

PROCEDURAL FAIRNESS

- Core principles:
 - Right to a fair hearing (s 5(1)(a) ADJR)
 - Bias (s 5(1)(a) ADJR)
- Gateway question: does procedural fairness apply? (rare for it not to)
 - 1. The default *content* of the principles of procedural fairness.
 - 2. To *what* extent do those general principles apply in this context?
- Default entitlement exists at common law.
 - But this entitlement can be watered down by policy (eg. National security).

Forming a Judgment

- Government may argue **policy context, statutory wording**, no general entitlement to anything.
- Applicant must show how the requested procedural protection is needed to **avoid practical injustice** to deliver a **reasonable opportunity** to present one's case **in the circumstances**.
 - If you believe your right to PF has been breached, you say two things:
 - 1. Cite cases that say your entitled to the lawyer, cite general principle cases.
 - 2. Talk up the practical injustice of what has happened (ie. I didn't have a lawyer, I didn't know what was happening and I didn't have a reasonable opportunity to present my case in the circumstances).
 - Reasonable opportunity might mean lawyer, might mean interpreter etc.
 - But may depend on circumstances: ie. can't expect an oral hearing if you are amongst thousands of people disputing.

Where does Procedural Fairness Come From?

- It is an implication drawn from rule of law values ... (also from concepts like democracy, libertarian ideas, dignity of the individual).
- It is a principle of statutory construction.
 - So not constitutionally rooted right.
 - Does not have the rigidity of constitutionally protected rights.
- *Re Refugee Tribunal; Ex parte Aala*:

- "...it may be that for many purposes the competing views lead to no different result, the ultimate question being whether the obligation asserted is compatible with the terms of the relevant legislation. On either view, the obligation to accord procedural fairness is an obligation affecting how the decision maker is to go about the task of decision-making."

1. Gateway Question: Does this decision attract procedural fairness obligations?

- *Kioa v West* (1985):

- "The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect **rights, interests and legitimate expectations**, subject only to a clear manifestation of a contrary statutory intention."
- "The reference to 'right or interest' in this way must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests."

- Don't worry about legitimate expectations (being phased out).

- The gateway includes 'interests' = reputation, financial interests.

- Not necessary to show the *Tang* criteria.

- Once interest is demonstrated, the general entitlement of procedural fairness will then be implied in as part of statutory interpretation (unless excluded).

- Procedural fairness attracts the principle of legality, and the courts are quick to preserve this right.

- So often no consistency in cases in terms of clarity and ambiguity.

- But may not find for procedural fairness if the result will frustrate the purpose of the legislation — extremely rare for this finding to be reached.

- I.e. in *Kioa* the person was a flight risk and so no notice was given to them of their deportation (would have frustrated the purpose of the law, which was to deport the person).

2. General or default requirements?

Adequate prior notice

- Prior to someone making a decision about you, that affects your rights and interests, they must share with you evidence that is credible, relevant and significant (*Kioa*).

- **Core material relating to the question at hand, such that if you didn't get it in advance you would have no reasonable opportunity to present your case.**
- But what level of detail?
 - Can't be solved at general level, requires judgment.
- 'Adverse material should be disclosed' — *ABT v Bond* (1988)
 - Particulars of the investigations were provided to Bond, but Bond claimed these particulars were inadequate given the adversarial nature of the inquiry.
- *Dainford v ICAC* (1990) — ICAC inquired into Dainford's land dealings (property developer). D didn't know about the allegations. D wanted all of the details of the allegation, but Court held that "credible, relevant and significant" meant (jn these circumstances) all they needed was notification as to the general scope and nature of the inquiry.
- *Re MIMI; Ex parte Miah* (2001) — Protection visa application. Applicant not informed of decision-makers intention to rely on change of government in home country as means for arguing that there was not a well-founded fear of persecution. **Higher level of detail required where personal liberty of livelihood at stake.**
 - Failure to notify of change in government meant that he '**could not adequately run the case**'.
- But does not include the implications which the Tribunal draws from the relevant factual material "***procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given***" — *SZBELK v Minister for Immigration and Multicultural and Indigenous Affairs*.
 - Decision-maker found that the applicant had not been truthful about how he had left his home country.
 - Applicant said that the decision-maker had never suggested that he thought the applicant was not being credible, so he never had the opportunity to rectify it.
 - But court held that the decision maker did not have to do this.
- Really trying to show that the material is so significant to the question at hand, such that if you didn't get it in advance then you would have no reasonable opportunity to present your case.
 - Why must you have this document in order to present your case?
- Public policy grounds, such as confidentiality may also reduce the notice requirements.
 - Also consider commercial sensitivity, safety etc.
- Need for confidentiality can really 'water down' prior notice.

- *Minister for Immigration v Maman* [2012]— an applicant for a visa was denied access to the full contents of a letter given by his former partner, alleging domestic violence. In denying the visa, the decision-maker stated that they had relied on the contents of the letter, but all Maman had received was a summary of its contents. Full federal court held that on the facts Maman was entitled to the letter, despite the very personal nature of its contents and had been given on a confidential nature. Because of the centrality of the letter to the analysis of the decision-maker it was held that the full details had to be shared. The material was adverse to Maman and his request for a visa.
 - Difficult because the situation was 1:1, no other way to rebut what was said about their relationship.
- BUT in *VEAL of 2002 v Minister for Immigration* [2005], the HC stressed that confidentiality was a relevant factor. Neighbour blew the whistle on a visa-holder. HC held that the identity of the whistle blower and his letter should be protected in order to protect whistle-blowers. On balance, the applicant had enough information to contest the allegations in the letter.

Right to a hearing

- General principle: No absolute right to an oral hearing.
 - In most administrative matters (as high volume decision making), there will be no hearing and only a chance to put in written submissions.
- Must show a special case to get a hearing.
- Hearings attach to areas where credibility (judging truth of account), understanding (is the person going to struggle to understand what is happening) and narrative are important.
 - Eg. asylum area where a right to hearing has been installed.
- In *Chen Zhen Zi* (1993), French J said that when it comes to a right to fair hearing it is about one set of policy factors vs another set of policy factors.
 - Decision-makers should make value judgments about the importance of the private interest that will be affected by the decision on one hand and the burden to the administrative process on the other hand.
 - Have tried to fast-track this and remove right to fair hearing, but French installed a very strong common law presumption regarding the right to a hearing in asylum cases.

Steps to Problem Solving

- **Step One:** Is the decision one to which procedural fairness applies? (Does this decision attract procedural fairness obligations?)
 - Not all decisions attract procedural fairness, but many do.
 - Can tell if it does if it affects the **rights, interests** or legitimate expectations (Kioa v West).
 - Eg. proprietary rights.
 - Presumption that procedural fairness applies in all decisions that affect the rights and interests of the applicant (S10).
- **Step Two:** What default or common law entitlements might apply?
 - What entitlements arise from the factual scenario?
 - Ie. right to representation, fair hearing, adequate notice, entitlement to cross-examine etc.
 - Also any other issues that may affect the client's entitlement to PF (ie. time, interrupting witness, not explaining terms).
 - **Step Three:** Context
 - To determine to what the content of procedural fairness that applies in this case?
 - Courts are quite willing to apply PF, but often cases turn on how the context strengthen or limits procedural fairness entitlements?
 - **Step Four:** Conclude
 - Explain why there was no reasonable opportunity to present/ present their case/ that they suffered practical injustice because the PF entitlement was denied.
 - If acting in for G'ment — PF did not cause any practical injustice.