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Legal Services Bulletin
Law Faculty
Monash University
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The Courts

Environment: standing to apply

The Australian Conservation Foundation v Minister for Resources (20 December 1989) concerned an application for review of a decision by the Minister to give an assurance to a Japanese woodchipping company that it would be permitted to export a certain quantity of woodchips each year for the next 17 years.

The Minister and the company objected on the basis that the applicants did not have standing to bring the application. Justice Davies, however, considered that while the Australian Conservation Foundation (ACF) did not have standing to challenge any decision concerning the environment, it had a special interest in the South East forests that are National Estate. It was not just a busybody in this area. It had been established and functioned with government financial support to concern itself with such an issue.

Justice Davies pointed out that 'in determining standing, it is necessary to take account of current community perceptions and values'. He expressed the opinion that 'the community at the present time expects that there will be a body such as the ACF to concern itself with this particular issue and expects the ACF to act in the public interest to put forward a conservation viewpoint as a counter to the viewpoint of economic exploitation'.

Mr Harewood, the second applicant, claimed standing on the ground that he was a local property owner. The facts before the Court, however, did not show that he had a special interest in the issue raised in the proceedings, namely whether the action taken by the Minister has adversely affected the National Estate. His interest in the National Estate was little more than that of any ordinary member of the community and his application was therefore dismissed.

When the Court looked at the substance of the case it found that the evidence did not show that the Minister misunderstood or failed to consider the issues raised by the Australian Heritage Commission Act 1975. As no reviewable error was involved in making the decision, the application was dismissed.

The case was remitted to the AAT to make the necessary findings of fact and thereupon to resolve the matter. Justice Hill left it open to the AAT whether it called for fresh evidence but declined to order a rehearing of the case before another member of the AAT.

Committal hearing: review of factual material

Castles v Briot (23 October 1989) was an appeal to the Full Federal Court from a decision by a single judge on 14 April 1989. The appeal was successful. The Full Court held that the trial judge was in error in using the AD(JR) Act to review all the evidence before the Local Court and to conclude that there was no evidence on which a properly and fairly instructed jury could reasonably find guilty intent. This purely factual question should not have been the subject of review under the AD(JR) Act. The Full Court also allowed an appeal against the order of the primary judge extending the time within which the proceedings under the AD(JR) Act might be brought.

Immigration cases

The last few months saw several cases in this area involving consideration of questions of principle such as the admissibility of statements of reasons, the handling of adverse findings of fact, delegation of powers and estoppel.

Statements of reasons under the AD(JR) Act: admissibility

In Minister for Immigration, Local Government and Ethnic Affairs v Taveli (31 May 1990) 94 ALR 177 the Full Federal Court examined the following two questions: first, whether a statement of reasons tendered on the Minister's behalf should have been accepted into evidence; and, secondly, whether it was open to the trial judge to set aside the decisions under review 'as from the date of those decisions'.

Inoke Taveli Faka'osi and his family were all Tongan citizens. After the rejection of an application by Mr Faka'osi's sister, who was resident in Australia, to sponsor the family to migrate, they visited Australia and eventually overstayed their visas. In the meantime the Department informed Mr Faka'osi's sister that due to changes in the family's circumstances a fresh sponsorship could be successful. They applied, but due to circumstances outside their control the new application was mislaid. Mr Faka'osi was subsequently arrested and a deportation order was made out. The family applied for review.

At the hearing, counsel for the Minister sought to tender a document referred to as a 'section 13 statement of reasons'. The document was not verified on affidavit and its maker was not subject to cross examination. The trial judge rejected it on the grounds that the statement was a self-serving document and that, in any event, there had been a direction that the evidence to be adduced at the trial be on affidavit.

Justices Davies and Hill agreed with the view expressed by the trial judge that the section 13 statement should be rejected. However, they noted (Justice Hill being somewhat equivocal) that the statement could have properly been admitted as evidence if it had been verified by affidavit. The two judges disagreed on when it would be appropriate to have cross examination on the affidavit: Justice Davies noting it would be rare and Justice Hill that it would not be unusual. Justice French, in dissent, determined that the statement was admissible without verification but went on to find that the trial judge's ruling could not reasonably have affected the result of the proceedings. The judges all made observations on whether the statement could have been tendered as a business document or part of the res gestae (an evidential rule allowing inclusion of evidence because of its contemporaneity and relationship with the act concerned) but, as the matter had not been put on that basis, made no determination.

With regard to the trial judge's decision to set aside the decisions under review 'as from the date of those decisions', the Full Court found no error. It dismissed the appeal.

Use of adverse findings of fact

In Minister for Immigration, Local Government and Ethnic Affairs v Dhillon (8 May 1990) the Full Federal Court dismissed an appeal by the Minister against an earlier judgment (Admin Review 21:77) setting aside the Minister's decision to refuse an entry permit and to deport Mr Dhillon. The Minister's decision had been based on doubts about the genuineness of Mr Dhillon's marriage to an Australian citizen.

In the course of the judgment the Court pointed out that:

> '...a primary responsibility of a statutory decision maker is to reach firm conclusions about those facts which are relevant to his or her decision. If the decision maker is subsequently called upon to state his or her findings, he or she should do so in clear and unambiguous terms; not being reticent in expressing findings adverse to particular people, if in fact they were the actual findings reached at the time of the decision. Contrary to the submission put by counsel for the Minister, it is not correct to discount a factor favourable to an applicant by reference to conflicting evidence or doubts. A person affected by a statutory decision is entitled to have the case determined by reference to found facts, not suspicions or conflicts of evidence. Only if this is done is it possible for the affected person to understand precisely the reason why the decision went as it did. Only if this is done is it possible for a judicial reviewer to determine whether there was evidence before the decision maker to support the finding. In making the above observations we bear in mind that there may be cases, for example risk assessment in the case of a suspected terrorist, where the relevant finding is that a risk exists. If that fact be found it may be proper to be influenced by it.'

Natural justice and evidence lacking sufficiency

Broussard v Minister for Immigration, Local Government and Ethnic Affairs (13 December 1989) involved review of a decision by the Minister refusing the grant of permanent resident status sought on compassionate or humanitarian grounds.

The case involved a position where the Minister's delegate determined that the uncorroborated claims of Mr Broussard were insufficiently probative to sustain the requested grant of status. Justice Gummow noted that this was not a case where the decision-maker incorrectly believed that uncorroborated evidence of itself was incapable of being sufficient but was one where the particular evidence was found to be lacking. The judge determined that in a circumstance such as this the delegate should have drawn this failure of the evidence to the attention of the person involved, Mr Broussard, so that he could attempt to remedy the situation. The delegate's failure to notify Mr Broussard, the Court determined, amounted to a denial of natural justice.

Estoppel

In Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic (7 February 1990) 92 ALR 93 an appeal to the Full Federal Court was allowed in part.

Mr Kurtovic had, subsequent to his commission of a serious offence, been made the subject of a deportation order. Mr Kurtovic's appeal to the AAT was successful and the Minister revoked the order and notified Mr Kurtovic that the question of deportation would arise again were he to commit another offence. About a year later, subsequent to receiving

reports from two parole officers and the Prison Medical Service, the Minister issued another deportation order. Mr Kurtovic successfully sought before a single judge to have the order set aside because of a breach of natural justice, not being shown or allowed to comment upon the recent reports, and estoppel, alleging the Minister had by his letter prevented himself from issuing a deportation order unless a further offence was committed.

From that decision the Minister appealed to the Full Court. It partially upheld the appeal noting: (i) that the power to make a deportation order was not one that became spent upon its initial exercise but could be used as required from time to time; (ii) that the Minister was not prevented from issuing another order because there had been no detrimental reliance upon his letter and, in any event, the letter did not amount to a sufficiently clear and unambiguous representation that Mr Kurtovic would be free to remain in Australia while he committed no further offences. However, the Minister was required to communicate to Mr Kurtovic the nature of the allegations in the report and his failure to do so amounted to a denial of natural justice.

It is further to be noted that Justice Gummow, in discussing the role of the doctrine of estoppel in administrative law, approved a statement from Halsbury's Laws of England that, in general, estoppel cannot operate to prevent or hinder the performance of a positive statutory duty, or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public.

Delegation of powers

Singh v Minister for Immigration, Local Government and Ethnic Affairs (30 November 1989) 90 ALR 397 was an application for review of a refusal by the Minister to grant permanent resident status to Mr Singh and his family on compassionate or humanitarian grounds. The decision had been made by a Departmental officer pursuant to a delegation of powers by the Minister. On examination of the documents, which delegated certain powers to 'authorised officers', Justice Keely concluded that there had been no effective delegation of powers.

The documents purported to delegate to authorised officers the powers to refuse an application for grant of resident status, but not the power to grant an application. Justice Keely held that the Minister was not empowered by the wording of the Migration Act 1958 or the Acts Interpretation Act 1901 to delegate to an officer the power to decide against granting resident status, while at the same time deliberately withholding from that officer the power to grant an application.

As there had been no valid delegation of the power, the decision had been made by an officer who was not an officer authorised by the Minister to exercise his power in respect of the application for resident status. The decision was therefore set aside, and the application was remitted to the Minister for determination according to law.

Reasonableness of decision

Luu v Renevier (1989) 91 ALR 39 arose out of a decision to deport a person with a record of offences involving sexual assaults. There was evidence that the sexual assaults were at least partially caused by a medical condition that was surgically redressed while Mr Renevier was in hospital. The decision-maker refused Mr Renevier's application for permanent residency on the basis that the real risk of recidivism outweighed the counterveiling compassionate grounds. The Full Court upheld the decision of the trial judge that because the finding on a question of critical importance that there was a real risk of recidivism was not based on any cogent evidence from a suitably qualified medical practitioner, it was unreasonable within the meaning of paragraph 5(2)(g) of the AD(JR) Act. The unreasonableness was constituted primarily by the decision-maker's failure to obtain relevant medical reports. During the course of its judgment the Court stated that:

> 'One may say that the making of a particular decision was unreasonable - and, therefore, an improper exercise of the power - because it lacked a legally defensible foundation in the factual material or in logic. But, equally, one may be able to say that a decision is unreasonably made where, to the knowledge of the decision-maker, there is readily available to him or her other factual material, likely to be of critical importance in relation to a central issue for determination, and which has not been obtained.'

Commonwealth Ombudsman

Defence Service Homes Second Assistance Policy

In February 1990 the Ombudsman, in reporting to the Secretary to the Department of Veterans' Affairs, expressed the opinion that the law and practice in relation to second assistance under the Defence Service Homes Scheme was unreasonable and improperly discriminatory and in all the circumstances wrong. He recommended that the Defence Service Homes Act 1918 and the relevant policies be amended to enable portability to be extended to loans granted before December 1987 comparable to the portability for loans approved after that date (Admin Review 24:45). During the 1990 Federal Election campaign, the Prime Minister announced that the Government would move to provide uniformity of loans portability.

Since that time the Ombudsman has kept in touch with the Department to ascertain what steps would be taken to implement the Prime Minister's promise. In the meantime, the Department completed its review of its policies on second assistance and proposed significant liberalisation of its previously restrictive policies as an interim measure until the new law comes into operation. The Ombudsman welcomed this development, although he still had some reservations about the scope of both the interim amendments and the proposed