Conference on Constitutional Law

Commentary on Sir Anthony Mason's Paper – The Hickman Principle and Part 8 of the *Migration Act*

I wish to comment upon the last matter raised by Sir Anthony in his thought – provoking paper , namely the exclusion of judicial review by privative clauses, and the operation of the *Hickman* principle, in the context of the recent amendments to Part 8 of the *Migration Act*. I propose briefly to refer to judicial exposition of the *Hickman* principle before turning to consider the key provisions of the new Part 8 and some issues which might arise as to the validity of those provisions.

On 27 September 2001 the Commonwealth Parliament enacted the *Migration Legislation Amendment (Judicial Review) Act* which applies to the High Court, the Federal Court and the Federal Magistrates' Court. That Act repealed the existing Part 8 of the *Migration Act*, which has operated since 1 September 1994.

The new Act applies to all applications for review made after 2 October 2001 even if the primary decision was made before that date.

Former Part 8 – Explained in Yusuf

The previous Part 8 left untouched the High Court's jurisdiction under section 75(v) of the Constitution, but purported, in section 476, to limit the grounds of judicial review available in the Federal Court by excluding as a ground for judicial review the following:

- breach of the rules of natural justice;
- unreasonableness;
- the taking into account of irrelevant considerations;
- failure to take into account relevant considerations;
- bad faith.

The effectiveness of the relevant sections to exclude judicial review on those grounds has been significantly curtailed by the High Court's decision in May 2001 in *Minister for*

Immigration and Multicultural Affairs v Yusuf (2001) 75 ALJR 1105. McHugh, Gummow and Hayne JJ there explained at 1120-1121 that, as a matter of statutory construction, contrary to what had been previously assumed to be the case, the relevant provisions were ineffective to exclude review where the relevant tribunal exceeded its authority or powers.

With reference to *Craig v South Australia,* (1995) 184 CLR 163 at 179 McHugh, Gummow and Hayne JJ stated that an administrative tribunal exceeded its powers and thus committed a jurisdictional error if it identified a wrong issue, asked itself a wrong question, ignored relevant material, relied on irrelevant material or, in some circumstances, made an erroneous finding or reached a mistaken conclusion in a way that affected the exercise or purported exercise of the tribunal's power. They made it clear that that list was not exhaustive and, by a footnoted reference to the High Court's decision in *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, suggested that a breach of the rules of natural justice would similarly involve an excess of authority. In those circumstances judicial review would be available in the Federal Court.

Although the full implications of the decision in *Yusuf* have yet to be thoroughly explored, it is clear that the decision has had the effect of considerably expanding the grounds for judicial review hitherto thought to be available in the Federal Court.

Parliament's Response – Recourse to the Hickman Principle

It was no doubt in response, at least in part, to that development, that the new Part 8 of the *Migration Act* was introduced. Its purpose could not be more clear. In the words of the Minister in the Second Reading Speech, it is, in migration matters, to *"restrict access to judicial review in all but exceptional circumstances"*.

The legislation aims to achieve that purpose by the time-honoured device of a privative clause, which is found in section 474 of the new Part 8. Part 8 was drafted to address the Government's concern in relation to an increase in applications to the High Court and Federal Court and the attendant costs. The Minister states that a privative clause such as section 474 would narrow the scope of judicial review by the High Court and the Federal Court. It remains to be seen whether section 474 and the accompanying sections will in fact achieve that goal.

Section 474 is expressly based on a very similar privative clause in *King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 ("*Hickman's* case"). It should be recalled that such a

clause was there held to be ineffective to prevent the issue of prohibition to a Board which made orders deciding a matter wholly outside its authority.

In that case, Sir Owen Dixon formulated the principle of statutory construction, since described as "classical"[1] discussed by Sir Anthony and generally known as "the *Hickman* principle". Sir Anthony has elsewhere[2] described the principle as follows:-

> *"The principle protects a decision not exhibiting jurisdictional error on its face from invalidation if it was:*
>
> *(i) a bona fide attempt to exercise the power;*
>
> *(ii) it relates to the subject matter of the legislation;*
>
> *(iii) it is reasonably capable of reference to the power given to the body.*
>
> *In conformity with the authorities, a further proviso should also be added, namely that the decision does not violate any statutory requirement which is regarded as imperative or inviolable."*

Sir Owen Dixon in *Hickman's* case stated at 618 that the principle had a "*protective operation upon the action of Boards acting irregularly or outside their formal authority*". Clearly then it could not protect an action or decision wholly beyond power – such as the orders of the Board in the case at hand.

It is by this "home-grown expedient" as Sir Anthony describes it, that Australian courts have attempted to reconcile what has been described as the "prima facie inconsistency" between one statutory provision which seems to limit the powers of a tribunal and another, the privative clause, which seems to contemplate that the tribunal's order shall operate free from any restriction[3].

Sir Owen Dixon emphasised[4] that in each case it was necessary to interpret the whole legislative instrument to determine whether transgression of a provision limiting an

---

1 *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Limited* (1960) 104 CLR 437 at 435.

2 The Honourable Sir Anthony Mason AC KBE, paper entitled *"The Foundations and Limitations of Judicial Review"* delivered on 19 September 2001 as lecture 1 of the Australian Institute of Administrative Law Lecture Series.

3 *R v Coldham; ex parte the Australian Workers' Union* (1983) 153 CLR 415 at 418 per Mason ACJ and Brennan J.

4 *The King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 616.

authority's powers necessarily spelt invalidity. He stated that in construing the apparently inconsistent provisions, *"effect must be given to the whole legislative instrument by a process of reconciliation"*[5].

The *Hickman* principle has been repeatedly applied by the High Court to determine the extent of the operation of privative clauses similar to the new section 474 of the *Migration Act*. Its application produces the following result. Where a decision which does not exhibit jurisdictional error on its face satisfies the four "*Hickman*" provisos, then, in the words of Justice Brennan:

> *"The privative clause treats an impugned act as if it were valid. Insofar as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded"*[6]

As Gaudron and Gummow JJ have explained, such a privative clause operates, in effect *"to recast the legislative provisions which confer the power in question and which condition its exercise"*[7].

The operation of the *Hickman* principle produces the result that a properly drafted privative clause will protect a decision from a mere defect or irregularity which does not deprive the relevant authority of the power to make an order.[8] In the words of Deane and Dawson JJ, such a clause will thus *"exclude general judicial review"*[9].

The Hickman Principle – is it clear ?

It should be noted (and has been, by previous commentators)[10] that the *Hickman* principle is not without its ambiguities. There is, for example, some judicial disagreement as to whether, in determining whether a decision is a bona fide attempt to exercise a power, a court may

---

5 *The King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 617.

6 *Deputy Commissioner of Taxation v Richard Walter Pty Limited* (1995) 183 CLR 168 at 194, per Brennan J.

7 *Darling Casino Limited v NSW Casino Control Authority* (1997) 191 CLR 602 at 631.

8 *Deputy Commissioner of Taxation v Richard Walter Pty Limited*, (1995) 183 CLR 168 at 180, per Mason CJ; *O'Toole v Charles David* (1990) 171 CLR 232 at 305 per Dawson J.

9 *R v Coldham; ex parte the Australian Workers' Union* (1983) 153 CLR 415 at 427.

10 R. Anderson, *"Parliament v Court"* (1950) 1 UQLJ 39; R Anderson, "*The Application of Privative Clauses to Proceedings of Commonwealth Tribunals*" (1956) 3 UQLJ 3S, S. Gageler S.C. *"The Legitimate Scope of Judicial Review"* (2001) 21 Aust. Bar Rev. 279.

look only at the record or whether it may look also to other evidence to ascertain the decision-maker's subjective intentions[11].

Further, judicial minds may well differ as to whether a decision "relates to" the subject matter of legislation, or is "reasonably capable" of reference to the power of a particular body.

Finally, it must be recalled that the *Hickman* principle arguably does not protect a decision which exhibits jurisdictional error on its face (although there is some debate about this). The High Court has in *Craig* and *Yusuf* explained the circumstances in which an administrative tribunal such as the Refugee Review Tribunal or Migration Review Tribunal commits a jurisdictional error . They are fairly extensive.

In *Craig v South Australia* (1995) 184 CLR 163 the High Court at 179 emphasised, in the context of jurisdictional error, the following "critical distinction" between administrative tribunals and courts of law . In the absence of a contrary intention in the statute which established it, an administrative tribunal (unlike an inferior court) lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law[12]. A privative clause would thus arguably be ineffective to exclude judicial review if the Refugee Review Tribunal or the Migration Review Tribunal purported to do either of those things.

As to whether breach of any particular provision of the *Migration Act* limiting the authority of one of those tribunals would be protected by section 474, in accordance with the principles expounded by Sir Owen Dixon in *Hickman's* case, that would depend upon the interpretation of the whole of the *Migration Act*.

I will turn now briefly to the relevant provisions of the new Part 8 of the *Migration Act*.

<u>Part 8</u>

The key provision is section 474, which provides that a privative clause decision:

> *"(a) is final and conclusive; and*

---

11 *O'Toole v Charles David* (1990) 171 CLR 232. *Mason CJ, Brennan and Dawson JJ were each of the view that it may be permissible to look at the decision-maker's subjective intention. Deane, Gaudron and McHugh JJ stated however that a court may look only at the face of the record.*

12 *Craig v South Australia* (1995) 184 CLR 163 at 179.

> (b) *must not be challenged, appealed against, reviewed, quashed or called in question in any court; and*
>
> (c) *is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account".*

The section thus picks up and expands upon the words used in the privative clause in *Hickman's* case. A "*privative clause decision*" is defined in sub-section 474(2) as a decision of an administrative character made, proposed to be made, or required to be made under the *Migration Act* or under a regulation made under that Act.

Sub-section 474(4) provides that decisions under various sections of the *Migration Act* are not privative clause decisions. Those decisions are reviewable by the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977 ("the ADJR Act").

The Explanatory Memorandum makes it clear that the intention of section 474 is *"to provide decision-makers with wider lawful operation for their decisions"*. There may well be a real question as to whether the section achieves that goal if the view that privative clauses are unable to exclude review for jurisdictional error on the face of the decision prevails, given the broad formulation of the concept of jurisdictional error by the High Court in *Craig* and *Yusuf*.

Section 475A preserves the Federal Court's jurisdiction under sections 39B and 44 of the *Judiciary Act* in relation to a privative clause decision made on review by the Migration Review Tribunal, the Refugee Review Tribunal or the Administrative Appeals Tribunal. The Federal Court's jurisdiction in relation to a privative clause decision thus appears to be the same as the High Court's, given that section 39B vests jurisdiction in the Federal Court in terms identical to that vested in the High Court by section 75(v) of the Constitution[13].

Section 476 provides that the Federal Court has no jurisdiction over a primary decision. That is defined in sub-section 476(6) as a privative clause decision that is reviewable or has been reviewed by the Refugee Review Tribunal, the Migration Review Tribunal or the Administrative Appeals Tribunal, or would have been so reviewable if an application for such review had been made within time. As Professor Aronson has pointed out in a discussion of the new Part 8, it may be that the Federal Court now has ADJR jurisdiction over such decisions because the amendment to the ADJR Act excludes only privative clause decisions

---

13 *Duff v McCulloch* (1985) 11 FCR 237.

from ADJR review, and not "primary decisions" as defined. In addition, the High Court has jurisdiction pursuant to section 75(v) over such decisions.

Section 477 imposes a 28 day time limit on an application to the Federal Court under section 39B of the *Judiciary Act*. Section 486A imposes a time limit of 35 days on an application to the High Court.

Section 484 provides that the jurisdiction of the Federal Court and the Federal Magistrates' Court in relation to privative clause decisions is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under section 75.

Conclusion

It remains to be seen whether the new Part 8 will achieve the stated aim of restricting access to judicial review in all but exceptional circumstances. If the courts continue to apply the *Hickman* principle of statutory construction and, in particular, adhere to the view that such a clause is ineffective to exclude judicial review for jurisdictional error, it is quite likely that that goal may be frustrated. Section 474 presumably would not then be unconstitutional, and the Federal Court's jurisdiction would be essentially the same as it was before, as explained in *Yusuf*.

The operation of the new Part 8 has fallen for consideration by the Federal Court in a number of cases – for example, *Walton v Ruddock* [2001] FCA 1839, a decision of Merkel J.[14] An argument as to validity in relation to an alleged breach of natural justice is continuing this afternoon before Gyles J, in a case in which the Solicitor-General for the Commonwealth appears for the Minister.

Professor Aronson has stated that *"….. the courts usually respond to legislative attempts to limit or completely exclude the scope of judicial review of administrative action with a mixture of incredulity, disingenuous disobedience and downright hostility"*[15]. Whether that approach will prevail in the case of the new Part 8 remains to be seen.

---

14 See also *VAM v The Minister for Immigration and Multicultural Affairs* [2001] FCA 1809 at para [23]; *CBA v The Minister for Immigration and Multicultural Affairs* [2001] FCA 1797 at para [19]; *Sheejo v The Minister for Immigration and Multicultural Affairs* [2001] FCA 1708; *VAZ v The Minister for Immigration and Multicultural Affairs* [2001] FCA 1805 at para [20]. On the day this paper was delivered, Allsop J delivered his decision in *NABL v The Minister for Immigration and Multicultural Affairs* [2002] FCA 102, in which he referred, at paragraphs [8] – [10] to the effect of the new provisions.

15 Aronson and Dyer, *Judicial Review of Administrative Action* (2nd edition, 2001), p.675.

It is, perhaps, pertinent to note the extra-curial statement of the Chief Justice of the High Court in a recent paper entitled "*Courts and the Rule of Law*" delivered at Melbourne University in November of last year in the Rule of Law series.

In words that might be thought to give the lie to Professor Aronson's wry observation, Chief Justice Gleeson there stated, in the context of a discussion of privative clauses, that:

> *"Legal theory does not require the conclusion that all forms of restriction upon the capacity of the judiciary to override executive action on legal grounds necessarily involve a derogation from the rule of law. Subject to any limits on legislative power imposed by the Constitution, it is for Parliament to define the power and jurisdiction of administrators and tribunals.....* ***to the extent to which a privative clause, properly construed, lawfully amplifies power or limits jurisdiction, then respect for the rule of law requires courts to give effect to that expression of legislative will****..... The extent to which it is within the competence of Parliament to exclude all forms of judicial review of administrative action remains to be defined".*

15 February 2002

Nicole Abadee
6th Floor
Wentworth Chambers

Tel: (02) 9231 3864
Fax: (02) 9221 5604
Email: nabadee@sixthfloor.com.au