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REVIEW AND APPEALS IN IMMIGRATION LAW

BY
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Review and Appeals in Immigration Law
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You will understand that as a Justice of the High Court, although I can draw attention to the provisions which govern the reception of migrants in this country, and to other places, I cannot predict how those provisions might be interpreted by Courts in this country in the future or express any views about whether they are good or bad provisions. In any event on those matters the best informed and intentioned, and most humane of minds will often differ.

Why then, you might legitimately ask, did I accept your invitation to address this body?

The answer is a simple one. In a real and personal sense I owe a great deal to migration in this country. I hope I may be forgiven therefore for making this personal disgression.

By 1954, although my parents' situation was a very modest one, they had managed with some difficulty to send me to what was regarded as, and was, I think, a good school. This was a privilege, and a privilege I very much enjoyed. I regret to say however that the educational opportunities it afforded to me and the general perception in the community at that time were not conducive to the development of any significant measure of sensitivity to, or tolerance of other people and other places.

In 1954 my parents' circumstances deteriorated. Although I won a Commonwealth scholarship entitling me to attend University full time with a small living allowance - not I hasten to say a very special achievement in those more relaxed academic times - I had to start full time work immediately after I left school, attending University for evening lectures only which were very freely offered in those years. I enrolled in the law faculty and began to attend lectures.

I applied for a position in the Crown Law Department of the Commonwealth in Brisbane. There were no vacancies. It was suggested to me that I should go into another department with a view to transferring to the Crown Law Department when a vacancy occurred.

I became a clerk in the Immigration Office situated then in Edward Street in Brisbane. It seemed a long way from the playing fields of my GPS school to the basement of that building where the Records Section of the Department was housed and to which all new recruits were sent in order to learn some of the fundamentals of public administration, the orderly storage, location and retention of files and records. Necessary work it undoubtedly was, stimulating and exciting it was not.

A reprieve came after about three or four weeks when I was installed as a base level clerk in the Naturalization Section of the Department on the ground floor of the building.

You must understand that these were less enlightened times. English and European migrants were virtually the only migrants received into the country. Most migrants from Europe were disparagingly referred to an "reffos" whether they were refugees or not. The sad truth is that many of them were refugees in fact.

By 1956, the year in which I worked in the Section, the government was still encouraging migration but the great streams of displaced people from Europe had largely by then found homes in North America, South America and this country.

At that time there was a minimum period of residence of five years as a qualification for British Nationality and Australian Citizenship. Accordingly, by 1956 a great number had so qualified and were anxious to obtain the status of Australians.

In that perverse way that the Public Service sometimes had, I, an English speaking, inexperienced, callow young man of eighteen years was placed at the point of first engagement between the Section and the migrant public, the counter. Equally perversely, a young Czech woman who was fluent in five languages was placed at a desk far removed from public contact. It was my duty to answer inquiries about the process of obtaining citizenship, and the various stages which applicants' applications had reached.

My encounters with migrants were a wonderful and eye-opening experience for me. Sometimes I had to ask my Czech colleague for assistance. I can remember particularly, how precious were passports for those who held them, and how even more precious were the travel documents issued by the International Refugee Organisation to people who had become stateless and therefore unable to obtain passports. Until then I had never thought of the ramifications of statelessness. Brought up in Australia and fairly safely cocooned, except for a few intrusions on to the Australian mainland from the war, and not subjected to the sweep of massive and heartless armies engulfing nations and altering boundaries at will, it had never occurred to me that there would be any difficulties about travelling to another country, or indeed in establishing credentials to live in this one.

During that year I met people from all over the British Isles and Europe: Romanians, Czechs, Slavs, Bulgarians, Germans Dutch, many Italians, Greeks and Maltese, Ukrainians who proudly asserted their Ukrainian-ism and determined detachment from the USSR, and people of the Baltic States which Australia recognised as being part of the USSR in 1974.

I might say that I also met many people who had been imprisoned in concentration camps. Some of them showed me their tattooed numbers and scars from the beatings. I also met people from Asia, although they were far fewer in number.

I found the conversations of all these people fascinating. Having started out with all sorts of preconceptions about people who did not speak my language fluently and who did not play the sports that I had played at school, I soon began to get into trouble with my supervisor for spending far too much time talking to these people, and I believe, learning from them. They spoke of their homelands, the pain of dislocation and their great hopes for their new country, which I confess, must have been disheartening to them for aridity in some respects, both natural and cultural.

It is now a matter of indisputable historical fact that these people made a major contribution to all aspects of Australian life in the same way as in more recent times people from many parts of the world other than Europe and England are making a contribution.

Those people also then made a major contribution to my education and, I hope, understanding, of how some of the rest of the world lived and what we might learn and gain from peoples from other lands.

I hope that short and rather personal summary of the first year of my working life goes some way to explaining why I accepted your invitation as something in the nature of a duty: a debt to be repaid for an education accorded to me some forty or so years ago.

Accordingly, because of my experiences in my first job I have always been interested in Immigration. It is a subject that has arisen in my life in a number of areas. One is in relation to artists visiting Australia to take part in local stage productions. I will say a little about this later. I have some interest also as a result of my personal experience of the production of plays that I have written, and as a former director of the Australian Broadcasting Corporation. Immigration has also arisen in my role as a High Court Justice; and, in a connected sense, as part of the very topical issues of the day.

Apart from those factors, it is difficult to live in Australia now - as always - and not recognise the importance of immigration to the country. And this country more than any. The visible signs of this are everywhere: in the Universities; in the conservatoriums and concert halls; in the valleys and

beside the lakes of the Snowy River system; in the restaurants and hotels; in the construction industry and in the world of finance. Walk into any public art gallery and you will see wonderful works by such painters as Sali Herman, Josl Bergner, Vasilieff, Judy Cassale and Michael Kmit to name only a few migrant artists.

Very few countries in the world can claim the same level of importance to itself of the migration programme. Apart from Israel, Australia apparently has a higher percentage of its citizen population born overseas than any other advanced industrialised nation. In 1997, nearly half of Australia's population increase was directly or indirectly attributable to immigration [1]

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David Malouf's very excellent Boyer lectures this year highlighted for me more than perhaps anyone had before, just how being a land of mostly migrants helped shape the national spirit. As might be expected, Malouf put it more elegantly than I could [2]

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> "Half a lifetime ago olive oil was still a medicine and spaghetti came in tins."

And of the first immigrants, the convicts he said [3]

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> "When we look about the world we live in here, this clean and orderly place with its high level of affluence and ease, its concern for rights and every sort of freedom, these cities in which a high level of civility is simply taken for granted and barely remarked upon, what seems astonishing is that it should have emerged from a world that was at the beginning so un-free, so brutal and disorderly. It did so because these rejects of society, of whom so little might have been expected, made it happen. Out of their insistence that they were not to be so easily written off."

What Malouf also does is remind us that the colonies, and later the nation, were an attractive destination for immigrants because it provided them with an opportunity to "remake themselves, in terms of the opportunities offered by a second chance in a new place" [4]

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What he said, truly reflects the fact that immigrants came here in part only for the space, sunshine and surf but mostly for the opportunities, the lack of oppression, and of greatest importance - the newness of the place, its generally easy tolerance and freedom from many of the problems of the "old world", bound up in racial and religious strife, and by tight class structures.

There are few other countries therefore to which immigration has been historically, and continues to be, so overwhelmingly important: important for the past, because so many of us (and our forebears) immigrated; important for the future, because, despite technological developments in transport and communications, our country is still relatively isolated from the rest of the world.

For Australia to keep up with cultural, intellectual and societal developments in the rest of the world, we need to stay in contact with the peoples of other lands and not just by the internet. We have this problem: we are geographically on the way to nowhere except Antarctica: we are not large enough or perceived to be technologically, or commercially sophisticated enough for people to seek work - temporarily - in this country, as people do in New York or London or Paris or Berlin or Tokyo. With those features against us, it is easy to further discourage those who do want to enter.

So, to return to where I was. Immigration is important is the tangible sense. It is also important in the controversial sense. Little else excites more heated disagreement these days: and all of this in the context of sweeping reform and change.

The most recent changes, of course, are the amendments to the *Migration Act* , defining rights of

review and appeal in immigration law. I cannot, as I foreshadowed, today speak on these topics. You catch me at a particularly unfortunate time. The Full Bench of the High Court has reserved its decisions in two cases which raise some of these issues. Had the cases been decided I could perhaps have told you then with confidence precisely how the law on this topic stands in Australia.

It may be instructive however to see how other countries deal with controversies arising in relation to immigration matters. Let me first focus on the UK, where some very interesting changes are taking place, especially in light of its changing relationship with the EU. I will also look very briefly at the structure of the United States system of appeals and review, both common law countries as we are.

It is probably right to say, although I am not an expert on the systems of those countries that they offer somewhat less ample access to the courts than Australia. The perennial questions however are whether an applicant should be entitled to an appeal or a review and the nature of any such review or appeal. These are matters though, not for the Courts but for executive governments.

"Review" and "appeals" can be distinguished, in my view, in this way. An appeal in the ordinary sense entitles an appeal court to examine a decision of an inferior court or tribunal is factually and legally correct, although appeal courts in practice do not often reverse factual findings. A "review" is a horse of a different colour. A right to a review is usually a lesser right than a right of appeal. Reviews can take different forms: reviews on legal questions only, or on some factual issues only, and so on. There are also in Australia some special rights in some cases, the rights of application for the great prerogative writs conferred by the Constitution to ensure that public Commonwealth decision makers make decisions according to law.

It is probably right to say that the scope of the scrutiny narrows as you climb the review ladder. Migration review and appeals are a very important area; not only for the nation, but also for the judiciary. Interestingly, in the 1980s, review of immigration decisions in the UK constituted the largest area of litigation [5]

and consequentially a large burden on administrative and judicial resources.

With that background, I go now to look at the UK reforms of migration review and appeals. In that country, the current Government is proposing some further changes. The changes would restrict avenues of appeal. The specific proposals bear a resemblance in some respects to the Australian situation, and hence have resonance with what we are experiencing here.

Decisions at the executive level are taken by the Immigration and Nationality Directorate of the Home Office. Asylum and immigration appeals are determined in a two-tier system within the Immigration Appellate Authority. The first tier involves a hearing by an adjudicator; the second tier is an appeal Tribunal. But to reach the second tier, applicants must normally first obtain leave.

The adjudicators need not be legally qualified.

The second tier is comprised of three persons, at least one of whom is legally qualified. Beyond the Immigration Appeal Tribunal, lie further limited avenues. Once the Tribunal makes a final determination there is an avenue of appeal but on a point of law only to the Court of Appeal, or the Court of Session. However, leave must first be obtained from the Tribunal or the Court.

The Adjudicators sit in various locations around the UK. The Tribunal sits only in London.

But neither the adjudicators nor the Tribunal have jurisdiction in respect of all decision of immigrations officers. Some appeals can be made on limited grounds only [6]

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This system has its beginnings in the Wilson Committee of 1967. Before this, a very rudimentary system had been in place, involving, at various times, appeal to an Immigration Board and the Chief Magistrate.

The problems with the current system, it is claimed, are these. First, backlogs of appeals are

enormous. In the asylum appeal queue are 52,000 matters. Secondly, there is a rapidly increasing number of appeals being filed. Thirdly, there are significant delays before appeals are heard which of course means that the backlogs are not being cleared. Finally, the problem with the present English system is its complexity. The existence of various avenues of appeals and different avenues for different types of appeals add to the problem.

The Government of Mr Blair has apparently committed itself to a "firmer, faster and fairer" system for dealing with asylum and immigration cases in a consultation paper released recently. How does the UK government think it can achieve firmness, fastness and fairness? And fairness there of course, involves as it does here, a system that does not favour queue jumpers at the expense of would be migrants who have followed the conventional and legal processes. The consultation paper indicates there will be a single right of appeal. Secondly, the IAA will be restructured. One possibility is the enhancement of the IAT's authority and credibility by making it a Court of Record with a High Court Judge or a Circuit Judge as President. The hope is that this might [7]

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> "persuade the higher courts to refuse an application for judicial review at the leave stage rather than granting leave to move to a full hearing of the application."

The new IAT would concern itself only with points of law.

This accords with the Executive's generally quite restrictive view of the role of judicial review. Governments universally seem to have taken the view that migrant intakes are matters for them and not the courts. Courts cannot of course have the knowledge of the administrators as to the relevant matters determining immigration policy generally. The view has been expressed in the United Kingdom that [8]

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> "the need for such a review should be rare and limited to resolving important, novel or complex points of law."

The reforms have come in for some criticism. Recent comments published by an English academic and English solicitor, Blake and Sunkin, are an example. Of the Home Office's view of judicial review, they say [9]

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> "[I]t is a novel approach to judicial review to argue that the status and credibility of decisions of the public body being reviewed (as opposed to its adherence to the law and to fair procedures) is a reason for granting or refusing leave to move."

It is interesting that during the 80s the adjudicators were not even given a full set of Immigration Appeals Reports. In fact, there were large delays in the publication of the 1981 volume of the Reports. They were eventually printed in 1983. Why? Because, it seems, the Home Office wanted to have them printed by prisoners in gaols to save money.

Blake and Sunkin stress the importance of judicial review in maintaining the quality of judicial decisions. They hold that the Home Office thinks the IAT is not performing well. They stress the need for quality at the initial decision making stage. "Regrettably" they conclude, "the paper [of the Home Office recommending the changes] is not sufficiently reasoned overall to amount to a coherent basis for review of immigration appeals" [10]

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Well, perhaps that is a little harsh. It is simply a consultation paper at this stage. More will no doubt emerge, and views such as those of Blake and Sunkin may well be taken into consideration as part of the consultation process.

It should not be forgotten that there had already in the United Kingdom been some truncation of the

rights of appeal in the *Asylum and Immigration Appeals Act* 1993 [11]

. At the same time, a statutory right of appeal was inserted.

Of course the United Kingdom system of immigration appeals and review operates in a very different legal structure from that of this country. There is no constitutionally entrenched jurisdiction in the final appellate court, as there is in the High Court of Australia by virtue of s 75 of the Constitution. The United Kingdom also has no ADJR Act. As DeSmith notes, while many Commonwealth countries have undertaken root and branch reform to the supervisory jurisdiction of their courts, modernisation of the judicial review procedures and remedies in England and Wales has been more superficial [12]

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In the UK adjudicators are appointed by the Lord Chancellor and the Secretary of State. Our system is a little different, apart from the obvious absence of the Lord Chancellor in the Australian system. Here, Immigration Review Tribunal members are appointed by the Governor-General.

In the United States, there has, in recent years, been an attempt to curtail the scope of judicial review of immigration decisions. The *Immigration and Nationality Act* was amended in 1996. The constitutional guarantees of due process while restricting Congress in the extent to which judicial review can be wound back or excluded altogether, have been interpreted very narrowly. In one case in the 50s, the US Supreme Court held that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" [13]

. That rather suggests an alien denied entry should travel second class in the judicial train. But that does overstate the position somewhat. The right was territorially based: those physically present in the US were treated differently from those outside the country.

The new United States legislative regime excludes judicial review for certain cases of criminal deportation. The relevant Act provides that "any final order of deportation against an alien who is deportable by reason of having committed a criminal offense shall not be subject to review by any court". That is really quite significant when you consider that even something as minor as turnstile jumping in the New York subway has been held be a crime of "moral turpitude" invoking deportation proceedings.

There are also expedited removal proceedings for certain classes of aliens.

The exclusion provisions have received varying interpretations from different courts in the United States. Some have held their jurisdiction has been removed altogether; others have held that habeas corpus is available.

The trend towards curtailing the availability of general administrative procedural law in immigration cases, that I have briefly discussed in the UK and USA has been noted by international scholars as a world-wide phenomenon [14]

. It comes in contrast to the accelerated development of somewhat enlarged legal remedies by individuals against the state in immigration law during the 80s.

In fact, one commentator has noted that political awareness in Europe is very much preoccupied with the phenomenon of migration. The United Kingdom has made the changes I have discussed. Germany revised entirely its immigration legislation in 1992. In France, the Netherlands, Belgium, Italy, Portugal, Spain, Greece, Austria and Sweden, wide ranging legislative changes have taken place in this decade. The view has been put that the tendency to more and more far-reaching restrictions will not leave the content of European immigration law and national immigration legislation untouched [15]

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So it seems that migration systems all over the world are under review. What a long way we are

from the Roman system; where Roman citizenship was almost impossible to obtain unless you were born into it. Yet it was so highly sought after - rights or commercium and conubium - the rights to do business and legitimately marry, both travelled only with Roman citizenship [16]

. Citizenship could also be lost relatively easily; for example, if one was thought to be living too luxuriously by the censor. In later times, for example in England in the 14th to 17th centuries, under the Sumptuary Laws [17]

, the penalty for conspicuous consumption was only punitive taxation and not loss of citizenship.

It is desirable, I think, everyone would agree, that whatever the proceedings that are available, they be accessible to the individual. They must be fair and open. The courts or special tribunals of a fair and independent character need to have some supervisory role. In the immigration sphere, there should be linguistic and legal assistance. There are international law sources which also provide a guide as to what is required.

These principles are reflected in the Universal Declaration of Human Rights. Article 8 reads:

> "everyone has the right to an effective remedy by the competent national tribunals for act violating the fundamental rights guaranteed him by the constitution of by law."
>
> Article 10
>
> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

(The Articles do not in terms mention Courts).

Can I now move to discuss the second issue I raised at the beginning of this presentation; visas for artists. The provisions of the Migration Act which provide for entertainment visas impose quite extensive restrictions. Where a production is being subsidised by the Australian government, a visa can be granted, but only if Australian content requirements have been met. Where there is no government subsidisation, the Arts minister must give a certificate stating that citizens or residents of Australia have been afforded a reasonable opportunity to participate in all levels of production, and that foreign or private investment is greater than the amount to be spent on the entertainer sponsored for entry. There are also public interest criteria for entertainment visas. One of them is character. Visas have been refused on this basis. There were David Irving, Ervin, the Hell's Angels and - almost - Marilyn Manson, who of course ended up suffering a much more embarrassing rejection - that of his fans at his final performance. Those observations should not be taken as an endorsement of that entertainer. It is not a case of the more offensive, the more artistic the work. Oscar Wilde was far too sweeping when he said "All art is immoral".

The recent play which has been so successful in the Northern Hemisphere "Art" has been the subject of recent controversy in Australia: whether Tom Conti the well known Scottish actor should be permitted to undertake a leading role in the Australian production of the play.

Sometimes local or international funding may only be available because a production has attracted a big international name. As unpalatable to Australian artists as it may be the public do sometimes want big names. Often the physical presence of the owner of such a name is a condition of the funding agreement. But the entertainer may not be able to get into the country because he or she is denied a visa. The funding falls through and the performance may not go ahead. Australian supporting actors and all the production and lighting workers, and set decorators may miss out: and the Australian public denied audience access to the real and actual presence of live international artists. Whether these are outweighed by the gains and benefits to Australian artists and the public, it is not for me to say, and I do not say.

The High Court does have a role in migration matters. The Constitution grants, I repeat, to the High Court original jurisdiction when the prerogative writs are being sought against an officer of he Commonwealth. The jurisdiction extends to immigration Tribunals and is, as I have already said, in the course of consideration at this very time.

Ladies and gentlemen, it has been a pleasure and a privilege to talk to you today and to say that I am grateful for the education migrants gave me as an uninformed youth forty years or so ago, for their major contributions to Australian life over those years, and the continuing stimulation and contribution that they are making to our national identity.

Endnotes

Department of Immigration and Multicultural Affairs, *Population Flows: Immigration Aspects* , January 1999 at 2.

2 *The Making of Australian Consciousness* , Lecture Six, "A Spirit of Play", Boyer Lectures, 1998.

3 *The Making of Australian Consciousness* , Lecture One, "The Island", Boyer Lectures, 1998.

4 Ibid.

5 Sunkin, *The Judicial Review Caseload, 1987-1989* [1991] *Public Law* at 493.

6 See DeSmith, *Judicial Review of Administrative Action* , 5th ed (1995) at 954-955.

7 Home Office and Lord Chancellor's Department, *Review of Appeals : A Consultation Paper* , July 1998 at par 5.4. Available on the web page of the Home Office: www.homeoffice.gov.uk/ind/consult.htm.
See also the Home Office White Paper, *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum* , July 1998.

8 Home Office and Lord Chancellor's Department, *Review of Appeals : A Consultation Paper* , July 1998 at par 6.1.

9 Blake and Sunkin, "Immigration: Appeals and Review" [1998] *Public Law* 583 at 585.

10 Id at 591.

11 Sections 7(2), 8, 9 and sch 2.

12 *Judicial Review of Administrative Action* , 5th ed (1995) at 615-616.

13 *United States ex rel Knauff v Shaughnessy* 338 US 537 at 544 (1950).

14 See Boeles, *Fair Immigration Proceedings in Europe* (1997) at 466.

15 Id at 3.

16 See Nicholas, *An Introduction to Roman Law* , 3rd ed (1962) at 64-65.

17 The laws were in force between 1336 and 1603 and were repealed by 1 Jac 1 C 25.