CASE NOTE

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS v. MAYER[1]

Mayer's homeland was the Indonesian province of Irian Jaya. He had there been imprisoned by the Indonesian authorities for opposition to Indonesian rule. In 1971 he fled to Papua New Guinea where he resided until June 1984. At no stage did he acquire Papua New Guinean citizenship. He came to Australia on 25th June 1984 and was granted a temporary entry permit. On 2nd July 1984 he submitted to the Department of Immigration and Ethnic Affairs a duly completed form titled 'Application for Refugee Status'. In so doing he sought recognition as a 'refugee' as defined in the United Nations Convention relating to the status of Refugees.[2]

By so applying he sought to bring himself within the operation of s.6A(1)(c) of the Migration Act 1958 (Cth).[3] By a letter dated 8th August 1984 the Department advised Mayer that the Minister decided that he was 'not eligible for the grant of' refugee status. Mayer then requested[4] the Minister to provide a statement of his reasons for that decision. The Minister refused to comply with the request on the grounds that the decision to refuse the grant of refugee status was 'not a decision to which the Administration Decisions (Judicial Review) Act 1977 (Cth.) applied because it was not a decision of an administrative character made under an enactment within the meaning of s.3(1) of the Act'.

On appeal brought by special leave from the decision of the Full Court of the Federal Court, the High Court held that the Minister's decision was a decision made under an enactment within the meaning of the ADJR Act. It was common ground that Mayer's application to the Minister was for a determination of the kind referred to in s.6A(1)(c) of the Migration Act.[5] Thus the

[1] (1985) 61 A.L.R. 609.

[2] Article 1(A) of the 1951 Convention and of the 1967 Protocol relating to the status of Refugees defines a refugee as any person who:

> . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable to, or owing to such fear, is unwilling to return to it: Art.1(a).

[3] Section 6A(1)(c) of the Migration Act 1958 (Cth) provides:

> An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say . . .
> (c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967.

[4] Mayer relied on s.13(1) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) Section 13(1) of the ADJR Act provides:

> Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Courts under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for this decision.

By s.3(1) an 'enactment' is defined as meaning, *inter alia,* an Act of the Commonwealth Parliament.

[5] That is to say a determination, 'by instrument in writing that [Mayer] has the status of refugee within the meaning of the Convention or Protocol'.

ultimate question on which the appeal turned was whether the Minister's decision refusing to make such a determination was one made 'under' that paragraph of the Act.

The majority of the High Court (Mason, Deane and Dawson JJ.) began their analysis by an examination of the Convention and Protocol referred to in s.6A(1)(c) of the Migration Act.[6] They noted that the 'status' of a particular person under the Convention and Protocol was a temporary one which would depend on whether or not a person came within the definition of 'refugee' at a particular time and in light of particular past or present circumstances. The Convention and Protocol did however require that a State Party determine whether or not a person who was within its territory was a 'refugee' at the particular time and if so, what that State's actual obligations were in respect of such a person.

Prior to the 1980 amendment which introduced the provisions of s.6A(1)(c) of the Migration Act, there was no Commonwealth legislative provision dealing with the making of a domestic determination that a person had such a status. There was instead an Inter-Departmental Committee set up to advise the Minister for Immigration and Ethnic Affairs on the question whether any particular person was a refugee within the meaning of the Convention. With the help of and on the advice of that Committee the Minister would resolve that question and then proceed to administer the provisions of the Act. But these arrangements were entirely without any statutory foundation or effect. Hence the argument advanced on behalf of the Minister was that the requirement in s.6A(1)(c) should be read as a reference to only an objective fact, namely that there happened to be such a general determination. So read, s.6A(1)(c) did not therefore, confer statutory authority on the Minister to make such a determination and therefore such a decision was not one made under the paragraph. As the Court pointed out, this argument involved the proposition that, in the absence of any other statutory provision conferring authority on the Minister to make such a determination, the intention of the Parliament was to leave the function of determining the 'status of refugee' without any statutory basis whatsoever, notwithstanding that that determination was the foundation of s.6A(1)(c).

The implications of this position are far reaching indeed. It would have suggested that the Minister would be under no statutory duty even to consider whether a determination should or should not be made. Moreover s.6A(1)(c) might be deprived of any effective content by a mere change in or discontinuance of current administrative arrangements. To avoid these kinds of consequences the majority were of the view that it was more probable that the intention of the Parliament was to confer upon the Minister statutory authority to make the relevant determination under s.6A(1)(c). This view was confirmed by the wording of the paragraph. The words 'has the status of refugee' refer to the possession of such status at the time when the grant of an entry permit is under consideration. Because the status of refugee is a temporal one, which can vary according to circumstance, the reference to a determination as to refugee status must be construed as a reference to a contemporaneous determination rather than to some past determination.

Encapsulating the above mentioned arguments in a slightly broader proposition of statutory interpretation the majority said,

> A legislative provision operating upon a specified determination of a Minister or other officer can readily be construed as impliedly conferring upon the designated Minister or other officer the statutory function of making the particular determination. Such a construction is likely to be clearly warranted in a case where the determination upon which the legislative provision operates is a determination to be made for the purposes of the particular provision and at a time when and in the circumstances in which the provision is called upon to operate, where no other statutory source of obligation to consider whether the determination should be made or of authority to make it is apparent and where the legislative provision will be without effective content if no authority to make the requisite determination exists.[7]

Section 6A(1)(c) provided an example of such a situation. The determination referred to therein and upon which the paragraph operated, was a contemporaneous one made for the purposes of the section. There was no other apparent statutory source of any duty to consider whether such a determination should have been made. Moreover, unless the section impliedly conferred statutory authority on the Minister to make such determinations, this section could be rendered ineffective by mere administrative fiat.

Thus the conclusion of the majority of the Court was that s.6A(1)(c) should be construed as impliedly conferring on the Minister the function of determining, for the purposes of the paragraph, whether a particular applicant for an entry permit 'has the status of a refugee' within the meaning of the Convention or Protocol. In that event, it was within s.3(1) of the ADJR Act,

[6] The principal import of the Conventon is to define the obligations of States who are 'Contracting Parties' in respect of 'refugees' for the purposes of the Convention.

[7] (1985) 61 A.L.R. 609, 618.

a decision made 'under' an 'enactment.' It was therefore a decision to which s.13(1) of the ADJR Act applied.

The decision is of considerable interest for several reasons. Firstly, it demonstrates an innovative and perceptive method of statutory interpretation. In ascertaining the often elusive intention of the Parliament, the Court made use of a series of arguments designed to set out a clear statutory mandate for the exercise of the Minister's decision. Rather than predicating the source of the Minister's authority on some loose and ill-defined administrative arrangement between governmental departments, the Court chose to root it firmly on a clear statutory basis. It is arguably preferable to construe legislation in such a way as to identify and locate clearly ministerial responsibility in a decision making process, than to leave the process behind the often obscure procedures of inter-departmental administrative arrangements.

Secondly, the decision is of merit in expanding, even to a very limited extent, that bundle of rights afforded to those seeking refugee status. The refugee, notwithstanding several International Instruments, is in a parlous position in seeking asylum in Australia. The Convention and Protocol do not confer any automatic rights under Australian municipal law. Hence a decision which, in effect, requires the Minister to give his or her reasons for making a determination as to refugee status is to be applauded. In a small way it may diminish the opportunities for ill-considered or improperly informed decisions which are of the gravest consequences to seekers of refugee status. As against this benefit the increased administrative burden involved in the procedure would seem marginal.

ROBERT LANCY
Lecturer in Law,
University of Melbourne.