Tribunal Decisions Under Judicial Review - the High Court's Decision in *Minister for Immigration and Ethnic Affairs v Guo and Another*[1]

The High Court, on the 13th June 1997, delivered a judgment allowing an appeal by the Minister for Immigration and Ethnic Affairs (the Minister) against a previous decision of the Full Court of the Federal Court in granting relief to two Chinese Nationals in the form of a declaration that they were refugees and as such entitled to appropriate entry visas. The case is of importance in that it further clarifies the limits, both in scope and function, applicable to judicial review of refugee decision making.

The Facts

Guo Wei Rong and Pan Run Juan were husband and wife who had previously travelled to Australia from Bei Hai in the People's Republic of China (PRC) in 1992 on board the *Jeremiah*. On this journey they were unsuccessful in their claim for refugee status and were deported. They made a second journey to Australia in 1993 arriving on December 5 on board a boat named '*Quokka*' by Australian Immigration officials. They travelled to Australia with their youngest two children leaving their eldest with relatives in the PRC. Upon arrival in Australia they, along with other passengers aboard the *Quokka*, were detained at the Port Hedland Detention Centre under s54B of the *Migration Act* 1956 (Cth). On the December 14th, 1993 Mr Guo lodged an application for refugee status. Mr Guo claimed that he was outside of his country of nationality owing to a well-founded fear of prosecution for reasons of political opinion. He made claims, inter alia, relating to political activities in Australia, illegal departure, household registration,

[1] *Minister for Immigration and Ethnic Affairs v Guo and Another* (1997) 144 ALR 567. Hereafter to be cited as *Guo*.

the confiscation of his work equipment, revocation of his work relation license, and forced sterilisation due to the 'one child policy'. Ms Pan also applied for refugee status stating that she feared forced sterilisation if she were to return to the PRC and that this amounted to persecution by reason of membership of a particular social group.

On January 31st 1994 a delegate of the Minister refused both applications. Mr Guo and Ms Pan applied to the Refugee Review Tribunal (the Tribunal) for review of the delegate's decision. On May 19th 1994 the Tribunal affirmed the decision of the Minister's delegate in refusing the applications for refugee status. As a result Mr Guo and Ms Pan then sought judicial review in the Federal Court pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (*'ADJR Act'*) and s39B of the *Judiciary Act* 1903 (Cth).

The Legislative Framework

The application for review was determinable by reference to the provisions of the *Migration Act* 1958 (Cth) (the Act). Of substantial relevance was s22AA of the Act which provides:

> "If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee."

Interestingly the term 'refugee' as defined in s4(1) of the Act is synonymous with the Convention relating to the Status of Refugees signed at Geneva in 1951 (the Refugees Convention) as amended by the Protocol relating to the Status of Refugees signed in 1967. Thus the concept of refugee, developed under international law, is adopted in the domestic provision. The Convention, as modified, defines a refugee as a person who:

> "owing to a 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, is unable or, owing to such fear, is unwilling to return to it."

The majority in *Guo* identified four key elements to the definition of a 'refugee' in Art1A(2) of the Convention. These were:

(1) the applicant must be outside his or her country of nationality;
(2) the applicant must fear "persecution";
(3) the applicant must fear such persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and

(4) the applicant must have a "well-founded" fear of persecution for one of the Convention reasons.

The History of the Litigation

(i) The Decision at First Instance

At first instance, Sackville J, in the Federal Court, dismissed the applications holding that none of the alleged plethora of defects in the decision-making had been established. Of the numerous grounds submitted for review the essence was that the decisions made by the Minister's delegate and the Tribunal were affected by errors of law and, in the case of the Tribunal, by a failure to accord procedural fairness. Of most importance in Sackville J's judgment, at least for the present purposes, is in regard to the jurisdiction conferred upon the court by the *ADJR Act* for review purposes. Sackville J concluded that it was beyond the jurisdiction of the court to conduct de novo hearings on factual questions previously determined by the Tribunal. Additionally, Sackville J rejected arguments that the Tribunal had failed to apply the correct test in determining whether 'a real chance that the refugee will be persecuted if he returns to his country of nationality' existed. Sackville J stated:

> "The tribunal specifically found that Mr Guo did 'not face a real chance of forcible sterilisation on return to China' and that he did 'not face a real chance of persecution as a result of the evidence he [had] given in other proceedings'."[2]

It was this issue which became the cynosure of the appeal to the Full Bench of the Federal Court.

(ii) The Decision of the Full Court of the Federal Court

The grounds of appeal before the Full Court, whilst significantly narrower than those argued before the primary judge, were still quite lengthy. The grounds included application of the wrong test as to the question of entitlement to refugee status, failing to consider whether Mr Guo's punishment and interrogation with respect to his protest activities in Australia indicated that there was a real chance of persecution, failure to find a well founded fear of persecution, the making of findings which were unreasonable or alternatively not supported by evidence and finally by failing

[2] *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1995) 38 ALD 38

to have regard to the material before it.

The Full Court unanimously upheld the appeal finding that the Tribunal had failed to correctly apply the 'real chance test' which resulted in an error of law pursuant to s5(1)(f) of the *ADJR Act*. While all were in agreement that the correct test had not been applied, each member of the Court approached the question of the failure to apply the correct test from varying perspectives. Beaumont J felt that the Tribunal had confined its inquiry and as a result had failed to address the correct question which was committed to it for decision, stating that:

> "... the Tribunal did not, in truth, consider whether, even if not explicit, a political opinion could be inferred by the authorities from what Mr Guo had done when account was taken of all of his conduct."[3]

Einfeld J was broader in his approach adopting an analysis of the language used by the Tribunal to ascertain whether the correct test had actually been applied concluding that:

> "All of these parts of the Tribunal's reasoning suggest that the Tribunal was looking for independent corroboration of Mr Guo's assertions, so redolent of a balance of probabilities test."

Foster J concurred with the reasoning of Beaumont J and Einfeld J concluding that:

> "Where proof beyond reasonable doubt is required, self-contradiction, inconsistency and evasiveness may, of course, give rise to sufficient doubt to warrant the rejection of evidence. However, in cases where only a real possibility need be shown, care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted."

In relation to relief Beaumont J and Einfeld J thought a declaration under s16(1)(d) of the *ADJR Act* entitling Mr Guo and Ms Pan to refugee status was the appropriate course whilst Beaumont J, in dissent, stated that it was not appropriate to make a final determination on the matter and further that the case should be remitted to the Tribunal for reconsideration.

(iii) The Decision of the High Court

From the decision of the Full Court the Minister appealed to the High Court. The appellant submitted that the Tribunal had applied a real chance

[3] *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 151; 135 ALR 421

test of persecution and not a balance of probabilities test, that there was no basis for holding that the Tribunal had constructively failed to exercise its jurisdiction, and that there was no basis for concluding that the tribunal had not asked itself the real question in the case. Additionally the appellant questioned the validity of declaratory relief however, given the ultimate outcome, this did not prove a substantive issue for consideration.

The respondents, in addition to addressing these issues, contended that the Tribunal's decision constituted an improper exercise of power as the Tribunal had taken into account an irrelevant consideration and had further failed to take a relevant consideration into account in the exercise of their jurisdiction, that a decision not justified by evidence had been reached, and that the Tribunal's exercise of power was grossly unreasonable and could not have been reached by a reasonable person.

The High Court gave little heed to the respondent's claim in relation to irrelevant/relevant considerations and the lack of evidence to support the Tribunal's decision. Additionally, Kirby J concurred with the manner in which Sackville J had dealt with the issue of *Wednesbury*[4] unreasonableness, again dismissing this argument as without merit. With these issues quickly dealt with the High Court was left to focus on the core issue at hand, which was, as stated by Kirby J:

> " ... the matter eventually comes down to the question whether an error of law is shown in the approach of the tribunal to the performance of its statutory function."

Essentially in framing the answer to this question the High Court relied upon well-established principles relating to the correct and limited role of the judicial review process. This role was articulated by Kirby J who noted the "limitations inherent in proceedings for judicial review." By undertaking this analysis the High Court found that the Full Court of the Federal Court had erred in finding such an error of law.

It was contended by the majority members[5] that the Full Court of the Federal Court were influenced by their own views as to the state of affairs in the PRC and as such were encouraged to "trespass into the forbidden field of review on the merits". Given the factual context of the case the majority stated that the Tribunal was entitled not only to find that Mr Guo "had no political profile with the Chinese authorities" but also "that there was no real chance that Mr Guo would have a political profile attributed to him or that he would be persecuted by reason of such profile." These conclusions had been reached by the Tribunal

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[4] *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223, ADJR Act s5(1)(e) and 2(g): *Wednesbury* unreasonableness refers to an abuse of power resulting in an error of law which occurs where a decision is so unreasonable that no reasonable decision-maker could have reached it.

[5] Majority members were Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

addressing the correct legal questions regardless of how they may have been articulated. Kirby J who considered that the Tribunal had also considered the correct legal questions stated:

> "So long as the tribunal considered the correct legal questions, no lawful basis could be established for the intervention of the Federal Court simply because that court disagreed with the tribunal's factual conclusions."

Additionally Kirby J rebuked the approach of Einfeld J for his 'over-zealous' approach stating:

> "I consider that the approach which his Honour adopted to the analysis of the tribunal's reasons was that which was criticised by this court in *Wu Shan Liang* ... reading such reasons with an over-zealous eye to find in them expressions or approaches (such as the 'balance of probabilities') which are not stated runs into the dangers against which *Wu Shan Liang* warns."

This approach by the High Court further confirms, in light of the recent decision in *Wu Shan Liang*[6], that a merit review/judicial review distinction must be clear so as to indicate and ensure that the court has not supplanted the discretionary judgement of the administrator. This sentiment, and the supporting rationale, reverberates throughout *Guo*.

The majority members in *Guo* also took the opportunity to caution against substituting the 'real chance' test for that of the Convention term 'well founded fear' stating that "... it is always dangerous to treat a particular word or phrase as synonymous with a statutory term ...". In addition the majority members stated that

> "Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is 'well founded' when there is a real substantial basis for it."

In an attempt to reduce the incidence, or at least perceived incidence, of tribunals and courts falling into error in the application of the *Chan*[7] test the majority members advised that:

> "Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate."

Although it was unnecessary for the High Court to determine the question regarding the validity of declaratory relief, the majority members,

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[6] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

[7] *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379: established that the legal test for determining applicants for refugee status be founded or determined by a requisite 'well founded fear of persecution' otherwise known as the 'real chance' test.

and Kirby J, examined the issue. The High Court restated that whilst the *ADJR Act* had without doubt widened the scope of administrative law remedies it was not within the jurisdiction of the court to direct the administrator to exercise their residual discretion in a particular manner. As such no declaration should have been made as the residual discretion as to whether the Minister was 'satisfied' was retained under s22AA of the *Migration Act* 1958 (Cth). In addition the declaration was found to be "so loosely framed [it] is objectionable in form" and further should not have been ordered under s16(1)(d) of the *ADJR Act* as the section relates to imperative rather than declaratory relief. Finally Kirby J stated:

> "Had legal error of the kind found been established, the proper course would have been to remit the proceedings for redetermination by the tribunal consistently with the Federal Court's elucidation of the law. The provision of a declaration such as the Full Court felt entitled to make was, at the least, not appropriate."

Commentary

The High Court enunciated, yet again, in *Guo* the principles of judicial review which underpin the *ADJR Act*. This decision highlights the difficulties associated, particularly with regard to immigration and refugee cases, in separating administrative decisions made intra vires which in the individual circumstances may appear 'unjust' from those that should be set aside on the appropriate and orthodox basis of constituting an error of law. Additionally the High Court warns against a system of judicial review which embraces wide ranging notions of administrative 'justice' suggesting that the merit review system of tribunals provides an appropriate forum for such principles. *Guo* also amplifies the approach of the High Court in *Wu Shan Liang* regarding the proper limits of judicial review. By combining the outcomes of *Guo*, *Wu Shan Liang* and *Chan* a 'non-interventionist' approach in the review of administrative decisions, especially those involving questions of fact, emerges.

Additionally reference is also made by the majority members to the emerging pattern of litigation and further legal questions arising from 'One Child Policy' cases. The majority draws on the Court's recent decision in *Applicant A v Minister for Immigration and Ethnic Affairs*[8] in which a claim based on membership of a social group consisting of 'parents of one-child in the PRC' was dismissed. In that case the majority held, that under convention purposes, such person were not a particular social group and furthermore that persecutory conduct could not define 'a particular

[8] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331.

social group' with Dawson J stating that:

> "A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention 'completely reverses the statutory definition of Convention refugee in issue'..."

Thus the majority, in the present case, concluded that whilst Guo might well have been able to establish that his sterilisation constituted persecution, that persecution was not for reasons of his membership of a particular social group.

Effectively a minimisation of the jurisdiction of a court under the *ADJR Act* in reviewing findings of fact is developed with the ultimate jurisdiction in administrative decisions being vested in the function of the administrator. The recent trend of the Federal Court to invoke a process of disguised merit review is admonished reaffirming that the court may only set aside a decision on the basis of legal error. The rationale being, amongst other issues, that an inappropriate and unacceptable fusion in the roles of the judiciary and the executive would otherwise evolve.

The majority in reaching their decision follow a somewhat legalistic approach. By drawing on *Chan*, *Wu* and *Applicant A* it is contended by the majority that the Tribunal did decide correctly the question of the case and further that the Full Court of the Federal Court were influenced by their own views regarding the present state of affairs in the PRC and as such trespassed 'into the forbidden field of review on the merits'.

Kirby J in a separate judgment largely adopted the approach of the majority however he laboured on the issue of the correct role of the Courts under judicial review. Kirby J concluded that:

> "The matter was one for judgement and assessment. It thus involved a classical problem of fact-finding and decision-making. The speculative consideration of what might occur to the respondents, if once again they were returned to China, was one necessitating conclusions of fact on the part of the tribunal and speculation as to the future resting on those conclusions. So long as the tribunal considered the correct legal questions, no lawful basis could be established for the intervention of the Federal Court simply because that court disagreed with the tribunal's factual conclusions."

Conclusion

The decision, in light of other High Court developments discussed above, is important for all administrative lawyers. Although the decision in *Guo* may seem somewhat harsh, for at least the uninitiated, given the particular factual circumstances of the case the High Court's approach cannot be seen to espouse any disparagement of the principles of human rights and

further individual justice when viewed in light of the judicial review process. In contrast the High Court clearly articulates support for the role of merit-based review with Kirby J stating:

> "... judicial review is designed, fundamentally, to uphold the lawfulness, fairness and reasonableness (rationality) of the process under review. It is thus ordinarily an adjunct to, and not a substitution for, the decision of the relevant administrator."

Additionally in discussing the adoption of a broader approach Kirby J states that:

> "No course would be more likely to undermine the legitimacy and acceptability of judicial review than a usurpation by the courts, where this is not warranted, of the ultimate functions committed by law to the decision-maker."

Whilst the principles of human rights may appear to take a regressive step throughout the review process this can surely only be seen as a result of the tribunal process which is currently in place. What is at issue in the case is not the issue of human rights, which should be dealt with at a primary level, but the proper role of the Courts in judicial review. Clearly there is a curtailment of the recent trend of the Federal Court to involve itself, under the guise of judicial review, in a merit based review process. The line of authority clearly readdresses the role of the decision maker in administrative law confirming, yet again, that the ultimate power is vested, or at the least should be, in the hands of the administrator.

Thus a return to the established principles of judicial review of administrative decision in the area of refugee decision making is evidenced. Interestingly this return to established principles by the High Court would no doubt be fully supported by the present government which has endeavoured to constrain the upsurge of refugee decisions being appealed, inter alia, under the guise of judicial review.

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