Attachment A

Australian Institute of Administrative Law

CONTROLLING MIGRATION LITIGATION

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INTRODUCTION

Migration litigation has been a topic of currency, if not controversy, for some years in Australia. However, the discussion often fails to deal with the topic in the broader contexts of, first, primary decision making in the migration and refugee area and, secondly, international comparisons. In my view it is instructive to spend a little time examining these broader contexts because they provide some sobering perspectives.

Primary decision making in migration and refugee areas

The national figures on migration and refugee decision making are startling. In relation to migration decision making, in 2007-08 500,989 applications relating to potentially reviewable decisions were lodged with the Department of Immigration and Citizenship (DIAC) and 461,562 such applications were granted which, when withdrawals are taken into account, gives a rejection rate of a mere 6.34%.[1] The number of review applications (which cover both refusals of visa applications and cancellations of visas) lodged with the Migration Review Tribunal (MRT) in 2007-08 was 6,325.[2] While that number is significant it needs to be seen within the broader context I have mentioned, showing that favourable decisions are made by DIAC in the vast majority of cases.

Refugee status decision making is a more complex picture. The Refugee Review Tribunal (RRT) only has jurisdiction in relation to refugee claims made "onshore", i.e. by persons who are in Australia. The figures for the wider offshore refugee and humanitarian program show that in 2007-08 a total of 47,331 applications were made resulting in 13,014 persons entering Australia under the program.[3] During the same year, 2,215 onshore claims were granted in relation to the 3,987 initial lodgements.[4] The 2,284 applications made to the RRT in that year[5] again need to be seen in this broader context of the overall numbers of favourable refugee and humanitarian decisions made by DIAC.

Against this background what is the position concerning judicial review of migration and refugee decisions?

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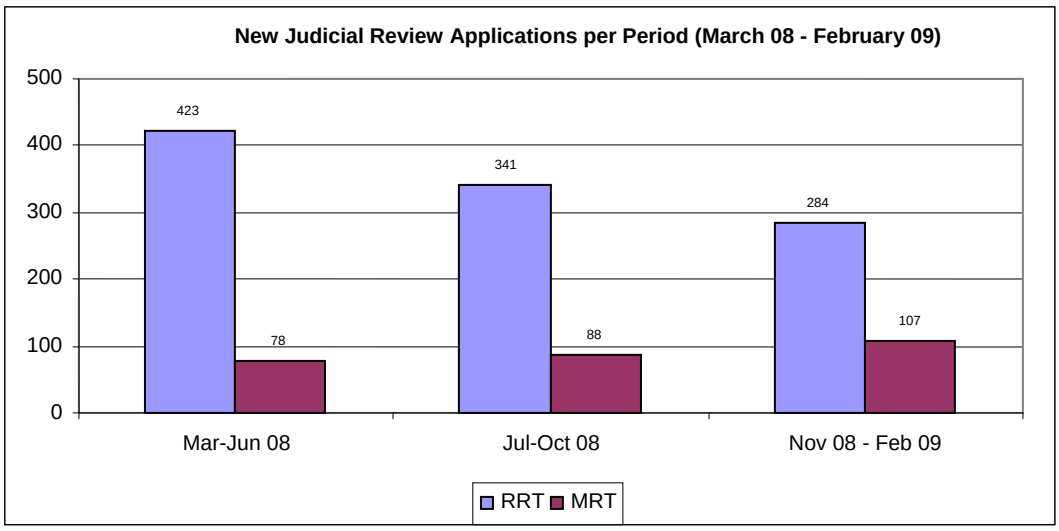
1 According to figures supplied by DIAC to the Migration Review Tribunal and Refugee Review Tribunal in March 2009.
2 Migration Review Tribunal and Refugee Review Tribunal Annual Report 2007-08, p.28.
3 Department of Immigration and Citizenship Annual Report 2007-08, pp. 79-80
4 Department of Immigration and Citizenship Annual Report 2007-08, pp. 79-80, 88.
5 Migration Review Tribunal and Refugee Review Tribunal Annual Report 2007-08, p.28.

In 2008-09, 989 judicial review applications were made in respect of decisions of the RRT.[6] This means that about 40% of RRT decisions were the subject of judicial review applications. In most cases the applicant was the asylum seeker, as the Minister only rarely seeks review. Of the judicial reviews that were resolved in 2008-09, the RRT's decision was upheld in 84% of the cases. In the remaining 16%, the matter was remitted to the RRT for reconsideration.

In the MRT, the overall judicial review rate since the MRT's inception in July 1999 has been 5%. In 2008-09, 253 judicial review applications were made, which translates to about 4% of decisions made by the MRT.[7] During the same period, the MRT's decision was upheld in 67% of the judicial reviews that were resolved. In the remaining 33% the matter was remitted to the MRT for reconsideration.

Over the past 12 months the number of judicial review applications in relation to the RRT has been falling, while the like figures in relation to the MRT have remained steady, though remaining low in comparison with the number of decisions made by the MRT. The graph below shows the figures for the 12 months to the end of February 2009.



International context

By comparison with many of our overseas immigration and refugee appeals tribunal counterparts, our judicial review numbers are small.

6 Statistics as at 30 June 2009.
7 Statistics as at 30 June 2009.

For instance, in Canada during 2008, 5,684 judicial review applications were filed and 2,232 remained pending as at 31 December 2008, in respect of refugee and migration matters (representing 77% of all judicial appeals filed with the Canadian Federal Court).[8] According to the figures published by the Canadian Federal Court, from 1 January 2000 to 31 December 2008, a total of 68,080 refugee and migration appeals were filed with the Court.

In the United Kingdom, ordinarily, there is no right to appeal a decision of the Asylum and Immigration Tribunal (AIT). The AIT makes most initial decisions through a single immigration judge. Such decisions can be "reconsidered" on the making of an application to the High Court. During 2007-08, a total of 26,561 applications for reconsideration were lodged.[9]

In Australia, by contrast with these numbers, 1,552 filings in the migration and refugee area were made in the Federal Magistrates Court in 2007-08.[10] That court is now the court before which most first instance migration and refugee judicial reviews come.

JUDICIAL REVIEW

In the context of, first, the large numbers of favourable primary migration and refugee decisions that are made, secondly, the small numbers of applications for judicial review sought in relation to MRT decisions, thirdly, the apparently declining numbers of applications for judicial review sought in relation to RRT decisions and, fourthly, the small numbers of judicial reviews in Australia by comparison with other countries, one might ask whether there are issues in relation to judicial review that need addressing in the Australian context. I suggest that there are because, as I shall explain, the present legislative structure tends to give rise to inefficiencies in the operation of judicial review and unduly focuses on form at the expense of substance. While the numbers are not unduly concerning, systemic improvements can and should be made.

Judicial review litigation in the area is of three different types:

- migration law litigation;
- refugee law litigation; and
- litigation relating to the "procedural code".

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8 See http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics.

9 See http://www.ait.gov.uk/Documents/Statistics/2007_2008/InternetStats_2007_08Oct.pdf.

10 Federal Magistrates Court Annual Report 2007-08.

It is appropriate to say something about each in turn.

Migration law litigation

This year marks the 20th anniversary of the commencement, on 19 December 1989, of the amendments to the Migration Act which enabled the codification of the criteria for the various classes of visas and entry permits, and introduced merits review to the jurisdiction in the form of the now superseded Immigration Review Tribunal (IRT).[11]

Prior to the codification of the visa criteria, primary decision making under the Act was largely discretionary, with few provisions in the legislation limiting the Minister or his or her delegate in granting or refusing a visa or entry permit. Guidance to decision makers on the application of their discretionary powers was scattered across a variety of departmental handbooks. Instructions were frequently expressed in broad terms and were as lengthy as the current *Migration Regulations 1994* (the Regulations). However, as the guidance material did not create an entitlement, there was uncertainty as to outcome. That uncertainty, as pointed out by Robyn Bicket in her paper delivered to the AIAL's 1996 Administrative Law Forum, was added to by the need, under administrative law, to consider the merits of those cases which fell outside the guidelines.[12] Non-statutory Immigration Review Panels made recommendations to the Immigration Minister when appeals were made.[13]

Consequently, decision making was criticised by the public as being arbitrary and subject to day-to-day political intervention in individual cases. The government of the day responded to this criticism by spelling out in the Regulations the criteria a person needed to satisfy in order to be granted a visa or an entry permit. That is to say the government accepted recommendations made by the Administrative Review Council for the "structuring" of the Minister's discretionary powers. [14]

While the structuring has been a considerable advance in terms of openness, accountability and the delivery of administrative justice, the complexity of the Regulations and, in some instances, their poor drafting, provide ample scope for judicial review of decisions of the MRT. The decision of the Full Court of

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11 See *Migration Legislation Amendment Act 1989 (Cth).*

12 AIAL Forum 1996 Sydney, *Administrative Law: setting the pace or being left behind?* R. Bicket, 'The Migration Reform Act – Necessary Change or Overkill', p.324.

13 See Administrative Review Council (ARC) Report No.25 (1986), *Review of Migration Decisions.*

14 ARC, op.cit.

the Federal Court in *Dai v MIAC*[15] provides an example of how opaque Regulations can give rise to large numbers of remittals on judicial review.

Dai was concerned with a category of case that forms one of the more significant areas of the MRT's work, namely student visa cancellations. In *Dai*, the Full Court of the Federal Court found that the relevant form of a condition spelled out in the Regulations to which student visas were subject was invalid because it was unreasonable and uncertain.[16] As a result of the decision of the Federal Court, numbers of MRT decisions which had purported to apply the particular regulation were set aside on judicial review and remitted for re-determination.

Another example showing how construction of the Regulations can give rise to spikes in litigation can be seen in the circumstances which ultimately led to the decision of the High Court in *Sok v MIAC*[17] *("Sok")*, on appeal from the decision of the Full Court of the Federal Court in *MIAC v Sok.*[18] Those cases concerned the "spouse" provisions of the Regulations and, in particular, the provisions which allow the grant of a spouse visa despite the cessation of a spousal relationship in circumstances where domestic violence has been committed by the sponsoring spouse. The particular issue was whether the domestic violence qualification could be engaged if the first time the applicant raised the claim was in the application to the MRT.

In *Sok* the High Court overturned the Full Federal Court judgment. In brief, the High Court held that the MRT must consider a claim of domestic violence made to it, even if no such claim was made before the Minister's delegate refused to grant the visa; and the Tribunal must invite the applicant to attend a hearing before it concludes that it is not satisfied that the applicant has suffered domestic violence. This judgment essentially returned the law to the Tribunals' understanding of it when the current domestic violence provisions were introduced in late 2005 and settles the divergence of views in lower Courts on this issue.

Since the High Court's decision in *Sok*, approximately 30 MRT decisions have been set aside on judicial review and have been remitted for reconsideration.

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15 [2007] FCAFC 199.

16 The appellant, *Dai*, failed to maintain satisfactory academic progress and was placed on academic probation by her education provider. In May 2004, the education provider notified *Dai* that her enrolment had been cancelled as a result of unsatisfactory academic performance. Her visa was cancelled in July 2004 pursuant to ss.116(1)(b) & (3) of the Migration Act and r.2.43(2) of the Regulations due to a breach of condition 8202(3)(b). The applicable version of condition 8202(3)(b) required the appellant to achieve an academic result that is certified by the education provider to be at least satisfactory.

17 [2008] HCA 50.

18 [2008] FCAFC 18 (French, Lindgren, Jacobson JJ, 5 March 2008).

Conclusion

It is beyond question that the structuring of administrative discretions that led to the Migration Regulations was a necessary reform and represented a huge advance in administrative justice. It is also the case, however, that the highly prescriptive form of the Regulations and the uncertainties of interpretation that the drafting at times gives rise to can be productive of individual judicial review challenges which, in a high volume decision making milieu, have knock-on effects.

One way of reducing the litigation would be to wind back some of the prescription and give decision makers a greater degree of discretion in appropriate circumstances. In my view, an unfortunate feature of modern Commonwealth legislative drafting is its high level of prescription. Public servants have a natural tendency to want to control outcomes but it is a tendency which, in my view, needs to be resisted because it can lead to unworkable, or at least uncertain, law which then becomes productive of court challenges. Legislative drafters need from time to time to take a stand against their instructors and allow decision makers scope to resolve some issues through the exercise of discretion.

Refugee law litigation

Before a person can be found to be entitled to a protection visa, he or she must be found to be a refugee within the meaning of the Refugees Convention.[19] The meaning of the term "refugee" in the Convention has been the subject of a great deal of judicial consideration over the years, both in Australia and in other countries which are signatories to the Convention. In my view, that litigation is unexceptionable and is a necessary safeguard to ensure that persons deserving of international protection under the Convention are not at risk of being condemned to persecution.

Recently, however, one of the statutory modifications in Australia to the Convention definition has been the subject of considerable litigation leading to significant uncertainty for the RRT and primary decision makers. The provision concerned is section 91R(3) of the Migration Act. It provides that, in determining whether a person has a well-founded fear of being persecuted for one or more of the Convention reasons, any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the Minister (or the Tribunal on review) that he or she engaged in the conduct

[19] Migration Act, s.36(2). Note, however, that the Government has announced that it intends to legislate for a scheme of "complementary protection" which will expand the class of persons entitled to a protection visa.

otherwise than for the purpose of strengthening his or her claim to be a refugee.[20]

Both the Second Reading Speech[21] and Revised Explanatory Memorandum to the Bill that introduced section 91R(3)[22] make it clear that the provision was intended to overcome the effect of Federal Court decisions that had recognised the claims of applicants who had deliberately set out to contrive claims for refugee status after they had arrived in Australia. This line of court authority expressly rejected the existence of a "good faith" test within the Convention, finding that the fraudulent nature of any acts was simply a factual issue to be considered in determining whether the applicant satisfied the conditions of the Convention definition. [23]

Since the enactment of s.91R(3), if relevant conduct enlivens the provision, it requires decision makers to consider the applicant's motivation for engaging in the conduct. The correct application of s.91R(3) is more difficult in circumstances where the decision maker finds there was more than one reason for engaging in the relevant conduct. The courts have taken divergent approaches on this issue.

Initially, the Federal Court interpreted s.91R(3) as imposing a sole purpose test in determining whether conduct had been engaged in "otherwise than for the purpose of strengthening the person's claim to be a refugee".[24] On this basis, if the decision maker were satisfied that the conduct was engaged in for some other concurrent purpose, then the decision maker was not obliged to disregard the conduct under s.91R(3).

It has more recently been held that s.91R(3) must be construed so as to encompass conduct which has mixed motives and reasons and that the conduct may not be taken into account either as supporting or as disproving a refugee claim, unless a motive of strengthening the claim is positively

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20 The background to the enactment of s.91R(3) was the practice that arose of refugee status applicants participating in demonstrations of protest against the governments of their countries of nationality with the purpose of manufacturing evidence for their applications.

21 House Hansard 28 August 2001 p.30422, Senate Hansard, 24 September 2001, p.27604.

22 *Migration Legislation Amendment Bill (No. 6) 2001*.

23 See *Mohammed v MIMA* (2000) 98 FCR 405 (Spender & French JJ, Carr J dissenting); *MIMA v Farahanipour* (2001) 105 FCR 277 and *MIMA v Kheirollahpoor* [2001] FCA 1306 (French J, 16 August 2001). cf *Heshmati v MILGEA* and *Somaghi v MILGEA* (unreported, Federal Court of Australia, Lockhart J, 22 November 1990) overturned on appeal on other grounds: *Somaghi v MILGEA* (1991) 31 FCR 100 and *Heshmati v MILGEA* (1991) 31 FCR 123; see also *Li Shi Ping & Anor v MILGEA* (1994) 35 ALD 557 at 580, not disturbed on appeal: (1994) 35 ALD 225, *Khan v MIMA* (1997) 47 ALD 19.

24 Authority upholding Tribunal decisions which applied a sole purpose test includes *SAAS v MIMA* (2002) 124 FCR 182 (not disturbed on appeal), also *SZIAT v MIAC* [2008] FMCA 44 (Nicholls FM, 30 January 2008) at [74]-[75].

excluded.[25] In other words, if the motive of strengthening the refugee claim forms any part of the purpose for engaging in the conduct, the conduct must be disregarded.

In another case, the Federal Court in *SZJZN v MIAC*[26] held that the relevant test for s.91R(3) is a dominant purpose test.

As a result of these cases, the nature of the decision maker's obligation to disregard conduct which the decision maker is not satisfied was engaged in otherwise than for the purposes of furthering the applicant's protection claims is unclear. The issue is currently before the High Court in cases *SZJGV* and *SZJXO*.

In practice the conduct in question usually involves attending Church or practicing Falun Gong in Australia. In the High Court appeals, the applicants are claiming that the conduct must be disregarded for all purposes. The Minister, on the other hand, is claiming that the conduct cannot be relied upon by an applicant but can be considered by the decision maker in determining the primary facts in the case including credibility issues.

During the 2008-09 financial year, the number of remittals by the courts of RRT decisions increased markedly as a result of the *SZJGV* decision. Hopefully, the High Court's decision will clarify the meaning of the provision in a way which enables primary decision makers and the RRT to apply the law with greater certainty, thereby leading to a reduction in litigation. A possible legislative solution may be to repeal s.91R(3) and allow decision makers to undertake the "real chance of persecution" assessment in the absence of the imposed "good faith" test.

Litigation relating to the procedural code

The *Migration Reform Act 1992* established the RRT to deal with refugee related reviews.[27] The Reform Act also spelt out a detailed procedural code to

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[25] *SZJGV v MIAC* (2008) 170 FCR 515. See also *SZMPJ v MIAC* [2008] FMCA 1640 (Smith FM, 17 December 2008) at [25]. Contrast *SZNAB v MIAC* [2009] FMCA 152 (Driver FM, 3 June 2009) where the Court stated that the sole purpose approach should be applied pending the outcome of the High Court appeal in *SZJGV v MIAC* and that Madgwick J's dominant purpose comments in *SZJZN v MIAC* (2008) 169 FCR 1 were *obiter*, but did not consider the decision in *SZMPJ v MIAC* or its construction of the Full Federal Court decision in *SZJGV*.

[26] *SZJZN v MIAC* (2008) 169 FCR 1 at [35]. However, this was treated as *obiter dicta* in *SZMBL v MIAC* [2009] FMCA 44 (Smith FM, 10 February 2009) at [112] (not disturbed on appeal: *SZMBL v MIAC* [2009] FCA 622 (North J, 22 May 2009)) and *SZNAB v MIAC* [2009] FMCA 152 (Driver FM, 3 June 2009) at [7].

[27] The RRT replaced the Refugee Status Review Committee set up by the Hawke Government in 1990.

be followed by the Department in relation to the making of decisions.[28] The code was elaborated in relation to the RRT and then the Immigration Review Tribunal (IRT),[29] especially concerning the information and hearing rights of applicants, by the *Migration Legislation Amendment Act (No 1) 1998 (Cth)*, that commenced operating on 1 June 1999.

Core features of the natural justice hearing rule were addressed in the code - how information was to be collected, what information was to be given to an applicant, and how the applicant was to be given an opportunity to present a case. The intention was for the code to replace the common law requirements of natural justice and a provision was enacted that a breach of natural justice was not a ground upon which an application could be made for review of a decision. The Act also limited the application of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ('ADJR Act') to decisions made under the Migration Act by formulating more restricted grounds for judicial review.[30]

According to the Explanatory Memorandum, this overhaul was necessary due to the uncertainty that existed at the time concerning the content of natural justice, as interpreted by the courts. The Reform Bill aimed to define legal rights in a precise statutory code in place of an indeterminate common law doctrine.[31]

As might have been expected, the government's approach was heavily criticised.[32]

As might further have been expected, the scheme did not achieve its purpose.[33] In two decisions the High Court, in the exercise of its jurisdiction under s.75(v) of the Constitution, declared first an RRT and then a Departmental decision to be invalid on the basis of a denial of natural

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28 The Migration Reform Act introduced a new Subdivision AB with ss.26T-26ZE which intended to replace the uncodified principles of natural justice with clear and fixed procedures. The basic principles underpinning Subdivision AB were that the Minister was under a duty to give a visa application a fair and proper consideration and an applicant, who was seeking the benefit of the visa, had the obligation of doing everything reasonable to assist in the speedy consideration and determination of the application. Section 26Y imposed a requirement on the Minister to give the applicant particulars about certain adverse information that the Minister had, which would lead to the visa application being refused, and to invite a response. Equivalent provisions were not introduced for the Tribunals until 1999. The sections currently containing the code are ss.52-64 of the Migration Act (the Department), Parts 5 and 7 (Tribunals).

29 The IRT was established in 1989 and became the MRT in 1999.

30 See ss.166LA and 166LB of the Migration Reform Act, which set out seven grounds for judicial review of IRT and RRT decisions.

31 *Migration Reform Bill 1992*, Explanatory Memorandum, at [25]; see also [51], where it was stated that the Bill aims to 'replace the uncodified principles of natural justice with clear and fixed procedures which are drawn from those principles'.

32 See, e.g., "An overview of Federal and State administrative law systems in Australia", paper delivered by Dr John Griffiths at the 1994 Administrative Law Forum of the AIAL, "Are the States overtaking the Commonwealth?"

33 J. McMillan, 'Judicial restraint and activism in administrative law' [2002] Federal Law Review 12. See also J. McMillan, 'Controlling Immigration Litigation—A Legislative Challenge' (2002) 10 People and Place 16.

justice.[34] In response to *MIMA; ex parte Miah,* [35] further amendments were introduced (*Migration Legislation Amendment (Procedural Fairness) Act 2002)* to insert into the Migration Act a legislative statement that the codes of procedure governing the RRT and the MRT are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with. The provisions concerned are s.357A (MRT) and s.422B (RRT).

The proper construction of those provisions has been the subject of much judicial commentary.[36]

For the most part, Tribunal decisions are declared invalid by the courts because of a perceived procedural shortcoming in the way a decision was reached, i.e., as a result of non-compliance with the code.

Both the MRT and the RRT are bound by the code, which purports to be a statutory formulation of how procedural fairness is delivered to applicants. [37] In this respect the Tribunals are unique, as other merits review tribunals by and large operate under common law principles relating to the natural justice hearing rule.

Despite the intention of the Parliament in enacting the code, the judicial interpretation of its provisions, including s.359A/s.424A (the provision dealing with the putting of adverse information to the applicant) and s.359/s.424 (Tribunal's power to seek additional information), as well as other amendments to the Act designed to tie down procedural fairness, have resulted in considerable complexity in the conduct of MRT and RRT reviews.

The amendments to the Migration Act, which were introduced in the *Migration Amendment (Review Provisions) Act 2007* ('the Review Provisions Act') on 29 June 2007,[38] have ameliorated but not overcome difficulties with the code that decisions of the courts have highlighted.

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34 See *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22.

35 [2001] HCA 22.

36 See *NAQF v MIMIA* (2003) 130 FCR 456; *Wu v MIMIA* (2003) 133 FCR 221; *Moradian v MIMIA* (2004) 142 FCR 170; *SZBDF v MIMIA* [2005] FCA 1493; *VXDC v MIMIA* [2005] FCA 1388; *Antipova v MIMIA* [2006] FCA 584; *SZCIJ v MIMA* [2006] FCAFC 62; *MIMIA v Lay Lat* (2006) 151 FCR 214; *SZCIJ v MIMA & Anor* [2006] FCAFC 62; *Saeed v MIAC* [2009] FCAFC 41.

37 Many of the provisions are contained in Division 4 of Part 7, which is concerned with the conduct of reviews by the RRT, and in the mirror provisions of Division 5 of Part 5 in relation to the MRT.

38 I discuss these amendments more fully in a paper *('The Pursuit of Quality Decision Making in the Australian Refugee Review Tribunal')* presented at a conference in Prato, Italy, Best Practice for Refugee Status Determination: Principles and Standards for State Responsibility, May 2008.

The Review Provisions Act was passed in order to ameliorate the onerous obligations imposed on the Tribunals by the Migration Act, as interpreted in the High Court decision of *SAAP v MIMIA* ('*SAAP*')[39] and the Full Federal Court decision of *SZEEU v MIMIA* ('*SZEEU*').[40] Those judgments interpreted the section 424A 'adverse information' notice requirements as requiring the Tribunals to put the information in writing, despite the fact that it may have been put orally in a comprehensive way to the applicant at a hearing where the applicant had the benefit of an interpreter and despite the fact that the applicant may have had no facility with English.

In *SZEEU* and *SZEWL v MIMA* it was recognised that the applicant had been given what would otherwise be regarded as an appropriate and fair opportunity to comment or respond to adverse information, and that no practical injustice had occurred.[41]

Justice Weinberg in *SZEEU* made the following observation:

> *"With great respect, I doubt that the legislature ever contemplated that s424A would give rise to the difficulties that it has, or lead to the results that it does. The problems that have arisen stem directly from the attempt to codify, and prescribe exhaustively, the requirements of natural justice, without having given adequate attention to the need to maintain some flexibility in this area. This desire to set out by way of a highly prescriptive code those requirements was no doubt well-intentioned, and perhaps motivated by a concern to promote consistency. However, the achievement of consistency (assuming that this goal can be attained) comes at a price. As is demonstrated by the outcome of at least some of these appeals, codification in this area can lead to complexity, and a degree of confusion, resulting in unnecessary and unwarranted delay and expense. To put the matter colloquially, and to paraphrase, "the cake may not be worth the candle".*[42]

SAAP had considerable practical ramifications for the Tribunals' operations. More than 500 matters were remitted by consent by the courts to the Tribunals for reconsideration. Most of the remitted matters related to whether

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39 (2005) 228 CLR 294.
40 (2006) 150 FCR 214.
41 *SZEEU v MIMA* (2006) 150 FCR 214 at [183] per Weinberg J; *SZEWL v MIMA* [2006] FCA 968 at [11]-[12] per Allsop J.
42 (2006) 150 FCR 214 at [183].

the Tribunals had formally written to the applicant to invite comment on information that was relied upon. The information involved typically comprised information previously supplied by the visa applicant in connection with the decision under review such as information given in application forms or contained in passports. In most cases, and consistent with ordinary procedural fairness principles, the Tribunals had invited the applicant to comment on the information during the course of a hearing.

More recently, in 2008 a number of problematic court decisions in relation to the Tribunals' seeking information from applicants and third parties resulted in increased litigation and remittal rates for the Tribunals. These decisions once more highlighted the inflexibility of the procedural code.[43]

In *SZKTI v MIAC*,[44] the Full Court of the Federal Court considered the procedures under s.359/s.424 of the Act for obtaining additional information. In *SZKTI*, the applicant applied for a protection visa on the basis that he feared persecution in China for reason of his religion. In support of his application, the applicant provided to the RRT a letter from two church elders attesting to his activities with the church in Australia. A telephone number for one of the church elders was provided, together with an invitation from the applicant to contact the elders if the RRT had any questions. A Tribunal officer telephoned the elder and asked him about the visa applicant. The RRT then wrote to the visa applicant under s. 424A of the Act, seeking his comments on the information obtained from the elder. Ultimately, the Tribunal affirmed the decision to refuse the visa.

The Full Court of the Federal Court, in setting aside a judgment of the Federal Magistrates Court which had upheld the RRT's decision, held that the Tribunals may obtain 'information' by whatever method it considered appropriate but may only obtain 'additional information' by making a request in writing which is sent to an address provided for the purposes of the review and for which there is a prescribed period for a response. Thus, the mandatory nature of the obligations under the procedural code resulted in findings that the Tribunal's processes had miscarried.

This judgment was followed in *SZKCQ v MIAC*,[45] where the Full Court of the Federal Court held that the Tribunals have limited ability to informally ask for additional information from a person without engaging the procedures

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43 *SZKTI v MIAC* [2008] FCAFC 83; *SZKCQ v MIAC* [2008] FCAFC 119; and *SZLFX v MIAC* [2008] FMCA 451; *SZKJT v MIAC* [2008] FMCA 876.

44 [2008] FCAFC 83.

45 [2008] FCAFC 119.

that Parliament has laid down in s.359/s.424 of the Act to obtain that information.

Prior to these judgments, the Tribunals had taken the view that ss.359 and 424 of the Act gave them broad powers to get relevant information. The only qualification was that, if the Tribunal got such information, it was required, pursuant to ss.359(1) / 424(1) to have regard to it in making a decision on the review and to put anything adverse in writing to the applicant for comment.

Following the Full Court judgments, if the Tribunal invited a person to provide information in circumstances where the invitation, or receipt of the information, could not be attributed to some other statutory power, the invitation was required be given in writing in accordance with the procedures for a ss.359(2) / 424(2) invitation. This resulted in ridiculous outcomes, as Members could not even ask orally at hearings for applicants to send in their passport, if they had forgotten to bring it with them on the day.

The *SZKTI* judgment was appealed to the High Court, which has reserved its decision.

In response to *SZKTI* and *SZKCQ*, legislative steps were also taken. Amendments were introduced in the *Migration Legislation Amendment Act (No 1) 2009*. The amendments establish that the Tribunal may now orally invite a person to provide the Tribunal with information, including by telephone, or in writing. If the Tribunal invites information orally, no particular procedure must be followed, although the proviso in s.359(1) / 424(1) would continue to apply, requiring the Tribunal to have regard to the information.

While these amendments do not place the Tribunals in exactly the same position with respect to obtaining information as existed prior to *SZKTI*, they do give the Tribunals greater flexibility in the way they obtain information in relation to reviews.

Just in case any further elaboration is necessary as to how problematic is the procedural code, let me refer to the very recent decision of the Federal Magistrates Court in *SZNAV v MIAC.*[46] The case concerned the standard acknowledgement letter which the RRT sends applicants following the lodgement of an application for review. That letter includes a sentence inviting the applicant to immediately send the Tribunal any documents, information or other evidence the applicant wants the Tribunal to consider. In a novel construction, the Federal Magistrate held that the acknowledgement

[46] [2009] FMCA 693 (23 July 2009)

letter fell within s.424 of the Act and, by inviting information to be provided "immediately" instead of within a prescribed period, the letter did not comply with s.424B(2). His Honour further held that the breach constituted unfairness to the applicant and that jurisdictional error had occurred. The matter has been remitted to the Tribunal to be redetermined according to law.

Might I say that His Honour's view that the error in this case caused unfairness to the applicant is one on which minds may certainly differ.

My fervent hope is that His Honour's judicial colleagues are not persuaded to His Honour's views. Otherwise, we will again be faced with a large number of remittals from the courts, arguably for no good reason in terms of the delivery of substantial justice.

Conclusion

In my view, if the procedural code ever had any usefulness, it has outlived that usefulness. It is the source of much unproductive and unnecessary litigation, with all the attendant costs to the Commonwealth this involves. Further piecemeal amendments will only attract further litigation and further complicate Tribunal decision making, without any real benefit to applicants.

In my view, a return to decision making under common law procedural fairness obligations is necessary to align the MRT and the RRT with other federal review tribunals. Of course, common law procedural fairness would entail that, if particular country information or any other information is adverse to the applicant, he or she be informed of the substance of the information and given a reasonable opportunity to respond. In many cases the process of putting the substance of adverse material may need to be handled by letter; in other cases, it may be appropriate to put material orally, perhaps allowing an adjournment of the hearing. As is the case with the content of procedural fairness generally, the touchstone will be what fairness demands in the context of the particular case.

Such a change would overcome many of the anomalous results that are occurring in the judicial review of our decisions. The fundamental problem with the highly prescriptive code is that any minor fault in process is found by the courts to be a legal error, irrespective of whether the applicant has suffered any practical injustice.

I am further of the view that Part 8 of the Migration Act (dealing with judicial review and the privative clause) should be repealed and migration and refugee decision making should be brought back within the umbrella of the

ADJR Act. The privative clause (s.474), which I have not discussed in this paper but which has been amply discussed elsewhere,[47] has not achieved its intended effect. The argument can be made that, as a result of the High Court's decision in *Plaintiff S157/2002 v Commonwealth*,[48] the privative clause has merely had the effect of returning judicial review in the area to the complexity associated with the prerogative writs and the language of jurisdictional error. That complexity was to all intents and purposes thought to be removed from the law relating to Commonwealth administrative decision making with the coming into force in 1980 of the reforms introduced by the ADJR Act.

Finally, I want to mention a relatively simple reform of the Migration Act which, in one step, would substantially enhance fairness for applicants and reduce the potential for litigation. I refer to the absence from the Act of a "T documents" scheme under which applicants, upon lodging a review application with the MRT or RRT are provided with a copy, prepared by the Department, of all documents relevant to the review. Currently, RRT applicants have to resort to a Freedom of Information Act request to get documents, while MRT applicants must use the facility in s.362A of the Act to get copies of papers on the Departmental file. In my view, this is unacceptable in terms of administrative justice. It puts applicants in our jurisdiction at a disadvantage by comparison with applicants in other Commonwealth merits review jurisdictions.[49] It also leads to potentially unnecessary litigation by putting the burden on my tribunals to ensure that any adverse information contained in a document on the DIAC file, e.g., information obtained by DIAC officers on a site visit made in an overseas visa applicant's country, is put to the review applicant. In my view, fairness demands that such documents should be provided to review applicants as a matter of course upon lodgement of review applications with the MRT or RRT.

CONCLUSION

In my view, it is time for a comprehensive review to be undertaken of the merits review architecture of the MRT and the RRT and of the judicial review framework in which they operate. Both tribunals need to be brought more within the mainstream of Australian administrative law in order to deliver greater fairness to applicants and to reduce judicial review litigation.

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47 See, e.g., Professor Mary Crock, "Privative clauses and the rule of law" (1998 AIAL Administrative Law Forum, "Administrative Law and the rule of law: still part of the same package").

48 (2003) 211 CLR 476.

49 See, e.g., s. 37(1AE) of the *Administrative Appeals Tribunal Act 1975* (Cth) which requires "T documents" to be served on applicants.