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High Court considers unreasonableness ground of judicial review of administrative decisions

In *Minister for Immigration and Citizenship v Li* [2013] HCA 18, the High Court held that the Migration Review Tribunal's refusal to adjourn review proceedings was unreasonable and that the Tribunal exceeded its jurisdiction.

A majority of the Court held, in part, that:

- the legislature is generally taken to have intended that a statutory discretion is to be exercised reasonably
- the legal standard of reasonableness is not limited to what is known as *Wednesbury* unreasonableness (ie that a decision is 'so unreasonable that no reasonable authority could ever come to it')
- taking irrelevant considerations into account, failing to take relevant considerations into account, bad faith, dishonesty, disregard of public policy and misdirecting oneself as to the operation of the statute are all relevant to the question of whether the discretion was exercised reasonably.

Background

The Minister's delegate refused Ms Li's application for a student residence visa on the basis that some of her purported employment history was not genuine. Ms Li applied to the Migration Review Tribunal (the Tribunal) for review of the decision and simultaneously applied for a fresh skills assessment. The fresh assessment included some fundamental errors which caused it to be unfavourable. Ms Li's migration agent explained to the Tribunal that Ms Li was confident the assessing authority would grant her application for a review of the assessment and sought an adjournment of the Tribunal's decision until receipt of the review. The Tribunal refused the application for an adjournment on the basis that Ms Li had been given enough opportunities to present her case and that it was not prepared to delay the matter any further.

Ms Li successfully applied for review of the Tribunal's decision to the Federal Magistrates Court of Australia (now the Federal Circuit Court of Australia). On appeal the Full Court of the Federal Court unanimously dismissed the Minister's appeal, finding that Ms Li had been denied procedural fairness.

Tribunal's refusal to adjourn was unreasonable

The High Court gave 3 separate judgments (French CJ; Hayne, Kiefel and Bell JJ; and Gageler J).

All judges of the High Court rejected the view of the Full Federal Court that grounds for judicial review arose out of the statutory exhortation to the Tribunal (common to many other Commonwealth tribunals) to carry out its functions to pursue the objective of 'fair, just, economical, informal and quick' review and to 'act according to substantial justice and the merits of the case' (at [16], [51]–[53], [96]–[98]).

However, all judges held that the Tribunal exercised its discretionary power to adjourn unreasonably and therefore exceeded its jurisdiction. Their reasons for this conclusion differed.

Chief Justice French held that the provision of the *Migration Act 1958* (Cth) which states exhaustively the requirements of the natural justice hearing rule in Tribunal matters did not apply to the decision to adjourn, and that the Tribunal failed to accord Ms Li procedural fairness (at [21]). He also held that that there was an element of arbitrariness about the decision which rendered it unreasonable (at [31]).

The plurality accepted that the exhaustive statement of the requirements of the natural justice hearing rule did apply to the decision to adjourn, and relied solely on the unreasonableness of the exercise of discretion. They considered that, no matter what the Tribunal had considered in exercising the power, it must have committed an error and that the Tribunal therefore did not discharge its function according to law (at [85]). In effect, the decision lacked an evident and intelligible justification (at [76]).

Justice Gageler concluded that 'no reasonable tribunal, seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case, would have refused the adjournment' (at [124]).

A lowering of the unreasonableness bar?

The conventional view was that an applicant seeking to challenge the exercise of discretion on the basis of unreasonableness needed to demonstrate what has become known as '*Wednesbury* unreasonableness' (named after *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). Those seeking to do so faced an extremely high hurdle. Previous decisions suggested that this ground of review was 'extremely confined' (eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J). Although the principle was expressed in various ways in particular cases, a recurrent theme was that there must be something that effectively rendered the finding absurd. For example:

- in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290, Mason CJ and Deane J indicated that the decision-maker must make his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course
- in *Alexandra Private Geriatric Hospital Pty Ltd v Blewett* (1985) 7 FCR 341 at 357, Sheppard J stated that a decision will not 'be vitiated just because a court believes that the decision is unreasonable. It must be satisfied that no person acting reasonably could arrive at such a decision'
- in *Zentai v Honourable Brendan O'Connor (No 3)* (2010) 187 FCR 495 at [372], McKerracher J employed the language of a decision 'verging on absurdity'
- in *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10 at [152], Spigelman CJ (with whom Beazley and Tobias JJA agreed) said a decision is not unreasonable if it is a matter upon which reasonable minds can differ

— in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, Crennan and Bell JJ held that unsound or questionable reasoning will not be sufficient to establish *Wednesbury* unreasonableness.

Justice Gageler concluded that the standard to assess unreasonableness in the present context was *Wednesbury* unreasonableness (at [105]–[110]). However, French CJ and the plurality adopted a wider view of the place of reasonableness in the exercise of a statutory discretion.

The plurality held that:

— The law presumes that a statutory discretion is intended to be exercised reasonably – ie according to the rules of reason and justice (at [63], [65]). The presumption that the discretion to adjourn will be exercised reasonably was not rebutted by the Migration Act (at [86]).

— The legal standard of reasonableness in relation to an ill-defined discretion is determined by the scope and purpose of the legislation conferring the discretion (at [67]).

— *Wednesbury* unreasonableness is not the starting point or end point for the standard required (at [68]).

— Specific errors in decision-making (irrelevant considerations, lack of relevant considerations, bad faith and so on) may be seen as encompassed by unreasonableness (at [71]–[72]).

— By analogy with the test applied by an appellate court in relation to the exercise of a discretion by the court below (see *House v The King* (1936) 55 CLR 499), in the absence of comprehensible reasons for an exercise of a discretion the court can infer a failure to properly exercise the discretion where the decision lacks an evident and intelligible justification (at [75]–[76]).

— It is not possible to say what errors were made in this case ‘but the result bespeaks error’. The Tribunal did not discharge its function of deciding whether to adjourn according to law and acted beyond its jurisdiction (at [85]).

The judgment of French CJ is broadly consistent with that of the plurality. French CJ stated that ‘[t]he rationality required by the “rules of reason” is an essential element of lawfulness in decision-making’, and that this encompasses the usual grounds of judicial review (at [26]). He seemed to see *Wednesbury* unreasonableness as an aspect of this principle which applies where the decision-maker has obeyed all the other rules of lawful decision-making but has nevertheless exercised the discretion in an arbitrary or capricious manner or abandoned common sense (at [28]). He held that the decision in this case had an element of arbitrariness which rendered it unreasonable (at [31]).

Implications for Commonwealth agencies

It is not clear that French CJ and the plurality could not have decided the case in the same way on the basis of *Wednesbury* unreasonableness without resort to a wider conception of reasonable decision-making. The judgments suggest, however, that the Court is concerned to establish a broader framework for adjudging the lawfulness of administrative decisions which is not dependent on compartmentalised grounds of judicial review and which might be applied more like the test applied by an appellate court in relation to the exercise of a discretion.

The case suggests that, even when an administrative decision-maker has a wide discretion, significant care needs to be taken in order to ensure that the decision is lawfully made.

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