CAN REPRESENTATIONS BY A DECISION MAKER BE THE SOURCE OF A DUTY TO ACCORD PROCEDURAL FAIRNESS: A NEW LIFE FOR LEGITIMATE EXPECTATIONS?

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In a recent decision, *SZSSJ v Minister for Immigration and Border Protection*[2] the Full Court of the Federal Court (Rares, Perram and Griffiths JJ) dealt with one of the consequences of the Department of Immigration's publication on the internet of personal details of people in immigration detention. SZSSJ was one of the people in detention whose personal details were published.

By the time of the publication SZSSJ had applied for and been refused a protection visa. His application for review of that decision had been dismissed by the Refugee Review Tribunal and his applications for review of the Tribunal decision had been dismissed by the Federal Circuit Court and the Federal Court. There remained only the resolution of his application for special leave to appeal to the High Court.

Subsequently the Department of Immigration and Border Protection commenced an "International Treaties Obligations Assessment (ITOA)" in order to assess whether the disclosure of SZSSJ's personal information created a risk to him such that it engaged Australia's non-refoulement obligations.

In conducting that assessment the Department disclosed to SZSSJ that the list of persons in detention with their personal information had been accessed from a number of IP addresses: but declined to provide data which were provided by a consultant to the Department which indicated the likelihood of each of those IP addresses having access to the personal information of the detainees.

The Court found that the conduct of the assessment without providing to SZSSJ information on the full circumstances of the data breach was a denial of procedural fairness.

The Court's Reasons

The decision was unfair

That the Court found that the Department's conduct was unfair was unremarkable. The conclusion on that question was in the following terms:

> "[118] … The Department is requiring affected individuals to make submissions to it about the consequence of its own wrongful actions in disclosing their information to third parties without revealing to them all

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[2] [2015] FCAFC 125

> that it knows about its own disclosures. Whilst it is certainly true that the obligation of a decision maker is generally only to disclose information which is adverse to a claimant, the requirements of natural justice fluctuate with the circumstances of each case. The particular circumstances of this case take it far outside the realm of the ordinary.
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> [120] … In cases, such as these, involving persons whose claims for protection have failed, the public revelation of their identities that could have been accessed by the very person(s) from whom the failed protection seeker feared harm, conceivably might have some potential to expose him or her, on refoulement, to what he or she feared."

Was there a duty to be fair?

That the process was unfair could have no legal consequence unless there existed a duty to accord procedural fairness.

On that question the Court considered whether a duty arose by reason of ss.48B, 195A and 417 of the *Migration Act*. Those were "dispensing provisions" which were the subject of the High Court's decision in *Plaintiff S10/2011 v Minister for Immigration*[3]. They provided for the Minister to personally exercise a non-compellable power in the national interest to permit consideration of the grant of a visa in circumstances where a visa applicant had exhausted his or her administrative review rights. The Court in *S10* had found that the dispensing provisions were not attended by a requirement for the observance of procedural fairness (per Gummow, Hayne, Crennan and Bell JJ) at page 668 [100].

In *SZSSJ* the Court distinguished *Plaintiff S10/2011* on facts concerning the nature of the Departmental consideration. That aspect of the reasons concerns construction of the *Migration Act* alone and is not further considered.

The aspect of the Courts reasons with potential application beyond the field of migration decision making is that a duty to accord procedural fairness was found to arise independently of those statutory provisions.

The Court found that in three letters to SZSSJ, in the manual which governed the conduct of ITOAs and in a letter to the solicitors for SZSSJ, it was said that the assessment would be conducted fairly.

The Court reasoned:

> "[90] There is a considerable pedigree for the proposition that decision makers may, in some circumstances, generate an obligation of procedural fairness by [their] own conduct."

Having reviewed the case law on that question the Court found:

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[3] (2012) 246 CLR 636

> "[94] This suggests that a departure by an official from a representation about future procedure will be unfair in at least two circumstances:
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> (a) where, but for the statement, the claimant for judicial review would have taken a different course, that is to say, situations of actual reliance by the claimant; or
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> (b) where if the procedure had been adhered to a different result might have been obtained."

If SZSSJ was provided with, among other things, the full list of IP addresses from which the file including his personal information had been accessed, it was possible that he would have had a useful submission to make as to the risks faced by him upon refoulement. Consequently the case was one in which a different result might have been obtained if he had been provided with that information, and the conduct of the Department was sufficient in itself to trigger an obligation of procedural fairness.

The source of the obligation of procedural fairness

The Court particularly relied upon the decision of the Privy Council in *Attorney-General (Hong Kong) v Ng Yuen Shiu* [4] for the proposition that a decision maker may by its own conduct, generate an obligation of procedural fairness.

The Court acknowledged that the reasoning in *Ng Yuen Shiu* was premised on the concept of legitimate expectation and that the High Court had moved away from that doctrine as a useful tool of analysis in *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam*[5]. The Court reasoned that *Lam* stood for the proposition that the focus had now shifted to whether the departure from a representation made by a decision maker might render the process unfair. In so reasoning the Court relied in particular upon the well-known passage of Gleeson CJ at [34]:

> "… What must be demonstrated is unfairness, not merely departure from a representation. Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation … in a context such as the present, where there is already an obligation to extend procedural fairness, the creation of an expectation may bear upon the practical content of that obligation. But it does not supplant the obligation. The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed."

It is to be noted that Gleeson CJ was not dealing with the question of when representations by a decision maker would give rise to an obligation to extend

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[4] [1983] 2 AC 629
[5] (2003) 214 CLR 1

procedural fairness; but rather with the content of that obligation where "there is already an obligation to extend procedural fairness".

The distinction there drawn by Gleeson CJ was consistent with the reasoning of Brennan J in *Attorney-General (NSW) v Quin*[6]:

> "So long as the notion of legitimate expectation is seen merely as indicating 'the factors and kinds of factors which are relevant to any consideration of what are the things which must be done or afforded' to afford procedural fairness to an applicant for the exercise of administrative power, the notion can, with one important proviso, be useful. If, but only if, the power is so created that the according of natural justice conditions its exercise, the notion of legitimate expectation may usefully focus attention on the content of natural justice in a particular case: that is, on what must be done to give procedural fairness to a person whose interests might be affected by an exercise of the power. But if the according of natural justice does not condition the exercise of the power, the notion of legitimate expectation can have no role to play. If it were otherwise, the notion would become a stalking horse for excesses of judicial power."

The distinction drawn by Gleeson CJ and Brennan J is central to maintaining the coherence of the constitutional writs. Those writs are available to correct purported exercises of administrative power beyond jurisdiction. If a decision maker has jurisdiction to make a decision without according procedural fairness, the mere fact that the decision maker makes a representation that he, she or it will act fairly does not operate to limit or restrict the decision maker's jurisdiction. That being so the mere statement by the decision maker cannot be productive of an excess of jurisdiction which would otherwise not have occurred.

The Court in SZSSJ did not identify a source of the obligation to accord procedural fairness other than the Department's own representations. The reasoning that those representations were sufficient to create that obligation is not consistent with that of Gleeson CJ (upon which the Court relied) or Brennan J.

This is not to say the Court was in error.

Rather the reasoning of the majority (Gummow, Hayne, Crennan and Bell JJ) in *S10/2011* at [64] – [65] and [70] focuses upon whether any exercise of power is apt to affect the rights, interests or privileges of an individual.

The majority reasoned at [65]:

> "The phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded. The phrase, as

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[6] (1990) 170 CLR 1 at 39

> Brennan J explained in *South Australia v O'Shea*[7], 'tends to direct attention on the merits of a particular decision rather than on the character of the interests which any exercise of the power is apt to affect'."

Consistent with that distinction where the exercise of a power is apt to affect substantially the interests of an individual there is no diversion of attention onto the merits of the particular decision from a focus on the character of the interest thereby affected. That is so even when the effect on the individual's interests arises only because of the facts of the individual case.

In *S10/2011* the majority reasoned at [97]:

> "'The common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power."

On the facts considered in *S10/2011* the occasion for operation of such a condition did not arise because each plaintiff had had all matters of relevance to their individual circumstances taken into account through the merits review processes which had been exhausted. Thus the majority held at [100]:

> Upon their proper construction, and in their application to the present cases, the dispensing provisions are not conditioned on observance of the principles of procedural fairness. [emphasis added]

By the underlined words the majority contemplated that those same provisions might be conditioned on the observance of procedural fairness if the facts were different.

Unlike S10/2011, in its reasoning in *SZSSJ* at [123] the Court identified the character of the interest of SZSSJ which was apt to be affected by a refusal to exercise the power conferred by the dispensing provisions to permit an application for a protection visa. The improper disclosure by the Department of confidential information of SZSSJ created a risk that he might suffer significant harm upon refoulement. In circumstances where the *Migration Act* operated so that all other review opportunities had been exhausted, any exercise or refusal to exercise the powers conferred by the dispensing provisions would determine whether SZSSJ was exposed to any such risk. That was an interest of SZSSJ that arose from facts particular to him. However it was an interest apt to be affected by the exercise of the statutory power. Consequently the condition implied by the common law had work to do.

Conclusion

It was not necessary for the Court in *SZSSJ* to rely upon the representations of the decision maker as the source of an obligation to accord procedural fairness; and it is

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[7] (1987) 163 CLR 378 at 411

doubtful that the Court's reliance upon those representations as a source of any obligation to accord procedural fairness (as distinct from the content of any such obligation) was soundly based.

Rather, the facts of the case highlight the significant weight to be placed upon the character of the interests of individuals apt to be affected by the exercise of a power conferred by statute as required by the reasoning of the majority in *S10/2011*.

The formulation by the majority in *S10/2011* of the circumstance in which the common law implies a requirement of procedural fairness facilitates a conclusion that a particular statutory provision may be qualified by the obligation to accord procedural fairness in some fact situations, while not being so qualified in others.

The decision in *SZSSJ* stands with the decision in *S10/2011* as an example where facts particular to the individual could properly be taken into account to find that SZSSJ was entitled to procedural fairness in the exercise of a power, even though exercise of that power did not require procedural fairness in the generality of cases.

That leaves much work to be done by the facts of each case – but continues to deny to the doctrine of legitimate expectation any significant role in Australian public law.