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Full Federal Court confirms 'legal unreasonableness' principles

In [Minister for Immigration & Border Protection v Eden \[2016\] FCAFC 28](#) (9 March 2016), the Full Federal Court of Australia confirmed the principles that apply to the standard of legal unreasonableness as an avenue for judicial review of administrative decisions.

Background

In May 2011, Mr Eden, a citizen of New Zealand, pleaded guilty to a charge that he had sexually assaulted a female passenger in a taxi he had driven. He was sentenced to 12 months imprisonment, fully suspended.

Minister's decision to cancel Mr Eden's visa

In April 2015 the Assistant Minister for Immigration & Border Protection exercised her discretionary power to cancel Mr Eden's visa on the basis that he did not meet the 'character test' in s 501 of the *Migration Act 1958* (Cth).

The Minister had regard to factors that weighed in favour of cancelling Mr Eden's visa, which were:

- the nature and seriousness of his offence
- the risks to the Australian community
- the expectations of the Australian community.

The Minister also considered the factors that weighed against cancellation, which were:

- the best interests of Mr Eden's young son
- his ties to Australia
- the hardship he and his family might face if he returned to New Zealand.

The Minister found that the risk to the Australian community of permitting Mr Eden to remain in Australia outweighed the factors in favour of not cancelling the visa.

Mr Eden applies for review of Minister's decision

Mr Eden applied for judicial review of the Minister's decision.

At first instance in the Federal Court, Logan J granted Mr Eden's application. Logan J held that the Minister's decision was legally unreasonable in the sense in which the ground of review was described in *Minister for Immigration & Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (see AGS Express Law, [High Court considers unreasonableness ground of judicial review of administrative decisions](#), No 186, 21 May 2013).

Logan J held that the cancellation decision was plainly unjust, was a disproportionate exercise of the 'cancellation' discretion and was legally unreasonable having regard to the seriousness of the offence, the delay and competing considerations.

Minister's appeal to Full Federal Court

The Minister sought to appeal the primary judge's judgment.

The Full Federal Court (Allsop CJ, Griffiths and Wigney JJ) ordered that the Minister's appeal should be allowed. The Court dismissed Mr Eden's application for judicial review, with costs.

Full Federal Court defines 7 principles of 'legal unreasonableness'

The Full Court summarised the relevant legal principles that apply to the standard of 'legal unreasonableness' as a ground of judicial review as follows (at [58] to [65]):

- The concept of legal unreasonableness concerns the lawful exercise of power.
- The Court's task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory. It does not involve the Court engaging in merits review of the decision under the guise of an evaluation of the decision's reasonableness or the Court substituting its own view as to how the discretion should be exercised for that of the decision maker.
- There are 2 contexts in which the concept of legal unreasonableness is employed. The first involves a conclusion after the identification of jurisdictional error in the decision-making process (for example, a failure to consider a mandatory consideration). The second involves an 'outcome-focused' conclusion without identifying jurisdictional error in the decision-making process.
- In assessing whether a particular outcome is unreasonable, it is important to note that there is an area within the boundaries of the exercise of a power that a decision maker has a genuinely free discretion ('**decisional freedom**'). Reasonable minds might differ as to the merits of the decision or outcome, but any decision or outcome within the area of decisional freedom is within the boundaries of legal reasonableness.
- In order to identify or define the width and boundaries of the area of decisional freedom, it is necessary to construe the relevant statute.
- If there are reasons for a decision, the reasons are likely to provide the focus for the evaluation of whether the decision is legally unreasonable. If there is an evident and intelligible justification for the decision then, in most but not all cases, such decisions will not be legally unreasonable.
- The evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions. However, it may be of some assistance to have regard to descriptive expressions that have been used in previous cases to describe the qualities of decisions that exceed the limits and boundaries of a statutory power (such as 'plainly unjust', 'arbitrary', 'capricious', 'irrational', 'lacking in evident or intelligible justification' or 'obviously disproportionate').

Primary judge did not carry out the evaluative exercise correctly

Applying these principles, the Full Court found that the primary judge's reasons:

- did not acknowledge the area of 'decisional freedom' that is open to the Minister
- did not evaluate whether the decision fell within that area having regard to the facts of the case and the subject matter, scope and purpose of the Migration Act.

The primary judge had assessed what he considered to be the reasonable outcome in the circumstances and then effectively concluded that any other view was legally unreasonable: at [91].

Decision to cancel did not lack intelligible justification and was not disproportionate

The Full Court found that, even if the primary judge had carried out the correct evaluative exercise, the Minister's finding of the unacceptable potential risk of harm to the Australian community was an evident and intelligible justification for the cancellation decision. It could not be considered to be, in any sense, unreasonable, illogical or irrational.

In concluding that the Minister had used 'a sledgehammer to crack a nut', the Full Court found that the primary judge did not explain why cancellation was not a proportionate response to the risk of harm. It was open to the Minister to weigh the risk to the community against Mr Eden's personal circumstances and make a decision in favour of cancellation.

The Full Court noted that, in the case of decisions made by the Minister personally for which no merits review is provided, intervention on the ground of legal unreasonableness would be fairly rare and would only occur in relatively clear cases. This was not such a case.

Related judgment – Minister for Immigration & Border Protection v Stretton

In an earlier judgment, *Minister for Immigration & Border Protection v Stretton* [2016] FCAFC 11 (15 February 2016), delivered by the Full Federal Court (identically constituted) and involving the same statutory power, Allsop CJ and Griffiths J each engaged in a detailed survey of the authorities that inform the relevant principles on the concept of legal unreasonableness (see, for example, Allsop CJ at [11] to [13]).

Each of their Honours also observed that the 'intensity of the standard' for legal unreasonableness is likely to be higher in a case involving the exercise of a substantive, rather than procedural, statutory power (at [21] per Allsop CJ and at [71] per Griffiths J, Wigney J agreeing at [90]).

Implications and significance

The Full Federal Court has confirmed the principles and the practical stringency required in the application of the standard of 'legal unreasonableness'. In deciding whether a decision is legally unreasonable, there must be an assessment of the 'decisional freedom' open to a decision maker. Also, careful consideration must be given to the facts of the case and the terms, scope and objects of the legislation under which the power is exercised.

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