CHAPTER THREE

REVIEW OF DEPORTATION DECISIONS

This chapter considers term of reference two; namely, the appropriateness of existing arrangements for the review of deportation decisions. Although the present system has proven satisfactory in the majority of cases, it has led to considerable disquiet when the Tribunal has reached outcomes different from those of the Minister or Department.

In this chapter, the Committee explores the arguments in favour of maintaining the current scheme and considers proposals for its reform, including making Tribunal decisions recommendatory. The Committee concludes that the existing review scheme should be maintained but that it should more closely reflect ministerial responsibility. Accordingly, the Committee endorses a proposal for the retention of AAT determinative powers while allowing the Minister a special power to set aside an AAT decision where he or she decides this is in the national interest.

Introduction

3.1 Before 24 December 1992, the AAT had only recommendatory powers in relation to deportation decisions. This meant that it could only affirm a decision or remit it to the Minister with recommendations. The Minister then had the responsibility for making the final decision to deport. The Minister could, and did, reject AAT recommendations in some cases.

3.2 Calls for change resulted from the Minister exercising his power not to follow AAT recommendations. There were perceptions that the recommendatory system encouraged litigation, and that political considerations were entering the decision-making process.

3.3 Since 24 December 1992, the AAT has been granted determinative powers for the review of deportation decisions. This means that the Tribunal acts as a primary decision-maker and makes a new decision on the facts before it. It can decide to affirm, vary or set aside the original decision according to the merits of the case. Under s.500(5) of the Act, such review must be conducted by a Presidential member of the AAT.

3.4 The move to determinative review has, however, created different problems. While there has always been friction between Ministers and the Tribunal when they have differed on the outcome of particular cases, the determinative system has caused that friction to become more public, for the Minister no longer has the power to intervene in cases where he or she perceives a threat to the community. As one commentator has observed:

> It is fair to say that criminal deportations are a vexed area of administration. Immigration Ministers have publicly voiced their disquiet when Tribunals exercising such administrative review... reach a different conclusion on the case to that of the Minister.[1]

1 Cronin, *Submissions*, p. S364.

3.5 It is clear that these disputes cause "resonating disquiet"[2] with the potential to detract from public confidence in the system. If the public loses confidence, the outcome would disadvantage both the Australian community and non-citizens who may seek to avoid deportation.

3.6 The Committee's terms of reference provide an opportunity to scrutinise the existing review arrangements and to consider proposals that will avoid the disquiet that has attended the determinative process.

3.7 In this chapter, the Committee first examines the current review framework and then canvasses various proposals for its reform.

Current review framework

Right of appeal to the AAT

3.8 As stated earlier, if the Minister decides to deport a non-citizen under s.200, s.500(1)(a) of the Migration Act grants a right of appeal to the AAT.

3.9 Under s.502 of the Act, however, no right of appeal is available where the Minister decides the matter personally and (because of the seriousness of circumstances giving rise to the decision) issues a certificate declaring the non-citizen to be an "excluded" person. In such cases the Minister must provide an outline of reasons and table it in Parliament within 15 sitting days of the decision.[3]

Review Statistics

3.10 The statistics provided by the AAT indicate that in the period 1 July 1993 to 30 June 1997 the Tribunal received 104 applications for review, and decided 84 of them. In 72 of these cases (86%), the AAT did not alter the Minister's decision, while in 12 cases, the matter was set aside (by consent or otherwise) or remitted to the Minister for reconsideration.[4]

3.11 DIMA provided broadly similar statistics to those of the AAT. It noted that the Tribunal had affirmed departmental decisions in 44 of the 53 cases (83%) that had gone to hearing since 1993. However, it added that in four out of the nine cases where the AAT had overturned the decision, the person had since re-offended.[5]

3.12 The AAT's figures indicate that in the period 1 July 1993 to 30 September 1997, the Tribunal took an average of 274 days to review applications on deportation. If one excludes certain "extreme cases" which took in excess of two years, the average is 216 days.[6]

3.13 DIMA provided a slightly different estimate of the current length of appeals. It claimed that, for the cases concluded between 1 July 1996 and 30 June 1997, the AAT spent

2 ibid., p. S365.
3 DIMA, *Submissions*, p. S477 indicates that s.502 has not been used in respect of criminal deportation.
4 AAT, *Submissions*, p. S156.
5 DIMA, *Submissions*, p. S287.
6 AAT, *Submissions*, p. S387.

an average of 232 days in finalising appeals.[7] The Tribunal put the average for this period at 196 days.[8]

3.14 These figures show that the AAT affirms the vast majority of deportation decisions and that it averages around seven to eight months to finalise cases.

Proposals for amending review arrangements

3.15 The Committee received considerable evidence on the current review framework. Most submissions supported retaining the current system of merits review and leaving it unchanged. The New South Wales Council for Civil Liberties, for instance, simply stated that they considered the existing arrangements to be appropriate.[9] DIMA, however, suggested a number of changes that might improve the system.

3.16 In this section, the Committee considers the arguments for:

- retaining the current system;
- making AAT review recommendatory; and
- providing the Minister with a special power of intervention.

Retaining the current system

3.17 A number of submissions supported retention of the independent merits review system because of the severe impact of deportation on non-citizen residents and their families. The Administrative Review Council (ARC), for example, explained the necessity for such review in these terms:

> Non-citizens who may be considered for deportation...may have been lawfully resident in Australia for a considerable period. The decisions made under those sections may significantly affect the interests of the deportees and their families in Australia. Not only is the person ejected from Australia, but deportation effectively imposes a life time ban on their return to Australia. In view of this, the Council considers that all deportation decisions under section 200 should be subject to external merits review.[10]

3.18 The ARC suggested that a generalist tribunal such as the AAT appropriately dealt with such matters, since deportation involved consideration of general issues such as the seriousness of the offence, rather than complex issues of migration or refugee law.[11]

3.19 The AAT argued that the existing system should be retained because deportation would affect the interests of the deportee and of his or her family and friends. It noted that the costs (financial and otherwise) to the deportee might be substantial, and that the effect of

7 DIMA, *Submissions*, p. S293.
8 AAT, *Submissions*, p. S387.
9 NSW Council for Civil Liberties, *Submissions*, p. S77.
10 ARC, *Submissions*, p. S87.
11 ibid., p. S448.

deportation was a permanent ban on re-entry to Australia. It added that, were merits review to be removed, more litigation might result:

> [I]f the right to seek merits review of these decisions were to be removed, it is likely that a greater number of deportation matters would result in applications to the Federal Court for orders of review pursuant to the *Administrative Decisions (Judicial Review) Act 1977*, at significantly greater cost to the taxpayer.[12]

3.20 The Jesuit Social Services and Jesuit Refugee Service supported the existing arrangements on slightly different grounds. They maintained that the principle reason for leaving deportation matters to the AAT was because it kept decisions free from political intervention. As they explained:

> In reviewing deportation decisions, it is...imperative that there be access to independent merits review. There is no reason why this should not continue to be through the Administrative Appeals Tribunal. Indeed...criminal deportation is such a highly emotive issue that care should be taken as far as possible to remove any form of or potential for interference in individual cases.[13]

3.21 The Law Society of New South Wales[14] and the AAT echoed these sentiments, the latter commenting that "[one] of the purposes of the introduction of a merits review scheme was to ensure that decisions in individual cases were removed from the political arena".[15]

Making AAT review recommendatory

3.22 In its first submission to the Committee, DIMA canvassed a number of options to improve the existing arrangements, including making the AAT's review powers recommendatory.[16] A shortcoming of the current arrangements is that the Minister cannot exercise his or her responsibility to the Parliament in determining who can enter or remain in Australia. DIMA described the situation as follows:

> The extent of the Minister's involvement under the present arrangements is limited to the establishment of the policy by which the deportation will be considered. The AAT, in the absence of statutory obligation to consider the policy, is not bound by the terms of the policy...The Migration Act recognises the Minister as responsible for decisions taken under the Act. However, the Minister is unable to

12 AAT, *Submissions*, p. S151.
13 Jesuit Social Services, *Submissions*, pp. S373-374.
14 Law Society of NSW, *Submissions*, p. S417.
15 AAT, *Submissions*, p. S454.
16 The remaining options proposed by DIMA included making the Immigration Review Tribunal responsible for review, eliminating merits review altogether, or appointing a special commissioner to deal with review applications. DIMA did not press or canvass these in detail nor were they raised by any other witnesses.

> decide a matter on its merits where the matter has been determined by the AAT.[17]

3.23 DIMA suggested that making the AAT's powers recommendatory would more closely reflect ministerial responsibility, because the Minister would make the final decision on matters of deportation. It noted that such a system existed until 1992, before the Tribunal was given determinative powers.[18]

3.24 In response to these suggestions, the AAT argued that reinstating recommendatory powers would politicise the review scheme and diminish the independence of the system. It stated:

> A key purpose of merits review is to have the review of administrative decisions carried out in an impartial forum, free from any political influences. If the review body has power only to make recommendations, this purpose is defeated as the ultimate decision must still be made in an environment where there is a perception of the possibility of political influence.[19]

3.25 The AAT further explained that recommendatory powers could increase delays and administrative burdens, since any ministerial decision to reject the recommendation of the Tribunal would be open to challenge, especially in the courts. It drew attention to two deportation cases[20] in which the Minister's decision not to accept the recommendations of the Tribunal had precipitated legal appeals, and remarked:

> [These] cases illustrate one of the underlying problems with any system in which the role of the Tribunal is limited to making non-binding recommendations to the Minister: any decision of the Minister to reject a recommendation of the Tribunal will be open to further avenues of challenge, for example through the courts. The interpolation of a decision of the Minister between the decision of the Tribunal and the courts could fragment and protract the process of review of deportation decisions, and may result in delays.[21]

3.26 The Law Society of New South Wales also expressed the view that recommendatory powers would politicise the review of decisions, and added that the proposed system had been tried and had failed:

> The suggestion that we move back to a system of recommendatory powers for the AAT will defeat the entire purpose of having a merits review system and will also lead to the system becoming increasingly

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17 DIMA, *Submissions*, pp. S293-294. That the Minister is powerless to overturn an AAT decision was confirmed in *Gunner v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court, 19 December 1997). In this case, Justice Sackville ruled that the Minister could not use the power to cancel visas on character grounds (s.501) to set aside an AAT deportation decision that had been made on the same facts.

18 ibid., p. S294.

19 AAT, *Submissions*, p. S384.

20 *Minister for immigration, Local Government and Ethnic Affairs v Batey* (1993) 112 ALR 198; *Haoucher v Minister for Immigration and Ethnic Affairs* (1989) 93 ALR 51.

21 AAT, *Submissions*, p. S455.

> political. This system has been tried and it failed. This was the primary reason for the shift to a determinative review system in 1992. There is now no good reason to return to it.[22]

Providing the Minister with a special power of intervention

3.27 In evidence before the Committee, the DIMA representative suggested that it might be preferable for the Tribunal to retain its determinative powers, but for the Minister to have the ability to overrule its decisions when he thought it in the national interest to do so:

> When I think of the number of decisions that [the AAT] makes and the fact that [there are] a number of those decisions where I think any minister may put his or her mind to changing the decision, there may be more efficiency in maintaining its determinative nature, but allowing a minister to come to a different conclusion if they wish.[23]

3.28 DIMA formalised this proposal in a supplementary submission as its preferred model for changing the review arrangements. It suggested that the Minister should be given a personal power to set aside deportation decisions of the AAT where the Minister was satisfied that it was in the national interest to do so. It drew attention to a similar provision in s.501A of the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997.

3.29 DIMA explained that the power was necessary because the Government used deportation to protect the Australian community from serious crime; however, it could not accomplish that task when the AAT overturned decisions to deport persons convicted of crimes such as drug trafficking and rape. In such cases, the Minister was powerless to act. DIMA described the situation in these terms:

> There is a natural concern when merits review bodies overturn deportation decisions. While this does not occur with great frequency, on occasions where there is an exceptionally serious crime involved, such as drug trafficking, fraud involving millions of dollars, rape etc, it is sometimes difficult to understand how such a decision might have been reached. As the courts cannot consider appeals against such merits review...there is no further avenue of appeal for the Department or the Minister in carrying out their roles of protecting the Australian community from persons who have already demonstrated the danger they represent.[24]

3.30 DIMA emphasised that the government should be able to re-examine AAT decisions which were at odds with the community needs, because the Government was ultimately responsible to the Australian community:

> [T]he community looks to the Government to provide appropriate levels of protection...Where the Government fails to provide the level of protection expected of it then it is open to the community and

22 Law Society of NSW, *Submissions*, p. S417.
23 DIMA, *Transcripts*, p. 272.
24 DIMA, *Submissions*, p. S465.

> through its representatives in Parliament to sanction the Government. It is not appropriate that an administrative review body should make merits decisions for which the Government is ultimately held responsible, without there being an avenue for the Government to re-examine those decisions which are out of step with community needs.[25]

3.31 DIMA concluded that its proposal was balanced, as it only allowed for overturning AAT decisions where they were out of step with community needs and where the Minister acted personally and in the national interest.[26]

3.32 The Senate Legal and Constitutional Legislation Committee has recently scrutinised national interest powers in the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997. Various provisions of that Bill would enable the Minister to exclude merits review of decisions if the Minister believes that such review would be contrary to the national interest.[27] The majority of the Committee found that these powers were not too broad, and that "national interest" naturally applied to serious issues that might affect the Australian community. The majority also accepted that the courts would determine the boundaries of the phrase as the need arose; and that the Minister's bona fides would still be subject to legal appeal.

3.33 The findings of the Senate Legal and Constitutional Legislation Committee furnish cogent reasons for thinking that the Minister's power to overturn AAT decisions in the national interest will not be overly broad. In addition, it should be noted that Immigration Ministers, for some years, have had the power to exclude deportation decisions from AAT review where this is in the national interest (s.502) but have chosen not to use that power in relation to criminal deportation cases.

25 ibid., pp. S465-466.

26 ibid., p. S467.

27 The provisions enable the Minister to issue conclusive certificates precluding review by the Refugee Review Tribunal and the proposed Merits Review Tribunal.

Conclusion on the review of deportation decisions

3.34 The Committee acknowledges the necessity for a review process for deportation decisions, since those decisions may have a severe impact on the interests of the deportee and his or her family in Australia.

3.35 The Committee, however, takes the view that there is scope to improve the current system. Although the AAT overturns less than 20% of the initial deportation decisions, when it has done so its determinations have aroused ministerial and public disquiet. As stated earlier, that disquiet poses a threat to public confidence in the system.

3.36 The main reason for that disquiet is the anomalous nature of the current scheme. The responsibility for allowing persons to enter or remain in Australia, and for protecting the Australian community, is vested in the Minister, who is answerable to Parliament. That responsibility is emphasised by the Minister's ability to exclude decisions from being reviewed by the AAT where this is in the national interest (s.502).

3.37 Under the present law, however, the Minister cannot act when the AAT makes decisions that, in his or her view, are out of step with the expectations and needs of the Australian community, or could pose a threat to the community's welfare. Nonetheless, the Minister is held accountable for those decisions. This situation is unsatisfactory and contributes to the disquiet that has attended the review process thus far.

3.38 While the initial DIMA proposal that giving the AAT recommendatory powers would better reflect the responsibility of the Minister, it poses too many practical difficulties. As DIMA noted, it would be inefficient for the Minister to make the final decision on every deportation matter given the small number of times that he or she would differ from the AAT. Furthermore, a move to recommendatory powers might well lead to an increase in judicial review applications from the Minister's decisions, thereby delaying proceedings and creating greater costs for taxpayers to bear.

3.39 The proposal of DIMA for a ministerial power to set aside AAT decisions would ensure an appropriate balance between ministerial responsibility and the benefits of merits review. It would underscore the responsibility of the Minister to Parliament and, through it, the people. At the same time, because the Tribunal seldom overturns departmental decisions, and because the power could only be exercised personally in the national interest, the impact of such a power on the merits review system would be minor.

3.40 The Committee appreciates that the reference to the "national interest" in this proposal may generate concern about the breadth of the Minister's discretion. Such concern, however, would be unwarranted based on past usage of the existing power in s.502 for removals.

Recommendation 1

The Committee recommends that the *Migration Act 1958* be amended to:

(a) provide the Minister with a power to set aside an AAT decision on deportation if the Minister regards this outcome as being in the national interest;

(b) require the Minister, when exercising the power, to table an outline of the reasons before each House of Parliament within 15 sitting days; and

(c) subject the exercise of this power by the Minister to a formal review by the appropriate committee of the Parliament three years after the tabling of this report.