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Précis Paper

Judicial Review of Migration Decisions

A discussion of judicial review in migration and citizenship litigation

Discussion Includes

- Appearing for the applicant
- Jurisdictional error
- How much scope is there to challenge negative credibility findings at judicial review stages?
- Public Interest Criterion 4020 (PIC 4020)
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Judicial Review of Migration Decisions

In this edition of BenchTV, Oliver Jones (Barrister – 4th Floor Selborne Chambers, Sydney) and Amina Youssef (Solicitor and Migration Agent – Parish Patience Legal and Migration Services, Sydney) discuss judicial review in the migration and citizenship litigation sphere, focusing upon the hurdles that are often faced by both applicants, their representatives and those appearing for the Minister.

Appearing for the applicant

1. Oliver Jones began his career as a solicitor appearing on behalf of the Minister for Home Affairs while he now appears on behalf of applicants.

2. A big challenge faced by advocates for the Minister is that they are required to have regard to future implications for legislation, case law and so on which is a burden that an applicant does not have.

3. However, acting for the applicant does come with its own challenges. The applicant advocate requires a measure of creativity and tenacity in constructing a jurisdictional error out of sometimes less than optimum foundations.

4. So, whilst the Minister might have the burden of being consistent in the defence of many cases, the applicant advocate has the burden of winning against almost all odds, and establishing in a highly creative fashion a jurisdictional error on the part of the decision-maker whose decision is under challenge.

Jurisdictional error

5. Jurisdictional error is a very important concept in migration and citizenship litigation. It is a very old concept and is one that has survived in Australia, even though it has long been jettisoned in the common law world.

6. Jurisdictional error is an inseparable part of daily practice for the migration advocate. In the broadest possible sense, there are two types of jurisdictional error:
    a. Jurisdictional error of fact
    b. Jurisdictional error of law

7. Jurisdictional errors of fact occur less frequently than of law. Typically a jurisdictional error will involve a situation whereby there is some kind of factual situation which operates as a pre-condition to the exercise of power by the decision-maker. The decision-maker needs to

be satisfied as to the existence of that fact before they proceed to perform their statutory function.

8. A slightly broader notion of jurisdictional error was identified by Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS* [2010]. They said in this case that the Minister's state of satisfaction as to whether or not a person is a refugee is itself a jurisdictional fact.

9. Jurisdictional errors of law would be familiar to most administrative lawyers. They involve things like:
    a. Being required to take into account relevant considerations,
    b. Being prohibited from taking into account irrelevant considerations, and
    c. Correctly construing the statutory provisions which govern the exercise of the decision-maker's function.

10. The first step in challenging a decision is to identify the jurisdictional area in which to find a ground of appeal in the Federal Circuit Court. The time limit within which an appeal must be lodged in 35 days, or if you are on a visa, 28 days.

11. The judicial review sphere is slightly more flexible than the merits review sphere. In the merits review sphere, the deadline is a drop-dead deadline, meaning that if an applicant does not file its challenge to a decision with the Administrative Appeals Tribunal (AAT) within the statutory time frame, the Tribunal has no jurisdiction to hear it.

12. The Tribunal has no capacity to extend the deadline. An applicant will need a very persuasive reason for obtaining an extension of time in relation to applications for judicial review. Applicants are well advised to file within the designated time period.

<u>How much scope is there to challenge negative credibility findings at judicial review stages?</u>

13. Credibility is a very important aspect of immigration law. Negative credibility findings can affect an applicant at the Department stage, the merits review stage and so on.

14. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] McHugh J stated at [67] that 'a finding on credibility… is the function of the primary decision-maker 'par excellence''. The result of which now means there can be little or no interference by the courts in a credibility finding.

15. Once the decision-maker says that it does not believe the applicant is a truthful person, it can be very difficult for the applicant to obtain the visa they seek. This difficulty is

compounded by the sort of thinking reflected in a case like *Durairajasingham* which suggests that there is little or nothing the courts can do regarding judicial review.

16. Fortunately in more recent times there has been a relaxation of this approach. There has been a somewhat greater willingness on the part of the courts to overturn credibility findings by invoking a doctrine that is now called 'legal reasonableness', otherwise known as Wednesbury unreasonableness.

17. The *Wednesbury* threshold was extremely high, such that an applicant had to show that a decision was profoundly irrational, i.e. that the decision was so unreasonable that no reasonable person could reach that decision.

18. This criterion was very difficult to satisfy. However, in more recent times, at least in England but also to some extent in Australia, there is a developing relaxation of the Wednesbury criterion. Now it seems as if it is sufficient to establish that the decision lacks an evident and intelligible justification.

19. This expansion of the notion of legal unreasonableness has started to feed into judicial review of credibility findings. There have been some Federal Court cases recently, including *DA016 v Minister for Immigration and Border Protection* [2018], in which the Tribunal, using this expanded notion of legal unreasonableness, has overturned credibility findings.

20. An adverse credibility finding is definitely still detrimental to an applicant, and not easy to cure on judicial review. However, it may not be quite the seemingly impossible tasks that it once was.

21. Serious negative credibility findings can have the effect of an applicant:
    a. Failing to meet relevant public interest criteria
    b. Having the visa refused
    c. Being prevented from having a visa granted for a period of 3 years

<u>Public Interest Criterion 4020 (PIC 4020)</u>

22. Public Interest Criterion 4020 (PIC 4020) enables refusal of a visa if an applicant provides a bogus document or information that is false or misleading in relation to their application, or if the Minister is not satisfied of an applicant's identity.

23. If an applicant's transgression is such that it is enough for the Tribunal or Department to invoke PIC 4020, subsequent applications made by the same applicant will also be affected. The question then becomes what are the boundaries of the definition of false or misleading information and bogus documents? Is there any scope for judicial relief under PIC 4020?

24. The answer lies within the decision of Driver J in *Vyas v Minister for Immigration and Citizenship* [2012]. The issue highlighted in this case was the extent to which the applicant needed to have a guilty mind.

25. Driver J accepted that a guilty mind was required. The applicant needed to be aware of the fact that a document was bogus and/or that a false or misleading statement had been made. It was not enough that there had simply been the submission of incorrect information, it had to have been done consciously by the applicant.

26. In a subsequent decision, the Full Court to a certain degree wound back this requirement. The Full Court accepted that some level of intention was necessary in order for PIC 4020 to be breached, but the intention did not necessarily have to be that of the applicant.

27. Even if the applicant himself or herself had no intention, then the intention element of PIC 4020 would nonetheless be satisfied if there was scope to infer that someone, even a third party, had intentionally submitted the bogus document or made the false or misleading statement.

28. The result of this shift is that it became increasingly easier for the Minister to establish a breach of PIC 4020, even if the applicant was several steps removed from the relevant falsehood.

29. In more recent times there has been a division of opinion. There are many cases which talk about fraud often by a migration agent upon the applicant which is said to unravel something. This is in line with the common law notion that fraud unravels everything, as noted in *SZFDE v Minister for Immigration and Citizenship* [2007].

30. In the recent Full Court decision of *Singh*, the issue in which the Full Court was divided as to how far a fraud upon the applicant by a migration agent giving rise to a falsehood led to a breach of PIC 4020. In light of the earlier Full Court authority aforementioned which diluted *Vyas*, one would think the answer to this was quite straightforward.

31. As the fraud was intentional by the third party, then it was enough to give rise to a breach of PIC 4020 – it mattered not that the intention was not held by the applicant. The majority in *Singh* adopted this line of reasoning, holding that if there is a third party intention, then even if there is a fraud upon the applicant there remains a breach of PIC 4020.

32. The dissentient, Brumburg J, reasoned that once you pass through the gate of having a fraud upon you, then the third party intention would not suffice – the fraud would unravel the falsehood and no breach of PIC 4020 would arise.

33. Currently the weight of the authority is against the person who, however innocently, has a false or misleading statement or a bogus document on their record in their dealings with the Department.

34. Another major issue is to what degree the applicant is complicit in the fraud. The relevant judgments of the Full Federal Court, including *Singh* and *Gill* use the language of 'complicity'. The question arises where an applicant seems to be negligent or indifferent, is there any extent to which that can amount to complicity?

35. Once you reach that point of complicity, the Full Court's reasoning seems to be that you cannot escape the consequences of the fraud.

36. This situation typically arises where applications have been submitted involving some form of skills assessment by Trades Recognition Australia (TRA) which is wholly falsified. Each TRA assessment is identified by a reference number, and in the 'rogue' cases the application contains a false number.

37. The question then arises with the existence of that fraud, how far is the visa application unraveled? If the visa application is unraveled by the fraud, the person in question can make a fresh visa application.

38. There has been a contrast in the authorities between complicity on the one hand, and indifference on the other hand. Is it enough to be indifference that the applicant does not care, or has not considered the possibility of the fraud by the rogue? Or the applicant need to cast their mind in advance to that possibility and then say 'having thought about it – I don't care'.

39. The general policy for solicitors and migration agents who are working in this area is to always make sure the information being lodged on behalf of the client is correct. This can be achieved by sending draft copies of the application to the client to be approved.

<u>Bias</u>

40. Traditionally there have been two types of bias:
    a. Actual bias
    b. Apprehended bias

41. Actual bias is when you can show that the decision-maker is genuinely compromised in some way. This occurs most obviously when the decision maker has a pecuniary interest in the outcome of the proceeding.

42. It is much more common to pursue the matter of bias through the vehicle of apprehended bias. Apprehended bias does not require proof that the decision maker is indeed compromised – it turns on the question of perception.

43. As noted by Lord Chief Justice Hewart, 'just must not only be done, it must manifestly or undoubtedly be seen to be done'. In the realm of administrative law, perceptions can be as important as reality.

44. Even if there is no evidence that the decision maker is actually biased, there is still an available ground of review if there is a perception of bias. It is not enough that the applicant subjectively considers that the decision maker appeared to be biased. It is rather from the standpoint of the judicial officer as the reasonable person determining whether there would be an apprehension that the decision maker did not bring an open mind.

45. While not as difficult to prove as actual bias or legal unreasonableness, apprehended bias is still difficult to establish.

46. The courts have traditionally given decision makers a fair amount of latitude to say and do things in hearing to test the case of the applicant. Some of these things may seem rigorous or even hostile, but the courts will still be willing to allow the decision to stand

47. Recently some judicial officers have felt that the line has been crossed and that the decision-maker has gone beyond actively testing the applicant's case. For example in *SZUCD & Anor v Minister for Immigration & Anor* [2017], Judge Barnes held that line had been crossed and an apprehension of bias arose.

<u>Fast track review process</u>

48. The fast-track review process relates to the Legacy Caseload and asylum seekers who arrived by boat between 13 August 2012 and 1 January 2014. These asylum seekers are only allowed to apply for safe haven enterprise visas, or temporary protection visas.

49. Applicants using the fast track review process will have an interview at the intial stage, and then eventually if they are refused they are referred to the Immigration Assessment Authority (IAA) if they are not excluded from doing so.

50. In the interests of expedition and efficiency, Parliament created this scheme which involved merits review on a more restricted basis. Merits review has long involved not just a further oral hearing, but carte blanche for the applicant to raise new material to be considered by the merits reviewer.

51. The striking feature of the Immigration Assessment Authority scheme is that both of the above mentioned features are largely absent from the kind of review conducted by the Authority. There was never an oral hearing, and it was only in exceptional circumstances that the Authority would be permitted to consider new information. This heavily restricted version of merits review has not been met with universal claim in the courts.

52. On the contrary, courts seem to have been devising ways in which to utilize the concept of jurisdictional error ever so slightly to ameliorate these harsh edges of the fast track review scheme.

53. In *CRY16,* the Federal Circuit Court applied the concept of legal unreasonableness. It is a longstanding notion of procedural fairness in the context of Tribunal work regarding migration, for a difference of approach between the delegate and the Tribunal to trigger an obligation to notify the applicant that the Tribunal is going to approach the resolution of the proceeding in a different way. This approach was laid down by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006].

54. No such obligation arises in the context of the IAA scheme. In *DGZ16 v Minister for Immigration & Anor* [2017], the Full Federal Court made it clear that there is no wholesale transplant of *SZBEL* to this framework of decision making and review.

55. However, in *CRY16* the Full Federal Circuit Court said that if there is a material difference of approach between the delegate and the authority, and if the authority acquires new information for the purpose of determining this review in the different fashion from the delegate, then the authority may, as a matter of legal unreasonableness, be required to consider whether or not to invite the applicant to provide new information.

56. Whilst it is much narrower than *SZBEL*, there is a notion that the Authority must to some extent consider whether to exercise these limited powers and at least satisfy itself that exceptional circumstances are absent before proceeding without providing an opportunity of any kind whatsoever for the applicant to have input.

57. There is an obligation to consider inviting new information from the applicant where there is a difference in approach by the authority from the delegate. However, there is not a situation so broad that the moment there is a difference in approach by the authority there is an obligation to invite comment, which is what one would have in regards to the Tribunal as per *SZBEL*.

58. The procedural obligations are more limited in cases taking issue at the Immigration Authority Assessment stage than they are at the Tribunal and the information is often more limited.

59. Ultimately the Authority may still be capable of irrationality or legal unreasonableness in the way it rules upon the person's Protection visa status. When it comes to the reasoning adopted by the Authority, it should be the same scope for challenge that there is when one challenges the Tribunal's state of satisfaction in accordance with *SZMDS*.

Partner visas

60. Partner visas are available to applicants who have been in Australia and do not hold a substantive visa, as long as they are eligible to lodge an application. A 8503 condition imposed on the applicant's last substantive visa may prevent that applicant from lodging a Partner visa application, even if that visa has expired. In those scenarios, applicant may face Schedule 3 issues which relate to compelling reasons.

61. If an applicant is refused at the Department stage, they then may go to the Tribunal. The Tribunal is required to be satisfied that there are compelling reasons for them to waive the Schedule 3 criteria. This regularly arises where a person who has been in Australia lawfully in some way reaches the point of expiration of their visa and has a limited class of visas for which they can apply whilst still remaining on shore, these include Protection visas and Partner visas.

62. There is not an unqualified right to apply for a Partner visa while still onshore, which is the case with the Protection visa. The qualification on the right to apply for a Partner visa while onshore goes to the timing of when the applicant applied on the one hand, and when they last held their substantive visa on the other.

63. Typically the person is required to apply for the partner visa within 28 days of the substantive visa expiring, and if they fail to do so and the delay is substantially longer, the question that arises is are there compelling reasons to waive the Schedule 3 criteria?

64. It is not fatal to the application if the Tribunal find that there are not compelling reasons to waive the Schedule 3 criterion, but it does involve significant hurdles – most notably that they will need to make the application offshore. There may also be questions as to an exclusion period or a bar for a certain period before applications can be made offshore.

65. To date the courts have been a little unclear in regards to how these issues are to be tread. In *Waensila*, the Full Federal Court held that there is no real time restriction on compelling

reasons. An applicant may refer to events that arose at any time on their journey up until when they applied for a waiver of the Schedule 3 criterion.

66. The Tribunal cannot say it is going to restrict itself to material showing compelling reasons at a particular time, and if it does so this is considered a jurisdictional error.

67. There are a number of first instance authorities which seem to recognize some limits on the concept of compelling reasons which are not all that easy to apply. There is a suggestion that the law of relevant and irrelevant considerations is applicable.

68. Viewed in the statutory context, there are some matters which the Tribunal must not take into account and some matters which is must take into account in determining whether compelling reasons are present.

69. There are still boundaries to be marked out regarding relevant and irrelevant considerations, and it is important to note that there could be a significant number of people who have faced an adverse determination of compelling reasons by the Tribunal in circumstances where that determination is an appropriate vehicle for testing this subject matter limits to the concept of compelling reasons in the statutory scheme.

BIOGRAPHY

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Oliver is a specialist in immigration and citizenship litigation. His cases concern skilled migration, refugee law, spousal visas and citizenship matters. Oliver regularly appears for applicants in the Federal Circuit Court and the Federal Court. Where appropriate, Oliver appears in the Administrative Appeals Tribunal. Oliver regularly presents at seminars and writes in scholarly journals on international law, statutory interpretation and precedent. His latest article is 'Should Supreme Courts bind District Courts' (2017) 44 *Australian Bar Review*, 126-143.

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Amina is a Legal Practitioner and Registered Migration Agent. She is a solicitor with carriage of judicial review proceedings at Parish Patience. Amina has acted as a litigator in the Migration jurisdiction of the Federal Circuit Court, the Federal Court and the High Court. She regularly acts as an advocate at the Department and Tribunal stages. Amina's migration work spans the full range of visas including refugee, partner and student, as well as citizenship matters.

BIBLIOGRAPHY

Cases

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16

Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1; (2000) 168 ALR 407 at [67]

Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223

DAO16 v Minister for Immigration and Border Protection [2018] FCAFC 2

Vyas v Minister for Immigration and Citizenship [2012] FMCA 92

SZFDE v Minister for Immigration and Citizenship [2007] HCA 35

Singh v Minister for Immigration and Border Protection (2018) FCAFC 52

Gill v Minister for Immigration and Border Protection [2017] FCAFC 51

SZUCD & Anor v Minister for Immigration & Anor [2017] FCCA 421

CRY16 v Minister for Immigration & Anor [2017] FCCA 1549

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63

DGZ16 v Minister for Immigration & Anor [2017] FCCA 623

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16

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Waensila v Minister for Immigration and Border Protection (2016) FCAFC 32