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23 December 2010

ROLE OF COURTS IN JUDICIAL REVIEW

In its decision in *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48 the High Court reaffirmed the proper role of courts in reviewing administrative decisions.

The Court held that:

- courts should not delve into the merits of administrative decisions on the ground that the decision-maker did not give 'proper, genuine and realistic consideration' to the evidence before it
- the weighing of evidence, and the preference for some evidence over other, is a matter for decision-makers, not for courts exercising supervisory jurisdiction.

Background

The case concerned a Nepalese couple (the applicants) who unsuccessfully applied for protection visas claiming to be refugees to whom Australia owed protection obligations. The applicants left their home in Kathmandu at a time when the Nepalese government was in the midst of a civil war against the Communist Party of Nepal (the Maoists). The applicant husband, a school teacher and a shop-owner, claimed he was forced to pay compulsory donations out of his income into Maoist coffers (so-called 'revolutionary taxes'), and was forced to attend Maoist training camps. The husband further claimed each side of the conflict suspected he sympathised with the opposite side, and that in the circumstances he had a well-founded fear of being persecuted for his political opinion or membership of particular social groups (teachers and business operators) if he returned to Nepal. The wife claimed a protection visa as a member of the husband's family. The protection visa applications were refused by a delegate of the Minister, and the applicants applied to have that decision reviewed by the Refugee Review Tribunal (RRT).

Given the end of the civil war, and the Maoist parliamentary majority in Nepal, the husband modified his case before the RRT to focus exclusively on his status as a school teacher and the treatment of teachers in Kathmandu. As part of the evidence presented to the RRT, the applicants relied on 2 letters from the school at which the husband taught, which appeared to corroborate some of the husband's claims. Whilst the RRT accepted these letters came from the relevant school, it gave the letters 'no weight' because they pre-dated the end of the civil war and because the husband’s own evidence was that the Maoists were now treating 'pro- and imputed anti-Maoists the same'.

The RRT concluded that it was not satisfied that school teachers are currently forced to pay revolutionary taxes under threat of violence where the applicant last resided or in other large cities in Nepal. The RRT referred to certain evidence given by the applicant husband in this

respect as a 'baseless tactic' designed to help him overcome the potentially adverse impression available to the RRT after it alerted him to inconsistencies in his own evidence.

In the Federal Court

An application for judicial review brought by the applicants in the Federal Magistrates Court was unsuccessful ([2009] FMCA 886]), however an appeal from that judgment to the Federal Court was allowed ([2009] FCA 1577), resulting in the RRT's decision being set aside.

The appeal judge, Rares J, held that the RRT had failed to give 'proper, genuine and realistic consideration' to the evidence before it, resulting in jurisdictional error.

His Honour said that, in the absence of any finding that the letters contained falsehoods, he could not 'conceive how any rational, reasonable approach to the evaluation of that evidence could give it "no weight"'. Instead, his Honour held that the RRT had not 'genuinely consider[ed] the applicants' claims as corroborated by the letters', and had used the 'formula' of giving material 'no weight' as a basis on which 'it might ignore probative, relevant and highly supportive material corroborating the factual fears' which the applicant husband claimed.

Rares J also held that the 'baseless tactic' comment was made without evidence, and indeed was contrary to the evidence. Coupled with the RRT using the 'no weight' formulation 'to shut out powerfully corroborative independent evidence', the comment indicated the RRT had an apparent bias against the applicants.

The Minister for Immigration and Citizenship (the Minister) sought and was granted special leave to appeal to the High Court from this judgment ([2010] HCATrans 133).

In the High Court

Merits review is not a matter for courts exercising supervisory jurisdiction

The High Court unanimously allowed the Minister's appeal, setting aside the order of Rares J and effectively restoring the RRT's decision.

The High Court (at [23]) affirmed what was said by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36:

> The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The Court then considered the origins of the phase 'proper, genuine and realistic consideration', which has its source in certain observations by Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, and noted that those comments related to the exercise of discretionary power in accordance with a rule or policy, without having regard to the merits of a particular case (at [26]).

The High Court also cited, with apparent approval, Basten JA's warning in *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45] concerning the language of 'proper, genuine and realistic consideration':

> That which had to be properly considered was 'the merits of the case'. Taken out of context and without understanding their original provenance, these epithets are apt to encourage a slide into impermissible merits review.

It is for the decision-maker to decide on the weight to be given to evidence

The High Court accepted the Minister's submission that the weight to be accorded to the various letters before the RRT, and the factual matters to which they gave rise, were entirely matters for the RRT as they concerned the merits of the application (at [32]). The Court held that, read in context, when the RRT said that it gave the letters 'no weight' (at [33]):

> … it was referring to the fact that it did not accept the letters as evidencing that the [applicant husband] was in some danger from Maoists in Kathmandu. This was in large part because of social and political changes which had occurred since the letters were written. The evidence given by the [applicant husband], including his evidence about the effect of those changes, undermined his claim of political and social activism, thereby contradicting the support which the letters gave his assertion that Maoists were continuing to pursue him in Kathmandu. The weighing of various pieces of evidence is a matter for the [RRT].

In the same way as describing reasoning as 'irrational or unreasonable' may merely be an emphatic way of disagreeing with it, so too, the High Court cautioned, can referring to the need for 'a proper, genuine or realistic evaluation' of evidence merely be a way of registering that emphatic disagreement (at [34]). That is what occurred in this case. The probative value of the letters was a matter on which 'reasonable minds might come to different conclusions'. The RRT's preference for other evidence goes to the heart of the merits of the decision and cannot give rise to jurisdictional error on the part of the decision-maker (at [35]-[37]).

Further, the High Court held, the use of the expression 'baseless tactic', read in context, also did not give rise to any jurisdictional error. The RRT was merely recording the fact that it did not accept the applicant husband's evidence that a teacher in Kathmandu would attract the attention of the Maoist (at [38]-[40]). It also followed that the use of the term could not give rise to an apprehension of bias in the circumstances (at [44]).

When could jurisdictional error occur?

It should be noted, however, that during the hearing the Minister accepted that a statutory provision requiring a tribunal to give an applicant an opportunity to appear before it to give evidence and make submissions implies that such evidence and/or submissions is to be given 'proper, genuine and realistic consideration'. That concession appears to have been approved by the Court (at [29]).

Despite the unanimous approach of the High Court to the facts of the case before it, the judgment leaves open the possibility that a failure to give 'proper, genuine and realistic consideration' could, in appropriate circumstances, amount to jurisdictional error. Indeed, quite apart from the statutory scheme provided for under the *Migration Act 1958* (Cth), it would appear open to courts to extrapolate from this approach to hold that the 'hearing rule' (which forms part of the common law procedural fairness obligations) requires not only that an opportunity be given to a person potentially adversely affected by a decision to make comments or provide evidence in response to adverse information that is credible, relevant and significant to the decision, but also that the decision-maker consider the comments or evidence provided (i.e., that the decision-maker give 'proper, genuine and realistic consideration' to that material). A failure to do say may amount to a denial of procedural fairness and jurisdictional error.

Impact for decision-makers

The effect of the High Court's judgment is that courts must guard against the 'slide into impermissible merits review' that may suggest itself from the use of the expression 'proper, genuine and realistic consideration'.

It is a matter for the decision-maker to weigh the evidence, and make findings based on that evidence. Disagreement with the way in which evidence was considered or findings made, however emphatically held or expressed, does not result in jurisdictional error in the absence of 'illogicality' or 'irrationality' of the type discussed in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 61.

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