RE-OPENING TRIBUNAL DECISIONS: RECENT DEVELOPMENTS

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Tribunals v Delegates

As a general proposition, an administrative decision that has been validly made and perfected cannot be revoked or altered by the decision-maker unless there is statutory authority (express or implied) to revoke or alter that decision.[1] One possible source of such a power is s.33(1) of the *Acts Interpretation Act 1901 (Cth)*. Further, it seems that an 'invalid' administrative decision, being a decision that can be impugned for jurisdictional error or failure to observe procedural fairness or which was procured by fraud or misrepresentation, can be treated by the decision-maker as either having not been made or, perhaps more controversially, as being subject to an implied power of revocation by the decision-maker.[2]

These propositions cannot be easily translated to the merits review tribunals operating in the Federal sphere. The characteristics of these tribunals which affect the application of these principles include their presence in a relatively rigid hierarchy of merits review, the statutory requirement that upon the completion of the review they publish reasons for a decision[3] and their subjection to a statutory scheme of judicial review which is subject to a time limit in which the application for judicial review can be made which may be either strict,[4] or capable of extension upon the exercise of a judicial discretion.[5] These factors tend against there being an implication of some general implied power upon the part of a tribunal to revoke a valid decision and the tribunal being free to ignore an earlier "invalid" decision so that it can exercise its review functions again.

The problems of re-opening tribunal decisions are best illustrated by the scheme of merits and judicial review created by the *Migration Act 1958*. The Act provides for a scheme of the primary decision-making by delegates of the Minister and then review of many of those decisions by a merits-based tribunal, being either the Migration Review Tribunal ("the MRT")[6] or the Refugee Review Tribunal (the "RRT").[7] There are mandatory time limits in which application for review may be made to those bodies.[8] The MRT and the RRT must conduct their review in accordance with a detailed procedural scheme and at the conclusion

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1 See *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429, 442-444 and *MIEA v Kurtovic* (1990) 21 FCR 193; see generally Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22 MULR 30, 49.

2 See the discussion in *Leung v MIMA* (1997) 79 FCR 400, 411-412 (per Finkelstein J); see also *Ousley v The Queen* (1997) 192 CLR 92, 100.3 – 101 (per McHugh J) and 130.5 – 131.7 (per Gummow J).

3 See, e.g., s.43 of the *Administrative Appeals Tribunal Act 1975* (the "*AAT Act*"); ss. 368 and 430 of the *Migration Act 1958 (Cth)*.

4 See, e.g., s.478 of the *Migration Act 1958 (Cth)*.

5 Section 44(2A) *AAT Act*.

6 See Part 5 and Part 6 of the *Migration Act*.

7 See Part 7 of the *Migration Act*.

8 Sections 347 and 412.

of their review must publish reasons for their decisions.[9] After the publication of a decision, the Act provides for a limited form of judicial review to the Federal Court,[10] provided that an application for review is lodged within 28 days of the notification of the relevant tribunal decision. The time limit may not be extended.[11] The grounds of review in the Federal Court are restricted by the exclusion of certain grounds of review including a breach of the rules of natural justice[12] and *Wednesbury* unreasonableness.[13] Co-extensive with this scheme of judicial review is the conferral[14] of original jurisdiction on the High Court to grant a writ of mandamus, prohibition or an injunction (and an ancillary jurisdiction to grant *certiorari*[15]) against an officer of the Commonwealth, which includes the tribunal. In the case of both the RRT and the MRT, the grounds for the grant of these writs, at the very least, include a breach of the rules of natural justice.[16] There is no mandatory time limit in which such an application could be made.[17] The end result is to create a bifocated system of judicial review with different time limits and some grounds available in the High Court that are not available in the Federal Court, and *vice versa*.[18]

The application of the principles stated above to such a scheme can be problematic. If a conclusion is reached that the relevant tribunal has some power to revoke a valid decision, then it serves to undermine the hierarchy of the Act and, in particular, the time limits within which each next step may be made. For example, a party who has been unsuccessful in the RRT and who is out of time to apply for judicial review to the Federal Court, could apply to the RRT to re-open its decision and to present fresh evidence, and if a negative answer is received, seek judicial review of that decision by the Federal Court. Similarly, if the MRT or the RRT is free to ignore an earlier decision that is considered invalid for say, a failure to afford procedural fairness, then in effect that tribunal is exercising a judicial review function that is wider than that conferred upon the Federal Court and is otherwise only exercisable by the High Court.

Bhardwaj

A majority of the Full Court of the Federal Court in *MIMA v Bhardwaj*[19] considered the observations made in the previous paragraph unpersuasive when weighed against the injustice occasioned by a failure to give a review applicant an effective opportunity to be heard. Mr Bhardwaj had had his visa cancelled by a delegate of the Minister. He sought review of that decision by the then Immigration Review Tribunal ("the IRT") (the effective predecessor to the MRT). He was advised by the IRT that an oral hearing of his application for review would occur on a particular day. On the evening before the hearing, Mr Bhardwaj's agent sent a facsimile to the IRT advising it that Mr Bhardwaj's was sick and unable to attend. Unfortunately, it seems that the facsimile was misplaced and the Tribunal proceeded to make and publish a decision cancelling his visa (the "first decision"). Mr Bhardwaj's agent then made representations to the IRT. It then recommenced the conduct of the review. Ultimately, it published another decision that revoked the delegate's cancellation of Mr Bhardwaj's visa (the "second decision"). The Minister sought judicial review of the

9 Sections 368 and 430. By amendments made with effect from 1 June 1999, both Tribunals must give advance notice to the relevant applicant for review of the date upon which their decision will be published : ss 368A to 368D, 430A to 430D.
10 See Part 8 of the *Migration Act 1958 (Cth)*.
11 Section 478.
12 Section 476(2)(a).
13 Section 476(2)(b).
14 By s.75(v) of the Constitution.
15 See *Re MIMA; ex parte Durairajasingham* (2000) 74 ALJR 405 at para 29 (per McHugh J).
16 See *Re Refugee Review Tribunal; ex parte Aala (2000) 75 ALJR 52.*
17 But see Order 55 rule 17 of the High Court Rules.
18 See *Durairajasingham*, supra, at paras 7 to 15.
19 (2000) 99 FR 251.

second decision, arguing, in effect, that the IRT was *functus officio* by the time it was made. Given the time limits on applying for judicial review set out in the Act, it was not open to Mr Bhardwaj to then seek judicial review of the first decision. The Minister was unsuccessful before Madgwick J[20] and appealed to the Full Court and was again unsuccessful by a 2:1 majority.[21]

The majority (Beaumont and Carr JJ) appear to identify three bases upon which the IRT could either revoke or reconsider the first decision and make the second decision.

First, Beaumont and Carr JJ found that the IRT was entitled to treat its first decision as effectively "void" on the basis that, had an application for judicial review been lodged within time in the Federal Court, the first decision would have been set aside as there had been a breach of former s.360(1) of the Act which required the tribunal to give the applicant for review the "opportunity to appear before it".[22] Their Honours did not identify whether such an error was an error within jurisdiction, a jurisdictional error, or a failure to observe procedural fairness.

Second, Beaumont and Carr JJ identified s.33(1) of the *Acts Interpretation Act 1901* as a separate source of power for the RRT to conduct a review after the first decision and make the second decision. Section 33(1) provides:

> Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

Their Honours considered that the "occasion" required the re-performance of the duty in this case because of the procedural errors that occurred in relation to the making of the first decision.[23] Implicit in this approach is that the "occasion" identified in s.33(1) is an occasion that can be identified *by the Court* and is not a matter for the decision-maker.

Third, Beaumont and Carr JJ stated that there was an implied power on the part of the Tribunal to reconsider its decision in circumstances where in making that decision the Tribunal had, by its own mistake, failed to afford an applicant a fundamentally important right, the error was not in dispute between the interested parties, the error was material to the case before it and the request for the reconsideration had taken place within a reasonable time of the original decision.[24] Their Honours did not identify the source of this power or indicate whether it was an example of one or other or both of the propositions in the previous two paragraphs.

Lehane J dissented. His Honour held that the provisions of the Act described above led to the conclusion that the IRT could not revoke a decision once made and that a "contrary intention" was manifest for the purposes of s.33(1).[25] Lehane J held that if no contrary intention was present for the purposes of s.33(1), then the IRT's power to reconsider might be exercised on any "occasion" that it considers appropriate.[26] His Honour also rejected the proposition that the IRT could act as though its earlier decision was a nullity, as that would be inconsistent with the structure of the Act and particularly the judicial review scheme.[27]

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20 *MIMA v Bhardwaj* [2000] FCA 789 (unreported, 15 June 2000).
21 Beaumont and Carr JJ, Lehane J dissenting.
22 Supra at paras 42-45.
23 Supra at para 46.
24 Supra at paras 47 and 15.
25 Supra at para 56.
26 Judgment at para 57.
27 Supra at paras 59 to 64.

On 20 February 2001, the High Court (McHugh and Gummow JJ) granted the Minister special leave to appeal from the Full Court's decision.

When is a decision made?

The above discussion addresses the circumstance, if any, in which a tribunal may revoke or reconsider a decision after it has been "made". Subject to any peculiar statutory scheme that suggests to the contrary, a tribunal can, prior to making its decision, reconsider the steps it has taken in conducting the review (subject to compliance with the rules of procedural fairness).[28] A critical issue then arises as to what point in time a tribunal has in fact "made" its decision such that it has become *functus officio*. It seems that the focus must be on the statutory requirement to give reasons and publish them to the parties. The issue has recently been considered by the Full Court of the Federal Court in *Seminugus v MIMA.*[29]

Formerly, s.430 of the *Migration Act* required the RRT to prepare written reasons and to give them to the applicant for review and the Secretary of the Department[30] within 14 days after the "decision concerned is made". Many of the statutory requirements to give reasons in other Federal and State Tribunals are expressed in similar terms.[31] In *Seminugus* it was argued that the RRT had erred in failing to consider a submission which it received shortly after the member had signed the reasons for the decision and provided them to the Registry, but before they had been provided to the parties. Spender J was of the view, *obiter*, that a member of the Tribunal was able to "retrieve [his/her] decision at any time prior to a copy of it having been sent to either the Minister [i.e. the Secretary] or the applicant" [32] (i.e. prior to publication). Higgins J considered that once the decision-maker had signed the reasons and handed them to the Registry, the decision had been "published" and the Tribunal was *functus officio.*[33] Before this point the member could change their mind. Madgwick J considered that the decision had been made and was irrevocable once it had been communicated to someone outside the RRT, which could be by publication to a party but also by communication of it orally to an applicant at the conclusion of the hearing.[34]

Current Position

Accordingly, on the present state of the authorities, at least in the Federal sphere, it seems that the position is as follows:

(i) subject to any peculiar statutory scheme which provides to the contrary, prior to the making of the Tribunal's decision (see *Semunigus*), a tribunal can reconsider the steps it has taken in the course of determining the application for review;

(ii) after a decision has been "made", a tribunal can exercise any express power that is conferred on it to reconsider its decision (such as the slip rule);[35]

(iii) after the making of the decision, a tribunal *may* be able to reconsider the exercise of its review powers if it is (correctly) persuaded that its first decision was subject to jurisdictional error, a breach of procedural fairness or was procured by fraud or misrepresentation (*Leung*; *Bhardwaj*);

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28 Campbell, supra at 38.7.
29 (2000) 96 FCR 533.
30 Of Immigration and Multicultural Affairs.
31 See s.43 of the *AAT Act*.
32 Supra at para 12.
33 Supra at paras 78 to 79.
34 Supra at paras 101 to 104.
35 See, e.g., s.43AA of the *Administrative Appeals Tribunal Act 1975 (Cth)*.

(iv) after the making of a decision, and unless a contrary intention appears, a tribunal may be able to reconsider the exercise of its review power pursuant to s.33(1) of the *Acts Interpretation Act*, at least in circumstances where the "occasion" is as described by Beaumont and Carr JJ in *Bhardwaj*;

(v) otherwise, there may exist a residual implied power on the part of the relevant tribunal to reconsider the exercise of its review function in the circumstances identified by Beaumont and Carr JJ in *Bhardwaj*, summarised above.

The Administrative Decisions Tribunal (NSW) (the "ADT")

New South Wales is not subject to the constitutional limitations that affect the establishment of tribunals and inferior courts at the federal level. Thus the *Administrative Decisions Tribunal Act 1997* (NSW) (the ADT Act) confers on the ADT both a primary decision-making function,[36] which is analogous to that of a Court in that it resolves disputes between private parties, and a review function in relation to government decisions.[37] Section 89 imposes an obligation on the ADT to provide reasons for its decision that must be given to the parties. Section 87 confers to a power to amend the reasons where there is an "obvious error in the text" (ie a "slip" rule). Further the ADT Act makes provision for an internal appeal both for an error of law and, with leave, on the merits (ss. 114 and 115) as well to the Supreme Court on a question of law (s. 118).

Overall the considerations that have been identified above as warranting a limited view of the power of a tribunal to reconsider its decisions apply with equal force to the ADT. The appeal mechanism provided for in the ADT Act could be severely undermined by the implication of some general power reposed in the ADT at first instance to reconsider its decisions. Moreover if an order is made in a private dispute between the parties, say for example under the *Anti–Discrimination Act 1977*, it would seem undesirable for either a party or the tribunal to later call that into question when the statutory appeal mechanism has not been invoked. Whether this proves to be the case must await the outcome of the appeal in *Bhardwaj*.

36 See Chapter 4 of the ADT Act.

37 See Chapter 5 of the ADT Act.