

LIV Judicial Review Training Part 2.2
IAA – the statutory scheme, procedural fairness and what to look out for
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Lecture Theatre, Law Institute of Victoria
6:30–7:30pm

Basics

- New Part 7AA to Act introduces ‘fast track review process’
 - But **s 473DB(2)** allows IAA to make a decision ‘at any time’ – so need not even be close to being fast
- Who is subject to IAA?
 - ‘unauthorised maritime arrivals’ (“boat people”) who
 - entered Australia between 13 August 2012 and 31 December 2013
 - not been taken to Manus or Nauru
- **What is IAA?**
 - Immigration Assessment Authority established ‘within the Migration and Refugee Division of the Tribunal’ – **s 473JA**
 - operates in same manner as Tribunal subject to unique legislation
 - Office holders in IAA
 - President of the AAT – Justice Duncan Kerr
 - power to designate ‘guidance decisions’ - will discuss significance later
 - Head of Migration and Refugee Division of AAT
 - who each have power to ‘issue directions or determine policies’ – **s 473JB**
 - directions must not be inconsistent with Act and can relate to practices and procedures of IAA – **s 473FB**
 - Senior Reviewer and other Reviewers – ie not Members or officers of Tribunal under AAT Act
 - all engaged as public servants – **s 473JE**
- **How to access IAA?**
 - only by referral of Minister per **s 473CA**– not by application of client
 - power of Minister to allow IAA review for person or class of persons – **s 473BC**
 - does so by legislative instrument
 - unlikely to want to challenge because gives client more extensive review rights
 - but do check Legislative Instruments Act for form and process requirements to ensure referral is valid
 - Minister power to exclude a person from IAA review by issuing ‘a conclusive certificate’ under **s 473BD**
 - *Question: why not challenge conclusive certificates in respect of a client?*
 - *Answer: opinion is could be challenged – but very difficult. The dual test in BD under which certificate is given is no accident.*
 - test has two key elements – ministerial belief of what is in the national interest

- Ministerial belief as touchstone – very low threshold i.e. subjective belief of Minister is jurisdictional fact
 - French CJ in *M70* at [57] ‘Where a power is expressly conditioned upon the formation of a state of mind by the decision-maker, be it an opinion, belief, state of satisfaction or suspicion, the existence of the state of mind itself will constitute a jurisdictional fact. If by necessary implication the power is conditioned upon the formation of an opinion or belief on the part of the decision-maker then the existence of that opinion or belief can also be viewed as a jurisdictional fact.’
- ‘contrary to the national interest to change the decision or for decision to be reviewed’
 - very broad test – courts at pains not to trample on ‘national interest’ test
 - Hot Holdings ‘decision maker "may properly have regard to a wide range of considerations of which some may be seen as bearing upon such matters as the political fortunes of the government of which the Minister is a member and, thus, affect the Minister's continuance in office"’
 - In *Plaintiff S297* (2015 HCA decision – see [20-21]) the Court looked at a Ministerial determination against national interest. Asked, ‘did the criterion permit the Minister to treat the plaintiff's status as an unauthorised maritime arrival as sufficient to justify the conclusion that it was not in the national interest to grant the plaintiff the visa which he sought?’ Answer: no.
 - However case turns on facts and is not necessarily generally applicable – because ‘national interest’ was the sole basis for rejection on reconsideration of protection visa application
- *Opinion: Conclusive certificates are not fertile ground for review, even though their effects are pretty drastic.*
- **What is put before IAA?**
 - Positive obligation on Secretary to provide certain things
 - mandatory requirements to make IAA process lawful
 - check off list in **s 473CB** to ensure all is there and all fits description
 - obligation on IAA to ‘consider’ all of that material
 - *Opinion: this provides opportunity for challenging IAA decisions, as framed in mandatory language – Secretary must give - if not given, or don't fulfil statutory criteria, IAA process will be miscarried.*
- **What is not put before the IAA?**
 - IAA under statutory obligation to conduct review without ‘new information’ and without an interview – **s 473DB**

- but have discretion to 'get' any document or information it 'considers relevant' – **s 473DC**
 - no duty to enquire **s 473DC(2)** – so forget that line of authority
 - IAA can only 'consider' that new information if there are
 - exceptional circumstances (**s 473DD(a)**)
 - could not have been given to the Minister and was not previously known and is 'credible personal information' (**s 473DD(b)**)
- **Which rules of natural justice apply?**
 - Opinion: not many
 - Exhaustive statement is set out in Division 3 of Part 7AA per **s 473DA**
 - Very limited rules include:
 - Person must be provided with new information that would lead to an adverse result at IAA stage and be provided with an opportunity to comment
 - note deemed receipt provision in **s 473HD** – relevant in limited circumstances particularly where deadline imposed and issue about responses – unlikely to be an issue in this context but worth flagging.

Discussion:

- *Under **DD** – first, consider whether there are exceptional circumstances; second, the scope of when information could not be provided to Minister, under **DD (b)** – “could not have been provided”.*
- *Does it include where the person didn't know it was going to be relevant? For e.g. if a letter is sent to applicant saying X incident occurred, and DM asks for comment would that be excluded?*
- *Principle: an invitation to i/v carries with it a requirement that the i/v be fair and reasonable etc.*
- *Charlie (Refugee Legal) – surely if an applicant provides an answer to a question asked by a DM after the decision was made, any response is new information provided by the DM, so any response has to be considered?*
- **Guidance decisions – the strange creature of the IAA process**
 - **s 473FC** – power to President to issue a direction making a decision of the IAA, Tribunal or RRT one 'to be complied with' when deciding cases 'of a kind specified in the direction'
 - power to make a decision of a non-judicial body as if it is a binding authority and subject of doctrine of *stare decisis*.
 - compels decision maker to comply with guidance decision
 - decision not to be complied with if 'clearly distinguishable from the facts or circumstances'
 - Advice: know your case well and be prepared to distinguish with the detail of it if the guidance decision leads in a non-beneficial direction
 - Opinion: guidance decisions seem ripe for judicial review including to power of President to fetter statutory powers of IAA officers

Discussion:

- *Q: Do we know whether the IAA will give client notice that the Guidance Decision applies to the case? It wouldn't be adverse information necessarily.*
- *A: because the Guidance Decisions will be public, it would be prudent to keep an eye on them if running these matters*
- *Q: Why would Department refer cases for review if there's a guidance decision?*
- *A (Joel, VLA): It might be a technical issue on which the President wants to impose a particular standard, rather than rejecting all cases of that kind.*
- *Q (Charlie, Refugee Legal): What obligation is there on the Tribunal to raise the issues? If there is, a Guidance Decision would be an issue. And where in many cases an intention to avoid there being an i/v, or things being put in writing, what obligation is there on IAA to raise issues?*
- *A: One, there is no positive obligation to raise issues. Two, the facts of the decision are facts the applicant should be aware of anyway – whether or not alert to them. Could be a real burden.*

Opportunities for judicial review

There are several opportunities on the face of the Act. Need to identify and set up. The following is a 9-point plan of potential avenues for JR of an IAA decisions.

1. Check that **s 473CB** requirements are met i.e. materials fulfilling statutory criteria were provided as is a mandatory requirement
 - a. Requirement is condition precedent to lawful decision making by IAA
 - b. Requirement includes provision of a statement that:
 - i. sets out the finding of fact made
 - ii. refers to the evidence on which those findings were based
 1. note that other provisions like this (like **ss 368** and **430**) require provision of 'evidence or other material' - exclusion of 'other material' means only evidence must be noted – this may be a distinction without a difference
 2. note also that **s 473FA(2)** states that Tribunal is not bound by the rules of evidence
 - iii. gives the reasons for the decision
 1. if statement does not do so, Tribunal's power arguably not lawfully exercised
 2. see jurisprudence on **ss 368** and **430** as to content of these obligations - especially *Yusuf*
2. IAA's obligation to 'consider' all material provided to it. This may be a strong ground of review for applicants.
 - a. See *MZYTS* and *CZBP* re what is involved in a consideration. See esp. *CZBP* at [65] for a neat summary of authority
 - i. must 'deal with' the evidence – do a proper evaluation of it
 - b. must give each factor real consideration

- neat summary of relevant authorities *Telstra v ACCC* [106-7] per Rares J (and all cases referring to this paragraph) - stand for propositions that:
 1. A decision-maker must give proper, genuine and realistic consideration to the merits of the case
 2. where a decision-maker was required to consider material, the process of consideration “... involves an active intellectual process” directed at the nominated subject-matter
 3. Where a decision-maker must consider matters prescribed by law, generally, he or she cannot jettison or ignore some of those factors or give them cursory consideration only in order to put them to one side

- 3. Decision statement – **s 473AE(1)(b)**
 - a. requirement to set out ‘the reasons for the decision’
 - b. standards as set out above from *Yusuf*, *MZYTS* and *CZBP* apply
 - i. decision maker must record reasoning process and be reasoned, not unreasonable

- 4. Minister’s decision to grant certificate under **s 473BD** to exclude a person from IAA
 - a. decision to issue certificate reviewable under s 75(v) jurisdiction of High Court and possibly FCC
 - i. standard grounds for review, but very high threshold because Ministerial belief of what is in the national interest – per Nola’s seminar paper:
 1. legally unreasonable
 2. apprehension of bias
 3. irrelevant considerations
 4. wrong question

- 5. Exercise of discretion in respect of ‘getting’ (but not considering – **s 473DD**) new information and calling to interview under **s 473DC**
 - a. although hard to determine how this provision interacts with obligation not to conduct interview or give new information
 - b. IAA obliged to act reasonably in exercising discretion unlikely to be excluded from judicial review
 - i. reasonableness can be determined by looking at reasons – if they are impossible to navigate then may be unreasonable - or, if no reasons provided, looking at outcome
 1. see *Kaur v Minister* [2014] FCA 915 at 110-111 summarising Full Court in *Singh* and HCA in *Li*
 2. ‘If the repository of the power had given no reasons for the outcome, then the supervising court can only focus on the outcome of the exercise of power in its factual context as presented and evaluate for itself the justification or intelligibility of that outcome, bearing in mind the constraints applicable to the role of a supervising court. If the repository of the power has given reasons, then it is the justification given in the reasons, and the intelligibility of the exercise of power as explained in the reasons, which

the supervising court should examine, bearing in mind the constraints applicable to that task. Limiting the examination to the reasons given by the repository of the power is consistent with the approach taken to the role of reasons generally in assessing jurisdictional error: namely, that reasons enable a supervising court to see what the repository of the power herself or himself saw as relevant, irrelevant, or as her or his statutory task.'

6. Same applies with discretion under **s 473DF(4)** to make decision without response from applicant to invitation to respond to new information
 - a. reasonableness obligation applies to this exercise of discretion
7. May want to argue on behalf of applicant that IAA *cannot* consider new information in reaching decision under **s 473DD**
 - a. if new information is about post-Minister decision misconduct or activity contrary to protection claims (for e.g. applicant claims to be persecuted for Christianity but then features in YouTube video reciting the Koran while in Australia)
 - b. could be useful to knock out unhelpful information
 - c. argue that no 'exceptional circumstances'
 - i. not defined in case law
 - ii. high threshold so gives room to be creative about why the circumstances are not exceptional
 - *Q: Is there a possibility that revocation of the IAA on national security grounds might somehow prevent the review from being completed?*
 - *A: Think there is not the power to revoke. Default position is non-referral – there has to be a positive decision to refer. Might be in the territory – where there is power to do, power to undo.*
8. New information - invitation to respond under **s 473DE** only if personal to that person
 - a. provides very limited right to be heard – heavily qualified as to the type of information giving rise to right to respond
 - b. must be a real invitation and genuine opportunity to respond
 - i. see **s 425** authorities re: invitation must be to a meaningful process, must have genuine chance to present case in response
9. Biased decisions
 - a. very high threshold but said in **s 473FA** to be a threshold requirement of IAA that IAA must operate 'free of bias'
 - b. usually such sections have little work to do (**s 357A(3)** and **422B(3)**), but this specific reference to bias (notably in place of the usual test of 'fair' and 'just') may give a court reason to pause. Courts have said this doesn't give rise to substantive rights or positive obligations in respect of other provisions - query whether will take similar line in respect of IAA?