



RESEARCH NOTE

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The Reception Of Treaties In Australian Domestic Law: New Responsibilities For Decision-Makers

Australia is party to some 900 treaties. The place of such treaties in Australian domestic law has been an issue in recent times. *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*, handed down on 7 April 1995, may re-invigorate the ongoing debate concerning the involvement of Parliament in the treaty-making process.

The High Court decided that when the executive ratifies an international treaty, provided there are no statutory or executive indications to the contrary, a legitimate expectation is created that administrative decision-makers will act in accordance with the treaty. Should decision-makers not act in such a manner, procedural fairness requires that the person affected be given the opportunity to persuade them otherwise.

The Facts

Mr Teoh, a Malaysian citizen, arrived in Australia in May 1988 and was granted a temporary entry permit. In July he married Jean Lim, an Australian citizen. Mrs Teoh had four children at that time, and there are three children of the marriage.

On 3 February 1989, Mr Teoh applied for a permanent entry permit. In November 1990 he was convicted of importing and possessing heroin. He was sentenced to six years' imprisonment. The sentencing judge accepted that Mrs Teoh's addiction to heroin was a relevant factor in explaining Mr Teoh's actions. In January 1991, Mr Teoh was re-

fused a permanent entry permit: his criminal record meant that he could not meet the good character requirement. In July 1991, and again in February 1992, a delegate of the Minister ordered Mr Teoh's deportation.

Mr Teoh appealed the decision, ultimately to the Full Federal Court. The Federal Court found that Australia's ratification of the *United Nations Convention on the Rights of the Child* (although not part of Australian law) created a legitimate expectation in parents or children that an action by the Commonwealth would be conducted in accordance with the principles of the Convention.

The United Nations Convention on the Rights of the Child

Australia ratified the Convention in December 1990 and it entered into force for Australia in January 1991. Amongst other things, the Convention (Article 3) provides that 'in all actions concerning children ... the best interests of the child shall be a primary consideration.'

The High Court's Decision

Mason CJ and Deane J

Although the provisions of an international treaty do not become part of Australian law unless incorporated by statute, they may, nevertheless, have implications for domestic law. For example, an international convention, ratified by Australia, may influence the Court's interpretation of an ambiguous statute. The courts should favour that interpretation which accords with

Australia's treaty obligations. International conventions also assist the development of the common law. However, their Honours noted that 'judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law.'

Neither of these issues are raised in this case. Rather, Mason CJ and Deane J state that the questions to be answered here are:

whether the provisions of the Convention are relevant to the exercise of the statutory discretion and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention (p 12).

Their Honours said that the Convention was relevant; the decision refusing Mr Teoh a permanent entry permit was an action concerning children.

Further, their Honours stated that the ratification of an international convention is 'not to be dismissed as a merely platitudinous or ineffectual act.' Rather, it is a 'positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.' This statement gives rise to:

a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention

and treat the best interests of the children as a primary consideration (p 15).

Moreover, their Honours made it plain that this was an objective test, stating that:

It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it (p 15).

Where a decision-maker intends making a decision inconsistent with a legitimate expectation, 'procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.'

In this case, the good character requirement, in conformity with departmental instructions, was treated as *the* primary consideration; the decision-maker did not treat the interests of the children as *a* primary consideration. Their Honours said:

A decision-maker with an eye to the principal enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it (p 15).

Mr Teoh, was therefore, denied procedural fairness.

Toohy J

Toohy J stated that by ratifying the Convention, Australia gave an undertaking that it will, in all actions concerning children, make the best interests of the child a primary consideration. If a decision-maker intends not to treat the best interests of a child as a primary consideration, he or

she must give the person affected an opportunity to argue that the decision-maker should do so.

Gaudron J

Although agreeing with Mason CJ and Deane J as to the status of the Convention in Australia law, Gaudron J partly based her judgement on the existence of common law rights in Australian domestic law. Her Honour said the status of the children as Australian citizens was significant in deciding the case:

It is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare, particularly decisions which affect children as dramatically and as fundamentally as those involved in this case (p 31).

The Convention, according to Gaudron J, 'gives expression to a fundamental human right which is taken for granted by Australian society.'. Therefore, 'it is reasonable to speak of an expectation that the Convention will be given effect.' Procedural fairness required that if the delegate was not going to take into account the interests of the children as a primary consideration, Mr Teoh should have been informed so that he had an opportunity to persuade her otherwise.

McHugh J

McHugh J delivered a dissenting judgement. His Honour took the view that the 'legitimate expectation' must be one actually held by the applicant.

In allowing the Minister's appeal, McHugh J, said, amongst other things, that ratification of the Convention did not give rise to a

legitimate expectation that Mr Teoh's application would be treated in accordance with the Convention.

Implications

As McHugh J noted in his dissenting judgement, if the ratification of a treaty gives rise to a legitimate expectation, 'administrative decision-makers would have to ensure that their decision-making complied with every relevant convention or inform a person affected that they would not be complying with those conventions.'

McHugh J also stated that in order for Mr Teoh to successfully argue that the *Convention* gave rise to a legitimate expectation, 'the doctrine of legitimate expectations will have to be extended.' The majority's analysis of what constitutes a 'legitimate expectation' will, therefore, need to be closely examined.

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