TOPIC: Australian Administrative Law.

Judicial review should be limited to the consideration of errors of law strictly defined. Issues of fact should be the sole preserve of the decision-maker or merits review. Consequently, courts should not indulge in de facto review of factual issues under the guise of ultra vires or jurisdictional error in areas such as jurisdictional fact, unreasonableness and lack of evidence.

Do you agree?

Discuss this statement with reference to relevant cases and legislation.

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1. INTRODUCTION

By definition, judicial review refers to the type of court proceeding whereby a judge re-evaluates the legality of an action or decision made by a public body thereby challenging the manner in which a decision was made as opposed to the rights and wrongs of the judgement handed down.[1] Judicial review was necessitated by the need to challenge erroneous and/ or unlawful administrative rulings and is found within the Administrative Decisions (Judicial Review) Act 1977.[2] The Administrative Appeals Tribunal is a hybrid between the administrative agency and court and was formed by the Administrative Appeals Tribunal Act 1975 (Cth).[3] The legality of judicial review is found

[1] Judicial Communications Office, 'Judgments and Guidance - Judicial Review,' (2008)

[2] See sections 2- 5 of the Australian Constitution

[3] Administrative Appeals Tribunal Act 1975 (Cth).

within the doctrine of a separation of powers whereby courts have the power to review the legality of actions and decisions as opposed to their merits.

Judicial review is an area of administrative law that is often misunderstood and hence needs clarification as to its definition, nature and overall scope. This clarification is provided in the judgment of Brennan J in *Attorney-General (NSW) v Quin*:

> "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government…The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error."[4]

In that regard, judicial review essentially is not the mere re-hearing of the merits of a certain case. Instead, it is the reviewing of a decision to ensure that the decision-maker followed the accurate legal measures or used the right legal interpretation. That said, there is the dire need to attain the suitable balance between preventing legal action from wearisome government policies and the provision of the means of testing the legality of administrative action.

Should judicial review be restricted to merely those cases where there has been a misapplication of the law or can its mandate be extended to other cases where they may be some other problem such as the occurrence of unreasonableness? This is a question that has baffled the minds of many legal experts in the field of administrative law. The following discussion will thus shed some light on this oft

[4]Attorney-General v Quin (*1990*) *170 CLR 1, 35-36*

misinterpreted aspect of law by showing that whereas the role of the judicial review is primarily with regards to errors of law, it has a much wider scope than most realize.

2. JUDICIAL REVIEW AND ERRORS OF LAW

Primarily, an error of law is the classic basis for the consideration of the judicial review of an administrative action. This is due to the fact that all administrative decisions must be made according to the law. Since the decision- making power is granted by legislation in the first place, the decision–maker or merits review should must properly understand and apply their decision–making power. The courts have the constitutional duty to correctly interpret the when passing out judgments and this role lies within the decision makers' institutional capability and expertise.[5] Therefore, administrative decision-makers no longer have the sole discretion as pertains to the interpretation of the law neither do they have the jurisdiction to incorrectly interpret the law.

When an administrative decision-maker makes a mistake in law, their decision is summarily deemed to be against the law and thus can be set aside. This is because courts no longer make a distinction between jurisdictional and non-jurisdictional errors of law and treat them equally. Decision-makers must correctly understand why they have been conferred with the power that they have been and then use this power for that purpose alone. When a decision-maker asks itself the wrong question or misdirects itself in law, it is deemed to have failed to execute the task entrusted to it by Parliament and its decision is thus against the law. In other words, if the decision- maker did not get the law right, there is a premise for judicial review. Evidently, errors of law are thus the primary basis for judicial review.

It should be noted, however, that even when a decision is based on an error of law, the court's powers are sometimes restricted to putting the decision aside and presenting the case to the primary

[5] David Goddard, 'Review For Error Of Law – Some Comments,' (2008)

decision-maker for re-evaluation.[6] There are certain situations whereby, even when a decision is lawfully incorrect, it will not be liable to judicial review. On the other hand, there are circumstances where a decision is the correct one but is set aside due to the fact that there is a likelihood of legal error. Thus, even when an error of law has occurred, the powers of a judicial review are not all encompassing and at times, are very limited regardless of whether or not an error of law has been committed. Judicial review thus is somewhat restricted as pointed out in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[7] by Mason J. This limited role of the judicial review process based on an error of law should thus be continually kept in mind so as to be constantly aware of the boundaries that should not and cannot be overstepped.

3. THE GREATER SCOPE OF JUDICIAL REVIEW

The case has already been made concerning the need and applicability of judicial review in instances when an error of law has occurred. However, various court decisions have shown that even in factual issues, judicial review can and must be applied for the law to be fully upheld. For instance, in cases where a decision makers has misdirected itself in law; when it has misunderstood the purpose of their conferred power; when it has asked itself the wrong question/ or when it has not had regard to the right legal considerations, it would be foolhardy to simply limit judicial review to cases of errors of law.

4. JUDICIAL REVIEW AND JURISDICTIONAL FACT

Some legal experts have argued that cases dealing with jurisdictional facts should not be subject to judicial review due to the simple fact that if they are facts, the facts are sufficient basis to make a

[6] *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 578-579, 598-600.

[7] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24

lawful decision. In certain instances, a decision maker may view the existence of some fact as a prerequisite for an official exercising jurisdiction and this is called a jurisdictional fact. [8] A jurisdictional fact is a fact that must exist objectively so as to enliven jurisdiction therefore a court executing judicial review can analyze evidence that was previously not available to the primary decision maker when deciding on the existence of a jurisdictional fact. It is akin to merits review the difference being that the review is not based on merits but on whether or not the primary decision maker had the power to employ discretion from the beginning.[9]

The significance of this is that, with regards to jurisdictional facts, the court can re- determine the fact for itself and a judicial review may then ensue. In addition, jurisdictional facts are subject to judicial review due to the fact that an error as to jurisdictional fact is an error of law.[10]The instances when judicial review is executed with regards to cases dealing in jurisdictional facts are what Groves (2005) refers to as the "Brennan Approach." When the question for the court is whether the condition governing the exercise of a statutory power is satisfied, the court must place itself in the position of the repository of the power to establish whether the process adopted was fair, legal and reasonable. A different tactic is necessary when the question is if the jurisdictional fact in question existed at the relevant time. This provides procedural fairness which supersedes statutory power and allows for reviews to be done in such cases. [11]

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[8] Christopher Enright, 'Federal administrative law,' (), The Federation Press, Sydney p. 385

[9] Peter McClellan, 'Australian Administrative Law,' (2006)

[10] Anthony Mason and Geoffrey Lindell, 'The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason,' (2006), The Federation Press, Sydney, p. 193

[11] Matthew Groves, 'Law and government in Australia,' (2005), Federation Press, Sydney. p. 199-200

In addition, the term 'jurisdictional fact is an ambiguous one and is thus susceptible to abuse by those in power. Spigelman CJ recognized this in *Timbarra*[12] which was case involving a decision to grant permission for mines' extension. If this extension was "likely to significantly affect" a threatened species, there first had to be a Species Impact Statement to grant this permission. The court determined that the phrase "likely to significantly affect" constituted a jurisdictional fact thus "likely to significantly affect" was ruled as not factual unless backed by a Species Impact Statement. In this case, a court with a judicial review jurisdiction is required so as to determine the existence of facts. Thus, even in cases dealing in jurisdictional facts, a judicial review is sometimes necessary for clarity and procedural fairness.

Clearly, jurisdictional facts are without question subject to judicial review. The reviewing court should and indeed can decide for itself what the real facts are without external interference. That said, this power to review jurisdictional facts is somewhat limited on two accounts. Firstly, if someone inappropriately withheld important evidence from the first court a court may exercise discretion to refuse relief[13] or if the initial finding is openly done in a careful and accurate manner, the court will recognize the ruling as accurate as long as a party fails to provide good enough evidence to the contrary.[14] Thus, whereas jurisdictional facts can be subject to judicial review, it is not always the case and each case must be judged on a case by case basis.[15]

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[12] *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 at 63-64.

[13] See *R v Alle; Ex Parte Plumbers and Gasfitters Union (1981)* 153 CLR 376 AT 389- 390

[14] *R v Ludeke; Ex parte Queensland Electricity Commission (1985)* 159 CLR 178 at 183-184; 60 ALR 641 at 645

[15] Enright, (2004), p. 578

5. JUDICIAL REVIEW AND UNREASONABLENESS

Of all the grounds for review, the basis of unreasonableness has undoubtedly raised the most storm in legal administrative law circles**.** Introduced as a ground for review in *Wednesbury*[16]*by* Lord Greene MR whereby a law preventing children below 15 entry into a picture house was criticized as being unreasonable. In his ruling, Lord Greene defined unreasonableness thus: "If a decision on a competent matter is so unreasonable that no reasonable authority could ever come to it then the court can interfere," "and something so absurd that no sensible person could ever dream that it lay within the power of the authority."[17] This definition is vague and has proved to be very controversial that even fifty years later, the proper scope of unreasonableness as a ground of judicial review is still uncertain.

Nevertheless, gains have been made over the years and there have been a number of judicial reviews based on unreasonableness. These cases have been divided into three main groups- unreasonableness based on "discrimination," "irrationality," and "disproportionality." One case where discrimination and unreasonableness necessitated judicial review came into play in *Parramatta City Council v Pestell*,[18] where it was deemed unreasonable to enforce a "betterment rate" on industrial buildings but not on cottages regardless of the fact that both would realize an increase in value. It was held to be discriminatory and thus the rate was summarily reviewed. Another example is in *Minister for*

[16] *Associated Provincial Picture Houses v Wednesbury* [1948] 1 KB 223

[17] Ibid

[18] *Parramatta City Council v Pestell* (1972) 128 CLR 305

Primary Industries and Energy v Austral Fisheries Pty Ltd,[19] where a fisheries management plan was invalidated for containing erroneous facts thereby unreasonable.

On the flipside, though, unreasonableness challenges the distinction between legality and merits, due to the fact that it is activated by the poor quality of the bureaucratic decision. As such, it has caused no small degree of uncertainty and debate. In fact, several cases in the country rule that the unreasonableness has to be of an extreme nature or that it has to be obvious for it to be valid for judicial review and this further complicates the matter.

However, while presenting a challenge in administrative law, the premises for judicial review on the grounds of unreasonableness is still relevant and the only hurdle that needs to be overcome pertains to identifying unreasonableness. When this is identified, it serves a great legal purpose in ensuring those affected to attain the justice they may have missed out on during the primary decision making process.

6. JUDICIAL REVIEW AND LACK OF EVIDENCE

In cases where there was no evidence whatsoever to come to a conclusion or where the decision maker made a judgment on the grounds of a fact that in actuality did not exist, it goes without saying that an error is bound to occur and hence a judicial review is necessary for justice to prevail. In such instances, there is insufficient ground for making a judgment. A lack of evidence infringes on procedural fairness. The legislation that backs lack of evidence as a grounds for judicial review is found in ADJR Act ss 5 (1) (h)[20] and 6 (1) h[21]. They allow a judicial review when there was no material to make a

[19] *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381

20 ADJR Act ss 5 (1) (h)

21 ADJR Act ss 6 (1) h

proper decision in the original ruling. This backing is nonetheless dependent on ss 5 (3)[22] and 6 (3)[23] which state that these decisions can only reviewed in cases where no such evidence actually existed irrespective of whether or not the court considered the evidence at hand.

In *Re Pochi and Minister for Immigration and Ethnic Affairs*[24], an Italian immigrant who had lived in Australia for 20 years without citizenship had previously been convicted on a drug charge. He was to be deported on the grounds of "evidence" that the Administrative Appeals Tribunal termed as based on mere opinion, suspicion and hearsay. Brennan J ruled that the allowance in the A T Act 1975 (Cth) that made the rules of evidence not binding to the tribunal nevertheless constitute an allowance to make decisions that lacked evidence. When Immigration Minister appealed, the prior ruling was still upheld that no decision can be made due to mere speculation, gossip or suspicion.[25] As such, all decision makers are compelled by the law to ensure that all the judgments they pass are based on clear and accurate evidence failure to which the case is liable for judicial review.

7. CONCLUSION

Issues of fact are not the sole preserve of decision makers or merits review. Indeed, Australian law is very clear with regards to judicial review and its scope and it by no means contravenes the doctrines of ultra vires or jurisdictional error as the power to review is expressly contained within the Administrative Decisions (Judicial Review) Act 1977. As such, judicial reviews do not usurp the

[22] ADJR Act ss 5 (3)

[23] ADJR Act ss 6 (3)

[24] *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 and (1980) 44 FLR 41

[25] Michael Head, 'Administrative Law: Context and Critique,' p.159

authority executive bodies. While primarily constituted to deal with cases based on errors of law, the mandate of judicial review is much broader, encompassing the review of factual issues as long as there is a danger of procedural unfairness.

Nevertheless, the scope of judicial review is not limitless and as with everything in the legal world, must be executed within the confines of existing. If any legislation is flouted under the guise of ultra vires or jurisdictional error, the review should be deemed as unlawful and the decision itself should be subjected to another judicial review. If judicial review is executed lawfully, it has the great potential to ensure that real justice is served; both now and for future generations for the continual development of a safe, secure and just Australia.

BIBLIOGRAPHY

ARTICLES/ BOOKS/ REPORTS

1. Aronson, Mark, 'Unreasonableness and error of law,' (2001), <http://www.austlii.edu.au/au/journals/UNSWLawJ/2001/26.txt/cgi-bin/download.cgi/download/au/journals/UNSWLawJ/2001/26.rtf> at 4 September, 2009.

2. Goddard, David, 'Review For Error Of Law – Some Comments,' (2008), <http://docs.google.com/gview?a=v&q=cache:dBlNLvNMF_4J:thorndonchambers.com/Profiles/dg/David%2520Goddard%2520QC%2520-%2520Judicial%2520Review.pdf+NZLS+Intensive+%E2%80%A2+Judicial+Review+david+goddard&hl=en&gl=ke> at 5 September, 2009.

3. Judicial Communications Office, 'Judgments and Guidance - Judicial Review,' (2008), <http://www.judiciary.gov.uk/judgment_guidance/judicial_review/index.htm> at 5 September, 2009

4. McClellan, Peter, 'Australian Administrative Law,' (2006), Supreme Court New South Wales, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan311006> at 6 September, 2009.

CASE LAW

5. Associated Provincial Picture Houses v Wednesbury [1948] 1 KB 223
6. Attorney-General v Quin *(*1990*)* 170 CLR 1, 35-36
7. Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
8. Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559, 578-579, 598-600.
9. Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd (1993) 40 FCR 381
10. Parramatta City Council v Pestell (1972) 128 CLR 305
11. Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 2 ALD 33 and (1980) 44 FLR 41
12. Timbarra Protection Coalition v Ross Mining NL (1999) 46 NSWLR 55 at 63-64.

LEGISLATION

13. Administrative Appeals Tribunal Act 1975 (Cth).
14. Administrative Decisions (Judicial Review) Act 1977.
15. ADJR Act ss 5 (1) (h)
16. ADJR Act ss 6 (1) (h)
17. ADJR Act ss 5 (3)
18. ADJR Act ss 6 (3)