REASONING IN MIGRATION DECISIONS

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The work migration tribunals perform is important. It affects the well-being and even the very lives of people who seek to stay in Australia. Not only that. By any criteria, the task is onerous. Tribunal members have difficult factual and sometimes legal questions to decide. They are under very heavy time and workload pressures. They have an inquisitorial role to perform, which necessarily creates great difficulties when it comes to fact finding. Tribunals have to explain their findings and reasons and must do so, at least until recently, in sufficient detail and with sufficient cogency to survive judicial review.

The task of tribunal members has not been made any easier by the political sensitivity of the issues with which they must deal, particularly in resolving applications for protection visas. Nor is it assisted by the rapid changes to migration law, both statutory and judge-made. The extent of change is illustrated by the fact that during the past five months there have been no less than three regimes governing review of tribunal decisions in migration matters.

The first regime was that in force prior to 31 May

2001, when *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1 was decided by the High Court. *Yusuf* concerned the construction of s 430(1) of the *Migration Act 1958* (Cth) which requires the Refugee Review Tribunal ("RRT") to prepare a written statement that

a. sets out the decision of the Tribunal on the review;

b. sets out the reasons for the decision;

c. sets out the findings on any material questions of fact; and

d. refers to the evidence or any other material on which the findings of fact were based.

(See also s 368(1) of the *Migration Act,* relating to decisions of the Migration Review Tribunal.)

Under the construction of s 430(1) which prevailed before the decision in *Yusuf*, a failure to comply with the duties imposed by s 430(1) constituted a failure to comply with procedures laid down by the *Migration Act* and thus enlivened the ground of review created by s 476(1)(a) of the *Migration Act* (a failure to follow procedures prescribed by the legislation). Moreover, s 430(1)(c) of the *Act* was construed to mean that the RRT had to make findings of fact on issues that were **objectively** material to the applicant's case. A failure by the RRT to make findings on claims central to the applicant's case was itself enough to warrant an order setting aside the RRT's decision and remitting it for further consideration.

One consequence of this regime was that the reasons of the RRT were always subject to scrutiny to ensure that the requirements of s 430(1) were met. Regardless of the merits of the conclusion reached by the RRT, a breach of its duty to set out the findings on material questions of fact justified judicial review of the decision. This provided, in my view, a useful means of correcting a serious failure by the RRT to address a critical claim, without the Court adopting the impermissible role of fact-finder or reviewer of the merits of the decision. A body of jurisprudence developed that seemed to me to be both coherent and capable of application in a reasonably consistent manner.

The High Court's decision in *Yusuf* changed this regime. The Court held that s 430(1), on its proper construction, did not impose procedural requirements on the RRT. It followed that a breach of s 430(1) would not enliven the ground of review specified in s 476(1)(a) of the *Migration Act.*

Moreover, s 430(1)(c) was interpreted to mean that the Tribunal was merely required to set out the findings of fact it **actually** made. The word "material" in s 430(1)(c) was not to be read as importing an objective or external standard. McHugh, Gummow and Hayne JJ put it this way (at 17):

> *"All that s 430(1)(c) obliges the tribunal to do is to set out its findings on those questions of fact which it considered to be material to the decision which **it** made and to the reasons **it** had for reaching that decision."*

The joint judgment explained that this interpretation left s 430(1)(c) with important work to do in connection with judicial review. It ensured that a dissatisfied applicant and a court exercising powers of review could identify the RRT's actual reasons for the decision and the facts it considered material to the decision. The Court could then infer, for the purposes of judicial review, that anything not mentioned in the RRT's reasons had not in fact been taken into account by it. That omission might, however, reveal an error of law, "jurisdictional" error or a failure to take into account relevant considerations on the part of the RRT. By adopting an apparently broad (and in certain respects somewhat surprising) construction of the grounds of review (and the qualifications to those grounds) in s 476 of the *Migration Act,* the High Court actually widened the scope for judicial review in the Federal Court, potentially at least, quite considerably.

The third regime is that introduced by a recent package of legislative amendments, particularly the *Migration Legislation Amendment (Judicial Review) Act 2001,* operative 2 October 2001. The intention, as expressed in the *Explanatory Memorandum,* is to limit judicial review of so-called "privative clause decisions" by the High Court to the following grounds:

- where the tribunal exceeds constitutional limits;
- narrow jurisdictional error (for example, where the decision-maker does not have delegated authority to make that class of decision); and
- *mala fides.*

In other words, if the decision-maker acts in good faith, has the lawful authority to make the decision and does not exceed constitutional limits, the expressed intention to that decision should be lawful and not susceptible to judicial review.

On one view of the legislation, the Federal Court may have been deprived of jurisdiction in relation to privative clause decisions. On another, it will have a limited jurisdiction to review such decisions, perhaps co-extensive with that of the High Court. Depending on the way the legislation is construed, the surviving jurisdiction of the Federal Court to review privative clause decisions may or may not turn out to be something of an empty shell. An overriding question is whether the legislation curtailing judicial review of privative clause decisions is an unconstitutional attempt to oust the High Court's entrenched jurisdiction under s 75(v) of the *Constitution* to issue constitutional writs against officers of the Commonwealth. This question will ultimately be determined by the High Court itself.

While the issues of construction and the constitutional questions have yet to be determined, it is likely that the jurisprudence surrounding s 430(1) of the *Migration Act* will become part of the tangled history of migration law in Australia. The intriguing possibility that *Yusuf* actually might have opened the way to something closer to merits review than the previous law allowed, is unlikely to be explored in depth.

It is not appropriate to take the issues concerning the construction and validity of the new legislation any further. The only point I would make is that if the legislation operates as suggested in the *Explanatory Memorandum,* the reasoning in *Yusuf,* if not undercut, is rendered largely inoperative. That is so because a failure by the RRT to address critical issues or to make critical findings of fact (as revealed by its reasons), is unlikely to enliven any available ground of judicial review of the RRT's decision. Section 430(1) will remain in the *Migration Act,* but its status may be reduced in substance to that of an unenforceable set of statutory directions or aspirations.

Of course, the fact that the requirements imposed by s 430 (read in the manner prescribed by the High Court in *Yusuf*) may no longer be enforceable, even indirectly, does not detract from the importance of a tribunal giving adequate reasons for its decisions and making clear findings of fact. On the contrary, the absence of effective judicial review increases the significance of adequate reasons being given by tribunal members. The rationale for reasoned decision-making will remain: that is, adequate reasons

- promote sound administration, provide guidance to other administrators and encourage consistency in decision-making;
- enhance public confidence in the process or, at

least, limit suspicion about the integrity of the process;

- increase the likelihood that the person adversely affected will understand, if not agree with, the basis for the decision; and

- if any meaningful avenues for judicial review continue to be available, maximise the opportunities for taking advantage of them.

There are no rigid rules which govern the preparation of reasons, although s 430(1) of the *Migration Act* (particularly if read according to pre-*Yusuf* principles) obviously provides useful guidance as to the fundamental obligations of tribunal members. One advantage of the pre-*Yusuf* regime was that the work of tribunals was reviewed from time to time by judges by reference to issues determined to be material in an objective sense. Doubtless tribunals did not always welcome judicial intervention, just as trial judges do not necessarily always welcome the corrective influences of appellate courts. Nonetheless, judicial review brought home the importance of addressing systematically the critical factual claims made by an applicant.

From my own involvement in hearing challenges to RRT decisions, both under s 430(1) of the *Migration Act* and on other grounds, I have observed from time to time what I regarded as deficiencies in approach by the RRT to its difficult task. This of course is not to suggest that most decisions made by the RRT are poorly reasoned. They are not. It is important to stress that the sample of RRT decisions seen by the courts is not representative of all RRT decisions. I have no reason to doubt that the great majority of RRT decisions are not only free from reviewable error but are clear and well-reasoned. Even so, I think that some difficulties in reasoning are sufficiently common to warrant referring to them.

My starting point is that perhaps the most important task of the decision-maker is to make findings on the critical claims made by the applicant. This may seem obvious, but it is by no means infrequent that a tribunal does not adequately discharge that responsibility. Sometimes it is assumed that an adverse comment on the applicant's credit obviates the need for specific factual findings on each of the important claims. But a finding that an applicant is not generally to be believed does not of itself establish the falsity of every claim that he or she has made. It is still necessary to make explicit findings about the events (normally, in refugee cases, alleged persecutory conduct experienced by the applicant or his or her family) relied on in support of the application. Experienced decision-makers in this area will often remind themselves that an applicant may

exaggerate his or her claims, or even lie outright on some aspects of the case, yet give an essentially truthful account of his or her major claims.

A related difficulty arises where the tribunal contents itself with the comment that it has "considerable doubts" or "serious reservations" about the applicant's account in general, or about particular claims. Expressions of this kind are not clear findings on credit, let alone findings on the key claims made by the applicant. The risk is that they divert the decision-maker from the task of clearly stating its findings of fact. In some cases it will not be necessary to go beyond the expression of doubt, because there is a further insuperable obstacle to the applicant succeeding, even if his or her account is accepted in full. But if this is the case, the decision-maker needs to be sure that the obstacle is indeed insuperable. In any event, the tribunal should consider whether it is really necessary or appropriate to prepare reasons that not only reject the applicant's claim, but characterise him or her as an unreliable or untruthful person. Similarly, it is necessary to bear in mind, as must all decision-makers, that factual findings contrary to the case advanced by an applicant can be very hurtful or distressing and that such findings should generally be avoided if they are unnecessary to the decision. I have in mind one case where a tribunal made a finding as to the paternity of a child, yet the finding was not material to the tribunal's decision.

In order to make findings on the critical factual issues, it is of course necessary to identify what those issues are. This is where I have noticed a change in the presentation of reasons, particularly in the case of the RRT, over the last two or three years. Reasons have become lengthier and more discursive. I suspect that this is a product of time pressures. Ironically, the less time the decision-maker has, the lengthier and less focussed the reasons are likely to be. There is an increasing tendency for the reasons to include a more or less *verbatim* account of the interchange between the decision-maker and the applicant at the hearing. There is, perhaps, no great harm in this, other than tedium for a reader, provided that the discursive approach does not deflect the decision-maker from identifying the core factual claims made by the applicant and how they are said to attract the protection of the *Convention.* It seems to me to be useful for the decision-maker to include preparation of a summary of the applicant's case in his or her check-list of things to be done. Again, this may seem trite, but it is a little surprising how often the reason contains no summary of the issues. There is no reason in principle why such a summary should not replace a lengthy account of questions and answers at the hearing. The pre-*Yusuf* jurisprudence on s 430(1) of the *Migration Act* did

not require the RRT to set out the applicants' claims or evidence at length.

I appreciate that advice of this kind is not easy to implement. Nor do I hold myself out as a model for those wishing to prepare concise statements of reasons. Nonetheless, unless a decision-maker is able to summarise an applicant's case accurately, he or she may be at risk of not doing the applicant justice.

I should also say something about the process of fact-finding, while reminding myself that judges do not see a representative sample of tribunal decisions. In recent years, I have discerned what appears to be an increasing tendency for RRT to reject claims for protection visas essentially on the basis that the applicant's account is fabricated or so exaggerated as to demonstrate the unreliability of his or her version of events. By this comment I do not mean to imply that RRT members are not approaching their fact-finding task conscientiously. Nor do I suggest that RRT members are deciding cases without due regard to the pitfalls inherent in judging credibility on the basis of limited exposure to applicants who are often confused, frightened and desperate. But I think it fair to say that many Federal Court judges have encountered RRT reasons which, in their view, incorporate troubling findings of fact. (Of course, whether the RRT decisions have been set aside in these cases is quite another matter, because the Court has no authority to engage in merits review of RRT decisions.) It is not possible to put forward a definitive classification of such cases and it is necessary to acknowledge that judicial misgivings about a particular decision may be unfounded. My impression, however, is that judicial misgivings most often arise where the RRT takes a fairly formulaic approach to the assessment of credibility and, in particular, places heavy reliance on the failure of an applicant to make a specific factual claim at the earliest opportunity. There will be occasions when a failure by an applicant to make a claim at an early stage provides a sound enough basis for rejecting aspects or even the whole of his or her account. But sometimes the failure is readily explicable. There can be no substitute for the most careful scrutiny of the individual circumstances of each case and, legislative directions aside, the avoidance of rigid preconceptions as to what is or is not normal behaviour in abnormal situations.

Might I caution, too, against what might be described as excessively result-oriented reasons. Occasionally, a Court sees reasons that seem to rely on a number of alternative bases for rejecting an applicant's claims for a protection visa. The Tribunal may characterise the applicant's account as "somewhat fanciful" or "difficult to believe", but then go on to

find that in any event it must fail for another reason. There is of course no obligation on a Tribunal to explore every difficulty presented by an applicant's case. It is quite in order, in an appropriate case, to identify a single fatal flaw without necessarily ruling on every other obstacle the applicant faces. Equally, if the application is bound to fail for two or three independent reasons, there may be merit in identifying each reason and ensuring that appropriate findings of fact are made in relation to each. But tribunals should avoid the danger of dealing inadequately with each of two or more distinct obstacles in the applicant's path, in the mistaken belief that the cumulative effect of the obstacles must be to negate the applicant's case. The expression of doubts about various aspects of the applicant's claims is no substitute for clear findings of fact and precise conclusions.

In my view, the ultimate test of whether the reasons of a tribunal are satisfactory is relatively easy to state, although much more difficult to put into practice. Do the reasons provide an unsuccessful applicant, who carefully reads the reasons or an accurate translation of them, with a reasonable opportunity to understand clearly why he or she was found not to have met the relevant statutory criteria? The applicant may or may not accept the correctness of the tribunal's fact-finding or its application of legal principles. The applicant may or may not assess the decision by reference to reasonable or even rational criteria. But a reasonable applicant should be left with the feeling that the tribunal has carefully and impartially considered his or her claims. That is why, at the commencement of this talk, I characterised the task of migration tribunals as onerous.