TEOH - A PERSPECTIVE FROM THE BAR

*Neil Williams**

Text of an address to AIAL seminar, Teoh - International obligations and administrative decision-making, Canberra, 18 May 1995.

Soon after the High Court granted special leave in *Teoh*, I was contacted by the Director of the Environmental Defenders Office in Sydney. Pleadings had already closed in an action brought by the Tasmanian Conservation Trust. The Director had recently received the full Federal Court decision in *Teoh* and it occurred to him that perhaps he could get one or two students to comb through various treaties that might contain a statement of Australia's intention to give priority to the rights of the tree. He enquired whether we should amend our pleadings to take advantage of the Full Court decision. I replied that I thought we had a reasonable case anyway. I went on to say, and perhaps, with hindsight, I should not have, that I too had read the decision of the Full Court in *Teoh*, that I was aware the High Court had granted special leave to appeal, in my view the decision of the Full Court had quite limited merit (I am not sure that I used those precise words) and if we based our case around it, we might find by the hearing date that *Teoh* may be but a distant memory!

With that caveat to my qualification to speak on this topic in mind I will proceed with some observations on *Teoh*. I will start briefly with a reference to the context in which *Teoh* appeared in the cases, then give some examples of the potential way in which *Teoh* can be used by applicants in challenging government decisions.

Teoh seems to me to be part of a relatively short line of cases. The beginning can really be seen in *Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. That was a decision in which the Hong Kong Government had made a public statement that persons who had been resident illegally in Hong Kong for a substantial period would be given a certain procedure before being returned to the mainland. Mr Ng went in to the authorities within a couple of days of the announcement whereupon - without the procedure that had been foreshadowed - he was promptly deported to the People's Republic of China. He sought and obtained relief from the Privy Council, which held that the specific promise to people in his class was sufficient to give rise to an expectation that he would be afforded a fair procedure. There is an observation in the judgment to the effect that had he been asked "Is there anything that you would like to say as to whether you should be deported", that would have been sufficient to ensure him procedural fairness. So, the judgment had a limited scope, giving rise to a limited duty to be fair.

Next in line in Australia was *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, in which Chief Justice Mason referred to the need to avoid confusion between the content of the expectation and the resulting right to

* *Neil Williams practices at the NSW Bar.*

procedural fairness. The right to procedural fairness is no more than a right to be heard, that is, a right to a fair procedure. The Chief Justice also warned of the danger that to afford substantive protection to a legitimate expectation would interfere with the merits of a decision. So in *Quin*, the right was to a fair procedure but there was no substantive right.

Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648 - the next case in Australia - requires a consideration of the majority and the minority judgments. The majority, Justices Deane, Toohey and McHugh, all held in slightly different forms that a new and distinct issue had arisen when the file reached the Minister and this gave rise to a right to a further hearing. There had been a formal statement by the Minister for Immigration in the Parliament to the effect that decisions of the Administrative Appeals Tribunal in deportation matters would be given effect to unless there were exceptional circumstances to justify departure from the AAT recommendation to the Minister. The Court said that enumeration of exceptional circumstances in the Minister's statement gave rise to a distinct issue as to whether those particular circumstances applied to the case at hand. This issue had not previously been addressed in the administrative decision making process, and therefore there was an entitlement to be heard on that issue.

The minority, Justices Dawson and Gaudron, held in effect that there had been an ample opportunity to place matters before the Minister, and that fairness did not require a new hearing. There were no new matters that could be put, and a new hearing would result only in a repetition of the matters that had previously been put and would be pointless. Justice Gaudron commented that a hearing was required if additional facts were to be considered, that is, if the decision maker was determining a new and different case from that which was the subject of the recommendation.

So the difference in *Haoucher* between the majority and minority is not so much one of principle, but as to whether a new and distinct issue had arisen in the case.

The issue in *Teoh* was whether Mr Teoh should be deported. The statutory issue for determination was stated broadly, and was constrained, as *Peko-Wallsend* says, only by the general objects of the Act and any inferences to be drawn from them. The power was to be exercised, in other words, having regard to the interests of Australia as a whole (as the Federal Court had earlier held in *Minister for Immigration and Ethnic Affairs v Maitan* (1988) 28 ALR 419). Manifestly that involved the balancing of the interests of Australia in minimising the number of heroin importers who live here, against the interests of Mr Teoh and in particular the interests of his family. The issue for determination was quite well defined from the beginning. The decision maker clearly took account of the interests of the children and made quite strong statements of recognition of those interests and the bleak future they faced if Mr Teoh were to be deported. The decision maker was not, as the High Court held, obliged to give substantive effect to the treaty, or even to take the treaty into account in anything other than a procedural sense.

Since a balancing of the interests of the wife and the children against the national interest was carried out, it is difficult to see in *Teoh* what the fresh issue was to require a further hearing. The only conceivable matter was whether the decision maker should give primary consideration to the

interests of the children, that is, whether in terms Article 3.1 of the Treaty on the Rights of the Child should be applied. What this illustrates is that where the issues dealt with in the treaty have in fact been properly considered, there is no further obligation to draw attention to the treaty obligations and invite submissions on whether it should be followed. It would have been sufficient, the majority held, if the decision maker had made it plain that primacy was being given to the interests of the children in the decision. In that event, even though the treaty may not have been specifically referred to, the decision maker's obligation would have been discharged.

What this involves is a whole new natural justice process, or a loop in the decision making process. The first step is to identify the relevant treaty obligations. The second step is to draw the applicant's attention to them in specific terms if there is any intention to depart from them, and to invite submissions.

The shift in the cases that has occurred since *Ng's* case, is that there was a clear and specific promise to people in Ng's position, which was held to give rise to a limited procedural right to a limited hearing. In *Teoh*, a statement which was made only to foreign states - because treaties are entered into between Australia and foreign states - was held to give rise to an implied promise to Australian citizens. That promise was not satisfied by a procedure, which was otherwise fair, and could only be satisfied by a specific procedure, of a hearing on the issue of whether a treaty should be adhered to.

I have gone through that analysis to illustrate how broad *Teoh* is, and its great potential for applicants. The approach to the construction of a treaty is also to be noted. The treaty considered in Teoh referred to actions concerning children and applied both to executive agencies and to judicial bodies.

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

"Actions concerning children", the key opening phrase, is construed by the Court as including actions which have consequences for children. The scope of this particular treaty is enormous. One has only to reflect on the potential scope of actions that may affect children to realise the wide potential for this treaty provision to be invoked. For enforcement, there is no need to use the complaints procedure of the *Human Rights and Equal Opportunity Commission Act*, with its presently doubtful powers of enforcement. Following *Teoh*, an applicant can go straight to the Court and seek to have a decision set aside.

The decision, in my view, is a bonanza for applicants. A person who is aggrieved by a decision can seek, by a process of trawling through a range of treaties, to find some basis on which to have the decision set aside, and the chances of actually finding a relevant treaty will really be quite good. The implication is that community legal centres, interest groups, and private lawyers, should be obtaining access to treaty lists as a matter of urgency, and reviewing the treaties that have potential in their area.

Before describing a couple of brief examples, I should mention the limitations. The right that was created in *Teoh*, and there is no doubt it is a new right, is a procedural right only. While it gives a person aggrieved by a decision the potential to have the

decision set aside and reconsidered, it gives no more than that, and there is no obligation on a decision maker to give effect to a treaty, or to do anything more than invite submissions on whether the treaty should be applied. It is important with clients not to generate an expectation that the mere fact that a treaty obligation was not considered will lead to a positive decision. Justice McHugh in *Teoh* had formed the view that the decision maker had in fact given primacy to the interests of the child, so it is important not to overstate the substantive significance of the decision.

Nevertheless, what many clients want is to have a decision set aside and to have the matter reconsidered, possibly by a different decision maker, who may give a fairer hearing than they perceive they have had. In many cases the mere setting aside of the decision can lead to the introduction of new material which perhaps a previous adviser had not realised the significance of. In the migration context, it is common for migration agents not to put to the decision maker material which is of great probative significance, and for the lawyers who come into the case to have to try and unpick the decision that has been made in order to put forward the client's best points for consideration. So although the right is merely a procedural one, it can have substantial benefits for a client.

It is uncertain yet what effect the statement by the Attorney-General and the Minister for Foreign Affairs will have, but there is certainly an argument available that signature or ratification of a treaty is a formal act, the legal consequences of which cannot be undone by the mere issue of a press release. When a treaty is entered into by the Minister for Foreign Affairs or another duly authorised minister, it is entered into on behalf of Australia. Notwithstanding that the Minister for Foreign Affairs and the Attorney-General are the two Ministers of the Government with prime responsibilities in this area, it is at the least arguable that a press statement by those two Ministers has substantially less force than a formal act undertaken on behalf of the Government.

As to the legislation that is to be introduced to give effect to the press statement, it is a matter of waiting to see its form. It has been debated whether it is possible to give effect to a promise of the nature referred to in the press statement, but it seems to me to depend on form, and I will not go into the matter at this stage. In my view it is probably unlikely that the legislation will have a retrospective effect prior to the date on which the press statement was issued. What that means is that if the legislation is effective, there is at present a narrow window in which to replead cases, and bring challenges relying upon the *Teoh* decision, and the opportunity should not be overlooked.

I will now refer briefly to some potential applications of the *Teoh* decision. The real sting in the decision, it seems to me, is the observation of Chief Justice Mason and Justices Deane and Gaudron that Article 3.1 may represent the common law. If the best interests of the children are to be a primary consideration in courts of law, it may have implications, for example, for sentencing, as Justice McHugh observes. If it has implications for sentencing, why not for bail determinations? There could not be any doubt that a decision to jail a parent for a substantial period is a decision, in the sense in which the majority interpreted the treaty, that concerns or affects the children. It may not directly affect them, but the effect is nevertheless substantial.

These are issues that are well worth litigating in my view.

In environmental law there is a substantial potential - notwithstanding my earlier expression of views on this issue! I have heard it suggested that *Teoh* is confined to human rights treaties, but I see no reason why this should be so, provided there is a party with a right to be heard on the principal issue. A legitimate expectation according to *Teoh* (in this respect it is consistent with *Quin* and *Ng)* is objective. It is something that exists in the ether. It is something that no person need hold. Indeed, I think *Ng* was not personally aware of the statement, and in all the Australian decisions it has been observed that there is no need for a person to be aware of the statement for an expectation to arise. If no person need hold the expectation, why should a tree or even a swamp not have an expectation? If it is purely an objective matter, provided there is a person with an entitlement to be heard, it appears to me that there is a potential for the treaty provisions to be invoked.

The ILO Conventions are a rich source of treaty statements. Many of them are, like treaty provisions generally, very broad. They also often conflict with each other, but that is not a point that need worry a potential challenger. Take for example, ILO Recommendation 165 which has been adopted in a Schedule to the *Industrial Relations Act* and deals with workers with family responsibilities. Facing a transfer to somewhere uncongenial, why not invoke the treaty provision?

Even going as far as tax - again Justice McHugh refers to this - a decision, for example, to exercise recovery powers under the *Taxation Administration Act*, will have very harsh consequences for children in a situation where bankruptcy of the parents may be the result. Why should the interests of the child not receive primary consideration?

Those are but a few brief examples. In migration decisions the sky is the limit. Indeed, the present guidelines on deportation contain a list of matters to be taken into account. Those guidelines have the force of law, I believe, by virtue of their endorsement by the Minister, and one item on the list of matters to be taken into account is Australia's treaty obligations.

That is but a few examples of areas in which *Teoh* can be used. The potential for community legal centres and public interest lawyers is enormous. The treaties are also accessible, in a book published by the Department of Foreign Affairs. Some of the 900 or so treaties go back to the last century. These may not be of much use, but in more recent treaties there is a goldmine of potential challenges for persons disaffected by administrative decisions. To those who work on the applicant's side, my advice is to "get into it".