

The Hearing Rule

What is the basis of the clients claim?

Is the individual owed a duty of PF? (Implication) – Does the right to PF apply?

- History – originally NJ was a limited right to be heard by a judicial body making decision impacting on a legal right. The principle evolved to cover decision that affect ‘interests’ which fall short of being legal interests. The device of a ‘legitimate expectation’ is employed by courts to extend the reach of PF beyond the detriment to established legal rights to a ‘wider one of social interests’
- The decision must affect a right, interest or legitimate expectation of the applicant: *Kioa v West*
- There is a duty of PF owed to individuals (as opposed to the public at large) who will be directly and uniquely affected by the decision: *Kioa v West*
 - Once the right that founds the PF is established it must be explained by reference to the facts how that individuals rights are affected by the decision
 - The impact must be direct and unique to the individual rather than the public at large: *Kioa v West*
- Has there been any ‘practical unfairness’?
 - It must be possible to identify ‘practical unfairness’ that results from the DM process: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*
 - Whether one talks in terms of PR or NJ – the concern of law is to avoid practical injustice: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*
 - There is a need to establish that the impact of the DM process was unfair: *Lam*
 - Must identify how the failure to allow an individual the right to be heard was potentially detrimental to the individuals interest

Facts: Lam had been convicted of serious drug offences and his permanent (transitional) visa was cancelled and his deportation was ordered. Lam was unmarried but had two children who were Australian citizens and lived with a relative carer. The DIMIA Officer wrote to Lam asking details of the carer and care arrangements to assess Lam's relationship with the children and the effect the deportation could have on the children. The DIMIA did not contact the children because the information was later found.

Lam argued that he was denied PF because DIMIA cancelled his visa without advising him that they had decided not to contact the carer and instead decided to rely on the information about the children provided in the applicant's submissions, together with other material provided by the applicant, including a letter from the children's carer. He did not argue that he relied upon this to his disadvantage in any way upon the representation that the children's carer would be contacted; and that he was deprived of any opportunity to make submissions or draw DIMIA attention to any other relevant matter concerning the children.

Held: There was no unfairness in the DM process. DIMIA decision not to contact carer had not caused Lam to lose opportunity to advance his case. Gleeson CJ stated if the DM informs a person affected they will hear further argument upon a certain point, and then delivers a decision without doing so it may be easy to demonstrate that unfairness is involved. But what must be demonstrated is unfairness, not merely departure from a rep and not every departure from the stated intention necessarily involves unfairness, even if it defeats an expectation.

- It is a broad duty to accord and will apply to most administrative decision making impacting on rights/interests of an individual. Must identify and explain through analysis of facts what the basis the individual can found their claim for PF

What is the right/interest/legitimate expectation of the person claiming PF?

- Identify and explain through analysis of the facts what the basis the individual can found their claim for PF – identify how the decision will likely cause the individual concerned:
 - To forfeit a right/interest
 - Detrimentally impact an individual's interest
 - Undermine a proper assessment of their application for a right/benefit
- There is broad duty to accord – it will apply to most administrative decision making impacting on rights/interests of an individual

- Authority for implication
 - **Statute** – duty to grant PF may be express/implied under the legislation conferring power
 - **Common Law** – there is a duty to observe PF when exercising power which directly/indirectly affects a person's rights/interest/LE: *Kioa*

Rights

- Substantive legal rights: *Cooper v Wandsworth*; *Ridge v Baldwin*
- Property rights – *Cooper* – Court held that before the Board of Work demolished Mr Cooper's house it should have allowed him to be heard
- Pension rights – *Ridge* – decision of the watch committee to dismiss Mr Ridge involved forfeiture of his pension rights, and this should have been given a hearing

Interests

- No longer limited to legal interests
- Very broad – the presumption that the principles of NJ condition the exercise of a statutory power may apply to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation: *Kioa v West*
- Loss of a right/detriment to an interest – usually has claim to PF: *Cooper*
- This law extends to the protection for cases involving the loss or detriment to;
 - Property rights/interests: *Cooper*
 - Occupation/livelihood: *Sanders*
 - Business interest: *Fair Insurance*
 - Personal/business: *Annetts*
 - Financial interests: *FAI*
 - A membership of a club/organisation: *Ridge*
 - Status and disposition of immigrations: *Kioa*
- Interests attracting PF: