

## CONTENTS

### OVERVIEW

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### HISTORICAL AND CONSTITUTIONAL CONTEXTS

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### JUDICIAL REVIEW

Error! Bookmark not defined.

#### *SCOPE*

*Error! Bookmark not defined.*

#### *STANDING*

*Error! Bookmark not defined.*

#### *GROUNDINGS OF REVIEW*

*Error! Bookmark not defined.*

#### *JUDICIAL REVIEW AND HUMAN RIGHTS*

*Error! Bookmark not defined.*

#### *RESTRICTING JUDICIAL REVIEW – PRIVATIVE CLAUSES*

*Error! Bookmark not defined.*

#### *REMEDIES*

*Error! Bookmark not defined.*

#### *JUDICIAL RESTRAINT (Relates to Scope)*

*Error! Bookmark not defined.*

#### *EFFECTS OF JUDICIAL REVIEW*

*Error! Bookmark not defined.*

### MERITS REVIEW: INTERNAL REVIEW

2

### MERITS REVIEW: TRIBUNALS

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### MERITS REVIEW: DETERMINING ENTITLEMENT AND IMPROVING DECISIONS

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### OMBUDSMEN

Error! Bookmark not defined.

### RIGHT TO REASONS

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### FREEDOM OF INFORMATION

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### VALUES

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### PURPOSES AND FUNCTIONS

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**Facts:**

- Respondent - national of Sri Lanka, Tamil ethnicity
  - Unlawful non-citizen as defined by s 14 of *Migration Act 1958* and was taken into detention pursuant to s 189(3) – offshore entry person
- Requested a Refugee Status Assessment as to whether he was a person to whom Australia owed protection obligations
  - Respondent claimed he was owed protection – feared harm at the hands of the Eelam People’s Democratic Party + Sri Lankan authorities because of his Tamil ethnicity, his support of the Tigers of Tamil, and campaigning for a particular politician
  - Delegate made adverse assessment of claim
- Respondent requested Independent Merits Review of RSA
  - Interviewed by an independent merits reviewer (First Reviewer)
  - Told the respondent she would undertake a fresh re-hearing of his claims and make a recommendation which would be given to the Minister
  - First Reviewer became unavailable to complete the IMR
- Another individual then assumed responsibility for completion – Second Reviewer (not known to the respondent)
  - Didn’t interview respondent
  - Formed adverse view of credibility of respondent based on existing evidence
  - Proceeded to find against being owed protection
- Respondent filed application in Federal Circuit Court for judicial review of decision of Second Reviewer
  - Primary judge dismissed respondent’s application
  - Respondent appealed to Full Court
    - Allowed appeal
    - Second Reviewer arrived at his decision in breach of rules of procedural fairness

**Arguments (previous cases)**

- Respondent – denied procedural fairness
  - Second Reviewer didn’t conduct an interview with the respondent
  - Visible scarring on respondent’s arm was not taken into account by Second Reviewer
- Minister
  - Rules of natural justice don’t mandate that an oral hearing occur for the person affected

**Full court reasoning:**

- Accepted that there is no universal requirement for an oral hearing before an administrative decision is made
- However, respondent had a legitimate expectation that the person by whom he had been interviewed would be the person to make the recommendation to the Minister
- Respondent hadn’t been informed of change in identity of the person – unfair
  - He was entitled to be heard before his legitimate expectation is defeated by being given an opportunity to make submissions as to how review process should continue

**Submissions to HC:**

- Minister:
  - Full Court erred in concluding that the respondent had been denied procedural fairness without first establishing why the denial of a second interview was procedurally unfair
    - Applied the concept of ‘legitimate expectation’ – treating this as the basis for an entitlement to a particular form of procedure including an interview
- Respondent:
  - Full Court didn’t apply the concept of legitimate expectation as the sole basis for their conclusion
  - Members of the Full Court correctly concluded that he was denied the opportunity to advance his case afforded by an interview with person who actually made the recommendation
  - Sufficient reason to conclude that he had been denied procedural fairness

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**Held:** in favour of respondent, appeal dismissed

#### Legitimate Expectation

- ‘Legitimate expectation’ when used – adds nothing or poses more questions than it answers – disregarded expression (established position)
  - Doesn’t provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness
- Criticism made by the Minister can’t be upheld
  - The Full Court’s analysis proceeded on the basis that the issue was whether the respondent had been denied procedural fairness by the alteration in the review process which occurred without his being informed

#### The review process was unfair

- Two points:
  - Common grounds that IMR process was required to accord respondent procedural fairness
  - No general rule that procedural fairness requires administrative decision-maker to afford an oral hearing
    - Depends on the practical requirements in the circumstances of the case
- Distinguish *Lam* –
  - In that case – the applicant lost no opportunity to advance his case – no practical injustice was held to have occurred
  - This case – respondent had been afforded an interview with advantage that the individual responsible for making a recommendation would use all information presented to him in coming to a conclusion
    - Cannot say that he lost *no* opportunity to advance his case
- **Was it unfair for Second Reviewer to proceed by reference only to some information made available to First Reviewer + impression of his credibility formed from this material**
  - Fact that First Reviewer interviewed him – practical information of what procedural fairness required in this case – provides important information to decision-maker
    - Oral hearings important in forming a perception of credibility
  - Interview by Second Reviewer might have made difference to the outcome of the IMR process
- **Was it unfair to deny the respondent the opportunity to be heard on whether the IMR should proceed in that way?**
  - Information available from interview conducted by First Reviewer was only partly reflected in recommendation made to Minister
  - Because respondent wasn’t told of the alteration of the review process – denied opportunity to be heard as to how the changed process might be completed so that he wouldn’t be disadvantaged
  - No reasonable basis on which Second Reviewer could have refused the respondent an opportunity to be heard on the question of how review process should proceed

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## MERITS REVIEW: INTERNAL REVIEW

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- Conducted within the organisation in which the decision under review was made
- Decision is re-made by some other decision-maker within the organisation
- Typically triggered by a request for review by a person affected by the decision
- **Aim: to identify the correct or preferable decision**
- Closest to the bureaucratic model of judicial review and merits review (de-novo decision-making)
  - Resemble courts/tribunals because they *review* decisions
- Statute-based right
  - Sector by sector decision of Parliament (has created variation in whether internal review is compulsory or not)
  - Empirically internal review is normally the only form of administrative justice encountered by most applicants
- **Typically, internal review is a compulsory step/precondition of application for external review**
  - Establishment of (relatively informal, economical and quick) internal review mechanisms as a filter to limit the caseload of (relatively formal, expensive, and slow) external reviewers
    - A result of an assumption that external reviewers are more likely than internal review to satisfy the legal criteria (distance from original decision-maker)
      - Because of the tension between legal (fair and just) and managerial (economical, informal and quick) criteria
- Issues:
  - Should internal merits review be a compulsory step before external merits review is available?
  - How should we design systems of administrative review?
  - Whose interests are we more focused on?
    - Efficiency

## ANTI-COMPULSORY INTERNAL REVIEW

*Internal reviews best serve the interests of social security claimants when they form part of the administration of benefits and not part of the formal appeal arrangements*

- Issue: whether internal reviews or tribunal hearings should form the first formal tier of an appeals system
- Examination of the development and growth of internal reviews in social security
- **Introduction of internal reviews as a first tier has weakened the ability of housing benefit claimants and social fund applicants to obtain redress of their grievances**
- Internal reviews have occupied the place previously held by tribunals
  - They should thus be subject to criteria traditionally applied to tribunals
    - Speed of decision-making, independence, impartiality, participants by aggrieved citizens, cost, quality of decision-making
  - Against this, internal review emerge as inferior to tribunals
    - Benefits of tribunals: independence, impartiality, participation of appellant, experience of decision-makers
- Review:
  - Internal mechanism carried out by officials of the relevant administrative organisation
  - Can be carried out only on limited grounds defined in legislation
- Appeal:
  - It is a right of claimants to instigate appeal proceedings
  - The grounds of appeal are not restricted
  - Appeal is heard by a body independent of the department responsible for making the initial decision

## Reviews v Tribunals

- Reviews offer advantages of speed and lower costs
- Tribunals offer independence, impartiality, advantages gained from participation of appellant, and encourage confidence in competence as decision-makers
- **Speed of decision-making**
  - Reviews are inherently quicker than tribunal hearings
    - Not necessary to prepare comprehensive documents, organise a date for hearing, statutory ten days' notice, etc.
    - Other delays outside of control – unavailability of representatives, ore time to gather evidence, waiting for third party reports, etc.
    - Can respond faster to increases in benefit claims appeals
- **Independence and impartiality**
  - Where internal review had been made mandatory, it would be likely to supplant the tribunal, thus depriving those seeking it of a truly independent evaluation of the merits of the primary decision
  - Overall principle:
    - Rule of law: no one should be a judge in their own cause
    - Impartiality: absence of bias and prejudice
      - This requires independence – freedom of tribunals from the influence of Departments concerned with the subject matter of their decisions
  - Tribunals are independent
  - Internal administrative review, as first formal stage of appeal, fails this criteria
  - Principle of independence has a powerful influence in upper decision-making hierarchies, but less on lower
  - Demonstrated a willingness to abandon advantages to embrace structures bowing to other principles of speed and efficiency
- **Participation** (in writing, in person, representative, orally, etc.)

- Benefits of Tribunal:
  - Opportunity of providing additional/clarifying existing evidence
  - Allows tribunal to adopt inquisitorial mode
  - More comprehensive explanation of initial decision than that provided in decision letters
- Defining characteristic of tribunal hearings
- Social fund hybrid internal review may serve as a model, however
  - Claimant is offered a chance to attend an interview whereby the decision is explained, and a chance to present further information after a provisional decision
- **Costs**
  - Nature of reviews renders them inherently cheaper – salaries
  - Tribunals must pay expenses and attendance fees, travel, etc.
  - May be an important policy consideration, coupled with the role of reviews as a filter
- **Quality of decisions**
  - Issues with assessment:
    - What constitutes high-quality decisions?
  - Internal reviews may have the potential of providing high-quality decision making but have yet to demonstrate that they do
  - Tribunals have better opportunity of meeting standards of adequate adjudication because more time to consider each case, benefit of questioning claimants in person, and greater experience of inquisitorial techniques
- **Blocks the path of immediate access to a tribunal hearing / Moves from machinery of administration to machinery of adjudication**
  - Aggrieved claimants of some benefits are offered administrative review in the first instance, not an independent adjudication
  - When expressing dissatisfaction with a decision – one is effectively making an appeal
    - When the prior conduct of an internal review is made a pre-condition for appealing – it becomes the first formal tier of an appeals system
  - Instead of providing an administrative rationale – internal review has been driven into the arms of appeal
  - No longer intended to function as a means of correcting error, but as a means of redress
- **Appeal fatigue**
  - Those who failed to persuade at what is effectively a first tier appeal would be put off and less inclined to go further – availing themselves of their right to an independent appeal
  - Failure at internal review leads the majority of claimants of these two benefits to give up on their appeals