

LATEST DEVELOPMENTS IN IMMIGRATION LAW

DR STEPHEN TULLY
6 ST JAMES HALL CHAMBERS

LEGALWISE CPD SEMINAR 18 MARCH 2021

OBJECTIVES

To review:

- Significant and recent HCA and FCAFC cases
- Past trends and emerging issues
- Notable procedural issues

CONTENTS

- Grounds of jurisdictional error: legal unreasonableness, illogicality
- Materiality
- Procedural aspects
- Cancellation decisions
- Other issues: refugee law, fraud, procedural aspects

LEGAL UNREASONABLENESS

Stewart:

- Statutory powers are impliedly to be exercised within the bounds of reasonableness
- Decision has an intelligible justification (outcome focus) or results from an intelligible decision-making process (process focus)
- A high threshold
- Judged at time when power exercised
- Not assessed through lens of procedural fairness to an individual
- Focus on circumstances of exercise of statutory power

LEGAL UNREASONABLENESS – RECENT CASES

DUA16/CHK16 :

- incorrect information correctly disregarded (*DUA16*)
- unreasonable failure to inquire by exercising s 473DC power (*CHK16*)

ABT17: absent good reason (eg error), unreasonable to depart from a delegate's credibility assessment (including demeanour) without inviting applicant to interview

ILLOGICALITY

BJO18, MZZMX:

- Whether logical or rational minds might adopt different reasoning or differ in any decision or finding
- An end result or a fact finding process can be illogical
 - Adverse credibility findings are judicially reviewable
- Illogicality must be extreme
- Involves a case specific inquiry

MATERIALITY

SZMTA, Hossain, PQSM [materiality not essential to existence of jurisdictional error: Nettle & Gordon JJ]:

- Assessment of gravity of error/breach/statutory non-compliance
- Realistic (not fanciful) possibility of a different decision/deprived of possibility of successful outcome
- Question of fact from evidence including inferences
- May be a high or low threshold
- Is context specific
- Requires reconstruction
- Applicant bears onus on balance of probabilities
 - what applicant denied procedural fairness must show for a s 438 notification: tribunal "could have had regard to" or "did in fact" consider information: *MZAPC* (heard 5/3/21)

PROCEDURAL ASPECTS

- Section 473DD, *Migration Act 1958* (Cth)
- Procedural fairness

SECTION 473DD

Considering new information in exceptional circumstances

For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment Authority must not consider any new information unless:

- (a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and
- (b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:
 - (i) was not, and could not have been, provided to the Minister before the Minister made the decision under section 65; or
 - (ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

SECTION 473DD

- Definitions:
 - “information”
 - does not apply to certificates: *CED16*
 - “relevant”
 - “gets”
 - “consider”
 - “credible” = capable of being believed rather than true: *BTW17*
- Assess new information first against s 473DD(b)(i) and (ii), and only then against s 473DD(a): *AUS17*

PROCEDURAL FAIRNESS

Hempenstall:

- Content of obligation depends on facts and circumstances
- Opportunity to be heard = ascertaining relevant issues + informed of nature and content of adverse material
- Meaningful participation = opportunity to address issues that are not obvious and natural

CANCELLATION DECISIONS # 1

- An applicant “makes” representations under s 501CA(4) when they are given to prison authorities for dispatch to the Minister: *Stewart*
- Minister cannot re-exercise s 501(2) power: *Makasa*
 - unless factual basis has changed
 - subject to Ministerial override under s 501A

CANCELLATION DECISIONS # 2 – REPRESENTATIONS

YKSB, Meyrick, Swannick, Matthews:

- Representations as a whole are mandatory relevant considerations under s 501CA(4)
- Decision-makers:
 - must “consider”* (i) substantial, clearly articulated arguments; (ii) central and prominent issues; (iii) factors as relevant to the tribunal;
 - must honestly confront the human consequences of administrative decision-making (*Hands*);
 - need not refer to every piece of evidence or contention
- * “the reality of consideration” = give active intellectual consideration as a matter of substance
- Reasons for decision are interpreted practically with common sense; judicial task is one of impression or evaluation
- Each case depends on own facts and circumstances

OTHER ISSUES # 1 – REFUGEE LAW

- The particular social group to which an individual belongs must first be identified before any behavioural modification can be considered (ss 5J(3)(a), 5L): *ADL17*
- If no serious harm is found, the question of nexus (“for reasons of”) need not be considered: *CRU18*
- An unauthorised maritime arrival does not cease to be such when issued with a visa: *BXT17*

OTHER ISSUES # 2 - FRAUD

- Actual fraud or dishonesty and not mere negligence or other mishap
- Stultifies legislative scheme by adversely affecting the exercise of a duty, function or power: *DUA16/CHK16*
- Applicant bears onus
- Applicant complicit if “recklessly indifferent” as to whether agent acted unlawfully or dishonestly: *Katragadda*

OTHER ISSUES # 3 – PROCEDURAL ASPECTS

- Presence of prejudicial/inadmissible fact/material: if hypothetical fair-minded lay-observer, properly informed of nature of decision, context and circumstances, reasonably apprehends that decision-maker lacked independent/impartial mind (apprehended bias): *CNY17, MBJY*
- FCCA delay in delivering judgment need not be considered for time extensions and does not occasion jurisdictional error where judgment unaffected by delay: *WZASS*
- Relevant considerations for granting costs certificates include disentitling conduct, resources, importance of case: *MZZMX (No 2)*
- legal professional privilege applies under *Migration Act*: apply dominant purpose test and assess if waived: *BWO19*

THANK YOU FOR YOUR ATTENTION...

....ANY QUESTIONS ?