The Courts

Immigration: application for resident status

Pashmforoosh and Pashmforoosh v Minister for Immigration and Ethnic Affairs (9 November 1988) was an application by an Iranian couple for review of the refusal of resident status. The applicants arrived in Australia with their two children as visitors in 1984, on temporary entry permits obtained with the assistance of a relative in the Protocol Office of the Iranian Department of Foreign Affairs. They applied for resident status two months after their arrival. Twelve months later the Minister rejected the applications on the basis that they had not demonstrated strong humanitarian grounds.

The applicants requested access to their file, and applied for review by the Immigration Review Panel. In September 1986 the Review Panel recommended by a 2:1 majority that the appeal be upheld, but the Minister accepted the minority view that the departmental decision be maintained. The applicants applied for judicial review. The main grounds were alleged denial of natural justice, the failure to take relevant considerations into account, and that the Minister based his decision on the existence of facts which did not exist.

On the natural justice argument Justice Einfeld, citing the High Court in Kioa v West (1985) 159 CLR 550, Justice Fox in Sinnathamby v Minister for Immigration and Ethnic Affairs (1986) 66 ALR 502 at 506 and Justice Foster in Youssef v Minister for Immigration and Ethnic Affairs, unreported (16 November 1987) concluded that the withholding of adverse information in cables from the Australian Embassy in Iran, without permitting the applicants to explain or address the matters involved, were major derogations of the procedural fairness to which they were entitled. Justice Einfeld also expressed agreement with Justice Wilcox's formulation of the question of unreasonableness in Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 at 169-70, and concluded that the Minister's decision here was unreasonable because he failed to inquire into the circumstances fully when material and evidence were readily available. Finally, he said that on the evidence before him, which would have been before the Minister if natural justice had been given and due inquiry made, the alleged facts on which the Minister based his decision appeared to be untrue. He referred the matter back to the Minister for further consideration in accordance with law.

Immigration: eligibility for change of status

In Akers v the Minister for Immigration, Local Government and Ethnic Affairs (22 December 1988) Justice Lee discussed the application of section 38 of the Migration Act with regard to arrest and detention, and enlarged on the consideration of section 6A(1)(e) where the applicant does not hold a valid temporary entry permit. He also discussed sections 5(1)(h) and 5(3)(b) of the Administrative Decisions (Judicial Review) Act.

The applicant was a young American who had come to Australia and married in 1984, at the age of 19. The marriage had not lasted and she subsequently entered into a de facto relationship. Her original application for resident status in 1984 was refused but she was granted further temporary entry permits on the basis of her de facto marriage. She later applied again and was told that the processing would take some months and that, due to the need to streamline its operations, the Department would not issue a further temporary entry permit; but she would be allowed to remain until her application for permanent residence was finalised. In the interim, however, her de facto relationship broke up during the late stages of her pregnancy, and two months after the birth the child died. She had few ties back in the United States, and her mother informed the Department that she did not wish to see her daughter again. The Department eventually rejected the young woman's application for resident status, denied her application for review, took her into custody and commenced arrangements for her deportation.

Ms Akers was eligible for an entry permit under section 6A(1)(b), as the spouse of an Australian citizen, and had also applied under section 6A(1)(e), on strong compassionate or humanitarian grounds. The Department had only considered the latter ground. Justice Lee accepted the applicant's eligibility under section 6A(1)(b), and rejected the respondent's submission that an application under section 6A(1)(e) may not be considered unless, at the date the application is made, the applicant is the holder of a temporary entry permit. Such a permit may be granted at any time and the question whether such a permit should be issued is to be considered at the same time as considering the application for permanent resident status. He held that the decision-maker had proceeded upon an erroneous premise on a fundamental matter and had, therefore, taken into account an irrelevant matter. The decision-maker had also proceeded to an incorrect conclusion after relying on misunderstood information provided to him by a Departmental officer. Justice Lee concluded that this amounted to an improper use of power. He set the decisions aside and remitted the matter to the Minister for reconsideration.

Ministerial discretion to reject AAT recommendations

Haoucher v Minister for State for Immigration and Ethnic Affairs (17 February 1989), an application for special leave to appeal to the High Court, is the latest development in the series of challenges to decisions by the Minister for Immigration, Local Government and Ethnic Affairs not to accept AAT recommendations in deportation cases(see Admin Review 19:9-10). The High Court granted leave to appeal.

Commonwealth Ombudsman

Act of grace payments

The Minister for Finance has signed a formal instrument delegating his act of grace powers under section 34A(6) of the Audit Act to heads of agencies for a two-year trial period. The