

Blinco v Speer, Jones v Speer
Supreme Court of South Australia, Mullighan J, 21 May 1999
[1999] SASC 211

Procedural fairness—decision by Registrar of Magistrates Court to order licence disqualification for default of payment of fine—whether rules of natural justice apply—rules of natural justice excluded by legislative intention

The Court found that the principles of natural justice did not apply to the orders of the Registrar of the Magistrates Court disqualifying the plaintiffs from holding or obtaining a licence to drive a motor vehicle.

In 1996 s61A of the Sentencing Act was introduced which permitted disqualification of a driver's licence during the period of default of a fine and set out the procedure to be followed. Both plaintiffs were disqualified under these provisions and were later detected driving vehicles. They were charged with driving whilst disqualified.

The plaintiffs argued that there were two instances of natural justice being denied to them. The first was when the Registrar of the Magistrates Court decided to disqualify them from holding a licence. The second stemmed from them being unaware of the decision until notified by the Registrar of Motor Vehicles. The notices they received did not inform them of the right to have the decision reviewed by the Court.

The plaintiffs had argued that the licenses were a right and not a mere privilege, but the court held that the nature of the licences in this case was different to the licenses considered in *Banks v Transport Regulation Board (Victoria)* (1968) 119 CLR 222 where it was held that a license to drive a taxi was a property or civil right for certain purposes.

The Court considered that the rules of natural justice do not apply if the contrary intention appears in the relevant legislation. It held that the relevant provisions of the Sentencing Act make it clear that the operation of the rules of natural justice are excluded in the case of licence disqualification under s61A. Under s66 of that Act the power to disqualify a person from holding a driver's license is to be exercised without hearing the person in default, unless the court decides otherwise.

The Court was troubled by the failure of the Registrar of Motor Vehicles' notices to inform the plaintiffs of their right to apply for a review of the order made by the Registrar of the Magistrates Court, but found that it was not a denial of natural justice.

Rokobatini v Minister for Immigration and Multicultural Affairs
Federal Court of Australia, Full Court, 10 September 1999
[1999] FCA 1238

Migration—Administrative Appeals Tribunal—review of deportation order - Tribunal guided by superseded government policy—failure to apply new policy

direction that was binding upon Tribunal—whether error of law affected Tribunal’s decision

On 24 August 1998 a delegate of the Minister made a deportation order against the appellant, based on a report which assessed the case on the basis of a policy statement (“the Policy”) that came into effect in 1992. The appellant applied to the AAT for review, and on 19 January 1999 the AAT affirmed the decision under review, making extensive reference to the Policy. The Policy had been included in the so-called “T” documents lodged with the Tribunal, thus indicating that it was considered to be relevant to the review by those representing the Minister.

However, in December 1998 the Minister had signed the General Direction - Criminal Deportation - No. 9 (“the Direction”). By it the Minister purported to “give the following General Direction pursuant to section 499 of the *Migration Act 1958* to any person or body having functions or powers in relation to the deportation of a non-citizen...” The Direction said it had effect on and from the date of signing.

The appellant appealed to the Federal Court, contending that the mere fact of failure of the Tribunal to advert to the Direction was sufficient ground to set aside the decision. The primary judge disagreed, saying there was no relevant substantial difference between the Policy and the Direction.

The full Federal Court noted that under s499 of the Act the Direction must be “given” to those performing functions under it. The majority (Whitlam and Gyles JJ) found that a direction is given when it is made; therefore the AAT had erred in law by not following it. The majority also considered that there were differences between the Policy and the Direction, eg. the Policy included as a factor to be taken into account “any unreasonable hardship the offender would suffer”. The Direction included as a matter to be taken into account “the degree of hardship which may be suffered by the potential deportee”. Because of the way in which the AAT had dealt with the question of hardship, the majority held that the decision was not “in accordance with” the Direction.

The majority did not accept the Minister’s argument that it was futile to return the matter to the AAT as the hardship to the appellant would be overwhelmed by the primacy accorded by the Direction to protection of the Australian community. The majority suggested that the possibility of success was not insubstantial because it would expect that a proper assessment of the case would find that the hardship would be extremely severe (while noting that it was for the AAT to assess the severity, and then to carry out the weighing process required by the Direction).

Katz J considered that actual delivery of the Direction to the AAT was necessary. Therefore the Policy was still in effect at the time of the AAT’s decision, and the tribunal had erred in law in the way it used it. Katz J referred to *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 and concluded that the tribunal failed to assess independently the propriety of the relevant Policy and to determine independently that the circumstances of the case were such that the correct decision was that resulting from the application of the relevant Policy to the relevant facts.

Instead the AAT merely determined that the decision made conformed with the Policy.

Secretary, Department of Social Security v Payne
Federal Court of Australia, Kiefel J, 12 February 1999
[1999] FCA 95

Treatment of recovery of overpayment of benefits

Payne commenced to receive disability support pension ('DSP') in November 1993. From October 1994 to June 1995, she received DSP at a rate that was higher than her entitlement, taking into account her income from part-time employment.

A delegate of the Secretary to the Department of Social Security ('the Secretary') decided that Payne was indebted to the Commonwealth in the amount of \$4,024. On review, the Social Security Appeals Tribunal and the AAT decided that Payne had notified her income from employment in November 1994, and that the part of the debt which arose after that date should be waived because it was solely due to administrative error and had been received by Payne in good faith.

In considering the 'good faith' issue, the AAT noted that the Secretary had not disputed the respondent's good faith before the SSAT; that Payne chose not to give evidence before the AAT; and, therefore, there was no basis to justify the AAT disturbing the findings of fact of the SSAT.

The Secretary appealed to the Federal Court, where it was held, allowing the appeal and remitting the matter to the AAT, differently constituted, for reconsideration:

1. The function of the AAT is not restricted to deciding whether the decision under review was correct on the facts before it, or one reasonably arrived at. Its duty to review requires the AAT to make its own assessment and determination, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 applied.
2. In the present case, the AAT had the power to consider for itself whether the provisions of s.1237A(1), relating to the obligation upon the Secretary to waive recovery, were made out.
3. Although Payne had declined to give evidence before the AAT, there was relevant and cogent evidence put before the Tribunal which might have weighed against the Tribunal's view as to the credit of Payne, and her state of mind when receiving the payments in question.