INTERLOCUTORY RELIEF IN PROCEEDINGS UNDER SECTION 15 OF THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977 (CTH)

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INTRODUCTION

The use of interlocutory injunctions to obtain interim relief in civil proceedings has been a well documented and much discussed development in Australian civil procedure. The criteria for the granting of interlocutory injunctive relief are the now familiar dual requirements that the applicant demonstrate a serious question to be tried[1] and that the balance of convenience lies in his or her favour. These standard tests are set forth in the oft-cited case of *Australian Coarse Grain Pool Pty Ltd v The Barley Marketing Board of Queensland* ("*Australian Coarse Grain Pool*").[2]

The wholesale application of these tests to the granting of all interlocutory injunctive relief has been questioned, particularly in cases that do not concern proprietary or contractual interests. One area where the suitability of the serious question/balance of convenience tests has been placed in doubt is in proceedings under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act"), especially where review is sought of decisions of the Department of Immigration, Local Government and Ethnic Affairs ("the Department") to detain individuals in custody under the Migration Act 1958

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1. Sometimes referred to as a *prima facie* case.
2. (1982) 46 ALR 398. The general principles relating to interlocutory orders are set out in *Australian Coarse Grain Pool*, citing *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

(Cth) ("the Act"). In these areas, where the relationship between state and citizen is the most intimate and where a citizen's personal liberty may be at stake, the Federal Court has been quite willing to apply a loose interpretation of the serious question/balance of convenience tests or simply to ignore these tests and apply a more liberal standard for the granting of interlocutory relief.

TWO CASES ILLUSTRATIVE OF THE DIFFERENT APPROACHES

Msilanga - The Traditional Approach

The first case is an unreported decision by Justice Von Doussa in *Deodatus William Msilanga v The Honourable Gerard Leslie Hand, Minister for Immigration, Local Government and Ethnic Affairs*.[3] The applicant, a deportee, sought review of the decision of the respondent to detain him in custody.[4] The respondent had authorised the detention of the applicant pursuant to section 93 of the Act. The applicant sought judicial review of the decisions to detain him pursuant to section 5 of the ADJR Act and section 39B of the Judiciary Act 1903 (Cth). As part of the proceedings, the applicant sought an interlocutory order for his release from custody pending the determination of the substantive detention issues. The applicant asserted that the court had the power to make the orders sought pursuant to sections 19 and 23 of the Federal Court of Australia Act 1966 (Cth) ("the Federal Court Act"), when read in conjunction with section 15 of the ADJR Act.

The respondent opposed the application on the basis that the court had no jurisdiction and, further, that to make the orders sought by the applicant the court would have to substitute its decision for that of the Minister or his delegate. Justice Von Doussa applied the standard two-prong test for interlocutory relief. He held that the application raised a serious question to be

3. *Deodatus William Msilanga v The Honourable Gerard Leslie Hand, Minister for Immigration, Local Government and Ethnic Affairs* (unreported) Federal Court of Australia 8 March 1991 GD No SA11/91.
4. There were, in fact, two decisions. The first was made on 7 February 1991 to detain the applicant in custody. The second was made on 6 March 1991 to continue to detain the applicant in custody.

tried but refused to provide "expanded reasons" for his decision.[5] The question of the balance of convenience was, in his view, "the much more difficult question."[6] The basis for the deportation order was the applicant's conviction for the crime of wounding with intent to do grievous bodily harm. The applicant had been sentenced to seven years in prison and was released on parole after 23 months. Three days after his release, the Minister exercised his discretion under section 55 of the Act and ordered the applicant's deportation.

In weighing the balance of convenience, Justice Von Doussa considered the likelihood of the applicant attacking a member of the community and in particular the victim of the earlier attack, her family or friends. He also took account of the fact that the applicant had served his sentence for that crime; but for his being a non-citizen, the Department would have no grounds to detain him in custody.[7] He ordered the applicant's release from custody on reporting conditions, including an undertaking not to contact the victim and her family.[8]

Manoher - The New Approach

In *Peter Lawrence Manoher (also known as Peter Lawrence Mano) v Minister for Immigration, Local Government and Ethnic Affairs*,[9] the applicant, a Malaysian citizen, was taken into custody pursuant to subsection 89(4) of the Act. He had arrived in Australia on 14 September 1990, travelling on a false Australian passport. He had previously lived in Australia as a permanent resident for nearly 12 years before departing on 29 May 1988 with an authority to return to Australia within three years. The applicant did not try to enter Australia on the false passport, but instead applied for a border visa pursuant to Migration Regulation 111(1)(b). That application was

5. Von Doussa J said it was inappropriate to give his reasons for believing that there was a serious question since those very questions would have to be "agitated in more detail and determined in the course of a full trial." He did indicate, however, that those serious question included: the continuing legal effect of the first detention decision after the second detention decision, the lawfulness of the detention in the event of procedural error, the procedural regularity and validity of the second detention decision including whether or not the decision maker had taken into account irrelevant considerations. Supra n 3, 3-4.
6. Ibid, 5.
7. Ibid, 9.
8. Ibid, 11.
9. *Peter Lawrence Manoher v Minister for Immigration, Local Government and Ethnic Affairs* (unreported) Federal Court of Australia 15 May 1991 GD No WA 35/91.

refused on 21 September 1990. On the same day, the applicant applied for political refugee status. He was held in custody at the Immigration Detention Centre at Perth International Airport pending a decision.

On 12 March 1991, the applicant was refused political refugee status by the Determination of Refugee Status Committee ("the DORS Committee"). The following week he requested review of that decision by application to the DORS Review Committee.[10] Whilst that review was pending, the applicant sought judicial review under section 5 of the ADJR Act of the decision to refuse him a border entry visa. He also sought an order that he be released from custody pursuant to section 15 of the ADJR Act and section 23 of the Federal Court Act.

The respondent opposed the application arguing that to release the applicant from custody would allow him to enter Australia and thereby circumvent the provisions of the Act.[11]

Justice Lee found the power under section 15 of the ADJR Act to be "an unqualified statutory power provided as an ancillary measure to the conduct of judicial review of an administrative decision affecting a citizen."[12] He was reluctant to apply the "rules that have been applied by the courts in determining the grant of interlocutory relief in suits between private litigants...."[13] He felt that in many cases, such tests would be positively inappropriate, especially in circumstances involving the relationship between citizen and state. "[D]ecisions which affect a person's liberty will always require quite different considerations."[14] The test to be applied for interlocutory relief involving release from custody under section 15 was "what is just and fair in

10. It is important to note that during the seven months that the applicant was held in custody, the respondent did not once take the applicant before a magistrate to test whether or not the detention was lawful.
11. The respondent maintained the position that the applicant had not officially "landed" in Australia because he had not been processed through immigration. S 87(1)(a) of the Act provides:

> An officer may prevent a person from entering Australia where that person would, if he or she so entered, be an illegal entrant ... and may take such action and use such force as are necessary for that purpose.

S 14(1) provides that a non-citizen, on entering Australia, will become an illegal entrant unless he or she is the holder of a valid entry permit. In effect, the respondent was arguing that by releasing the applicant, he would be deemed to have entered Australia and thus become an illegal entrant subject to arrest.
12. Supra n 9, 11.
13. Ibid, 12-13 .
14. Ibid, 12.

the circumstances having regard to the interests of the applicant and the interests of the respondent in maintaining efficient departmental administration or efficient discharge of duties imposed on the respondent by statute."[15]

Despite the endorsement of a test based on what is "just and fair," Justice Lee felt compelled to address the serious question/balance of convenience tests, stating that he was satisfied that matters of substance were raised in the application and that as far as the question of balance of convenience went, it fell in the applicant's favour.[16]

He ordered the applicant's release from custody with appropriate undertakings that he live at a nominated address, provide a surety to the Department and report regularly to an officer of the Department.[17]

THE DEVELOPMENT OF THE NEW TEST

Doubt about the appropriateness of the serious question/balance of convenience tests in section 15 cases was first raised in the case of *Perkins v Cuthill* ("*Perkins*")[18] where Justice Keely explicitly stated that the Court should not apply the principles applicable to the grant of interlocutory injunctions.[19] He held that for interlocutory relief to be granted under section 15, the applicant had to "satisfy the court that reasons or circumstances exist which make it just that the court should make the order sought."[20] The validity of the test was challenged in *Faingold v Zammit* ("*Faingold*"),[21] where the decision of a single judge who applied the standard tests and refused to make interlocutory orders was appealed to the Full Federal Court. The Full Court held that the trial judge had not erred in applying the serious question/balance of convenience tests set out in *Australian Coarse Grain Pool*. The Court could see little practical difference between this test and that in *Perkins*.

Despite the efforts of the Full Court in *Faingold* to dispel any notion of two distinct tests, the case of *Dallikavak v Minister of State for Immigration and Ethnic Affairs* ("*Dallikavak*")[22] clearly showed that two different tests were emerging for section 15 cases. In *Dallikavak*, the Full Federal Court

15. Ibid, 12.
16. Ibid, 13.
17. Ibid, 15.
18. (1981) 52 FLR 236.
19. Ibid, 237.
20. Ibid, 238.
21. (1984) 1 FCR 87.
22. (1985) 9 FCR 98.

comprising Justices Northrop, Jenkinson and Pincus, considered an appeal against the refusal by Justice Keely of interlocutory relief pending the hearing of proceedings brought under the ADJR Act in respect of the appellant's imminent deportation. Justices Northrop and Pincus held that the appropriate first test was whether there was a serious question to be tried. Justice Jenkinson, although agreeing with the other judges in dismissing the appeal, took a remarkably different approach to *Faingold*. He said *Faingold* was not authority that the serious question/balance of convenience test had to be applied in all section 15 cases.[23] Rather, he thought the criterion suggested in *Perkins* for the exercise of the discretion was "a better guide than verbal formulae derived from commercial and property litigation".[24]

By now the judges favouring the *Perkins* test were taking every opportunity to cite it, although they were careful to mention also the standard tests of a serious question/balance of convenience. In *Videto v Minister for Immigration and Ethnic Affairs*,[25] the applicant sought to quash a deportation order or stay its execution. Justice Toohey cited both *Dallikavak* and *Perkins* with approval and said that the appropriate test under section 15 required the applicant to satisfy the court that reasons or circumstances exist which make it just that the court should make the order sought.[26]

In *Snow v Deputy Commissioner of Taxation*,[27] Justice French made an extensive examination of the section 15 cases as they then stood. Although agreeing with the "broad terminology" used in *Perkins*, he nonetheless approved the ruling in *Faingold* that "in many cases the practical application of that formulation may be little distinguishable from an application of [standard] principles governing the grant of interlocutory injunctions."[28]

In *Aboriginal Development Commission v Ralkon Agricultural Co Pty Ltd*,[29] the Full Court considered an appeal from the grant of an interlocutory injunction pursuant to section 15.

23. Ibid, 107.
24. Ibid, 109.
25. (1985) 8 ALN 237.
26. Ibid, 238.
27. (1987) 14 FCR 119.
28. Ibid, 131.
29. (1987) 15 FCR 159.

The Court approved the statement of Justice Dawson in *A v Hayden (No 1)*[30] that a court "ought not be misled by an overstrict application of verbal formulae to depart from its primary duty to do complete justice in the cause."[31]

CONCLUSION

It is clear that a new test is emerging for the grant of interlocutory relief pursuant to section 15 of the ADJR Act. Nevertheless some judges are still reluctant to reject outright the principles of *Australian Coarse Grain Pool*, which are normally applied in cases where the subject matter is of a proprietary or contractual nature.

That this new test should emerge from a series of immigration cases is understandable, given the nature of the power of the Minister and his or her delegates to arrest and detain non-citizens under the Act. It is not surprising that the Courts have sought to develop a more flexible standard which allows them to exercise their discretion to do justice in each particular case. It will be interesting to see whether the new test, "what is just in the circumstances", becomes the dominant test applied in determining whether to grant interlocutory relief in all cases involving administrative decision making, or whether its application will be limited to immigration cases.

30. (1984) 59 ALJR 1.
31. Ibid, 5.