

THE PRINCIPLES THAT APPLY TO JUDICIAL REVIEW: ITS SCOPE AND PURPOSE

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There is controversy about the underlying principles that govern judicial review. On one view it is a common law creation. On the other it is a statutory and constitutional doctrine¹.

In *Cooper v Wandsworth Board of Works* Byles J said:

...although there are no positive words in a statute requiring that the parties shall be heard, yet the justice of the common law will supply the omission of the legislature.

As Sir Anthony Mason said this can be construed as supporting either a construction that the doctrine is statutorily based or that it derives from the common law.

The common law proposition is expressed that:

unless parliament clearly intends otherwise, the common law will require decision makers to apply the principles of good administration as developed by the judges in making their decisions.²

The alternative statutory doctrine may be expressed:

unless parliament clearly indicates otherwise, it is presumed to intend that decision makers must apply the principles of good administration drawn from the common law as developed by the judges in making their decisions.

Brennan J said:

the common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interest might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice. The common law confers no jurisdiction to review an exercise of power by a repository when the power has been exercised or is to be exercised in conformity with a statute which creates and confers the power....³

In *Re Refugee Tribunal: Ex Parte Aala*⁴, Gaudron and Gummow JJ cited the above passage of Brennan J and this is also consistent with what Brennan CJ said in *Kruger v The Commonwealth Bank*⁵ that:

when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised⁶.

Mason CJ who had favoured the common law approach, considered that the conflict between the theories as to whether the starting point is statutory or common law, can be seen as a reflection of the disagreement between those who wish to emphasise legislative supremacy and those who wish to protect fundamental individual rights⁷.

He considered that the starting point may be important. If the statute is the starting point it may be easier to conclude that there is no intent to subject the decision maker to the

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common law principles. The broader view is that as expressed by Lord Steyn in *The Secretary of State for The Home Department: Ex parte Pierson*⁸ who said:

Parliament legislates for a European liberal democracy founded on the traditions and principles of the common law. The courts may approach legislation on this initial assumption. This assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.

Whatever the source, it is to be implied ordinarily that the rules of natural justice regulate the exercise of a power. In *Re Minister: Ex parte Miah*⁹ Mc Hugh J said:

It is now settled that, when a statute confers upon a public official the power to do something which affects a person's rights, interests or expectations, the rules of natural justice regulate the exercise of that power 'unless they are excluded by plain words of necessary intendment' (*Annetts v McCann* (1990) 170 CLR 596 at 598).

An intention on the part of the legislature to exclude the rules of natural justice is not to be assumed nor spelt out from 'indirect references, uncertain inferences or equivocal considerations' (*Annetts v McCann* citing *Commissioner of Police v Danos* ((1958) 98 CLR 583 at 396). Nor is such an intention to be inferred from the presence in the statute of rights which are commensurate with some of the rules for natural justice...the common law rules of natural justice are part of this background. They are taken to apply to the exercise of public power unless clearly excluded.

In *Ex parte Aala* a Tribunal made adverse credibility findings against an applicant. At the hearing the Tribunal stated that it had read all the papers from the previous applications and Federal Court proceedings in which the applicant had been involved. Relying upon this statement the applicant gave no further evidence. In fact, through an oversight, the Tribunal did not have certain unsworn statements by the applicant. It was held there had been a denial of procedural fairness and prohibition should issue under s 75(v) of the Constitution. In *Miah* an application for a protection visa on the basis that the applicant that the applicant was a refugee was refused on the grounds that the applicant's fear of prosecution in his country of origin was not well founded but a change in government in his country of origin had occurred after the application was lodged. The Minister's delegate did not tell the applicant of his intention to rely on new information respecting this governmental change or give him an opportunity to respond to it. By majority it was held that the Minister's delegate had failed to accord the applicant natural justice.

In *Miah's* case Gaudron J expressed procedural fairness in this way:

the basic principle with respect to procedural fairness is that a person should have an opportunity to put his or her case and to meet the case that is put against him or her [99].

In many instances the law may define the scope of judicial review. For example under s 44(1) of the *Administrative Appeals Tribunal Act 1975* an appeal may be made to the Federal Court 'on a question of law' from any decision of the Tribunal. Under the ADJR Act s 5 defines the grounds of review. These sections include breach of the rules of natural justice in connection with the making of the decision which itself entails examination of what the rules of natural justice require at common law.

The ultra vires doctrine

The statutory theory as to the source of judicial review is unquestionably the *ultra vires* doctrine. This rests upon the concept of parliamentary supremacy. It has been said that the common law theory is not inconsistent with parliamentary supremacy but it does not concede as much to the statute as does the *ultra vires* doctrine¹⁰. The *ultra vires* principle provides no explanation for judicial review of prerogative power. In *Ex parte Aala*, Gaudron

and Gummow J J said that if an element of executive power incorporated a requirement for natural justice, prohibition would lie to enforce its observance of the Constitution itself¹¹. Even more significantly the *ultra vires* doctrine does not provide a basis for a review in cases where the power exercised is not a statutory power. Indeed, the High Court in *Wu Yu Fang v The Minister*, on a special leave application, expressly queried the basis for an application for review which did not rest upon a specific statutory provision but upon a common law principle. The question then is whether the law will evolve in a similar way as it has in England, to allow judicial review because basic common law principles of administrative law respecting the exercise of discretionary powers have not been observed.¹²

Cases such as *R v Secretary of State for the Home Department: Ex parte Pierson*¹³ in the House of Lords emphasise the importance of the principle of the rule of law in support of the availability of judicial review even where the decision-maker has not appeared to have acted pursuant to statutory authority.

Chapter III of the Federal Constitution as a constraint upon the scope of judicial review

The decision of both the High Court and the Privy Council in the *Boilermakers'* case¹⁴ draws a very broad line of demarcation between judicial power, exercised by Chapter III Courts and administrative power exercised by non judicial authorities. Because courts are not, under this doctrine, to be burdened with any administrative decision-making, it is not open to Chapter III Courts to carry out 'merits review'. That is to say, it is not for courts to substitute its view of the correct or preferable decision for those of the Tribunal.

The division between the role of the courts in judicially reviewing the decisions of administrative bodies and administrative bodies was highlighted in *Lam v MIMIA* where Gleeson CJ commented upon the Privy Council decision of *Attorney General of Hong Kong v Shui*¹⁵. The respondent had entered Hong Kong illegally, was caught up in a program to deport illegal immigrants and the government publicly announced the policy to be applied. People such as the respondent would be interviewed and each case would be treated on its merits. The respondent was made the subject of a deportation order without consideration of the individual merits of his case. The Privy Council quashed the removal order. Their Lordships based their decision on the ground that in the particular circumstances of the case, including the representation that each case would be considered on its individual merits, the respondent had a right to a hearing which he had been denied. Their Lordships said that it was unfair that the respondent had been denied an inquiry into the individual merits of his case. They also said it was inconsistent with good administration. Gleeson CJ, in commenting upon this said:

if that were intended as a separate and independent ground for quashing the removal order, as distinct from a reason in legal policy for binding the authorities to the requirement of fairness, it would not relate easily to the exercise of this court of its jurisdiction under s 75(v) of the Constitution. The constitutional jurisdiction does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration. [32]

In the *Attorney General (New South Wales) v Quin*,¹⁶ Mason CJ said:

the prevailing view in this court has been, as Stephen J observed in *Salemi v MacKellar* (2) (1977) 177 CLR 396, that 'the rules of natural justice are in a broad sense a procedural matter' echoing the words of Dixon CJ and Webb J in *Commissioner of Police v Danos* (1958) 98 CLR 583.

Wednesbury unreasonableness

Since the decision of the High Court in *Lam v MIMIA*¹⁷ it may be accepted that while procedural unfairness constitutes jurisdictional error, substantive unfairness does not. Again

this is explained because of the restrictions placed in the Constitution upon judicial intervention in matters of an administrative nature. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*¹⁸ the English Court of Appeal had held that the exercise of a discretion will be invalid if the result is 'so absurd that no sensible person could ever dream that it lay within the power'. In *Eshetu v MIMIA*¹⁹ Gummow J commenting on *Wednesbury* said that a decision-making power might well be conditioned upon a basic element of reasonableness. This concept follows what was said in *Abebe v The Commonwealth*²⁰ by Gaudron J that an essential condition in the exercise of any decision-making power, in the absence of a statutory indication to the contrary, would be that it not be exercised in a manifestly unreasonable manner. In *Aala*, Gaudron and Gummow JJ returned to the question of reasonableness and approved what had been said earlier in *Kruger v The Commonwealth*²¹:

moreover, when a discretion power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.

In *Re MIMIA; Ex parte Applicant S120 of 2000*²² McHugh and Gummow JJ appeared to accept that where a Tribunal makes findings which are 'illogical, irrational, or lacking a basis in findings or inferences of facts supported on logical grounds' this may ground jurisdictional error, though it would not be so where there was some evidence, albeit inadequate evidence, for the Tribunal to arrive at its adverse conclusion. In this way limited recognition is given to the duty upon decision-makers to determine matters reasonably.

The use of privative clauses to prevent appeals

The High Court decision in *Plaintiff S157/2002 v Commonwealth of Australia*²³ was of enormous significance and will rank along with cases such as the *Boilermaker*' case, the *Engineers*' case and the *Australian Communist Party* case as a significant development in the constitutional jurisprudence of Australia. The Howard government in recent times has attempted to eliminate meaningful judicial review in the area of migration decisions. This has taken the form of turning back boats which have entered Australian waters; excising Australian territorial areas so as to prevent onshore processing of asylum seekers and others; and by amendments to s 474 of the Migration Act in 2001 introducing a 'privative clause decision' as final and conclusive and not to be challenged or appealed against in any court; and said it was not to be subject to prerogative writs in any court on any account.

A 'privative clause decision' was defined as a decision 'made under the Act or under regulations of the Act granting, cancelling, and revoking an order or determination including a failure or a refusal to make a decision.' Although there were some decisions under the Migration Act that were not subject to the privative clause, these were of no significance compared with the major determinations to be made by the Minister in relation to visas which were subject to the privative clause.

There was a further amendment of s 486A of the Act, which provided that an application to the High Court for a constitutional writ or an injunction or declaration in respect of a privative clause decision, must be made within 35 days of the actual notification of the decision. The plaintiff had sought to invoke the jurisdiction of the High Court under s 75(v) of the Constitution to issue writs of prohibition and mandamus against officers of the Commonwealth and had brought the action outside the 35 day period from notification.

The plaintiff's argument was that s 474 was invalid as it attempted to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution. The Minister's argument conceded that s 474 cannot oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution.

The Court said that there were two basic rules of construction which apply to the interpretation of privative clauses. The first is that if there is 'an opposition between the Constitution and any such provision, it should be resolved by adopting an interpretation consistent with the Constitution that is fairly open'. Secondly, it is presumed that parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies. Accordingly, privative clauses are strictly construed²⁴.

The Court said that a privative clause cannot operate so as to allow a non judicial tribunal to exercise the judicial power of the Commonwealth. Thus, it cannot confer on a non judicial body the power to determine conclusively the limits of its own jurisdiction²⁵. The Court said that the Minister's argument which gave paramountcy to s 75 over other provisions of the Act and imposed limitations upon power was not to construe the Act fairly. Their Honours quoted Dixon J who first noted that parliament 'could neither give power to any judicial or other authority in excess of constitutional power nor impose limits upon the...authority of a body... with the intention that any excess of that authority means invalidity, and ... at the same time deprive this court of authority to restrain the invalid action... by prohibition'²⁶.

In short, privative clauses need to be read together with the other provisions of the Act to which they relate to determine what force and effect they should have. It is presumed that Parliament does not intend to cut down the jurisdiction of the courts except to the extent that the legislation in question expressly states or necessarily implies.

The other aspect of s 474 upon which the Court concentrated was the wording in s 474(2) which stated that a 'privative clause' decision meant a decision of an administrative character, proposed, or required to be made 'under this Act or under a regulation or other instrument made under this Act'. In the joint judgment it is said 'decisions made under this Act' must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. 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 can not 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 s 474(2) of the Act²⁷.

The effect of a jurisdictional error means that the decision was a nullity and so no decision at all for the purposes of s 474(2). The contention of the plaintiff in *S 157 of 2002* was that there had been a denial of natural justice in that the Tribunal had taken into account relevant material adverse to the plaintiff's claim for refugee status without giving him notice of the material and an opportunity to address it. Once this was accepted the decision was made in jurisdictional error and not a 'privative clause decision' and it would have to be regarded as a nullity. Consequently the Court found that the applicant could bring a constitutional writ against officers of the Commonwealth, not only by virtue of the powers vested in the High Court under s 75(v) of the Constitution, but because s 474(2) would have no application to him as the decision was not a 'privative clause decision' being a nullity. For the same reason the 35 day limitation under s 486A which only related to 'privative clause decisions' would have no application to the plaintiff.

The joint judgment concluded with this resounding paragraph -

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by

privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s.75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.²⁸

What is jurisdictional error?

In *The Minister of Immigration and Multicultural Affairs v Yusuf*²⁹. McHugh, Gummow and Hayne JJ said:

it is necessary, however, to understand what is meant by jurisdictional error under the general law and the consequences that follow from the decision maker making such an error. As was said *Craig v South Australia* (1995) 184 CLR 163 if an administrative tribunal (like the Tribunal) falls into an error of law which causes it to identify wrongly; to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the Tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the Tribunal which effects it.

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. These different kinds of error may well overlap. 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. What is important, however, is that identifying the wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further doing so, results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision maker did not have authority to make the decision that was made; he or she did have jurisdiction to make it. Nothing in the Act suggests the Tribunal was given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law."³⁰

Craig v South Australia arose out of a ruling by a District Court judge that the prosecution could not proceed with a prosecution because the judge held that the principle of *Dietrich v The Queen*³¹ applied, in which the High Court had held that persons facing serious criminal charges who through no fault of their own, cannot find legal representation, ought not to be compelled to stand trial. The DPP sought a writ of certiorari to quash the decision of the District Court judge on the grounds that he had made erroneous findings and the High Court reversed the Court of Appeals order to issue certiorari.

In a joint judgment the High Court cited Lord Reid's speech in an *Anisminic Ltd v Foreign Compensation Commission*³²:

...there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with a question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. It may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

The High Court said that Lord Reid's comments applied to an administrative tribunal but would not in Australia refer to a court of law. In the absence of a contrary intent in the statute an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. In contrast, the jurisdiction of the court of law encompasses authority to decide questions of law as well as questions of fact. Accordingly, Lord Reid's comments were not to be accepted as an authoritative statement as to what constitutes constitutional error by an inferior court for the purposes of certiorari. This writ lies for jurisdictional error; procedural unfairness; fraud and error on the face of the record. However, it was said in *Craig* that the transcript of the reasons for decision did not form part of the 'record'. Certiorari would not lie to set aside the decision of the District Court judge even if it was assumed that the judge made an error in finding that the principle of *Dietrich* applied. It was an error within jurisdiction and was not an error on the face of the record.

Endnotes

- 1 The oft quoted statement of Byles J in *Cooper v Wandsworth's Board of Works* 1863 (14 CBNS 1280 at 1295) (143 ER 414 at 420)
- 2 See Forsyth *Heat and Light: A Plea for Reconciliation* (Hart Publishing, Oxford 2000 at 369) cited by Sir Anthony Mason Lecture 1: 31 *AIAL Forum* at 6 whose invaluable lecture highlights the importance of these issues.
- 3 *Annetts v McCann* 1990 170 CLR 596 at 604
- 4 (2000) 204 CLR 82
- 5 (1997) 190 CLR 136
- 6 204 CLR 82 at 100
- 7 *Foundations and Limitation of Judicial Review* 31 *AIAL Forum* at 12
- 8 (1998) AC 539 at 587
- 9 (2001) 206 CLR 57 at 93 [126]
- 10 *The Foundations and Limitations of Judicial Power*, supra p 12
- 11 (2002) CLR 82 at 101
- 12 *Enfield City Corporation* (2000) 199 CLR 135 at 153
- 13 (1998) AC 538 at 587-591
- 14 *R v Kirby; Ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254
- 15 (1983) 2 AC 629
- 16 (1991) 70 CLR at 23
- 17 (1977) 137 CLR 461
- 18 (1948) 1 KB 223 per Lord Greene MR
- 19 (1998) 197 CLR 611 at paras 121 to 148
- 20 (1999) 197 CLR 510 at para 116
- 21 (1997) 190 CLR 1 at 36; see article 'Natural Justice, The High Court and Constitutional Writs' by John Basten QC *AIAL Forum* 30 at pp 21-87.
- 22 2003 198 ALAR 59 at (34)
- 23 2003 8 CA 2
- 24 *Plaintiff S 157- 2002* a joint judgment at [72]
- 25 *ibid* at [73]
- 26 *ibid* at [58] citing *Hickman* (1945) 70 CLR 598 at 616
- 27 *ibid* at [76]
- 28 *ibid* [104]
- 29 2001 181 ALR 1
- 30 *ibid* at [82]
- 31 (1992) 77 CLR 292
- 32 (1969) 2 AC 147 at 171