

Topic 7: Grounds – Procedural fairness

Natural justice concept

- Natural justice (old term) = procedural fairness (new term)
- Procedural fairness is NOT about fair outcomes – not a merits review
- It is about the fairness of the process
- The content of paragraph *ADJR* ss5(1)(a) and 6(1)(a) is defined by common law
 - The paragraph is purely a codification of common law (overview of CL position in *Plaintiff S157/2002 v Cth*)
 - CL and statute identical for this ground
 - Starting point always legislation
- Two elements:
 - The hearing rule (*audi alteram partem*)
 - The bias rule (*nemo debet esse iudex in propria sua causa*)
- Two questions:
 - When is a decision maker required to afford a person procedural fairness/natural justice?
 - What does procedural fairness/natural justice require: what is its content?
- **NB** Principle of legality: Parl must show a clear and unambiguous intention to abrogate fundamental common law rights
- 3 steps:
 1. Absent statute, when does the common law say there is a duty to hear?
 2. What is the content of that duty?
 3. What happens when there's statutory modification?
- **NB** There is lots to discuss in PF. Even if you determine that PF does not apply – KEEP GOING! 'In the alternative'...etc

The Hearing Rule

Starting point

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- **WRITE:** [X] may be able to challenge the decision on the basis that there is a strong CL presumption that NJ applies because the statute gives DM power to affect [X]'s rights/interests in a direct and immediate way (*Annetts; Lam*). Whether the duty arises arises, and what it requires, depends on all the circumstances of the case, the Act, and the facts (*McHugh J in Teoh endorsed in Lam*).
- [X]'s rights and interests are affected because ____.
- **MAJOR FACT FLAG:** No hearing + adverse info re applicant

Step 1: Will CL imply the duty?

- **ALWAYS START WITH LEGISLATION**, which may dictate a duty to hear
 - If expressly stated in the Act that rules of PF have to be applied – then yes

- When legislation is silent then common law fills the gap to provide the duty
 - If not expressly stated, have to determine if affects rights and interests
 - Generally refers to legal rights – includes proprietary rights (*Cooper* - house demolished)
 - Broad approach (*Kioa*)

Interests that are applicable

- Personal interests (non-financial) (*Annetts*);
- Personal liberty (e.g. *Kioa*; *Haoucher*; *Plaintiff M61*);
- Business reputational interest (can be both personal and business) (*Ainsworth*);
- Status (*Haoucher*);
- Livelihood;
- Reputation (*Ridge*);
 - Of deceased; parents of deceased (*Annetts*)
 - Of business and commercial reputation (*Ainsworth*)
- Proprietary rights and interests (*Cooper*);
- Employment/income security (*Ridge*)

Considerations for whether duty is owed

- Even if a right, interest or legitimate expectation is prima facie established, CL might still refuse to imply a duty to hear after considering:
 - the nature of the decision;
 - the nature of the decision-maker
- Courts are less inclined to recognise a right to be heard where the decision contains a high level of political and policy judgment (*O'Shea*)
 - Legislation more concerned with individual rights? → NJ owed (*Plaintiffs10/2011*; *CPCF & O'Shea*)

Policy and political decisions

- The duty to provide a hearing can be limited if the decision has a significant political content or is made in a political arena
- In the below cases, the courts have accepted that the content of the HR should be modified in light of the politicized nature of the decision
- But, the problem with decisions of a very political nature is that natural justice can become so limited it is almost worthless
 - The extremely limited scope of natural justice in policy decisions begs the question of whether such cases are best regarded as non-justiciable rather than justiciable but subject to a very limited duty to accord NJ?

SA V O'SHEA (1987) 163 CLR 378

FACTS:

- OS has been convicted of child sex offences
 - Three-tiered process for release of sex offenders:
 - 1. Reports by 2 medical practitioners that no risk of reoffending
 - 2. Recommendation for release by the Parole Board (before which OS was legally represented and made submissions)

- 3. Governor in Council decision (on advice from cabinet)
- Medical practitioners and Board recommended release
- Governor decided that OS should not be released
- OS argued denial of natural justice – he should have been given an opportunity to present his case to the Governor

JUDGMENT

- The critical question is whether O'Shea had an adequate opportunity to present submissions on the question of public interest to the Parole Board
- He did – he had a hearing, legal rep and was able to make submissions
- No breach of procedural fairness
- The governor is **looking at the public interest** – issues that go to general perceptions of community safety, justice, sentences
 - Gov has unfettered discretion

CPCF V MINISTER FOR IMMIGRATION AND BORDER PROTECTION (2015)

FACTS:

- The plaintiff, CPCF, was a Sri Lankan national of Tamil ethnicity, who claimed to have a well-founded fear of persecution. He was one of over 150 passengers on an Indian flagged vessel which was intercepted in June 2014 by an Australian border protection vessel in the Indian Ocean.
- Following a decision of the National Security Committee of Cabinet in July 2014, the Australian border protection vessel began sailing towards India.
- In doing so, the maritime officers were acting under s 72(4) of the Maritime Powers Act 2013 (Cth) which provides that a maritime officer may detain a person and take that person outside Australia.
- The application of s 72(4) was conditioned by s 74 which prohibits a maritime officer placing a person in a place “unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place”.
- The plaintiff claimed the maritime officer was acting unlawfully because he had not given the matter independent consideration and was acting at the direction of the Australian Government ... and had not afforded him procedural fairness.

JUDGMENT:

- We have people who are having their liberty affected – what is reasonable in these circumstances?
- In assessing reasonableness there are 2 factors:
 - 1. Purpose of legislation – empowered maritime officers to exercise their powers in circumstances of great urgency. They needed to exercise them flexibly and quickly. It would be incongruous to imply procedural fairness on a maritime officer. The purpose lends itself against the duty existing. Requiring the maritime officer to provide procedural fairness would be equivalent to soldiers owing a duty of care on the battlefield. Common law doesn't impose the same common law constraints on the military.
 - 2. Contrary intention – s74 expressly requires a consideration of the person's safety – this section provides protection to a detained person and therefore cannot read in an indirect condition of procedural fairness when it's legislated for

- National security = compromise on standard of procedural fairness

PLAINTIFF S10/2011 V MINISTER FOR IMMIGRATION AND CITIZENSHIP

FACTS:

- Four non-citizens each had applied for a visa which was refused on the merits, and then failed in proceedings for merits review and judicial review.
- They then applied to the Minister asking him to exercise discretionary 'dispensing' powers he held in their favour. These powers were:
 - Section 48B empowered the Minister to remove a statutory bar upon a further application for a protection visa for a person whose application for a protection visa had already been refused;
 - s 195A empowered the Minister to grant a visa to a person in immigration detention;
 - ss 351 and 417 enabled the Minister to substitute for a decision of certain administrative tribunals a decision that was more favourable to the applicant.
- The Minister had issued guidelines in the form of directions to the Secretary and officers of the Department setting out the circumstances in which the Minister might exercise the dispensing powers.
- The Minister chose not to exercise his discretion in any of the cases.
- The applicants contended that in deciding: (1) whether or not to consider the exercise of the dispensing powers, and (2) then in deciding whether or not to exercise those powers, the Minister was obliged to afford natural justice or procedural fairness to any moving party.
- They also contended that inquiries made and submissions prepared by officers of the Department pursuant to the guidelines were subject to a requirement that procedural fairness

JUDGMENT:

- Emphasis on the special nature of the powers, which had common features:
 - the Minister must think it is in the public interest to exercise the power;
 - the power may only be exercised by the Minister personally;
 - the Minister does not have a duty to consider whether to exercise the power, whether he or she is requested to do so by the applicant;
 - if the Minister does exercise the power the Minister must put before each House of Parliament a statement setting out, inter alia, the Minister's decision and the reasons for the Minister's decision and, in particular, the Minister's reasons for thinking that the decision was in the public interest
- The legislative scheme has an extensive list of visas and extensive list of requirements/details for each, but this is accompanied by the Minister's **discretionary power to dispense** with all of it **if in the public interest**
- The Court looked at the legislative scheme as a whole
 - Parts of the Act deal with natural justice expressly "An exhaustive statement of the rule of natural justice"
 - Silence elsewhere: assume it's deliberate
 - Argument that common law rules apply

Step 2: Has the legislation evinced an intention to exclude the duty?

Statutory exclusion and modification

- Duty to provide a hearing can be excluded by express statutory language or necessary legislative intent
 - Provisions of this type are relatively rare
- Successive governments have tried to limit or exclude procedural fairness in refugee law, by introducing an exhaustive procedural code which is intended to exclude all hearing rights except those mentioned in the code
 - Eg. *Migration Act Subdivision AB* has efficiency and quickness in its heading, taken to be an integral part of
 - **NB s51A** saying nothing is left to the common law – attempts to oust it and replace with stat scheme: clear legal language indicating an intention to modify and abrogate on common law rights
- The High Court has considered these provisions many times and the message seems to be that it is difficult, perhaps impossible, for a parliament to draft legislation that is sufficiently clear for the courts to accept that the common law requirements of the duty to hear have been excluded
 - Eg. *Saeed*
- Situations where High Court has accepted that the duty to hear **has been excluded**:
 - Powers of a special nature / previous opportunity to be heard – *Plaintiff S10/2011*
 - Multi-stage decision-making – *O’Shea*
 - Right of appeal – *Ex parte Miah*
 - National security/urgency? – *CPCF*

Right to appeal?

- Can imply no duty to hear
- Factors in determining whether or not there is a duty when there is also a legislated right to appeal include (*Miah*):
 - Nature of appellate body: Internal (hearing duty exists) or external (maybe doesn’t)?
 - Preliminary (maybe excluded) or final (not excluded) decision?
 - Public (hearing not excluded) or private (maybe excluded) decision making process?
 - Formalities and urgency of decision? More urgent → hearing maybe excluded
 - Nature of interest and subject matter → more serious = hearing not excluded
 - Nature of hearing: de novo (includes most current evidence – hearing likely excluded) or limited (not excluded)?

SAEED v MINISTER FOR IMMIGRATION AND CITIZENSHIP (2010)

FACTS:

- In response to the decision in *Ex parte Miah*, the Migration Act was amended. The amendments included the insertion of s 51A that provides:
 - ‘Exhaustive statement of natural justice hearing rule
 - (1) This Subdivision is **taken to be an exhaustive statement of the requirements of the natural justice hearing rule** in relation to the matters it deals with.’