WHEN MAY A DECISION MAKER REMAKE AN ADMINISTRATIVE DECISION

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Australian Institute of Administrative Law Seminar, Canberra, 10 October 2002.

Introduction

In the interpretation of statutory powers and duties there is a rule that, "unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires".[1] However, if the power is a power to determine questions affecting legal rights[2] or if the power is of "such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or by the making of the statements or representations in question", [3] the courts have tended to say that the decision, if validly made, is irrevocable and cannot be remade.

The decision maker is said in these circumstances to be *functus officio.* The duty imposed on the decision maker to perform his or her function has been discharged so that nothing further remains to be done. This result is supported by the same arguments as support finality for the decisions of courts. Whether a decision maker is *functus* or whether, on the other hand, a particular decision can be remade depends on the statutory context. In *Minister for Immigration v Kurtovic*[4] the Full Court of the Federal Court held that the power conferred on the Minister to order the deportation of a non-citizen convicted of a serious criminal offence was not, on its proper construction, spent upon its initial exercise. As a result, the Minister could again order the deportation of a non-citizen whose previous deportation he had revoked.

The discussion so far has concerned situations where the original decision was validly made. But what if the original decision was not validly made? Can such a decision be remade? There is a line of cases, of which *Minister for Immigration and Multicultural Affairs v Bhardwaj*[5] is the most recent, which indicate that it can.

In *Comptroller - General of Customs v Kawasaski Motors Pty Ltd*,[6] Beaumont J said:

> Some administrative decisions once communicated may be irrevocable. But where it appears to a decision-maker that his or her decision has proceeded upon a wrong factual basis or has acted in excess of power, it is appropriate, proper and necessary that the decision-maker withdraw his or her decision. [7]

That was a case in which the decision to revoke a Commercial Tariff Concession Order was made with the consent of the party directly affected.

In *Leung v Minister for Immigration and Multicultural Affairs*[8] Finkelstein J said:

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> But what if the decision is invalid? Can the decision be ignored if the consent of all interested parties is obtained or is there some other principle that governs the situation? In my opinion, the true principle is this. To ignore an invalid decision is not to revoke it. It is merely to recognise that that which purports to be a decision does not have that character. To decide that matter again is not a reconsideration of it. It is in fact the original exercise of the power to make the decision. Hence, the rule embodied in the expression "functus officio" has no application to such a case. Nor is there any need to find either an express or an implicit power of reconsideration. Those doctrines, to the extent that they are applicable to administrative decision-making, only apply to validly made administrative decisions.[9]

Leung's case concerned the power of the Minister to revoke a grant of Australian citizenship after it was discovered false representations had been made in the application for citizenship. The revoking of a favourable decision, such as was involved in that case, will clearly be controversial.

Against that background the recent decision of the High Court in *Bhardwaj* is now considered.

Facts in *Bhardwaj*

A delegate of the Minister cancelled Bhardwaj's student visa. Bhardwaj applied to the Immigration Review Tribunal (IRT) for a review of the decision. The IRT invited him to attend a hearing before it on 15 September 1998. Late in the afternoon of 14 September 1998 the IRT received from Bhardwaj's agent a letter stating that his client was ill and requesting an adjournment.

By an administrative oversight, the letter did not come to the attention of the IRT. It dealt with the matter adversely to Bhardwaj and notified him and his agent on 17 September 1998 (September decision). The reason given for the decision was that Bhardwaj had not provided any information which suggested that the cancellation of his visa was unfair or inappropriate.

Once Bhardwaj's agent was informed of the decision, he drew the IRT's attention to the earlier letter. As a result, a new hearing date was arranged. On 22 October 1998 the IRT published a decision revoking the cancellation of the visa (October decision).

The Minister brought proceedings in the Federal Court seeking to have the October decision set aside on the ground that the IRT "had previously made a decision in respect of the same application and was *functus officio*". The Minister's application failed before Justice Madgwick. The Minister's subsequent appeal to the Full Court of the Federal Court was dismissed.

Decision of the High Court

The High Court (by majority) (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J dissenting) also dismissed the Minister's appeal.

Relying on a statement made by Lord Reid in *Ridge v Baldwin*,[10] Gleeson CJ said that there is nothing in the nature of an administrative decision which requires the conclusion that a power to make a decision, once purportedly exercised, is necessarily spent. However, he said that that general proposition must yield to the legislation under which a decision maker is acting. Furthermore, the requirements of good administration and the need for people affected by decisions to know where they stand, mean that finality is a powerful consideration.

His Honour observed that, in the present case, the *Migration Act* provided for judicial review of the IRT's decisions, albeit within a closely confined structure. However, in circumstances where the IRT had not only failed to accord procedural fairness, but had also failed to perform the function conferred on it of conducting a review, it was not inconsistent with the statutory

scheme for the IRT to give Bhardwaj the opportunity to appear and give evidence and present argument.

Gaudron and Gummow JJ said that the failure of the IRT to give Bhardwaj a reasonable opportunity to present evidence and argument had the consequence that the IRT had not conducted a review as required by the Act; it had failed to exercise jurisdiction.

Their Honours said that it was unhelpful to describe erroneous administrative decisions as void, voidable, invalid, vitiated or even as nullities. The real issue was whether the rights and liabilities of the individual to whom the decision related were as specified in that decision. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. In their Honours' view, once that was accepted, it followed that, if the duty of the decision-maker was to make a decision with respect to a person's rights but, because of jurisdictional error, the decision-maker proceeded to make what was, in law, no decision at all, then, in law, the duty to make a decision remained unperformed. Their Honours concluded that there was nothing in the *Migration Act*, and no implication to be drawn from the terms of the Act, which purported to give any legal effect to decisions of the IRT which involved jurisdictional error.

McHugh J agreed with Gaudron and Gummow JJ that the IRT was authorised to make the October decision because its September decision was of no force or effect by reason of jurisdictional error.

Hayne J agreed that the error committed by the IRT in reaching its September decision was a jurisdictional error. What the IRT did was not authorised by the Act and did not constitute the performance of its duty under the Act. He said that a jurisdictional error of the kind made by the IRT was fundamentally different from a case where, for whatever reason, a decision-maker had second thoughts about such matters as findings of fact. Once it was recognised that, in the September decision, the IRT had not performed the duty imposed on it (namely to review in accordance with the statutory procedures, including allowing the respondent to be heard), it was clear that not only was there no bar to the IRT completing its task by the steps it took in October, it was duty bound to do so.

The judgment of Callinan J was to similar effect.

Kirby J dissent

In his dissenting judgment, Kirby J said that the language of the *Migration Act* made it impossible to postulate a residual power of the IRT to revoke an earlier decision that formally complied with the Act. The Act made it quite clear that, if there were any defects in a decision of the IRT, the remedy was through the Federal Court judicial review mechanism, for which the Act provided.

His Honour also referred to administrative practicalities. If a decision unfavourable to an applicant could be ignored, or treated as provisional by the IRT or anyone else on the ground that it was not really a “decision”, a favourable decision could equally be left uncertain. The result would be confusion or even chaos in the administration of the Act.

Implications of *Bhardwaj*

One cannot help but feel that the decision of the High Court in *Bhardwaj* may have been influenced by the fact that, under the truncated judicial review regime applying under the *Migration Act,* the Federal Court is denied the power to set aside a decision of the IRT on the ground of denial of procedural fairness. The decision may reflect the High Court's continuing

concern with the review regime applying in the migration area. One may speculate whether or not the result would have been the same if the original decision had been made by a decision-maker whose decisions were subject to judicial review in the ordinary way.

Be that as it may, the case stands squarely for the proposition that, if a jurisdictional error has been made in the making of a decision, eg, the decision-maker has exceeded his or her power or has breached the rules of procedural fairness, the decision may be remade because it was, in law, not a decision at all.

Is the case likely to lead to agency decision-makers being placed under greater pressure to change decisions which persons affected argue to be wrong in some way? Perhaps, although one could expect that, if an agency considers its decision to be correct, it will stand firm, requiring disaffected persons to exercise their right to seek review on the merits (if such a right exists) or judicial review in the Federal Court. One can imagine decision-makers being somewhat reluctant to assume the mantle of the judicial branch and make decisions about whether a particular decision was legally invalid.

In my view, the *Leung* case has the potential to be more troubling than *Bhardwaj*, suggesting as it does the possibility of agencies exercising an implied power to revoke favourable administrative decisions. It would be far more satisfactory and less productive of administrative uncertainty if a power to revoke or cancel were only exercised pursuant to statutory authority where the conditions for the exercise of the power were specifically set out.

Conclusion

Following the decision in *Bhardwaj,* it would seem that, regardless of the effect of section 33(1) of the *Acts Interpretation Act* 1901, a power to reconsider an administrative decision can be implied if the decision is invalid because:

- it has proceeded upon a wrong factual basis (*Comptroller-General of Customs v Kawasaki Motors Pty Ltd*); or
- the decision was infected with jurisdictional error, whether as a result of a failure to accord procedural fairness or otherwise (*Leung* and *Bhardwaj*).

These circumstances do not involve invocation of the doctrine of *functus officio* because the decision was not in fact a decision at all.

Endnotes

1 See, eg, *Acts Interpretation Act* 1901 (Cth), s33(1)
2 *Re 56 Denton Road, Twickenham* [1953] 1 Ch 51
3 *Minister for Immigration v Kurtovic* (1990) 92 ALR 93 per Gummow J at 112
4 (1990) 92 ALR 93
5 (2002) 187 ALR 117
6 (1991) 103 ALR 661
7 At 667
8 (1997) 150 ALR 76
9 At 88
10 [1964] AC 40 at 79