The Courts

Natural justice and deportation orders

Contrary to the view which has prevailed, the principles of natural justice do apply to the making of a deportation order under section 18 of the Migration Act, the High Court has ruled. The Court relied on statutory amendments, in the context of the AD(JR) Act, made since the earlier cases on this point. In Kioa v West (18 December 1985) it was held that the appellants, prohibited immigrants, had been denied an opportunity to answer some prejudicial material which had been before the delegate, and an order was made to set aside the deportation order and refer the matter back to the Minister.

The significance of this decision may extend beyond deportation orders under section 18 of the Migration Act. Mr Justice Brennan expressed the view that "the exercise of powers conferred by ss. 6, 6A, 7 and 18 are conditioned on the observance of the principles of natural justice".

Refugee status decision made under an enactment

In Minister for Immigration and Ethnic Affairs v Mayer (5 November 1985) the High Court held by a 3-2 majority that a decision by the Minister that a person was not eligible for refugee status had been made under an enactment. Hence the person was eligible under the AD(JR) Act to seek reasons for the decision. The Minister had claimed he was not required to give reasons for the decision and this had been overturned by Mr Justice Davies in the Federal Court. His Honour's decision was subsequently upheld on appeal to both the Full Federal Court and the High Court.

A decision, but not of an administrative character

In Letts v The Commonwealth & Ors (30 October 1985) the applicant sought review of a decision of the Registrar of the High Court that the commencement of certain proceedings in the High Court be referred to a Justice of the Court to consider whether it was an abuse of the process of the Court. It was argued, however, that there was no "decision" susceptible of review or, if there was a decision to which the AD(JR) Act applied, then the Court in its discretion should refuse to grant the application.

It was held that there had been a decision made by the Registrar - he had not purported to determine the matter but

he had made a decision to refer it to a Justice. Although on the outer edge of decision making, this was within section 5 of the AD(JR) Act. However, the decision had not been of an administrative character - the Registrar had been exercising the jurisdiction of the High Court to control frivolous or vexatious applications, a jurisdiction that could be exercised through officers of the Court as well as Justices. Furthermore, the applicant was not a person aggrieved by the Registrar's decision - it was the decision of the Justice that had precluded acceptance of the applicant's documents and that decision had built into it the machinery by which leave could be sought to commence the proceedings.

Legality of adoption of policy guidelines

There was nothing illegal or improper in the adoption by the Minister of policy guidelines, provided she remained ready to consider arguments of particular applicants that their cases should be regarded as exceptions, it was held by the Federal Court in Peninsula Anglican Boys School v. Ryan & Anor (17 October 1985). The Minister for Education and Youth Affairs had refused an application for a capital grant to assist in the establishment of a new school. The application had been pending when the policy regarding grants had been altered, and it had subsequently been rejected under the new policy.

The Court also held that the Minister was under a duty to act in accordance with the rules of natural justice but had not acted unfairly in failing to give warning to the applicant of the adoption of new policy guidelines. In the absence of a contrary statutory intent, the general rule was that in considering and determining an application for the exercise of a discretion in favour of a particular person, a statutory decision maker has an obligation to act fairly towards that person. While the steps required to satisfy the obligation would vary from case to case, the requirement of fairness is constant and fundamental.

It might have been thought desirable to bring the new policy to the attention of the applicant and for the applicant to have been asked to justify the applications in that light, but a departure from optimum administrative procedure is not necessarily the same thing as unfairness in the natural justice sense, it was held.

A "serious question to be tried"

Mr Justice Wilcox made orders requiring the Minister for Immigration and Ethnic Affairs to take whatever steps were necessary and reasonably available to arrange the return of the first applicant to Australia from Hong Kong, at the expense of the second applicant, in Azemoudeh & Anor v

Minister for Immigration and Ethnic Affairs (10 October 1985). He acknowledged that this was an unusual order to make, especially at an interlocutory hearing, but it appeared to be the only method of protecting the position of the first applicant pending a final determination of his application for review of decisions refusing to grant him an entry permit or to consider upon its merits an application by him for an entry permit. The "serious question to be tried" test was applied to determine whether interlocutory relief should be granted.

The first applicant was a Christian living in Iran and the evidence was that such people in Iran were not protected by the laws of Iran. Lacking the requisite travel documents, he had boarded a flight for Australia in Hong Kong, having posted his passport to Sydney. A solicitor at the airport in Sydney arranged to make an application for refugee status for him but the applicant, immediately on his arrival in Sydney, was sent back to Hong Kong. That afternoon, interlocutory orders requiring him to be returned to Australia were refused because it appeared to the Court that it would be enough if he remained in Hong Kong while the matter was further investigated.

Following a telex from the Australian High Commissioner in Hong Kong, in which it was made clear that the Hong Kong authorities would not defer indefinitely the first applicant's departure from Hong Kong, it was submitted by the applicants that the Court should now order the return of the first applicant to Australia, pending determination of his application for refugee status and the final hearing of his application for review.

It seemed to Mr Justice Wilcox that there was a serious question to be tried in so far as it was alleged that in rejecting the claim for refugee status there had been a failure to take into account relevant considerations, namely, the situation in Iran, especially in relation to practising Christians. Furthermore, the first applicant's access to his legal adviser had been denied at the airport, thus perhaps hindering him in the presentation of his case to the authorities at that time.

In relation to the balance of convenience, there was a possibility that the first applicant could be repatriated to Iran, and although it would have sufficed for him to be held in Hong Kong pending the final decision, it had become clear that this possibility was not available. The respondents claimed that the return of the first applicant could later require the Commonwealth to bear the expense of his ultimate deportation, but the Court said it would be wrong to give weight to a cost which would be incurred by the Commonwealth because of the course its officers unnecessarily chose to pursue as against an applicant whose case was at least strongly arguable and who faced considerable disadvantages if he was not allowed to remain in Australia.

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A D M I N I S T R A T I V E L A W W A T C H

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Review of FOI legislation

The operation and administration of the FOI legislation is to be reviewed by the Senate Standing Committee on Constitutional and Legal Affairs following the first 3 years of operation of the Freedom of Information Act 1982. Submissions from interested groups, organisations and individuals are welcome. The closing date for submissions is 21 February 1986, and the Committee expects to conduct public hearings after this date.

Social Security Appeals Tribunal

At the Annual Conference of members of the Social Security Appeals Tribunals (SSATs) held in Melbourne on 9 - 10 November 1985, the Minister for Social Security, the Hon Brian Howe M.P., made an announcement which indicated that the full recommendations of the ARC's Report No. 21, The Structure and Form of Social Security Appeals, would not be implemented immediately. However, the Minister's proposals could be interpreted as the first step in a staged implementation of those recommendations. He intends appointing State Presidents of the SSAT (for 3 year terms) and to hand over a range of responsibilities to them. He will not be appointing a National President of the SSAT and the SSAT will not be given determinative powers for the present. Executive (departmental) members will be retained as suggested by the ARC. It is understood that some of the details of the Minister's proposals are still to be finalised.