# CASE NOTES

## DRAKE v. MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS[1]

*Administrative law — Administrative Appeals Tribunal — Function of Tribunal in relation to ministerial policy — Application of ministerial policy — Administrative Appeals Tribunal Act 1975 (Cth)*

*Background*

Daniel Dwight Drake came to Australia from the United States of America in 1968 and in 1974 was granted permanent resident status. On 3 January 1978 he was convicted in the Court of Summary Jurisdiction in Darwin on three charges relating to marijuana. For the offence of possessing cannabis at Wollogorang between 28 September 1977 and 9 December 1977 Drake was fined $400 and sentenced to 12 months' imprisonment to be released after 3 months or on his entering into a recognisance of $200 to be of good behaviour for 2 years.

On 1 April 1978 he was released from prison. On 21 April 1978 the Minister for Immigration and Ethnic Affairs made an order that Drake be deported from Australia.[2]

Drake applied to the Administrative Appeals Tribunal to review the decision of the Minister.[3] Mr Justice Davies, then a Deputy President of the Tribunal, affirmed the Minister's decision on 10 November 1978.[4]

Pursuant to section 44 of the Administrative Appeals Tribunal Act 1975 (Cth), Drake then appealed to the Federal Court of Australia from the decision of the Administrative Appeals Tribunal.[5] The appeal was allowed on 3 May 1979 and the matter remitted for a rehearing.

On the rehearing the Tribunal was constituted by the then President Mr Justice Brennan who, on 21 November 1979, affirmed the decision of the Minister that Drake be deported from Australia.[6]

*The decision of the Federal Court*

In appealing to the Federal Court, Drake founded his attack on the decision of the Tribunal on four distinct heads. Only the fourth, on

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[1] (1979) 2 Administrative Law Decisions (A.L.D.) 60; (1979) 24 A.L.R. 577. Federal Court of Australia; Bowen C.J., Smithers and Deane JJ. This case is also discussed by Dr Pearce in "Courts Tribunals and Government Policy" *infra* p. 203.

[2] S. 12 of the Migration Act 1958 (Cth) provides that: "Where . . . an alien . . . has been convicted in Australia of any . . . offence for which he has been sentenced to imprisonment for one year or longer, the Minister may . . . order the deportation of that alien".

[3] Administrative Appeals Tribunal Act 1975 (Cth), s. 25 and Part XXII of the Schedule.

[4] *Re Drake and Minister for Immigration and Ethnic Affairs* (1978) 2 Administrative Law Notes (A.L.N.) No. 4.

[5] (1979) 24 A.L.R. 577.

[6] *Re Drake and the Minister for Immigration and Ethnic Affairs (No. 2)* unreported decision No. 78/10017, 21 November 1979.

which he was successful, is the subject of this Note. That ground was that:

> The Tribunal attached such importance to a policy statement of the Minister on the question of considerations relating to the deterrence of others as to result in a failure by the learned Deputy President of the Tribunal to exercise his own independent judgment.[7]

Bowen C.J. and Deane J. began their joint judgment on this ground by drawing attention to the distinction between the administrative function of the Tribunal and the judicial function of a court: in its review, "the Tribunal is not restricted to consideration of the questions which are relevant to a judicial determination of whether a discretionary power allowed by statute has been validly exercised".[8] Rather, the function which has been entrusted to the Tribunal is to adjudicate on the merits of the decision and the propriety of a permissible policy. Further, the question for the determination of the Tribunal is whether the decision under attack before it was the correct and preferable one, but on the material before the Tribunal rather than on the material before the decision-maker.[9]

The judgment then pointed out that, in its review, the Tribunal is not at large even where the legislation under which the decision was made fails to specify criteria. The Tribunal is subject to the general constraints that the relevant power must not be exercised for a purpose other than that for which it exists, that regard must be had to the relevant considerations and that matters "absolutely apart from the matters which by law ought to be taken into consideration" must be ignored.[10]

Having set out the broad function of the Tribunal the applicability of general government policy was dealt with. First the position of the administrative officer exercising a power conferred upon him by virtue of his office was considered. *R.* v. *Anderson; ex parte Ipec-Air Pty Ltd*[11] was cited for the case where an administrative officer is precluded from taking into account general government policy where he is charged with the exercise of a power by reference to defined criteria.[12] But ordinarily, in the absence of defined criteria, an administrative officer will be entitled to take into account government policy and the propriety of doing so was said to be most evident in a case such as the present where no statutory criteria for the exercise of the power were specified and where the power was entrusted to a Minister of the Crown responsible to Parliament. "Clearly . . . the Minister was entitled to be guided by any general relevant government policy which was not inconsistent with the provisions or the objects of the Migration Act."[13]

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[7] (1979) 24 A.L.R. 577, 583.
[8] *Id.* 589.
[9] *Ibid.*
[10] Citing *R.* v. *Cotham* [1898] 1 Q.B. 802, 806; *Randall* v. *Northcote Corp.* (1910) 11 C.L.R. 100, 109-110; *Shrimpton* v. *Commonwealth* (1945) 69 C.L.R. 613, 620; *R.* v. *Anderson; ex parte Ipec-Air Pty Ltd* (1965) 113 C.L.R. 177, 189.
[11] (1965) 113 C.L.R. 177, 204-205.
[12] (1979) 24 A.L.R. 577, 589-590.
[13] *Id.* 590.

Turning to the position of the Tribunal, Bowen C.J. and Deane J. said that where, as in the instant case, there is no express statutory provision either requiring or authorising the Tribunal to determine the matter in accordance with relevant government policy and where it was permissible for the decision-maker to take relevant government policy into account in making his decision, then

> the Tribunal is entitled to treat such government policy as a relevant factor in the determination of an application for review of that decision.[14]

But:

> On the other hand, the Tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be.[15]

Although this statement is the crux of the decision, Bowen C.J. and Deane J. said it was undesirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the determinations of the Tribunal.[16] They said that that was a matter for the Tribunal itself to determine

> in the context of the particular case and in the light of the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case.[17]

But even where it was the case that the Tribunal concluded that a particular government policy which had been applied by an administrative officer was unobjectionable and the need for consistency was such that the correct or preferable decision was that which resulted from the application of that policy, such a decision should be the outcome of the Tribunal's independent assessment of all the circumstances of the particular matter and not an uncritical application of government policy. Also, since the borderline between the two approaches may well be blurred, it was stated to be desirable that the Tribunal, where it decided that the application of government policy would lead to the correct decision, should make it clear that it had considered the propriety of the policy and expressly indicate the considerations which led it to conclude that the correct decision would be reached by applying government policy.[18]

It was held that the Tribunal's reasons for decision indicated that it had failed to make an independent assessment of the propriety of the Minister's policy and an independent determination that the case was such that the correct decision would result from the application of that

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[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] *Id.* 590-591.
[18] *Id.* 591.

policy. The Tribunal had therefore failed properly to perform its function.[19]

Smithers J., in a separate judgment, reached the same conclusion. He pointed out that the duty of the Tribunal is not to review the reasons for the decision but rather the decision itself and to satisfy itself whether it is a decision which, in its view, was objectively the right one to be made.[20] He concluded that:

> the factor which may be said to constitute error in the present case is not that the Tribunal applied considerations in accordance with the Minister's policy, with the expression of which, as a guide in relation to the subject matter, no substantial fault can be found, but that the Tribunal treated the application by the Minister of his policy as paramount.[21]

He also said:

> In the performance of the Tribunal's function it is essential that a policy adopted by an administrator should be under review to the same extent as his evaluation of relevant matters and his general process of reasoning, not for the purpose of deciding whether it was reasonable for the administrator to make the decision he did, but for the purpose of deciding whether, by the objective standard of good government it was the right decision to make.[22]

The Commonwealth applied to the High Court for special leave to appeal from the judgment of the Federal Court. This was refused on 30 July 1979.

*The rehearing*

At the rehearing before the Tribunal,[23] Brennan J. quoted the passage from the Federal Court decision in which Bowen C.J. and Deane J. left it to the Tribunal to determine the part which ministerial policy should play[24] and then quoted from his decision in the first of the deportation cases, *Re Becker and Minister for Immigration and Ethnic Affairs*.[25] In that decision Brennan J. had himself discussed the Tribunal's function and had formulated four related but distinct issues which might arise in any application to review a decision to order deportation:

> First, is it a case where the Minister may order deportation . . .? Second, if the Minister has a policy which governs or affects his exercise of the power, is that policy consistent with the Act? Third, if the Minister has such a policy, is any cause shown why the Tribunal ought not to apply that policy, either generally or in the particular case? And finally, on the facts of the case and having regard to any policy considerations which ought to be applied, is the Minister's decision the right or preferable decision?[26]

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[19] *Ibid.*
[20] *Id.* 599.
[21] *Id.* 601.
[22] *Id.* 602.
[23] *Supra* n. 6.
[24] *Supra* n. 17.
[25] (1977) 15 A.L.R. 696.
[26] *Id.* 699-700.

In *Re Drake (No. 2)* Brennan J. then proceeded to examine the Minister's policy statement and to determine, in the light of the reasons of judgment of the Federal Court, what part it should play. He noted the width of the discretion and the variety and complexity of factors exposed for consideration. He then looked at the prospects of inconsistency in making decisions where there was more than one decision-maker and found that it would depend on "the extent of the disparity in the respective decision-makers' perceptions of Australia's best interests and the way in which those interests are affected".[27] His conclusion was that in matters of deportation, inconsistency born of the application of differing standards and values should be reduced so far as it is possible to do so.[28] One way of doing this was for the Minister to adopt a guiding policy and thus diminish the importance of individual predilection.[29]

Having discussed the limits of a lawful policy "which leaves the range of discretion intact while guiding the exercise of the power",[30] Brennan J. reiterated the opinion of Smithers J. that "no substantial fault can be found" with the Minister's policy and said that "as that is so there is no reason why the Minister should not apply it in deciding the cases before him".[31] But he explained that he used the term "apply" in the sense not of an unquestioning adoption of the policy's standards and values, but rather of an assumption that, in the absence of any reason to the contrary, its standards and values were appropriate to guide the decision in cases falling within its terms.[32]

Brennan J. then made the following statements in reaching his conclusion as to the practice the Tribunal should adopt in relation to ministerial policy:

(1) In point of law, the Tribunal is as free as the Minister to apply or not to apply the Minister's policy. The Tribunal is at liberty to adopt whatever lawful policy it chooses, or no policy at all, in fulfilling its function to make the correct or preferable decision.[33]

(2) If the Tribunal applies ministerial policy, it is because of the assistance which the policy can furnish in arriving at the preferable decision. An appropriate guiding policy should be applied as an aid in achieving consistency in decisions.[34]

(3) It does not follow from the fact that courts have formulated rules of law that general administrative policy should be formulated by an adjudicative tribunal. The detachment which is desirable for

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[27] Transcript of judgment 9.

[28] *Id.* 11.

[29] *Id.* 12.

[30] *Id.* 14 citing *British Oxygen Co.* v. *Board of Trade* [1971] A.C. 610, 625 and 631 and quoting *Sagnata Investments Ltd* v. *Norwich Corporation* [1971] 2 Q.B. 614, 626. Whether the Minister's new deportation policy on drug offenders, announced on 1 February 1980, meets this criterion will need to be tested.

[31] Transcript of judgment 18.

[32] *Ibid.*

[33] *Id.* 19.

[34] *Id.* 19-20.

adjudication is not in sympathy with the purposiveness of policy formulation.[35]

(4) Administrative policy having a wide significance and affecting the character of Australian society is not conveniently formulated by the Administrative Appeals Tribunal.[36]

(5) Administrative policies are necessarily amenable to revocation or alteration on political grounds, and they are best formed and amended in a political context.[37]

(6) Although the Tribunal ought not and cannot deprive itself of its freedom to give no weight to a Minister's policy there are substantial reasons which favour only cautious and sparing departures from ministerial policy, particularly if Parliament has in fact scrutinised and approved that policy. To depart from ministerial policy denies to Parliament its ability to supervise the content of the policy guiding the discretion which Parliament created. The laying down of a broad policy on deportation is essentially a political function, to be performed by the Minister.[38]

(7) On some occasions, reasons may be shown to warrant departure from ministerial policy, for example where new circumstances have clearly made a policy statement obsolete. But, although the Tribunal is able to refine a broad policy, the creation of its deportation jurisdiction is intended to improve the adjudicative rather than the policy aspects of deportation decisions.[39]

Brennan J. then proposed the following practice:

> When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied . . . cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny.[40]

The sense in which Brennan J. used the word "applied" should be borne in mind. Also it should be noted that the determination of whether the policy is lawful is not in order to supervise the exercise of the discretion by the Minister but to determine whether the policy is appropriate for application by the Tribunal in making its own decision on review.[41]

*Other decisions*

The *Drake* decisions are not, of course, the only ones in which the

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[35] *Id.* 21.

[36] *Ibid.* See also M. D. Kirby J., "Administrative Law Reform in Action" (1978) 2 University of New South Wales Law Journal 203, 234.

[37] Transcript of judgment 22.

[38] *Id.* 22-24.

[39] *Id.* 23-24.

[40] *Id.* 26.

[41] *Id.* 27.

application of ministerial policy has been discussed. *Re Becker*,[42] as already mentioned,[43] was the first of them. In that case Brennan J., after setting out the four issues which may arise, went on to explain how the jurisdiction over policy is conferred by the Administrative Appeals Tribunal Act 1975 (Cth). He said it was because the Tribunal is empowered, as a court is not empowered, to review a decision on the merits (see sections 25 and 43) and the merits of a decision include not only the facts of the case but also any policy which has been applied or which ought to be applied to the facts in reaching the decision.[44] Brennan J. also stressed the importance of departmental assistance in the review of policy and that, where policy is being considered, it is essential that the Tribunal be fully informed as to the policy and the reasons for it.[45] He also drew a distinction between policies settled at the political level and those made at the departmental level. The points of distinction were the difference between the factors to be taken into account in the two kinds of policy and the difference in parliamentary opportunity to review. He concluded that more substantial reasons may have to be shown why basic policies, intended to provide the guideline for the general exercise of the power and which might frequently be forged at the political level, should be reviewed. "There may, of course, be particular cases where the indefinable yet cogent demands of justice require a review of basic or even political policies, but those should be exceptional. . . ."[46] It will be noticed that Brennan J. maintained this position in *Re Drake (No. 2)*.[47]

Another significant case is *Re The Hospital Contribution Fund of Australia and Minister for Health*[48] where Brennan J. set aside a decision of the Minister even though it had major social and political implications. In fact the decision had been taken by the Minister to Cabinet for advice to reinforce his views,[49] yet the Tribunal did not consider this a barrier to the review of the Minister's decision on the merits.[50] He rejected one ground the Minister relied on, the adequacy of reserves, and then rejected the Minister's expressed desire that levels of contributions to major funds should rise simultaneously.[51] The conclusion was that the balance was in favour of approval of the rise in contributions in order to achieve the agreed policy: viability in operation and protection of the interests of contributors.[52]

So a distinction was drawn between ministerial policy and the manner of implementing it. Similarly in *Re Georges and Minister for Immigration and Ethnic Affairs*,[53] Fisher J. found that the manner in which the

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[42] (1977) 1 A.L.D. 158; (1977) 15 A.L.R. 696.
[43] *Supra* p. 96.
[44] (1977) 15 A.L.R. 696, 700.
[45] *Ibid.*
[46] *Id.* 701.
[47] Transcript of judgment 26.
[48] (1977) 1 A.L.D. 209.
[49] *Id.* 214.
[50] M. D. Kirby J., *op. cit.* 236.
[51] *Id.* 236-237.
[52] (1977) 1 A.L.D. 209, 219.
[53] (1978) 1 A.L.D. 331.

department had implemented ministerial policy did not form part of the policy as settled at the political level and was a departure from it. He therefore disregarded the "longstanding view of the Department" and restricted his consideration to the Minister's policy as enunciated in the policy statement and as amplified by his letter.[54] Similarly in *Re Frith and Minister for Immigration and Ethnic Affairs*[55] it was said by counsel for the Minister that a deportation order was made on the basis of a conviction for a drug trafficking offence because it was the practice of the Minister to rely upon the last conviction. Davies J. said "if there is such a practice, it should not, in my view, be followed in the future. The most appropriate conviction is the one that should be relied upon".[56]

This raises the question of the manner of proof of ministerial policy, discussed in *Re Becker*[57] and in *Re Drake (No. 2)*.[58] In the former case, Brennan J. refused to act on what appeared to be a change in ministerial policy for two reasons. First, if there had been a change in policy, Brennan J. said that no doubt it would have been proved by a ministerial statement of some kind. Second, if there had been such a change, the absence of public announcement and subsequent opportunity for debate would minimise the weight which the Tribunal might otherwise accord to it.[59] In *Re Drake (No. 2)* Brennan J. returned to the question of the promulgation of policies and said it was desirable not only so that applicants to the Tribunal should know of its terms, and for this reason the Tribunal had required that the policy be advised case by case,[60] but also to improve the decision-making process whereby administrators should confine their own discretion through principles and rules.[61] Brennan J. described this not as a rule of law but nonetheless valuable as a principle of discretionary decision-making.[62]

*Conclusion*

It can be seen that the decision of Brennan J. in *Re Drake (No. 2)*,[63] while following the approach approved by the Federal Court, proposed a narrower practice to be followed by the Tribunal. That practice would make ministerial policy ordinarily applicable and to that extent the policy would not be under review to the same extent as the reasons and reasoning of the Minister. Also the Tribunal, to be consistent with the reasons of the Federal Court, would still have to make it clear it had considered the propriety of the policy and should expressly indicate its reasons for concluding that its application would lead to the correct decision.

But the conclusion that Brennan J. reached is consistent with that advanced by the Chairman of the Australian Law Reform Commission

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[54] *Id.* 333.
[55] (1978) 1 A.L.D. 590.
[56] *Id.* 599.
[57] (1977) 15 A.L.R. 696.
[58] *Supra* n. 6.
[59] (1977) 15 A.L.R. 696, 703.
[60] Transcript of judgment 15.
[61] Citing Davis, *Administrative Law Treatise* (2nd ed. 1979) ii, para. 8.8.
[62] Transcript of judgment 18.
[63] *Supra* n. 6.

that clearly stated and publicly disclosed ministerial policy should always be applied by the Tribunal except where it results in, say, clear injustice, discriminatory treatment or unfairness.[64] If this view was not adopted by the Tribunal the suggestion of Kirby J. was that

> consistent with the principles that repose ultimate policy in elected representatives, it may be desirable, without damaging the independence of the AAT, to permit Ministers in certain cases to certify publicly statements of policy which will be binding on the tribunal and not open to reversal by it.[65]

This has in fact been the approach taken to the review of quotas under the Dairy Industry Stabilisation Amendment Act 1978 (Cth).[66]

Many questions remain unresolved.[67] It is not certain whether the width of the Tribunal's powers in relation to ministerial policy, which has now become apparent, will lead to a reluctance on the part of the government and its advisers to vest jurisdiction in the Tribunal.[68] Neither is it clear whether the Tribunal will reject ministerial policy entirely in a particular case or merely gloss it by providing an exception to it.[69]

But it is now patent that the functions of the Tribunal go well beyond those of a court and represent a new form of review. No longer is there a concern solely with legality or with manner, form and procedure of administrative decision-making and practitioners for applicants should not confine their attack to these matters. The substance and merits and policy are now a proper subject for interference.[70] Of course the Tribunal's jurisdiction is still very limited, but at least in relation to those decisions from which there is a right to apply to it there will be a robust review on the merits rather than the traditional sophistic subtleties with their sometimes unexpected and often unsatisfying results.[71]

A. ROBERTSON*

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[64] M. D. Kirby J., *op. cit.* 238.

[65] *Ibid.*

[66] No. 94 of 1978, ss. 5 and 9. Note the different approach to review taken in the National Health Amendment Act (No. 3) 1978 (Cth), No. 189 of 1978.

[67] See the Australian Administrative Law Service, Bulletin No. 4, 13 December 1979, 5.

[68] For example, the Administrative Review Council in its 3rd Annual Report (1979) 21-22 recommended that the Tribunal should no longer be restricted (as it is in deportation matters) to making recommendations to the Minister that he reconsider his decision. It is understood that this recommendation will not be implemented by the Government.

[69] Taylor, "The New Administrative Law" (1977) 51 A.L.J. 804, 806.

[70] M. D. Kirby J., *op. cit.* 205-206.

[71] Cases after *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577 and applying that decision (other than that discussed) are: *Re Ajamian and Minister for Immigration and Ethnic Affairs* (1979) 2 A.L.N. No. 37; *Re Sergi and Minister for Immigration and Ethnic Affairs* (1979) 2 A.L.D. 224; *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 A.L.D. 33; (1979) 26 A.L.R. 247. There is also a useful discussion of the subject in Taylor, "The Administrative Appeals Tribunal", a paper given at the A.N.U. Law Faculty/Law Society of the A.C.T. Seminar in November 1978.

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