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Limits on Procedural Fairness

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LIMITS ON PROCEDURAL FAIRNESS

The question whether procedural fairness is a freestanding principle of the general law, or an implied statutory constraint on the exercise of administrative and judicial power, apparently remains unresolved. Since raising the issue some 30 years ago, the High Court, and other courts, have either ignored or sidestepped the question ever since: Aronson, Dyer & Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) pp.382-383. The debate is seen as sterile because, like other doctrines of the common law, the content of procedural fairness is subject to legislative variation. Unless, that is, it reflects some underlying constitutional principle which does not permit legislative interference.

Many administrative lawyers, including Professor Aronson, tend to be sceptical about the existence of a constitutional right to fairness. Where, in the Australian Constitution, some ask, is the principle to be located? Does the Constitution have a s 61A or a s 71A, as yet undiscovered?

But that is not the question I wish to explore today. Rather, I want to ask how, assuming legislative power, the Parliament might successfully assay the task of limiting procedural fairness. Some, witnessing recent attempts, might wish to adopt the unfortunate phrase used in argument during the *Miriwung Gajerrong* native title case, counsel suggesting that if native title was as described by the claimants, “you couldn’t kill it with a stick”. I do not wish to suggest that procedural fairness has some such reptilian characteristic, but governments which have sought to limit its operation, have discovered from time to time that it has a curiously intractable quality.

In the last 20 years, the inflexible proposition that procedural fairness does not condition some exercises of administrative power has become virtually untenable whenever that exercise has the potential to interfere directly with identifiable individual rights and interests. Rather, debate in the courts now focuses upon the content of procedural fairness and, in particular, whether that content has been limited by statute.

In addressing that question, I will address what is arguably the most fruitful source of discussion of administrative law principles in recent times, namely the *Migration Act 1958* (Cth). In terms of recent developments in this area, one helpful focus is the recent decision of the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24.

The factual background to that case clearly exhibited potential for procedural unfairness. The Refugee Review Tribunal was inquiring into the reasons why a Sabian Mandaean woman had left Iran to seek refuge in Australia. The Tribunal was apparently sceptical of her claims, which, in part, involved mistreatment of her eldest daughter. That daughter was already in Australia and had obtained a protection visa. The daughter attended the hearing at the Tribunal’s Sydney premises. The applicant was on a video-link to Baxter detention centre in South Australia. The applicant did not ask her daughter to give evidence, but at the hearing, the Tribunal decided to take evidence from both the applicant and her daughter, but asked the applicant to leave the room whilst her daughter told her story. It allowed, however, the applicant’s migration agent to remain and hear the daughter’s evidence. As the Tribunal no doubt anticipated, there were discrepancies between the two stories.

To approach the matter in this way left open the possibility that the applicant herself would not be given an opportunity to hear the evidence which might lead to her claim being rejected, or be able to provide an answer to any alleged inconsistency.

In order to understand how the High Court dealt with the matter, it is necessary to take a step back and examine the statutory history. The key to this history, as is now well known, lies in a succession of attempts by various governments to tie down the elements of procedural fairness which it was considered should properly govern the exercise of powers under the *Migration Act*, so that decisions would not be invalidated by overly generous and unpredictable judicial assessment of what procedural fairness required in a particular situation. One way in which that was sought to be done was by setting out the procedures in the Act and preventing any judicial review in the Federal Court for breach of non-statutory obligations of fairness: see old s.476 (now repealed) inserted by the *Migration Reform Act 1992* (Cth). Another step taken was of course the inclusion in 2001 of the privative clause, which was undoubtedly intended to be the stick which would kill the snake, though interestingly amendments which sought to codify exhaustively statutory procedural fairness followed the introduction of the privative clause. The judgment of the Court in *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, effectively precluded the privative clause from fulfilling its intended function. However, *Plaintiff S157* did not deal with the new provision stating that the statutory procedures set out exhaustively the content of the obligation of procedural fairness: see s.422B.

To return to *SAAP*, a majority of the Court was satisfied that there had been no procedural unfairness in a general law sense, because the claimant, through her migration advisor, had had the opportunity to be aware of the account given by her daughter to the Tribunal and to provide a response or explanation after the hearing. Nevertheless, there was a question as to whether statutory procedures had been followed. Section 424A of the Act required that if the Tribunal thought that particular information was likely to form part of the reason why it might reject an application, it must give notice of that information to the applicant in writing, including an indication as to why that information might lead the Tribunal to reject the claim. In the present case, since the information was given at a hearing, the written notice procedure could only, in practical terms, have been fulfilled after the hearing. It was at least feasible that it would give rise to a request for a further hearing. Whether there was any obligation to grant such a request was, of course, a separate matter. No written notice was given.

Part of the argument put to the Court was that, read in their statutory context, the written notice procedures set out in s 424A did not apply to information obtained at a hearing. However, only the Chief Justice and Justice Gummow (as in *Al-Kateb*, unusually joined in dissent) accepted that argument. But it was really only the Chief Justice, at [17], who considered that a provision like s 424A, which not only encapsulated but probably extended the nature of the obligation under the general law, should be read as defining that obligation, rather than as a freestanding right. For the other members of the Court, the operation of the provision was simply an exercise in statutory construction. The fact that general law procedural fairness would not have required such steps to be taken did not, it would seem, significantly influence their approach to the construction issue.

For present purposes, it is the approach to the question of construction which is of interest. A number of propositions can be stated with some confidence, but thereafter the exercise lapses into uncertainty.

First, procedural fairness will not usually be excluded, or its content limited, by negative implication. This principle was stated unambiguously by McHugh JA in *Baba v The Parole Board* (1986) 5 NSWLR 338. The reason for this is found in the exposition of principle by the Chief Justice in *Plaintiff S157*: while fairness may be a procedural right and not a property right or a fundamental personal right, it nevertheless enjoys similar protection. Clear and plain words of intent are required in order to exclude or limit it.

Secondly, assertions that statutory procedures form a "code" and hence are exhaustive of the right, are likely to be viewed sceptically: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. Thus, in *Miah's case*, the Court treated the statutory description of the statutory provisions as a procedural code as an indication of Parliamentary intention, rather than a clear and plain exclusion of elements of the procedure not addressed. This approach is likely to render such statutory labels of limited value, because of the uncertainty which would inevitably attend the delimitation of the area codified. Thus, an explicit statement of the content of the hearing rule would not be seen as excluding principles relating to bias or lack of good faith.

Thirdly, as explained in *Plaintiff S157*, despite the attempts to exclude all forms of relief which might allow enforcement of the right to procedural fairness, a privative clause will not easily be read as having that general effect. Whether a privative clause could be so drafted is a matter which I and others have explored in the constitutional context and will not be addressed here: see *Constitutional*

Elements of Judicial Review (2004) 10 Pub Law Rev 187.

From here on, uncertainty rules. One suggestion is to be found in *Plaintiff S157* itself. In two passages on which the Minister focused in a series of subsequent arguments, the Court accepted that the privative clause was a statement of Parliamentary intention requiring reconciliation with specific procedural provisions, which would otherwise have been treated as mandatory. However, SAAP appears to be the final nail in the coffin of that perceived opening. Once a statutory procedure, expressed in mandatory terms, is found to apply in a particular case, there is little hope of demonstrating that a contravention would not result in invalidity.

Next, there is the kind of provision which is commonly found in statutes establishing tribunals, but curiously absent from the *Migration Act*. That is a provision which states that non-compliance with any provision of the Act should be treated as an irregularity, which will not invalidate the decision: see, eg, *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 32(3) referred to in *Italiano* (supra); see also *Supreme Court Act 1970* (NSW) s 81. Such a provision arguably satisfies the requirements of *Project Blue Sky* and provides for the consequence of a breach. Thus what will often be a matter of implication is resolved; non-compliance, Parliament says, is a mere irregularity not giving rise to invalidity.

Before parliamentary counsel dash off to draft a further amendment to the *Migration Act*, I hasten to add that these provisions have their own difficulties, at least when stated to have a general operation in the manner commonly found today. Once again one has the question of reconciliation of such a provision with a procedural step stated in mandatory terms. For example, is the decision of a tribunal which is obliged to accord procedural fairness to be treated as subject to a mere irregularity when procedural fairness has been denied? Or does the "irregularity" provision only apply to steps which do not form part of the fundamental obligation of procedural fairness? If the latter is correct, we are back to making distinctions, based on prioritising provisions in a statute, with little guidance from the statute itself.

Instead of seeking to exclude aspects of procedural fairness from the obligations governing decision-making, it may be possible to state a statutory rule which would indicate the consequences of failure to adopt a fair procedure, as suggested by *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355. See also *Carroll v Mijovich* (1991) 25 NSWLR 441 discussing the consequences of failure to comply with procedures laid down by statute for the issue of a search warrant.

Two general provisions could have some operation in this regard. The first is the common provision applied to statutory tribunals, such as the provisions in the *Migration Act* with respect to both the Migration and the Refugee Review Tribunals: see ss 353 and 420.

420 Refugee Review Tribunal's way of operating

(1) *The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.*

(2) *The Tribunal, in review a decision:*

(a) *is not bound by technicalities, legal forms or rules of evidence; and*

(b) *must act according to substantial justice and the merits of the case.*

At one time this section was relied upon in the Federal Court as a source of procedural obligations. However, that line of authority was overturned by the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611. That case affirmed that a provision, such as s 420 of the *Migration Act*, was intended to free the Tribunal from obligations, rather than impose obligations on it: see *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, referred to recently in *Italiano v Carbone* [2005] NSWCA 177. However, the extent of the freedom so conferred has not been fully identified.

On one view the true effect of s.420 (and its many equivalents) may properly be understood as an example of the principle articulated by Dixon J in *Parisienne Basket Shoes v Whyte* (1938) 59 CLR 369 at 391, that such matters should generally be understood to fall within the determinative powers of

the tribunal. It may be clear that Parliament has mandated a procedure, but who is to decide how it should be exercised? In other words, may it not be for the tribunal to decide what is required in the circumstances of the case, subject to review on the grounds that it has acted arbitrarily, capriciously, irrationally or in bad faith: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432. Such an approach would limit the extent to which the courts can properly investigate in detail the procedural steps taken by a tribunal in a way consonant with the restraint required in relation to the correctness of a decision.

From the point of view of the Parliament, it would seem that most comprehensive attempts to limit or define the operation of procedural fairness are doomed to fail. General provisions will give little assistance and specific provisions are likely to leave gaps, so that their operation will not be exhaustive.

Unless the courts will allow decision-makers power to determine their own procedures, one is left with the courts identifying the scope of procedural obligations and the consequence of contravention. However, in what must now be seen as an area of significant contention between the legislature and the judiciary, it is surprising how little attention has been paid to the principles of statutory construction which apply in the resolution of these questions. That question was, however, expressly assayed by the Chief Justice in *Plaintiff S157* in terms which might have led to a brief concurring note from Kirby J. In my view, the Chief Justice's exposition of principle makes his judgment one of the more important judgments in administrative law in recent years. The next step must be to provide more detail and precision in the application of these principles.