Briefs

HUMAN RIGHTS

Kioa to Teoh

The High Court is in the right location but on the wrong track argues RICK SNELL

By a 4–1 majority, the High Court in *Minister of State for Immigration and Ethnic Affairs v Teoh* has taken Australian administrative law into uncharted territory. In the *Teoh* case the Court held that there had been a breach of natural justice because the decision maker had not given notice to the applicant that they were not going to make their decision in accordance with the requirements of the United Nations Convention on the Rights of the Child. The Commonwealth has promised legislation to delineate the impact of *Teoh* at least within the jurisdiction of the Commonwealth.

Finding

The leading judgment of Mason CJ and Deane J was careful to lay down the platitude that the High Court has to exhibit extreme care in the development of common law by reference to international Conventions. Nevertheless, in conjunction with Justices Toohey and Gaudron, their honours shattered the perceived understanding of the accepted legal position occupied by Conventions which have not been incorporated into Australian municipal law. The majority held that Australia's ratification of a Convention can give rise to a legitimate expectation that a decision maker will exercise administrative discretion in conformity with the terms of such a Convention. Given that Australia has ratified several hundred Conventions, there exists a vast minefield of hidden legitimate expectations which could haunt Australian decision makers at all levels of government.

Mason CJ and Deane J held that the ratification of a Convention automatically gives rise to the legitimate expectation that decisions will, in the absence of a clear manifest contrary statutory intent, be made in conformity to the requirements and obligations associated with that particular Convention. This legitimate expectation arises despite an applicant being unaware of the existence of that Convention and in the absence of any commitment by a decision maker to incorporate the requirements of a Convention into their decision-making processes. The majority of the High Court then held that if a decision maker proposes to make a decision inconsistent with that legitimate expectation, then procedural fairness, or natural justice, requires people affected by that decision to be given adequate notice and the opportunity to present a case against that decision.

In *Teoh* the applicant was a Malaysian citizen who arrived in Australia in 1988 and married an Australian citizen with four children. In addition three more children have been born since the marriage. In 1989 Teoh applied for a permanent entry permit. In November 1990, while the application for resident status was still pending, Teoh was convicted of six counts of being knowingly concerned in the importation of heroin and of three counts of being in possession of heroin. He was jailed for six years with a non-parole period of 32 months. Mrs Teoh's addiction to heroin was accepted as playing a part in Mr Teoh's criminality.

The Immigration Department decision maker decided that Teoh failed to meet the Department's policy guidelines namely that an applicant be of good character. Teoh's appeal to the Immigration Review Panel for reconsideration was rejected. The Panel stated:

> All the evidence for this Application has been carefully examined, including the claims of Ms Teoh. It is realised that Ms Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency. The Compassionate claims are not considered to be compelling enough for the waiver of policy in view of [Mr Teoh's] criminal record.

Mason CJ and Deane J argued that in this case Article 3 of the United Nations Convention on the Rights of the Child gave rise to the legitimate expectation that in making a decision in regard to Teoh's application, the best interests of his children would be a primary consideration of the decision maker. Mason CJ and Deane J argued that while the interests of the children were a factor in the final decision, nevertheless the primary consideration was the character of Teoh. Justice Toohey concluded:

> Before allowing the scales to come down against the respondent by reason of his criminal record, some more detailed assessment of the position of his family could have been undertaken.

Justice Gaudron agreed with the reasoning of Mason CJ and Deane J that the Minister's delegate did not proceed on the basis that the interests of the children were a primary consideration in deciding the application by their father.

The dissent of McHugh J

Justice McHugh delivered a very strong dissent. The basis of his dissent was three fold:

- first, the doctrine of legitimate expectations is an outdated concept in Australian administrative law since the decision in *Kioa*;
- second, even if legitimate expectation is still applicable there must have been an explicit or implicit undertaking to Teoh by the decision maker that the decision would be made in accordance with the requirements of the Convention;
- third, on the evidence available, the future of the family and the children was a primary consideration of the delegate.

Comment

In my opinion Justice McHugh's first approach is the one that should be adopted. The doctrine of legitimate expectations has no worthwhile role to play in administrative law since the decisions in *Kioa v West* and *Annetts v McCann*. The concept was conjured up by Lord Denning to breath life back into the concept of natural justice over 25 years ago. I agree with Justice McHugh that:

the rational development of this branch of the law requires acceptance of the view that the rules of procedural fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials.

In the *Teoh* case this required the decision maker to bring to the applicant's attention the critical issues and factors by which the administrative decision would be finally determined. Teoh was informed by the decision maker that character would be a key determinant in the final decision but that other considerations, especially family concerns, would be taken into account. To follow the path of reasoning used by the majority on the High Court is to take an unnecessarily convoluted path to the same point reached by Justice McHugh.

By importing the principles of Conventions like the United Nations Convention on the Rights of the Child via the concept of legitimate expectations, the High Court is undertaking a fundamental transformation of Australian administrative law. Every administrative decision maker, at Commonwealth/State or local government level, will now need to ensure that their decision-making processes have not neglected a crucial requirement of any one of several hundred ratified international conventions.

The majority decision in *Teoh* seems strange because other potential grounds for challenging the decision appeared far more feasible and did not need to invoke a major development in the common law. A challenge could have been mounted on the grounds that the decision maker had failed to take into account a relevant factor, made an unreasonable decision or inflexibly applied a policy. On the facts, the decision maker's processes avoided all of these errors and did not take any adverse factor into consideration without the applicant having timely notice and the opportunity to be heard on the matter. In the end the case seemed to come down to four judges considering that the decision maker had failed to adequately take the interests of the children into account in relation to Mr Teoh's application and one judge reaching the contrary conclusion.

The ten years since *Kioa v West* has seen the High Court lay the foundations for a first class system of administrative law with the notable absence of the keystone of a common law requirement to provide reasons. The foundation has been established on the theory of a combined green light/red light approach to the control of administrative decision making. A decision maker who has ensured that their decisions satisfy certain minimal threshold requirements has been free to decide without further restrictions. They have a green light. Where a decision maker fails to meet these minimum threshold requirements (opportunity to be heard in relation to adverse material, flexible application of policy or no omissions of significant relevant factors) in the full matrix of circumstances surrounding that decision they would be stopped by a red light. *Teoh* may now have given us a flashing amber approach to regulating administrative decision making. Decision makers will now have to look left, right and then take a punt that there is no applicable Convention hanging around.

The High Court can escape the confusion and uncertainty of this detour into the amber light area of controlling decision making by abandoning the concept of legitimate expectation. Three judges including the new Chief Justice, McHugh and Dawson have expressed strong reservations about the concept. With the replacement of Chief Justice Mason with Justice Gummow, the opportunity exists for the High Court to endorse Justice McHugh's preferred approach to the issue of procedural fairness as a presumptive right or absolute common law requirement which then requires a consideration of what level of procedural fairness is required in all the circumstances of any particular decision. Administrative decision makers would do better to ensure they exceed the minimal level of procedural fairness required in a particular case than to attempt to accommodate unknown legitimate expectations arising out of the decision of the Commonwealth Executive to ratify an international Convention.

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ANTI-DISCRIMINATION

Fixing the Brandy prohibition

ANDREA DURBACH reports on a recent High Court decision which rendered anti-discrimination legislation unconstitutional.

Enforcement provisions in the Commonwealth *Racial Discrimination Act* in effect since 1993 were ruled unconstitutional by the High Court in *Brandy v HREOC* (1995) 127 ALR 1 in February this year. The decision also affects the enforcement provisions of the Commonwealth sex, disability and privacy Acts. The Commonwealth has responded by reviewing key aspects of anti-discrimination legislation, seeking to devise legitimate enforcement mechanisms. Hopefully, the features of accessibility and expedition, which characterised the now invalid provisions, can be retained.

The implementation of federal human rights legislation in Australia over the last decade provided a blueprint for dispute resolution in a modern democracy. Informal and low-cost procedures characterised the operation of the legislation, which included conciliation and the expeditious registration of decisions, making them enforceable without the need for a protracted re-hearing before a court. The *Brandy* decision has dealt a blow to the progressive enforcement provision which, in the words of the President of the Australian Law Reform Commission, Alan Rose, 'was designed to save time and money and be more user-friendly'.

Following the decision, the Attorney-General, Michael Lavarch, announced a two-stage response:

(1) the interim reinstatement of the pre-1993 enforcement mechanism, to be implemented by the introduction of a Bill in late May;
(2) the appointment of a Review Committee to consider the options for a new and permanent enforcement scheme.

The challenge facing the Review Committee is to formulate a mechanism which guarantees the user-friendly emphasis of the previous legislation while ensuring enforcement of decisions rests with courts, as required by the Constitution. To this end, the Attorney-General's office has conducted a series of consultations with various organisations (including representatives of the National Association of Community Legal Centres) to discuss draft proposals prior to the Review Committee reporting to the Government in June.