

Chapter Five

Immigration Law and the Courts*

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For much of the last century Australian immigration law rested on two key controls: an officer of the Immigration Department had a discretion to decide who was allowed to enter Australia; and the Minister had a discretion to deport a person who was unlawfully in Australia.¹ Within the scope of that skeletal framework, government policy on migration could be developed, implemented and altered with few legal obstacles to surmount. Decisions on entry and deportation went largely unchallenged at the administrative level. The unfettered nature of the discretionary powers was respected as well by the courts.

In time, a different view took hold of the need for criteria on entry and removal to be spelt out in legislation and for procedural safeguards to be established.² This was reflected in the growth in size of the *Migration Act* 1958, from 35 pages in 1958 to nearly 500 pages (plus voluminous Regulations) in 2002.³ The steady growth in legal rules was soon accompanied by a comparable growth in disputes about whether those rules were being correctly applied. The age of immigration law – now the most controversial, and the single largest, area of public law adjudication by courts and tribunals in Australia – had arrived.

Why did it happen? What does this trend tell us about our system of law and government? Has it become better and fairer? Will decision-making standards just keep getting better and better if we have more and more litigation?

The facts suggest a different story. In the 1987-88 reporting year there were 84 applications filed in the Federal Court challenging an immigration decision. That had risen to 320 in 1993-94, to 673 three years later, and to 914 in 1999-2000.⁴ Now, roughly 70 applications are filed each week in the courts and the Administrative Appeals Tribunal. The active case load of immigration cases at 7 June, 2002 was 1,350 cases, including 287 applications before the High Court. In May, 2002 over 54 per cent of all cases decided by the Full Federal Court were immigration cases.

The explosion of litigation has also strained relations between the courts and government, and between the courts and the public. While the Minister for Immigration, on the one hand, has accused some judges of the Federal Court of undermining the will of Parliament,⁵ the full Federal Court responded by asking the Minister to explain his comments to the Court – in the words of *The Australian*, serving on the Minister “a judicial press release”.⁶ Judges of the High Court have also rebuked Parliament for imposing a “great inconvenience” on the Court.⁷ The controversy has extended as well to the public arena. At the height of the *Tampa* controversy, Paul Kelly wrote in *The Australian* of “a defiant court provoking political wrath”, and warned of “the sound of a huge voter backlash against the arrogance of the judiciary”.⁸

This controversy, it should be recalled, arose during a period dominated by two other across-the-board trends that should have worked against judicial expansion. One trend was that over this period Parliament and the Executive established a comprehensive system for non-judicial review and accountability, based around tribunals, Ombudsman, internal review, more detailed legislative and policy guidelines, and more open decision-making. Non-citizens were given the right to seek review or investigation of adverse decisions by the Migration Review Tribunal, the Refugee Review Tribunal, the Administrative Appeals Tribunal, the Ombudsman, the Human Rights and Equal Opportunity Commission, and to learn more about the background to a decision by utilising

the *Freedom of Information Act* 1982 or by requesting a statement of reasons. By any standard, the rights that had been conferred on non-citizens were extensive.

The other trend was a general overall improvement in government in the standards of administrative decision-making. That trend, while difficult to prove empirically, is noticeable in the way that decisions are now recorded and reasoned, in the consultation that is now extended to members of the public when decisions affecting them are made, and in the emphasis now given in the public service to staff training and recruitment.

Why, then, did immigration litigation become the behemoth that it has become? There are, of course, many factors that lie behind those developments, and they lie outside as well as inside the courtroom. Immigration control has become an acute problem for governments around the world, as a consequence variously of the population mobility that is a facet of globalisation, the growing ease of international travel, regional conflict, and the socio-economic aspirations of many people for an improved lifestyle in a different country. It was perhaps to be expected that litigation would become part of the strategy, to be used at least by some people in the pursuit of a favourable immigration outcome.

Litigation, in short, could be an end in itself. Over 90 per cent of judicial review applications in Australia fail at present, but the extra time that litigation buys is for many people a win in itself. It was perhaps to be expected too that this litigation would, to a point, be tolerated by many in government and the community. We live in an age when, as a community, we are reticent or coy about denying people the opportunity to ventilate fully any claim which they frame as a rights-based claim. There is as well a strong human and emotional reluctance to send families back to a life that is more wretched.

Courts, therefore, work in a difficult environment. They have an obligation to discharge their jurisdiction properly whenever it is invoked. They have a special responsibility, borne of our legal tradition, to be probing rather than compliant in the face of strong executive action. Moreover, in the great bulk of cases judges maintain a strong tradition of confining judicial attention to the legal issues, and of not being distracted by the factual, policy and humanitarian background to the litigation. Nor can one deny that government in Australia is better and fairer as a consequence of judicial review.

But, there is another side to the story. The problems of Australian immigration law and practice could not have occurred without some judicial input. Courts are not the child of circumstance and context: they play a large and adult role in defining the environment in which they work and in fashioning the rules that they apply. A judicial pronouncement is, after all, conclusive for the time being. The ruling has great precedential force in defining the legal principles to be applied in the next case, and in shaping the expectations that people have when they approach the courtroom.

The remainder of this paper takes up that theme, by discussing four judicial factors contributing to the problems of immigration law. The paper ends by drawing a few lessons for the future.

The impact of inappropriate decisions

The expansion of the law is often propelled by inappropriate decisions. Two cases that I will discuss illustrate this point.

The first is the now-famous decision of the High Court in *Kioa v. West*⁹ in 1985. That decision held that natural justice – the right to be heard and to comment on adverse material before an unfavourable decision is made – applied to a decision to deport a person unlawfully in Australia. That aspect of the decision is understandable enough, because of the impact that a deportation decision can have upon a person and their family. The problem with *Kioa*, however, which is now felt across the board in administrative law, is that the case did not clearly define what

must be disclosed by a decision-maker in order to comply with natural justice, yet a failure to meet the standard – whatever it is – results in invalidity.

For example, one definition from *Kioa*, which is now repeatedly applied by courts, is that a person is entitled to be told of “adverse information that is credible, relevant and significant”.¹⁰ That standard does not have self-apparent meaning, as illustrated by countless subsequent cases in which, after an exhaustive administrative hearing, a decision is nevertheless held by a court to be invalid because a single fact or item of information, even one whose relevance was expressly discounted by the decision-maker, was not brought to the attention of the person facing deportation. Curiously enough, in many ways the rules for making a valid executive decision are in crucial respects more demanding than the rules for making a judicial decision.

A second illustrative decision was in 2001 by the High Court in *Re Minister for Immigration and Multicultural Affairs v. Miah*.¹¹ Relevant to the case, the *Migration Act* said three things about refugee decision-making: firstly, it spelt out precisely what a Departmental decision-maker had to do in consulting a refugee applicant before making a decision whether to accept or reject a refugee claim; secondly, the Act declared that the decision-maker “is not required to take any other action”;¹² and, thirdly, the Act said that a person aggrieved by a rejection of their application had a full right of merit review in the Refugee Review Tribunal. Notwithstanding that scheme, a 3:2 majority of the High Court held that the common law doctrine of natural justice required the Departmental officer to go further still, and to disclose information obtained by the officer about the political conditions in the country of origin of the refugee claimant. The failure to do so meant that the decision was invalid, and could be challenged in the High Court even after the person’s right to seek review of the decision by the Tribunal had expired.

The purport of the ruling in *Miah* was to safeguard procedural fairness, but it could ironically achieve an opposite result. The decision creates a practical disincentive for the legislature to create administrative appeal rights. To do so simply establishes a second and duplicate administrative hearing that, as *Miah* shows, does not correct an earlier error but runs the risk of introducing a new error.

Intrusive judicial review

The second major problem in immigration litigation has been over-reaching, over-zealous judicial review. It is a pattern in only a small minority of cases, but a point often overlooked by commentators is that a handful of single judge decisions, because they are conclusive for the moment and occur at the front-line of justice, can have a greater impact in defining the dynamics of a legal system than the more authoritative rulings of appeal courts. This point, put more bluntly, is the practical side of the lawyer’s advice to the client, “You might be lucky and get judge X”.

One area where excessive judicial rigour has been a particular problem is in the scrutiny of the reasons for decision given by decision-makers and tribunals. Over the years those reasons have become lengthier and more elaborate, but no less defective when viewed through the prism of court decisions. The reason is not hard to see. When put to the test, it is very difficult for any decision-maker, even the most skilled wordsmith, to explain convincingly on paper why, in a confused factual setting, a particular decision is being made. It is equally difficult to explain why the credibility of a person under oath is being doubted, or why self-serving information provided by a person is not being accepted by a tribunal that is unable positively to disprove what the person said. An attempt, even by the most skilled wordsmith, to rise to that challenge can compound their difficulty by resorting to exaggerated reasoning, by constructing an argument from a flimsy premise, or by shaky logic.

Unless a court accepts that the merits of administrative decision-making lie with the Executive, and that courts cannot provide the guarantee of procedural perfection and absolute justice that they might like to provide, the dividing line between law and policy, between law and

merits, will be irretrievably blurred. This danger of judicial overreach, of judicial merits review, has been repeatedly recognised by the full Federal Court and by the High Court, including in the case of *Wu Shan Liang*,¹³ in which the Court warned of “over-zealous judicial review” and counselled that the reasons of a decision-maker should be taken at face value.

And yet the problem does not go away. At any time in the last decade there is one principle or other that holds sway as the basis for invalidating immigration decisions. The present battleground is a “privative clause” in the *Migration Act*,¹⁴ enacted by Parliament in September, 2001, and the subject recently of a specially-convened hearing before a five-judge bench of the full Federal Court.¹⁵ The purpose of the privative clause is to restrict judicial review to legal errors of an egregious kind. The meaning and scope of the clause is admittedly ambiguous, though it is noteworthy that at a very early stage in the elaboration of the clause the Federal Court has been split as to its meaning, much as the Court has been split on many pivotal issues of immigration law in the past. If the interpretation of the privative clause given in a handful of early decisions becomes established doctrine in the Court, it is probable that the privative clause will be largely ineffective. In short, it will be back to the parliamentary drawing-board to search for new ways of controlling immigration litigation.

Legal fallacies

A third problem in immigration litigation is that legal expansion in this area has been aided and driven at times by fallacies and shibboleths. An example is aptly provided by the controversial litigation in 2001 concerning the *MV Tampa*.¹⁶ Those proceedings, challenging the validity of a Government decision to refuse to allow a ship carrying potential asylum seekers to land at Christmas Island, were instituted by a lawyer and a civil liberties group that had no instructions from or prior contact with the potential asylum seekers. Both were given standing by the Federal Court on the basis that they were acting in the public interest to protect a vulnerable group of people against government excess.

I argued at the time that that claim was an untested assertion, an assumption, and that the Court should have declined to handle the dispute as a non-justiciable legal dispute.¹⁷ The public interest spirit of the plaintiffs was nevertheless accepted by the trial judge, and approved favourably by the full Federal Court, the Law Council of Australia, and a great many other lawyers.

Subsequent events have now undermined that untested assumption, at least so far as 131 people given asylum and permanent residence in New Zealand are concerned. The objective of the litigation was to ensure that those on the *Tampa* could land in Australia, which in practical terms would have meant spending the following nine months in detention in Woomera, Curtin or Port Hedland while their applications for asylum were processed. Nearly all those whose applications were subsequently processed at Nauru by the United Nations High Commissioner for Refugees (UNHCR) were refused refugee recognition, and have been required to return to a war-ravaged Afghanistan or elsewhere. Those who instead chose to go to New Zealand under the Government-sponsored plan have, with few exceptions, been given asylum and permanent residence in that country. With hindsight it seems clear that for many on the *Tampa* the Government initiatives delivered them a more favourable outcome than the “public interest” litigation.

There are countless other examples of assumptions which underlie assertive judicial review that are wrong or highly contestable. The scheme for Federal Court review of immigration tribunal decisions was frequently criticised by lawyers and judges for being restrictive, and producing great difficulty for asylum claimants, the Federal Court and the High Court. And yet, that scheme was less restrictive than that which has applied for more than 25 years to appeals from the Administrative Appeals Tribunal to the Federal Court.¹⁸

Similarly, the legislative model for the immigration tribunals was frequently criticised,

including by Justices Einfeld and North for “contravening every basic safeguard established by our inherited system of law for 400 years”.¹⁹ And yet, those criticisms do not take account of the fact that the tribunals were established to provide a measure of fair process in a controversial area of administration, involving over 11,000 appeals each year, and necessarily including the perspective of non-lawyers as well as lawyers on the appeal panel. There is no doubt that all legal claims would be resolved better if they could undergo the equivalent of High Court scrutiny, but merely to state that point is to highlight its impracticality.

Statutory interpretation

The fourth problem to beset immigration litigation has been the established principle in Australian law that the judiciary should not pay deference to the view expressed by the Australian government as to the meaning to be attributed to opaque statutory phrases. Immigration law is full of these – “well-founded fear of persecution”, “member of a particular social group”, “special need relative”, “humanitarian and compassionate considerations”. Interestingly, the courts often turn to the decisions of foreign courts, to the manuals of the UNHCR and to the opinions of international law text writers to elicit the meaning of those phrases. Yet there is a firm legal tradition of not turning to the views of the elected Australian government as to what those phrases mean.²⁰

The refusal to do so can mean that the statutory words operate in a vacuum: they derive meaning only from the dictionary, and are peculiarly susceptible to incremental growth in their scope and meaning. They can expand gradually to a point, well-described in a recent article by Janet Albrechtsen, when much of the world becomes an eligible refugee.²¹

An example from a few years earlier illustrates this point very well. Much of the immigration litigation in the 1980s related to the meaning of a visa criterion, “strong humanitarian and compassionate considerations”. The Federal Court declined to accept the Government’s argument that the criterion was intended as an exceptional category, to deal with about 100 cases a year of unexpected natural disaster, human misery and the like. Instead, the phrase was interpreted by the Court in reliance on the dictionary as meaning “evoke strong feelings of pity or compassion by Australians”.²² Predictably, the 100 or so applications expected each year rose quickly to 8,000.²³ The only option was to remove from the legislation this discretionary capacity to deal with hard cases.

Lessons for the future

And where do these legal problems leave us? With a better system of law and government? I will finish by briefly listing some of the consequences, some of the transactional costs of over-assertive judicial review.

First, as I outlined earlier, the litigation contributes measurably to the steady annual growth in immigration litigation, possibly exceeding 2,000 cases in 2002. It leads as well to a distortion of Australian government priorities – to a system in which we spend considerably more each year on litigating about 12,000 refugee places than we spend on our foreign aid budget to deal with the 22 million or so refugees and displaced persons.

Whether decision-making in Australia is better is even debatable. As Justice Gyles commented in a recent case:

“In this case, the Tribunal member, instead of giving a decision on credibility promptly, with the real reasons expressed economically, adjourned for a very considerable time, to ultimately produce a relatively elaborate piece of reasoning which included a detailed refutation of individual facts claimed by the applicant ... This is typical. The reason is not hard to find. For some years decisions of this Court ... had a natural tendency to encourage elaborate reasons [by Tribunal members], designed to protect them from such criticism, although there is usually no need for elaborate reasons when evidence is not accepted ...”²⁴

Judicial activism of the kind that I have criticised also ends up producing a worse rather than a better system of administrative law. I gave the example earlier of the removal from the *Migration Act* of the discretionary power to grant a visa in a deserving case where there were “strong humanitarian and compassionate considerations”. The *Migration Act*, and the protection of the human rights of potential visa claimants, is the poorer for the removal of that power.

Another example is the transformation of the system for judicial review of immigration decision-making. This commenced as an ideal system for review, built around tribunals and the *Administrative Decisions (Judicial Review) Act* 1977. As that framework broke down, the system has progressively worsened, and is now controlled by a privative clause. That, in my view, is the least best option, though it has to be said that it was adopted by the Government on the advice of six eminent QCs as being the “only workable option” left to the Government to curb excessive judicial review.²⁵ In short, the courts and the legal profession are not on strong ground in laying the blame for what has happened at the feet of Parliament and the Executive.

Equally, the legal developments have in my view contributed negatively rather than positively to Australian debate and to our sense of national identity. Not only are there sharp and heated divisions concerning the relationship between the Government and the courts, there is also a touch of schizophrenia in some of the controversy. The proponents of the need for a constitutional Bill of Rights to safeguard democratic debate are, in the next breath, the firmest critics of the Minister for Immigration for exercising that freedom of speech. Legal commentators who see judicial-Executive tension as a reminder that an assertive judiciary is essential to maintaining the rule of law are, in the next breath, highly critical of the Executive for sustaining that tension by its criticism of courts.

The views that I have just put are not fashionable in some (perhaps many) legal forums. The alternative argument more commonly presented is that judicial activism is an expression of the rule of law in safeguarding individual rights and civil liberties against Executive abuse. A related argument is that human rights standards should play a stronger and more overt role in judicial review in Australia, to keep pace with legal developments in other western democracies and with the globalising influence of human rights norms. It is also claimed, though not often explained, that judicial activism forms part of a new democratic settlement between the government and the community.

Those arguments are too easily made and too rarely justified. It is not enough to assume that general humanitarian concern, legal obligation and judicial activism go hand-in-hand, one justifying the other. A great many issues need to be addressed before that connection can safely and properly be made. If there are present deficiencies in the Australian system of administrative law and public administration, they need to be explained by example. If judicial method is as capable or better than legislative or executive method for distilling enduring community values, that needs to be demonstrated. Acknowledgment must also be made of the impact that legal activism can have on the style and complexity of administrative decision-making, and of who benefits from that trend. Those issues are not being confronted at present. Until they are, judicial activism that forms part of that trend can rightly be criticised.

Endnotes:

- * This paper draws from three other papers by the author: *Controlling Immigration Litigation – A Legislative Challenge*, (2002) 10 *People and Places*; *Federal Court v. Minister for Immigration*, (1999) 22 *AIAL Forum* 1; and *Have the Judges Gone Far Enough ... or too far?*, (2002) 30 *Federal Law Review*.

1. E.g., see s.6(2) (entry) and s.18(deportation) of the *Migration Act* 1958, as enacted in 1958; generally, see M Crock, *Immigration & Refugee Law in Australia*, The Federation Press, 1998, Chs 4, 10.
2. See Administrative Review Council, *Review of Migration Decisions*, Report No 25 (1985); Human Rights Commission, *Human Rights & the Migration Act*, Report No 13 (1985); Committee to Advise on Australia's Immigration Policies (Fitzgerald Committee); *Immigration: A Commitment to Australia* (1988) Ch.8; Committee for the Review of the System for Review of Migration Decisions, *Non-Adversarial Review of Migration Decisions* (1992).
3. The multiplicity of legislative changes occurring between 1991-2001 are summarised in *Refugee Law – Recent Legislative Developments*, in *Current Issues Brief, 2000-01* (Dept of Parliamentary Library, 2001), Appendix 7.
4. See Department of Immigration and Multicultural and Indigenous Affairs, Fact Sheet No 9, *Litigation Involving Migration Decisions* (available on the Departmental website – www.immi.gov.au).
5. E.g., *Butt out, Ruddock tells Judges*, in *The Australian*, 4 June, 2002.
6. *Ruddock Cops a Judicial Press Release*, Editorial in *The Australian*, 4 June, 2002; and see *Statement to the Federal Court on Behalf of the Minister for Immigration and Multicultural and Indigenous Affairs* (4 June, 2002).
7. *Re Refugee Review Tribunal; Ex parte Aala*, (2000) 204 CLR 82 at para. 133; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*, (2000) 168 ALR 407 at para. 13; and *Abebe v. Commonwealth*, (1999) 197 CLR 510.
8. P Kelly, *Defiant Court Provoking Political Wrath*, in *The Australian*, 5 September, 2001.
9. (1985) 159 CLR 550.
10. (1985) 159 CLR 550 at 629 per Brennan J.
11. (2001) 179 ALR 238.
12. *Migration Act* 1958, s.69(2).
13. *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang*, (1996) 185 CLR 259.
14. *Migration Act* 1958.
15. The Court heard appeals on 3-4 June, 2002 in five earlier cases – *NAAV*, *NABE*, *Ratumaiwai*, *Jian Zhong* and *Turcan*.
16. *Ruddock v. Vadarlis*, (2001) 110 FCR 491.
17. See J McMillan, *The Justiciability of the Government's Tampa Actions*, (2002) 13 *Public Law Review* 89.

18. The *Administrative Appeals Tribunal Act* 1975, s.44 provides that a person can appeal from a decision of the Tribunal to the Court on the ground of error of law. The *Migration Act* 1958, s.476 provided that a person could appeal from the Migration or Refugee Review Tribunal to the Federal Court on the ground of error of law and on other grounds as well.
19. *Selliah v. Minister for Immigration and Multicultural Affairs*, [1999] FCA 615 at paras 3-4.
20. E.g., *Corporation of the City of Enfield v. Development Assessment Commission*, (2000) 199 CLR 135.
21. *Emotionalism Triumphs over the Law*, in *The Australian*, 12 June, 2002.
22. E.g., *Surinakova v. Minister for Immigration, Local Government and Ethnic Affairs*, (1991) 26 ALD 203.
23. See E Arthur, *The Impact of Administrative Law on Humanitarian Decision-Making*, (1991) 66 *Canberra Bulletin of Public Administration* 90.
24. *NAAX v. Minister for Immigration and Multicultural Affairs*, [2002] FCA 263 at para. 56.
25. Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (Nos 4 & 5) 1997* (1997) at para. 2.12; see also the report of the Committee the following year on the *Migration Amendment Legislation (Judicial Review) Bill 1998*, at paras 2.2-2.5.