expect that those issues can be addressed satisfactorily by a single member in a one-tier tribunal. If we persist with that model, as the rumours suggest that the Government intends to do for immigration appeals,[23] we can expect confidently that the Federal Court (or, most likely, and worse still) the Federal Magistrates Service, will *de facto* become a routine second appeal tier in immigration cases.[24] The result – an appeal from a single member of a tribunal to a single member of a court – fails to address a structural problem that bedevils the current framework for administrative review.

The creation of a two-tier tribunal structure, as proposed in the ART Bill, provides an opportunity to create a framework for administrative review that enables complex issues to

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14 J McMillan, "Federal Court v Minister for Immigration" (1999) 22 *AIAL Forum* 1 at 16-17.

15 *MIMA v Singh* [2000] FCA 845.

16 *Yilmaz v MIMA* [2000] FCA 906.

17 Eg, *Samuel v MIMA* [2000] FCA 854; *Nader v MIMA* [2000] FCA 908; *Najarian v MIMA* [2000] FCA 933; *Wimalaratne v MIMA* [2000] FCA 964.

18 *MIMA v Bhardwaj* [2000] FCA 789.

19 *MIMA v Li Yue* [2000] FCA 856; *Charaev v MIMA* [2000] FCA 865.

20 *De Silva v MIMA* [2000] FCA 765.

21 *Candyah v MIMA* [2000] FCA 869; *Khoury v MIMA* [2000] FCA 733.

22 *Yit v MIMA* [2000] FCA 885.

23 At the time of writing, the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000 had not yet been published. It was rumoured that it would modify the ART Bill to remove the option for second-tier tribunal review in immigration matters.

24 The Administrative Review Tribunal Bill 2000, clause 170, provides that an appeal from the ART to the Federal Court can be transferred by the Federal Court to the Federal Magistrates Court. As Pearce comments (above n 13 at 8), "it is indicative of the downgrading of the status of the ART when compared with the AAT that appeals on questions of law can be determined at the Magistrates Court level".

be addressed initially and professionally within the tribunal system. The paper by Dr Nygh provides excellent substantiation – if it were needed – of the depth of understanding and experience of administrative law and immigration issues that presently exists within the Commonwealth tribunal system. It has been the experience of courts around Australia that the development of an internal two-tier structure – with either a Full Bench or a Court of Appeal – is the preferable model for the constitution of the court. One can only hope that this option of two-tier review for immigration matters will similarly be embraced by the Parliament in its passage of the ART Bill.

Impact of Federal Court Review on the Role of the RRT

Commonwealth administrative tribunals have lived and developed under the watchful presence of judicial review. Constitutionally this has been essential,[25] but functionally too it is an indispensable component of administrative justice that an opportunity should exist to test the legality of executive decision-making and tribunal adjudication in an independent judicial forum. Yet, no principle of justice is an absolute and unconditional truth, and the opportunity for judicial review is no exception. Judicial review which is undertaken without proper regard for the different context in which executive and tribunal decisions are made, and for the legitimate objectives which those processes uphold in a governmental system, can be as much a problem as the defective decision-making it is designed to correct. I have elsewhere discussed the distorting effects of judicial overreach in relation to immigration review,[26] and in this commentary will add only briefly to those remarks.

The many cases in which there has recently been an internal conflict within the Federal Court on questions of refugee law and administrative review have already been noted. To some extent, it is inevitable that different minds will reach different views on the complex issues that arise in the immigration jurisdiction. But that alone is not a satisfactory explanation. Too often the reason for the conflict and contradiction is that the goalposts have been moved in individual cases. No doubt this is in response for the most part to the arguments presented to the Court, but there is also an appearance from time to time of a solitary initiative by members of the Court to formulate new rules about administrative propriety, or (more cynically) to circumvent restrictions that have been placed on administrative review either by the Parliament or by the High Court. Inevitably, these explorations have been reined in, as they have been by the High Court and the Full Federal Court in cases such as *Wu Shan Liang*, *Guo Wei Rong*, *Eshetu*, *Epeabaka*, *Rajalingam*, *Singh* and *Yilmaz*.[27] Nevertheless, their recurrence dominates not only refugee review but also administrative law generally.

This trend raises profound questions about the dynamics of judicial review, and its compatibility with democratic foundations and the separation of powers. It has implications also for the professionalism and integrity of the system of administrative review by tribunals, in a number of ways. In the first place, the recent trend in judicial review of tribunal decisions engenders an atmosphere of ongoing disorder concerning the standards for administrative review and the professionalism of tribunals in meeting those standards. The fluidity in legal

25 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

26 McMillan, above n 14.

27 *MIEA v Wu Shang Liang* (1996) 185 CLR 259 (rejecting a trend of "reading behind" the decision-maker's reasons); *MIEA v Guo Wei Rong* (1997) 191 CLR 559 (rejecting a fallacious judicial approach to refugee determination); *MIMA v Eshetu* (1999) 162 ALR 577 (rejecting the characterisation of the "substantial justice" exhortation as a substantive requirement); *MIMA v Epeabaka* (1999) 160 ALR 543 (rejecting a probative evidence requirement); *MIMA v Rajalingam* [1999] FCA 719 (rejecting an inappropriate use of the "what if I am wrong?" test); and *MIMA v Singh* [2000] FCA 845 (rejecting the need for a statement of reasons to explain the dismissal of conflicting evidence); *Yilmaz v MIMA* [2000] FCA 906 (rejecting the view that incomplete appeals are necessarily invalid).

doctrine provides an incentive for unsuccessful visa applicants to litigate, more so when a lifeline is thrown by a Full Court either permitting the applicant to raise on appeal an issue that was expressly abandoned at trial (for example, *Teoh* and *White*[28]), or inviting or allowing the applicant to raise an issue that had not earlier crystallised in the case (for example, *Thevandram, MIMA v "A"*, and *Yilmaz*[29]).

The public standing of the administrative review system is endangered also by some of the subtle undertones in the litigation. For example, in the line of cases which led up to *Eshetu*, plaintiffs (with considerable judicial backing) were repeatedly asserting that tribunals defy their own statutory obligation to observe "substantial justice". In the line of cases which led up to *Singh*, plaintiffs were arguing (in nearly 50% of cases) that tribunals did not know how to write reasons statements properly. And, in the line of ongoing challenges premised upon *Sun Zhan Qui*,[30] parties routinely allege that tribunals are guilty of actual bias. An attitude of mind can soon develop in the broader community that the persistent repetition of these allegations is a sign that something must be wrong.[31] It is probable that if those allegations were thrown as repeatedly at courts, albeit in the velvet tones of advocacy, there would be judicial consternation concerning the implication for public confidence in the professional skill and integrity of the judicial system.

The adverse implications for administrative review are exacerbated too when the judgments of courts are spruiked with comments that are unfairly derogatory of tribunals or of the merits of the decisions under review. For the greater part judicial review is undertaken by the Federal Court in an exemplary and considerate fashion. However, in an earlier article I gave examples to suggest that a problem does exist in immigration review,[32] and I will briefly refer to recent examples to illustrate that the issue has not gone away.[33]

There is a recurring pattern of criticism of the factual inferences and merit determinations by the tribunal, sometimes rising explicitly to a generalised condemnation of "lack of competence" of the tribunal.[34] It is, to some extent, an accepted part of the pattern of administrative law review in Australia that it is undertaken in a robust fashion; the forthright declaration of principle and restraint of abuse of executive power can border on the bruising.

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28 *Teoh v MIEA* (1994) 49 FCR 409 (FC) at 416 (Lee J) and 428-429 (Carr J); and *White v MIMA* [2000] FCA 232 (FC) at paras 5-37.

29 See *Thevandram v MIMA* [1999] FCA 182 at para 11; *MIMA v "A"* (1999) 168 ALR 594 at paras 17, 109-111; and *Yilmaz v MIMA* [2000] FCA 906 at para 68. See also the examples given in H Burmester, "Commentary" (1996) 24 *Federal Law Review* 387.

30 *Sun Zhan Qui v MIMA* (1997) 151 ALR 505. See also *MIMA v Asif* [2000] FCA 228. For a critical analysis of the liberality of the test for actual bias applied in some decisions of the Court, see the judgment of Sackville J in *Yit v MIMA* [2000] FCA 885.

31 For example, see the submissions made by lawyers to an inquiry by the Senate Legal and Constitutional Legislation Committee, *Report on the Migration Legislation Amendment (Judicial Review) Bill 1998* (1999) at paras 1.21-1.44.

32 McMillan, above n 14 at 10-12.

33 Cf also *Semunigus v MIMA* [2000] FCA 240 at para 98 per Madgwick J; *Mashayekhi v MIMA* [2000] FCA 321 at paras 16-17 per Merkel J; *Duzdiker v MIMA* [2000] FCA 390 at paras 15, 16, 32 per Madgwick J; *Zaltni v MIMA* [2000] FCA 399 at paras 62-63 per Einfeld, Lindgren and Tamberlin JJ; *Sultan v MIMA* [2000] FCA 829 at paras 14, 17 per Madgwick J; *Nader v MIMA* [2000] FCA 908 at 68 per Hill J; *Xavier v MIMA* [2000] FCA 927 at paras 15-18 per Merkel J. Of similar note is the tendency to disparage the use of the term "appeal" to describe appeals from the AAT to the Federal Court, on the basis that AAT decisions are reviewed in the original jurisdiction of the Federal Court – eg, *Gibson v Repatriation Commission* [2000] FCA 739 at para 1 per Burchett, Lee and Hely JJ, referring to "a so called appeal"; see also *Board of Examiners under the Mines Safety & Inspection Act 1994 (WA) v Lawrence* [2000] FCA 900 per Lee J; and *Secretary, Department of Employment, Education, Training & Youth Affairs v Fitzalan* [2000] FCA 1061 per Burchett J. The use of the term "appeal" in this context has the support (apart from the dictionary) of a strong legislative tradition in Australia.

34 *Gamaethige v MIMA* [2000] FCA 1025 at para 34 per Branson J.

Nevertheless, there is a fine (yet important) line between correction of error in the individual case, and judicial disparagement of executive and tribunal processes. Arguably that line has been crossed when the criticism is made, as it recurringly is, in the context of a judicial statement along the lines that "there is no reviewable error of law in the tribunal's reasons, but the logic of the factual reasoning is questionable all the same".

It is implicit in comments of that kind that the legal principle that a tribunal is not required in its statement of reasons to explain why it has attached no weight to evidence contrary to its findings, is to be treated as a lowest common denominator standard beyond which the tribunal can safely get away with erroneous reasoning but attract judicial criticism when it does so. The orthodox alternative view is that the principle is meant instead to be a line which defines the boundary of a court's legitimate scrutiny. As Justice Mason observed in *Australian Broadcasting Tribunal v Bond*, "[s]o long as there is some basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, *there is no place for judicial review* because no error of law has taken place".[35]

A specific example of a recent comment that is disparaging of tribunals was an intimation by Lee J in *Zitoni*[36] that the Court should approach its task on the assumption that the RRT - and, presumably, most other tribunals - are error-prone. After acknowledging that a tribunal is not required to refer separately in its reasons to each individual item of evidence, his Honour continued:

> On the other hand, it should not be overlooked that the number of decisions a Tribunal member is expected to produce whilst constituting the Tribunal may be, on occasions, antithetical to due consideration of all relevant material in the conduct of a review hearing and the preparation of a decision free from error.

The authority given for that aspect of judicial knowledge was, interestingly, a similar claim in an academic article.[37]

A further example worthy of note comes from the decision of Madgwick J in *Akand*.[38] His Honour expressed "grave concern" about "a serious impropriety" on the part of the RRT and its registry. The impropriety arose from the fact that on a Tuesday the Tribunal was due to hand down a decision which had been written and signed over three weeks previously, and sent to the Registry for processing, a fact of which the parties had been notified. On the preceding Wednesday before the decision was due to be handed down, the applicant sent in a further submission, one of many. The Tribunal proceeded on the basis that, having already made its decision and duly notified the applicant, it was not obliged to consider the late submission. However, on the following day, Thursday, the Full Court in *Semunigus*[39] gave a split decision, of about 114 paragraphs, which dealt with the principle to be followed by the Tribunal in the case of late submissions. The "serious impropriety" alleged by Justice Madgwick lay, seemingly, in the following rationale: that, between the Thursday and the Tuesday, the Tribunal had not become aware of the Full Court decision (one of 3 Federal Court immigration decisions given that day, 15 that week); that the Tribunal had not digested the implications of the decision (a matter which, with respect, Justice Madgwick did not

35 (1990) 170 CLR 321 at 356 (emphasis added).

36 *Zitoni v MIMA* [2000] FCA 621 at para 22.

37 G Fleming, "The Proof of the Pudding is in the Eating: Questions about the Independence of Administrative Tribunals" (1999) 7 *AJAL* 33 at 46-47.

38 *Akand v MIMA* [2000] FCA 626.

39 *Semunigus v MIMA* [2000] FCA 240.

manage to do correctly in *Akand*[40]); and that the Tribunal had not considered whether to re-open the case before it (one of the 7,000 or so appeals received by the Tribunal each year). In considering whether there was "serious impropriety", one should note as well that the Full Court had not itself chosen to follow the practice which it follows in other cases it deems to be of public importance, of simultaneously publishing a summary of its judgment. Some may also think it relevant that the Full Court, of which Justice Madgwick was a member, had itself taken over 7 months to prepare judgment in the matter.

40 In *Semunigus*, the RRT member had on 12 June both signed his decision and handed it to the RRT registry staff for processing. Later that same day, a further and unforeshadowed submission was received from the applicant. At first instance, Finn J held that the RRT was *functus officio* when the submission was received and could not consider it. The Full Federal Court dismissed an appeal (Spender and Higgins JJ; Madgwick J dissenting). Spender J thought it probable that the RRT was not *functus officio* at the time of receiving the submission, but dismissed the appeal on the basis that the failure of the RRT to consider the late submission was not, in any case, a reviewable error under the *Migration Act*. Higgins J held that the decision was made when the Member's reasons were delivered to and recorded in the Registry of the RRT, and accordingly that the submission could not be considered by the Member at the time it was received. Higgins J also queried whether their could be a statutory obligation to consider a late submission, compatibly with the RRT's statutory obligation to be "economical, informal and quick" Madgwick J, dissenting, held that there was an implied statutory obligation on the RRT to consider whether to receive the late material. In *Akand* Justice Madgwick acknowledges that the majority in *Semunigus* held that there was no reviewable error, but otherwise his Honour's judgment in *Akand* proceeds on the basis that there was a legal obligation on the Tribunal to consider late submissions, which was the view taken in his Honour's own dissenting judgment in *Semunigus*.