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14 August 2008

High Court considers the nature of administrative review in the Administrative Appeals Tribunal

In *Shi v Migration Agents Registration Authority* [2008] HCA 31 (30 July 2008) (*Shi*), the High Court looked at the issue of what is really meant by describing the task of the Administrative Appeals Tribunal (AAT) as coming to the 'correct or preferable decision'. The High Court has held that, when reviewing a decision to cancel a migration agent's registration, the AAT was entitled to consider evidence of actions of the migration agent which occurred after the cancellation decision.

In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589, Bowen CJ and Deane J described the function of the AAT as being to decide 'whether [the] decision was the correct or preferable one on the material before the Tribunal'. This characterisation of the AAT's task has been repeated many times since.

In *Shi* the High Court was asked to consider what is the proper approach of the AAT in exercising its jurisdiction and powers.

Background

Before the Migration Agents Registration Authority

The appellant's registration as a migration agent was cancelled in 2003 after the Migration Agents Registration Authority (MARA) found a significant number of breaches of the Code of Conduct prescribed under s 314 of the Migration Act 1958 (Cth) and that it was satisfied that the appellant was not a person of integrity, or was otherwise not a fit and proper person to give migration assistance.

In the Administrative Appeals Tribunal

Section 306 of the Migration Act provides that, subject to the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act), an application may be made to the AAT for review of certain decisions made by MARA, including a decision to cancel registration as a migration agent. The appellant applied to the AAT for review of the cancellation decision and other decisions that MARA had made about his registration as a migration agent (including a decision not to re-register him).

The appellant was granted a stay of MARA's decision. This meant that he could continue to practise as a migration agent up until the hearing of his application for review, which occurred around two years after his application was filed. At the hearing of the application for

review, the appellant presented evidence that he had improved his practice to such an extent that he should not be the subject of a cancellation.

The AAT found a number of breaches of the Code of Conduct but concluded that it was not satisfied that the appellant was not a person of integrity or was not otherwise a fit and proper person to give immigration assistance. It set aside the cancellation decision and the other decisions under review. The AAT decided that the appellant should be cautioned, and it imposed certain conditions on the appellant about his future conduct as a migration agent.

In making its decision, the AAT took into account evidence of the appellant's conduct between July 2003 (when MARA had cancelled his registration) and September 2005 (when the AAT made its decision).

In the Federal Court

MARA successfully appealed to the Federal Court. One of the arguments advanced by MARA was that the AAT should have confined its consideration to whether, when MARA made its decision, the correct or preferable decision was to cancel the appellant's registration as a migration agent rather than looking at evidence of conduct which occurred after MARA's consideration of the matter. Edmonds J decided that the AAT had asked itself the wrong question on the basis that there was 'a clear line of authority' which obliged the AAT to assess the integrity or fitness of the applicant to give migration assistance as at the time of MARA's decision.

The appellant then unsuccessfully appealed to the Full Court of the Federal Court. In the Full Court, Nicholson and Tracey JJ affirmed the approach of the primary judge, including that the AAT had erred by taking into account evidence of matters which occurred after the date of MARA's decision. In a dissenting judgment, Downes J (who is also the President of the AAT) found in favour of the appellant, including on the basis that it was proper for the AAT to take into account the evidence of the later conduct.

In the High Court

There were two issues before the High Court. The first issue concerned the AAT's task. MARA contended that the AAT's task was to decide whether, at the time MARA made its decision, the correct or preferable decision was that the appellant was not a person of integrity, or was otherwise not a fit and proper person to give immigration assistance. The appellant contended that its task was to decide what was the correct or preferable decision at the time the AAT made its decision.

The second issue concerned the powers of MARA. In particular, could MARA (and could the AAT in exercising for itself 'the powers and discretions that are conferred' by the Migration Act on MARA) impose certain conditions on the appellant about his future conduct as a migration agent when it cautioned him?

This publication only considers the Court's decision insofar as it deals with the first issue, namely, the AAT's task.

The High Court overturned the judgment of the Full Court of the Federal Court. The High Court found that, absent some statutory basis for confining what the AAT can consider material which may bear upon circumstances as they existed at the time of the initial decision, the AAT should take into account information about conduct and events that

occurred after the decision under review. Further, any such statutory limitation is not to be found in the AAT Act, and so would have to be found in the legislation which empowered the primary decision maker to act.

The task of the Administrative Appeals Tribunal: correct and preferable decision at the time of review

Justice Kirby noted that the starting point was that the statutes did not spell out explicitly what the AAT's task is. Kirby J identified five factors which supported the conclusion that there was nothing about the nature of the decision under review in the present case that warranted departure from the general principle that administrative review is conducted at the time of the review on the latest material available.

1. The nature of the Administrative Appeals Tribunal

In this regard Kirby J looked at the 'radical' objectives behind the introduction of the AAT Act, being to create a tribunal which had the power to make decisions 'on the merits'.

2. The function of the Administrative Appeals Tribunal

In this context, Kirby J considered some of the seminal decisions concerning the role of the AAT, including *Drake v Minister for Immigration and Ethnic Affairs*, *Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, and *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88 (*Control Investments*). His Honour concluded that, in *Control Investments*, Davies J was correct in holding that, while some weight may be placed on the decision of the original decision maker (particularly when it involved special expertise or knowledge), ultimately it was for the AAT to reach its own decision upon the relevant material, including any material which was new, fresh, additional or different from that which was considered by the original decision maker. This was a consequence of the AAT's obligation to conduct a true merits review.

3. Purpose of section 43 of the Administrative Appeals Tribunal Act

Kirby J considered that the fact that the AAT has the power to substitute its own decision for that of the original decision maker points to an intention that the AAT is able to take into account the most up-to-date information available. His Honour held that, in law and in effect, the AAT's decision becomes the decision of the executive government, so that, when making a decision, administrative decision makers are generally obliged to have regard to the best and most current information available—a rule of practice which is no more than a feature of good public administration.

4. Nature of the decision under review

His Honour concluded that it is necessary to identify the precise nature and incidents of the decision that is the subject of review. The particular nature of the decision may sometimes, exceptionally, confine the AAT's attention to the state of the evidence at a particular point in time. However, there was nothing in the nature of the decision to cancel a migration agent's registration which compelled a conclusion that the relevant facts were only as at the point in time of MARA's consideration.

Shi was not a case where, of its nature, the decision had to be determined by the AAT by reference to the state of evidence at a particular time. Both the language of the Migration Act and its purpose suggested otherwise. Each of the grounds on which cancellation might occur

is expressed in the present tense and, necessarily, the circumstances to which each is addressed could be altered by supervening events. The language in the Migration Act clearly contemplates the possibility that circumstances may change between an initial decision of MARA and a subsequent decision of the AAT, performing the 'review' which the Migration Act contemplates and for which s 43 of the AAT Act provides.

To demonstrate this point, his Honour noted the AAT's powers in certain circumstances to make a decision 'in substitution for' a decision of the AAT which has been set aside upon review and noted that it would be remarkable if the substituted decision could not take into account evidence of relevant, and even critical, supervening events. Examples of such events might include the intervention of bankruptcy, or a criminal conviction for an offence of dishonesty of significance for the continued registration of the agent under the Migration Act.

5. Errors in the reasoning below

Kirby J identified errors in the approach taken by the majority in the Full Federal Court to the interpretation of the relevant provisions of the Migration Act. In particular, his Honour noted that Division 3, Part 3 of the Migration Act specifically contemplates merits review by the AAT. In construing the disciplinary provisions, the Federal Court erred in failing to appreciate this, as there is nothing in the legislation to suggest that such review should not be performed by the AAT with the benefit of any new, fresh, additional or different material.

Justices Hayne and Heydon in a joint judgment emphasised, in relation to the issue of the AAT's proper function, the need to give close attention to the relevant provisions, both in the AAT Act and the Migration Act. Their Honours essentially saw the task of the AAT as being to exercise all the powers and discretions conferred by the Migration Act on MARA.

Hayne and Heydon JJ found that MARA's contention that the question for the AAT was whether the correct or preferable decision when MARA made its decision was to cancel the appellant's registration should be rejected as it finds no footing in the relevant provisions. Their Honours held that framing the relevant question in the manner urged by MARA would treat the AAT's task as confined to the correction of demonstrated error in administrative decision making in a manner analogous to a form of strict appeal in judicial proceedings, which is not the AAT's task.

Their Honours concluded that, in essence, the AAT Act required the AAT 'to do over again' the original decision and that, unlike some legislative regimes—notably pension cases, where the critical statutory question is whether a criterion is met at a particular date—there is nothing in the Migration Act which limited the AAT's consideration to matters which were only in existence at the time of the cancellation decision.

Justice Crennan agreed with Justice Kiefel on the question of the AAT's task.

Justice Kiefel concluded that the nature of the review conducted by the AAT depends upon the terms of the statute conferring the right, rather than upon the identification of it as an administrative authority entrusted with a particular type of function. Her Honour concluded that, in determining the powers of the AAT in respect of matters in which it has jurisdiction, it is important to identify the decision under review as this marks the boundaries of review.

Her Honour held that the argument advanced by MARA that the AAT is only intended to exercise the power of the original decision maker when it discovers error ignores the powers provided for by s 43 of the AAT Act, which are to permit the AAT to consider for itself what

the decision should be. Such powers are not consistent with a role limited to the ascertainment of error.

Justice Kiefel concluded that, where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the AAT in the process of informing itself. It is otherwise where the review to be conducted by the AAT is limited to deciding the question by reference to a particular point in time.

Implications

The general position established by the High Court's decision is that, in the absence of some statutory basis for confining what the AAT can consider to be material which may bear upon circumstances as they existed at the time of the initial decision, the AAT should take into account information about conduct and events that occurred after the decision under review. Further, no such statutory limitation is contained in the AAT Act, and any limitation would have to be found in legislation which empowers a primary decision maker.

AGS Senior Executive Lawyer Dale Watson acted for MARA as instructing solicitor in these proceedings.

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