

# **JUDICIAL REVIEW OF MIGRATION DECISIONS**

**Immigration Advice & Rights Centre**  
**Continuing Professional Development Seminar**  
**Friday 28 September 2007**

**By**

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*Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly<sup>1</sup>.*

## **1. INTRODUCTION<sup>2</sup>**

Everyday public servants and bureaucrats make administrative decisions which affect the lives of ordinary people. If they didn't the process of government and the provision of government services would grind to a halt. This is not to say that the making of administrative decisions is a bad thing. Clearly it is not.

However, the point is that the exercise of the power to make those decisions is not without limits. This is particularly so in the context of the Migration Act where the powers that can be exercised administratively are substantial. Those powers are not limited to the grant or refusal of visas, but also include the powers to detain people without charge, to seize property, to require the production of documents, to obtain information provided in confidence, to enter and search premises and to remove people from Australia.

The purpose of judicial review is to ensure that powers are exercised within their legal bounds and to make sure that the law applies to the government as well as to the citizens. As Professor Aaronson has succinctly put it: *"One of administrative law's mantras is that there is no such thing as an unfettered power."*<sup>3</sup>

In broad terms I have divided this paper into two parts. The first will give a general overview of the legal principles which apply to judicial review. Although I will emphasise the migration context many of the issues discussed will be applicable to the judicial review of any administrative decision. The second part

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<sup>1</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25 per Brennan J at 70

<sup>2</sup> The author acknowledges the assistance of Nicolas Poynder, barrister in the preparation of this paper

<sup>3</sup> Aaronson, Dyer & Groves, "Judicial Review of Administrative Action", 3rd Edition, Law Book Co 2004

will be a more practical guide on how to make and manage an application for judicial review of a migration decision.

## **2. THE CONSTITUTION & ADMINISTRATIVE DECISION MAKING**

It is not possible to understand judicial review without having at least a basic understanding of how administrative decisions are made. To do that it is necessary to have some understanding of constitutional law and the separation of powers.

### **2.1 The separation of powers**

In the Westminster system there are three arms (or branches) of government, the parliament, the executive and the judiciary. The first three chapters of The Constitution are headed “The Parliament”, “The Executive Government” and “The Judicature”. The first section in each of these chapters deals with the vesting of the relevant “power of the Commonwealth”.

Legislative power can be delegated to the executive (e.g. for the purpose of making subordinated legislation such as regulations) and as a result a strict separation between the legislature and the executive is not necessarily possible<sup>4</sup>. However, there is a strict separation of judicial power. Only judicial officers of the Commonwealth can exercise the judicial power.

It is this separation of powers when enables the courts to engage in judicial review of administrative decisions. Indeed, this is an essential requirement of the rule of law, which requires that government should be in accordance with fixed rules which are intelligible, stable, applied equally and transparently by unbiased and disinterested decision-makers, and supervised by an independent judiciary.<sup>5</sup>

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<sup>3</sup> *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73

<sup>5</sup> Bottomley S, Gunningham N, and Parker S, *Law in Context* (Federation Press, Sydney, 1991) at 43ff.

## 2.2 Administrative decision making in Migration matters

In Australia, the vast majority of migration decisions are made by officers employed by the Department of Immigration and Citizenship (“DIAC”) who have been granted a delegation by the Minister<sup>6</sup>. Those decisions are subject to merits review in the two specialist tribunals set up to review decisions, the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT).<sup>7</sup> Some migration decisions are also reviewable in the Administrative Appeals Tribunal (AAT); for example, important issues of principle referred from the RRT<sup>8</sup>, the cancellation of business visas<sup>9</sup>, and the refusal of visas on character grounds.<sup>10</sup>

It is important to remember that these tribunals are part of the executive arm of government and that merits review serves a fundamentally different purpose to judicial review. The MRT website<sup>11</sup> tells us that the principal objective of merits review is to:

*“ensure that the administrative decision reached in a case is the correct and preferable decision. Correct in the sense that the decision made is consistent with law and policy, and preferable in the sense that, if there is an area of discretion in making a correct decision, the decision made is the most appropriate in the circumstances. A merits review system should also improve the general quality and consistency of decision-making, and enhance openness and accountability across a particular area of administration”.*

The principal objective of judicial review on the other hand is to make sure that the power to make decisions is exercised lawfully. As Kirby J explained:

*“Regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision”*<sup>12</sup>.

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6 Migration Act 1958 (Cth), s 496

7 Migration Act 1958, Parts 5-7

8 Migration Act 1958, Part 7, Division 8

9 Migration Act 1958, s. 136

10 Migration Act 1958, s 500

11 <http://www.mrt.gov.au/about.htm#history>

12 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*, (2003) 198 ALR 59 at [114]

### 3. MIGRATION LITIGATION – AN HISTORICAL PERSPECTIVE

To understand the current system that is in place for the judicial review of migration decisions it is instructive to look briefly at the history of how the law in relation to judicial review has developed. Migration litigation has been a live political issue in Australia for over 20 years and various governments have attempted to minimise litigation through legislative change. In many instances the Courts have responded by finding legislation invalid or interpreting it in a way not anticipated by the drafters.

A useful (and interesting) history of the Migration Act and judicial review has been set out by Justice French in *NAAV v MIMIA*<sup>13</sup>. However, some of the more important cases and legislative changes which have occurred since the early 1990's include:

1994	ADJR ceased to apply to most migration decisions & a new Part 8 was introduced into the Migration Act
1999	Provisions inserted requiring the review tribunals to give notice to applicants of information that might be adverse to their applications for review
2001	Border protection and exise of offshore territories from the migration zone
2001	Part 8A introduced time limits and restricted the courts power to consolidate proceedings and to hear class actions
2001	A new Part 8 (replacing the 1994 version) introduced the privative clause and concurrent jurisdiction given to Federal Magistrate's Court
2002	Codification of procedural fairness (s51A and corresponding sections relating to RRT and MRT)
2003	<i>Plaintiff S157 v Commonwealth</i>
2005	Federal Magistrate's Court acquires jurisdiction over most matters. Provisions providing for certification of reasonable prospects and sanctions for encouraging unmeritorious litigation introduced.
2005	<i>SAAP v MIMIA</i>
2007	<i>Bodruddaza v MIMA; SZBYR v MIC; MIC v SZKKC</i>
2007	Clear particulars of information can now be provided orally during the hearing

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<sup>13</sup> [2002] FCAFC 228 at paragraph 386.

Some of these issues will be discussed in more detail in other parts of this paper.

When the changes made are examined you come to the realization that there is clearly a balance to be had between protection of individual rights from irrational or illegal administrative decisions and the deterrence of litigation with little prospect of success. Such litigation is not only a drain on the resources of the judicial system but can also be an end in itself as it may allow litigants to live in Australia for several years until such time as their cases have finalised.

#### **4. JUDICIAL REVIEW – GENERAL PRINCIPLES**

##### **4.1 Constitutional Writs**

Section 75(v) of the Constitution<sup>14</sup> confers original jurisdiction on the High Court to decide matters in which one of the constitutional writs of mandamus, prohibition, and injunction, are sought against an “officer of the commonwealth”. There is another common law writ, certiorari<sup>15</sup> which is not mentioned in the Constitution and which is the subject of an academic debate between about whether the High Court has power to order it.

Each of the writs sought in an application under s. 75(v) of the Constitution has a different role to play:

- (a) *mandamus* is a command by the Court compelling the respondent to perform a public duty;
- (b) *prohibition* is a command prohibiting the decision-maker from continuing on an illegal course already commenced;
- (c) *injunction* is an equitable remedy similar to prohibition (and could be used for example where someone proposes doing something illegal in purported reliance upon a valid decision); and

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<sup>14</sup> *Migration Act 1958*, s. 476(1)

<sup>15</sup> Certiorari is not in fact referred to in the Constitution; however this has been remedied by the High Court either allowing the writ of prohibition to issue in place of certiorari, or by issuing certiorari in conjunction with another remedy: Crock M, *Immigration and Refugee Law in Australia* (Federation Press, 1998), p. 278

- (d) *Certiorari* is a command quashing or expunging a decision made in excess of power from the record. It has been said that certiorari is used to wipe the slate clean<sup>16</sup>.

The constitutional writs are only available where there has been a decision “infected” by *jurisdictional error*.<sup>17</sup> This is to be contrasted with *non-jurisdictional error*, or error within jurisdiction, which will not lead to the grant of a constitutional writ. For example, if a decision-maker incorrectly decides something which he or she is authorised to do (sometimes referred to as “authority to go wrong”, or “to decide matters within jurisdiction incorrectly”), this will merely be an error *within* jurisdiction and not amenable to the constitutional writs.<sup>18</sup>

In general (but not always) making a wrong finding of fact<sup>19</sup> or making other factual errors in the course of making a decision will rarely amount to a jurisdictional error.<sup>20</sup> Being able to tell the difference between jurisdictional and non-jurisdictional error is often extremely difficult. As Kirby J said in S20:

*“Distinguishing between errors that are jurisdictional and those that are not is a difficult task. Applying that distinction in particular circumstances may yield different answers depending on the perception of the case by different judges. It is not possible to catalogue exhaustively the kinds of error that indicate that a decision-maker has exceeded, or constructively failed to exercise, the jurisdiction conferred, distinguishing clearly those that do not. Moreover, the answer cannot be found through incantations about facts and law. Where the exercise of jurisdiction is conditioned upon a particular factual state, judicial inquiry into the evidence and fact-finding process may be necessary”*.<sup>21</sup>

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<sup>16</sup> *Ruddock v Taylor* [2003] NSWCA 262 at [21]

<sup>17</sup> See *VBA v Minister for Immigration* [2001] FCA 1797 per Weinberg J at [19]

<sup>18</sup> See discussion in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, per Hayne J at [163]

<sup>19</sup> *Waterford v Commonwealth* (1987) 163 CLR 54 at 77

<sup>20</sup> *Minister for Immigration & Multicultural Affairs; ex parte Cohen* (2001) 177 ALR 473, per McHugh J at [36]

<sup>21</sup> at [120])

## 4.2 Jurisdictional error

A jurisdictional error is a particular sub-species of an error of law. All jurisdictional errors will be errors of law but not all errors of law will be jurisdictional errors. The question then becomes how to recognise one. One of the most commonly cited definitions of a jurisdictional error comes from a joint judgment of the High Court in *Craig v South Australia*<sup>22</sup>:

*“If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.”*

The list which is cited in *Craig* is not exhaustive<sup>23</sup>. For a more detailed list of things that might constitute a jurisdictional error you can refer to section 5 of the *Administrative Decisions Judicial Review Act* (“ADJR”). Although the ADJR does not apply to privative clause decisions under the Migration Act (Schedule 1, item (da) and (db)) it has been said by the High Court in *Australian Broadcasting Tribunal v Bond*<sup>24</sup> that for the most part the ADJR was a restatement of the common law grounds.

## 4.3 Futility

Having identified a jurisdictional error there is another important matter that needs to be considered before action is taken for judicial review. That question is whether the error was material. As his Honour Mason CJ said in *Australian Broadcasting Tribunal v Bond*:

*“A decision does not ‘involve’ an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different”*<sup>25</sup>

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<sup>22</sup> (1995) 184 CLR 164 at 179

<sup>23</sup> *Minister for Immigration v Yusuf* [2001] HCA 30 at [82]

<sup>24</sup> (1990) 170 CLR 321

<sup>25</sup> (1990) 170 CLR 321 at 353

The reason for this is that the best result that an applicant can achieve is to have the original decision set aside and the matter remitted to a different decision-maker to be determined “according to law”. The courts do not have the power to grant the applicant a visa, and they cannot substitute their own decision for that of the decision-maker: see *Minister for Immigration v Sharma*<sup>26</sup>. An applicant may well be successful in the court yet receive the same result upon remittal.

It was made clear by the High Court in *SZBYR* that the grant of the constitutional writs is discretionary<sup>27</sup>. One of the reasons that the courts will refuse to grant relief is if it would be futile to remit the matter because the same result would be inevitable<sup>28</sup>.

As an example, in *Jiang v MIC*<sup>29</sup> (in which the applicant was refused a further student visa) the tribunal had applied a “substantial compliance” test and affirmed the delegate’s decision. On review in the Federal Court it was argued that a jurisdictional error had occurred because the tribunal had applied the wrong test. The Federal Court agreed saying that condition 8202(3)(b) required there to be a certificate of at least satisfactory performance. However, as there was no certificate issued by the educational institution, the condition could not be met and accordingly found that it would be futile to remit the decision to the delegate as the same result would follow.

#### **4.4 Some examples of reviewable errors**

It will assist in grasping the concept of what comprises a jurisdictional error to look at some cases to see how the facts give rise to a reviewable error. In giving these examples I have tried to concentrate on recent decisions.

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<sup>26</sup> (1999) 90 FCR 513

<sup>27</sup> *SZBYR v MIC* [2007] HCA 26 at [27]

<sup>28</sup> *S115/00A v Minister for Immigration* (2001) 180 ALR 561, per Finn J at [26]

<sup>29</sup> [2007] FCA 907

**(a) Failure to take matters into account**

In *Gurung v Minister for Immigration*<sup>30</sup> the decision under review was the decision not to grant a spouse visa. An earlier application for a spouse visa (with the same sponsor) was refused in 1997. The Tribunal did not take the previous application into account even though it was clearly relevant to whether there was a spousal relationship and accordingly a jurisdictional error was found.

We now also know from *Lau v MIC*<sup>31</sup> that the tribunal's failure to comply with the directions in an MSI is not necessarily a jurisdictional error.

**(b) Procedural Fairness**

In 2002 the rules of procedural fairness were codified by the Migration Act. In particular s57 (in relation to primary decisions), s359A (for MRT decisions) and s424A (in relation to RRT decisions) all provide that the applicant must be given particulars of any information that the decision maker considers would be the reason, or a part of the reason, for rejecting the visa application (or affirming the decision that is under review)

In *SAAP v Minister for Immigration*<sup>32</sup> an illiterate Iranian woman who was in detention in Woomera attended an RRT hearing by video link. She was represented by an adviser. Some adverse matters (in relation to her daughter's evidence) were put to her orally and she was asked to respond. Review was sought on the grounds that the notification requirements of s 424A in respect of adverse information obtained during the hearing hadn't been complied with. In a majority decision the High Court held that compliance with s424A was mandatory and failure to comply with it (by providing information in writing and inviting comment) was a jurisdictional error.

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<sup>30</sup> [2006] FMCA 1493

<sup>31</sup> [2007] FCA 1088

<sup>32</sup> (2005) 215 ALR 162

Arguments based on 424A and SAAP have probably been the most litigated alleged ground of judicial review in recent years. Some examples of successful cases were:

- *NBKS v MIMA*<sup>33</sup> where the full Federal Court found a breach of s424A on the basis that an internet search done in relation to the applicant's name (which showed a nil result) was not disclosed. The applicant had claimed he feared persecution if he was returned to Iran and the search was done to show that the Iranian authorities would not be able to find information about the application; and
- *Applicant VEAL of 2002 v MIMA*<sup>34</sup> in which the High Court found that the contents (but not an actual copy) of a "dob in" letter should have been disclosed to the applicant.

However, there have been two developments, one legislative and one judicial which may curb the scope of this ground of review.

On 13 June 2007 the High Court handed down its decision in SZBYR. There were a number of limitations placed on the interpretation of s424A, including:

- That the purpose of 424A is to provide a fair hearing and only applied to information available prior to the hearing; and
- Disbelief of the applicant's evidence is not itself "information" within the meaning of the section.

On 29 June 2007 the *Migration Amendment (Review Provisions) Act 2007* commenced, with effect over all applications made after that date.<sup>35</sup> The primary change is that the Tribunal may now give "*clear particulars*" of any relevant "*information*" to an applicant orally during the hearing, as long as the Tribunal:

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<sup>33</sup> [2006] FCAFC 174

<sup>34</sup> [2005] HCA 72

<sup>35</sup> Section 33 of the amending Act

- ensures, as far as is reasonably practicable, that the applicant understands why the information is relevant and the consequences of the information being relied on in affirming the decision under review; and
- orally invites the applicant to comment on or respond to the information; and
- advises the applicant that he or she may seek additional time to comment on or respond to the information; and
- if the applicant seeks additional time to comment on or respond to the information, adjourn the review if the Tribunal considers that the applicant reasonably needs additional time.<sup>36</sup>

In addition, the Tribunal is no longer required to give particulars of “*information*” that the applicant gave “*during the process that led to the decision that is under review*”, other than information that was provided orally by the applicant to the Department.<sup>37</sup>

### **(c) Bias**

Fortunately, cases of bias are quite rare in Australia. However there are cases about “reasonable apprehension of bias”. For example in *SZEOQ v MIMA*<sup>38</sup> the applicant was confronted with a Tribunal member who: “expressed profound disbelief” in the claims; “expressed opinions about merits”; acted in an aggressive manner and who was dismissive of the claims made. Cowdroy J had no trouble finding that this behaviour would give rise to an apprehension in a fair minded lay observer that the case had been prejudged.

### **(d) Fraud on the tribunal**

In rare circumstances, jurisdiction will be “constructively unexercised”. This occurred in *SZFDE v MIC*<sup>39</sup> where a struck off solicitor and deregistered

<sup>36</sup> *Migration Act*, s 359AA (MRT), s 424AA (RRT).

<sup>37</sup> *Migration Act*, s 359A(4)(ba) (MRT), 424A(3)(ba) (RRT).

<sup>38</sup> [2006] FCA 1171

<sup>39</sup> [2007] HCA 35

migration agent fraudulently represented to his clients that he was both practising and registered and advised them that they did not need to attend at the tribunal hearing. The tribunal proceeded on the assumption of regularity to find against the clients. On appeal the High Court found that the fraud of the agent unravels everything.

## **5. MAKING AN APPLICATION FOR JUDICIAL REVIEW**

Before embarking on lodging an application for judicial review with the courts it is important to consider Parts 8, 8A, 8B and 8C of the Migration Act (being ss474-487Q). These parts deal with judicial review and jurisdiction generally (Part 8), various restrictions including time limits (Part 8A), costs sanctions (Part 8B) and issues dealing with applicants in detention (Part 8C). I will deal with some of these issues in more detail in the following sections.

### **5.1 The Federal Magistrate's Court**

As a result of the *Migration Litigation Reform Act 2005*, which commenced on 1 December 2005, virtually all applications for judicial review of migration decisions will be heard by the Federal Magistrates Court.<sup>40</sup> The Federal Magistrate's Court now has the same migration jurisdiction as the High Court under s75 (v) of the Constitution.

The Federal Court has retained the power to review some forms of migration decision; for example decisions by the AAT<sup>41</sup> and decisions by the Minister to

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<sup>40</sup> *Migration Act 1958*, s. 476A.

<sup>41</sup> *Migration Act 1958*, s. 476A(1)(b). The position here is slightly complicated by the fact that the Federal Magistrates Court retains general jurisdiction over all migration decisions under s 483A of the *Migration Act* so on its face it can consider applications for review of migration decisions by the AAT; however s 44 of the *Administrative Appeals Tribunal Act 1975* only gives jurisdiction for appeals from the AAT to the Federal Court. The best view is that the Federal Magistrates Court should probably transfer any application to the Federal Court: see, e.g., *Blanco v Minister for Immigration* [2005] FMCA 136.

refuse a visa on character grounds.<sup>42</sup> It also has the power to hear appeals from the Federal Magistrates Court. These will now be heard by a single judge unless a judge considers it is appropriate to refer the case to a Full Court of three judges.<sup>43</sup> Any further appeal to the High Court can only proceed with special leave of the High Court.

## 5.2 The Privative Clause

The first section you come across in Part 8 is:

### **474 Decisions under Act are final**

(1) *A privative clause decision:*

(a) *is final and conclusive; and*

(b) *must not be challenged, appealed against, reviewed, quashed or called in question in any court; and*

(c) *is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.*

(2) *In this section:*

**privative clause decision** *means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).*

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Despite the wording of s. 474 of the Act, which purports to define almost all migration decisions as “privative clause decisions” and specifies that such decisions are not reviewable by any court for any reason, in reality all decisions of the MRT, RRT and the AAT can be challenged in court. This is primarily as a result of the decision of the High Court in *Plaintiff S157/2002 v Commonwealth of Australia*, which found that migration decisions affected by jurisdictional error are not “privative clause decisions” and are not therefore protected by s. 474.<sup>44</sup>

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<sup>42</sup> *Migration Act 1958*, s. 476A(1)(c). Although once again the Federal Magistrates Court also retains the general power to review such decisions under s 483A of the *Migration Act*: see, e.g., *Chhun v Minister for Immigration* [2006] FMCA 203.

<sup>43</sup> *Federal Court of Australia Act 1977*, s. 25(1AA).

<sup>44</sup> (2003) 211 CLR 476, per Gleeson J at [37], Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [76], Callinan J at [160].

In addition, while primary decisions which are reviewable by one of the tribunals are not reviewable by the court<sup>45</sup>, those primary decisions which are not reviewable by the Tribunals - such as decisions made by an overseas post where there is no relevant Australian connection – are subject to judicial review.

### **5.3 Time limits**

The next issue is that you must make sure that your application is made within time. The time limits are found in s 477:

#### ***477 Time limits on applications to the Federal Magistrates Court***

*(1) An application to the Federal Magistrates Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 28 days of the actual (as opposed to deemed) notification of the decision.*

*(2) The Federal Magistrates Court may, by order, extend that 28 day period by up to 56 days if:*

*(a) an application for that order is made within 84 days of the actual (as opposed to deemed) notification of the decision; and*

*(b) the Federal Magistrates Court is satisfied that it is in the interests of the administration of justice to do so.*

*(3) Except as provided by subsection (2), the Federal Magistrates Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 28 day period.*

*(4) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.*

This means that in the first 28 days of that 84 day period, no leave is required to file the application, but if the application is filed in the ensuing 56 days, then an extension of time is only given with leave of the Court. There is no discretion for the Court to extend the period for filing beyond the 84 day period.

It is important to “tick” the box seeking leave to extend time in any application filed outside the 28 day time limit, as failure to do so will invalidate the application: see *SZICV v Minister for Immigration*<sup>46</sup>.

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<sup>45</sup> *Migration Act 1958*, s. 476.

<sup>46</sup> [2006] FMCA 1063

A recent full court decision in the Federal Court (*MIC v SZKKC*<sup>47</sup>) has made it clear that time is reckoned from the time that actual (not deemed) notice of the decision is given to the applicant. In that case one of the applicants satisfied the court that the first time she was notified of the decision was several years after it had been made and after she was taken into detention. Her application was made within 28 days after she was notified of the decision.

In another interesting twist on the reckoning of time the High Court held in *Bodruddaza*<sup>48</sup> that s486A, which is a similarly worded to s477 (which applies in the Federal Magistrate's Court) and which relates to the time for bringing applications in the High Court was not constitutionally valid.

#### **5.4 Unmeritorious applications**

A new Part 8B has been inserted into the *Migration Act* for the purpose of deterring lawyers and other advisers from commencing and continuing with unmeritorious applications. The relevant section is:

##### ***486E Obligation where there is no reasonable prospect of success***

- (1) *A person must not encourage another person (the litigant) to commence or continue migration litigation in a court if:*
  - (a) *the migration litigation has no reasonable prospect of success;*  
*and*
  - (b) *either:*
    - (i) *the person does not give proper consideration to the prospects of success of the migration litigation; or*
    - (ii) *a purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.*
- (2) *For the purposes of this section, migration litigation need not be:*
  - (a) *hopeless; or*
  - (b) *bound to fail;**for it to have no reasonable prospect of success.*

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<sup>47</sup> [2007] FCAFC 105

<sup>48</sup> [2007] HCA 14

*(3) This section applies despite any obligation that the person may have to act in accordance with the instructions or wishes of the litigant.*

Any person who contravenes the obligation not to encourage unmeritorious cases may have a costs order made personally against them<sup>49</sup>. In addition, lawyers are required to certify that an application has merit before filing any migration proceedings<sup>50</sup>.

In some respects there is nothing new in this change as the courts have long had the inherent power to make costs orders against legal practitioners and others - including migration agents<sup>51</sup> - who assist in unmeritorious litigation. In addition the Federal Magistrate's Court Rules (rule 21.07) specifically gives the Court the power to order costs against a lawyer.

One practical problem is that in most migration cases it is not possible to assess the merits of the case in the 28 day time limit for lodging the application, which is often reduced to a few days if the client is dilatory in seeking advice. It is not until the Green Book is delivered, usually several months into the application, that the merits can properly be assessed. I will return to this issue subsequently, but it seems to me that the key obligation may be the one for lawyers not to continue with unmeritorious litigation.

It also remains to be seen whether these changes will have the unintended effect of sidelining lawyers in this process with the result that even more self represented litigants will prepare and lodge their applications and appear before the courts. Another potential unintended consequence is that the Courts will be reluctant to order costs against lawyers and advisers without first giving the lawyer or adviser an opportunity to be heard in opposition to the proposed order. This of course takes up more court time and actually has the potential to lead to even more litigation. It was exactly this issue that led the UK Court of Appeal in

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49 Migration Act, s. 486F.

50 Migration Act, s. 486I.

51 See, e.g., *Minister for Immigration v Shen* (2002) 70 ALD 636; [2002] FCA 899.

*Ridehalgh v Horsfield*<sup>52</sup> (in which the costs application took longer than the original hearing) to quote from Charles Dickens's Bleak House:

*"The one great principle of English law is, to make business for itself... Viewed by this light it becomes a coherent scheme, and not the monstrous maze laity are apt to think it."*

So when will an adviser have breached this duty not to encourage or continue with unmeritorious litigation? The meaning of the phrase "advise, encourage or incite" was considered by the Federal Court in *Employment Advocate v Williamson*<sup>53</sup>. The Court found that "advise" was more lenient than "encourage and incite" and that it was possible to advise without inciting, but not possible to incite without advising. What this really means is that the Court will have to consider the extent of the adviser's involvement.

In *SZFDZ v Minister for Immigration and Multicultural Affairs*<sup>54</sup>, Moore J found that the adviser (who was formerly a registered migration agent) had encouraged the applicant to commence proceedings that were bound to fail. The adviser had prepared the application and drafted the notice of appeal and had also appeared in court and made oral submissions. The adviser was ordered to personally pay the costs.

A recent example of costs being awarded against a lawyer in a migration case was *Tran v Minister for Immigration (No. 2)*<sup>55</sup>. In that case Weinberg J stated that he was: "...in no doubt that the applicant's solicitor had no idea what he was talking about..." before using his power under s 43 of the *Federal Court of Australia Act 1976* to order the solicitor to personally pay costs.

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<sup>52</sup> [1994] Ch 205

<sup>53</sup> [2001] 111 FCR 20 at [72]

<sup>54</sup> [2006] FCA 1366

<sup>55</sup> For an example of a personal costs order against a solicitor who had pursued an unmeritorious application see *Tran v Minister for Immigration (No. 2)* [2006] FCA 199 (Weinberg J) at [23].

## **5.5 Proceedings in the Federal Magistrate’s Court– Commencement and Conduct**

At around the same time that the Federal Magistrate’s Court was invested with (almost exclusive) jurisdiction in migration matters, a new Part 44 was inserted into its rules to set out the procedure for dealing with these matters. However, before discussing the current procedure, it is useful to note that the Federal Magistrate’s Court has published on its website two useful plain English guides to practice and procedure:

- (a) The Migration Appeals Brochure<sup>56</sup> (which is also available in community languages); and
- (b) Notice to Litigants<sup>57</sup> (effectively a practice note on procedure).

## **5.6 Application for an order to show cause (Rule 44.05)**

The application for a remedy to be granted in exercise of the Court’s jurisdiction under s476 must be in accordance with the prescribed form. The form of application is an application to “show cause” why a remedy should not be granted under the *Migration Act*.

The Federal Magistrates Court has usefully included a version of the relevant application to show cause in Part 1 of Schedule 2 to the *Federal Magistrates Court Rules 2001*, which is available on the Federal Magistrates Court website<sup>58</sup>. Properly pleaded, the form should call on the Minister to show cause why the Constitutional writs should not be issued, setting out the orders sought and the grounds of the application. Note also that the relevant decision-maker must also be named as a party<sup>59</sup>.

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<sup>56</sup> [http://www.Federal Magistrate’s Court.gov.au/pubs/html/migration\\_appeals.html](http://www.Federal Magistrate’s Court.gov.au/pubs/html/migration_appeals.html)

<sup>57</sup> [http://www.Federal Magistrate’s Court.gov.au/services/html/migration\\_nsw.html](http://www.Federal Magistrate’s Court.gov.au/services/html/migration_nsw.html)

<sup>58</sup> <http://www.Federal Magistrate’s Court.gov.au/rules/html/schedule2.html>

<sup>59</sup> *SAAP v MIMIA* [2005] HCA 24 at [43], [91], [153] & [180].

The filing fee on an application to the Federal Magistrates Court is \$350 and there is a daily hearing fee of \$419<sup>60</sup>. An application may be made to the Registry for waiver of the fees if payment would cause financial hardship.

The application should be supported by an affidavit which includes:

- (a) a copy of the relevant decision and any statement of reasons for the decision;
- (b) any document or other evidence that the applicant seeks to rely on; and
- (c) If an extension of time is sought, an explanation of the reasons for the delay and reasons why an extension should be granted.

Other provisions usefully facilitate the more efficient handling of migration cases. For example, applicants must now disclose previous applications for judicial review of the same migration decision<sup>61</sup>, and the High Court may now remit cases on the papers without an oral hearing<sup>62</sup>.

### **5.7 Response to the application (Rule 44.06)**

Each respondent who intends to oppose the application must file and serve a response setting out the grounds of opposition which may include matters such as:

- (a) Lack of jurisdiction;
- (b) Delay;
- (c) There have been other judicial review proceedings in relation to the decision; and

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60 *Federal Magistrates Regulations*, Schedule 1.

61 *Migration Act*, amended s. 486D.

62 *Judiciary Act 1903*, s. 44(4).

- (d) Non-compliance with s486D(1)

## **5.8 First court date (Rule 44.11)**

The court has wide powers to give orders and/or directions at the first court date.

These include matters such as:

- (a) Proceeding to an immediate show cause hearing under rule 44.12;
- (b) Listing the matter for future hearing; and
- (c) Dealing with procedural matters such as extensions of time, amendments, and the further filing of evidence

## **5.9 Show cause hearing (Rule 44.12)**

If the application does not appear to disclose any basis for review, the matter may then be listed for a “show cause” hearing at which it may be summarily dismissed under new powers of the Court to dispose of proceedings where there are “no reasonable prospects of success”<sup>63</sup>. However, if the application does show a basis for review, directions are usually given for the matter to be listed at some later date for a full hearing.

## **5.10 Summary Dismissal**

In addition to the Court’s powers under 44.12 there is also the general power in section 17A of the *Federal Magistrate’s Act* to be reckoned with. The new s17A applies to all matters commenced after 1 December 2005. It provides:

### ***17A Summary judgment***

*(1) The Federal Magistrates Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:*

*(a) the first party is prosecuting the proceeding or that part of the proceeding; and*

*(b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.*

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*Judiciary Act, s. 25A (High Court); Federal Court Act, s. 31A (Federal Court); Federal Magistrates Court Act, s. 17A (Federal Magistrates Court)*

*(2) The Federal Magistrates Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:*

*(a) the first party is defending the proceeding or that part of the proceeding; and*

*(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.*

*(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:*

*(a) hopeless; or*

*(b) bound to fail;*

*for it to have no reasonable prospect of success.*

This section does not limit any powers that the Federal Magistrates Court has apart from this section.

The common law test in relation to summary dismissal was the proceeding had to be so clearly untenable that they cannot possibly succeed<sup>64</sup>. There have been a number of cases in the Federal Court in relation to the interpretation of s31A Federal Court Act (which is the same as s17A). Justice Heerey in *Duncan v Lipscombe Child Care Services* said that “plainly s 31A was introduced to establish a lower standard for strikeouts (either of claims or defences) than that previously laid down”<sup>65</sup>.

So how will the Federal Magistrate’s Court wield its new powers? It is instructive to contrast the decisions of McInnis FM in the following two cases:

(a) *MZXFA v Minister for Immigration and Anor*<sup>66</sup>.

In this case the Court used its powers of summary dismissal, but in circumstances where the litigants involved had a long history of unsuccessful applications. The following extract from the judgment explains the reasoning:

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<sup>64</sup> *Dey v Victorian Railways Commissioners* (1949) 78 CLR 91 and *General Steel Industries v Commissioner for Railways* (1964) 112 CLR 125

<sup>65</sup> [2006] FCA 458 at [6],

<sup>66</sup> [2006] FMCA 245

*As indicated the history of the proceedings, the lack of any further particularity of the claim now sought to be pursued clearly enables this Court to conclude that the doctrine of res judicata applies and/or this application is frivolous or vexatious and/or it is an abuse of process. This is indeed what I would regard as a very clear case to justify summary dismissal. It is preferable to make an order for summary dismissal in matters of this kind as at least it is arguable that is a final order.*

*An order made under the new r.44.12 is an interlocutory order. As an 'interlocutory' order it then provides an option under r.16.05 (2) (c) of the Rules for the Court to set aside that order given it is described as an 'interlocutory' order. That opportunity, in my view, in a matter of this kind is not appropriate. It would be undesirable for litigation, given the history of this matter, to be pursued any further in this Court.*

*I am also further satisfied that it is appropriate, in granting leave to the First Respondent to make an oral application this day pursuant to r.13.10 and r.13.11 and to otherwise dispense with compliance with the rules to the extent that they would otherwise prevent the application being heard and determined today. It is in the interests of justice to do so. There must come a time when some finality is reached in relation to applications of this kind which, as I have indicated, I find is clearly a case of an abuse of process.*

*On the history before me that I am satisfied in this instance that the Applicants as a result of the proceedings referred to earlier in this judgment have habitually, persistently and without reasonable grounds instituted other vexatious proceedings in the Court or any other Australian Court. In this case, the other vexatious proceeding in my view is the earlier proceeding which was commenced in the Federal Magistrates Court. That in my view is sufficient to provide me with the basis upon which I can be satisfied pursuant to r.13.11(1) of the Rules.*

(b) *Tran v Minister for Immigration*<sup>67</sup>.

In this case the same Federal Magistrate displayed a restrained and in my view, common sense approach to the application that was made by the Minister for summary dismissal of the application. He said:

*"Summary dismissal proceedings and/or proceedings under the new rules, referred to as "show cause" proceedings, should not be regarded as a mere formality simply because an assessment has been made of arguments advanced for and on behalf of an Applicant which a party, that is, a respondent, does not regard as meritorious. An arguable case does not mean a case likely to succeed.*

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<sup>67</sup>

[2006] FMCA 961

*I accept in this instance that "arguable" means what it says, that there are arguments that can be advanced for and on behalf of an Applicant.*

*In applications of this kind, it is often the case that the court does not have the benefit of what is described as a court book enclosing relevant documents including correspondence relied upon by the Tribunal. The absence of that material makes the task of judicial review difficult, as the court is unable to identify, as it is entitled to identify, errors which may arise of a procedural nature in relation to correspondence and invitations to attend Tribunal hearings, or to comment on certain material."*

He continued:

*"In my view, applications for summary dismissal or applications relying upon Rule 44.12 of the should not be regarded as mere process, and should not be in automatic response to applications which have been filed, albeit without the particulars or contentions one might expect from a party who is non-English speaking and self-represented. The court should exercise significant care and caution in relation to applications of this kind, and in my view should not too readily dismiss an application where, as I have indicated in this case, I am satisfied there are at least grounds set out in some detail which are arguable."*

#### **5.11 Costs (Rule 44.15)**

There is now a scale of costs in relation to migration matters which is set out in Part 2 of Schedule 1 to the *Federal Magistrates Court Rules* and which I have summarised in the following table:

##### **(a) Proceedings that are concluded (rule 44.15(1))**

<b>Time when concluded:</b>	<b>Costs payable</b>
At or before first court date	\$1000
After first court date but before 44.12 hearing	\$2500
At final hearing	\$5000

##### **(b) Proceedings that are discontinued (rule 44.15(2))**

<b>Time when discontinued:</b>	<b>Costs payable</b>
14 days or more before first court date	\$500
Between 14 days before first court date but more than 15 days before the 44.12 hearing date	\$1250
Between 14 days before the 44.12 hearing date but more than 15 days before the final hearing date	\$2500
Any other time	\$3500

## 5.12 Pre-hearing procedures

Assuming that an application to the Federal Magistrates Court survives the “show cause” stage and proceeds to a directions hearing, a timetable is set for the procedural steps to be taken prior to the actual hearing. The most important procedural steps will be:

- (a) The filing and service of a bundle of relevant documents by the Minister (otherwise known as the “Green Book”). This is referred to in the Notice to Litigants and Practitioners (NSW 2005/01) to which I have already referred.<sup>68</sup> The bundle of documents contains copies of all documents in the possession of the Minister which are relevant to the application. This very useful practice obviates the need for formal discovery in most cases;
- (b) The filing and service of an amended application by the applicant. This will be necessary where the initial application is in any way inadequate or requires amendment as the issues in the application become clearer with the delivery of the Green Book or other documents;
- (c) The filing and service of any further affidavit evidence by the applicant. The restricted nature of judicial review means that in most cases this will be restricted to a transcript of any relevant Tribunal hearing, which is the responsibility of the applicant to obtain. Sometimes the applicant will also seek to tender documents not included in the Green Book, which are either in the applicant’s possession or have been obtained under the *Freedom of Information Act 1982*. These can usually be annexed to a short affidavit of the applicant or the applicant’s adviser identifying the relevant documents. In cases where there are significant factual issues – for example where there is a dispute over the date of

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Refer footnote 51

lodgment of an application or notification of a decision - an affidavit setting out the applicant's factual claims may need to be filed and served;

- (d) The hearing date and venue for the application. Hearing dates are allocated according to the availability of the relevant magistrate, although cases involving applicants in detention are given priority. Federal Magistrates Court cases are heard in either the Law Courts Building in Queens Square or in John Maddison Tower, 88 Goulburn Street; and
- (e) A timetable for the delivery of outlines of submissions and lists of authorities is also set at the first directions hearing.

### **5.13 Hearings**

Hearings rarely take more than half a day. The applicant presents his or her case first, with the tender of any evidence and cross-examination (unusual unless there are major factual issues), and submissions as to the law. The respondent's case then follows, and the applicant is given an opportunity to reply.

Decisions on applications for judicial review are usually reserved by the courts, although some of the Federal Magistrates are increasingly giving *ex tempore* (immediate) decisions, particularly in straightforward matters. Once again it is important to realize that the Court cannot grant a visa and the best result is to have the matter referred back to the relevant Tribunal to be decided according to law.

The usual order for costs in any application for judicial review is that the unsuccessful party must pay the legal costs of the successful party in accordance with the scale I have already discussed. In the event that an unsuccessful applicant intends to apply for a further visa it is important to realise that any unpaid costs order will be a "debt to the Commonwealth", which the applicant

will need to pay in order to meet the requirements of Public Interest Criterion 4004.

## **6. Professional obligations**

On a first reading of the new Part 8B it might be thought that a higher standard is required for legal advice given in relation to migration applications than to other matters. I'm not necessarily convinced that this is the case. A lawyer will have duties to both their client and to the Court (and to the extent that there is a conflict the duty to the Court will take precedence).

If a client has received an adverse decision which appears to be judicially reviewable, advice would properly be given about the right of review, including the various grounds that may be available and the process involved. The client should also be advised about the costs involved. Once they are fully informed it is the client's choice whether to start proceedings. Any lawyer who encourages a client to commence unmeritorious litigation (or litigation which the lawyer believes is groundless) is already in breach of his or her professional duties and even absent the new Part 8B would possibly be personally liable for costs or even the possibility disciplinary proceedings.

There is a problem of circular logic in relation to the timing of the giving advice to the client and the delivery of the Green Book. The decision to instigate proceedings must be made before the Green Book is delivered, but it is not possible to properly advise the client on prospects until all the material in the Green Book is considered. When one looks at *Tran*, it appears that the Court is aware of this problem and most cases that at least appear to be "arguable" will survive the show cause hearing. In my view the key obligation of lawyers will then centre on the construction of the word "continue". If after having started proceedings and after reviewing the contents of the Green Book, the lawyer forms the view that the case is without merit, then the obligation is not to continue with the proceedings. Of course if proceedings are discontinued scale costs will

payable (but the client would have been advised of this possibility). Failure to discontinue in those cases may trigger the personal costs sanctions.

## **Conclusion**

If the reader of this paper only remembers one thing from it, it should be that the fundamental maxim of administrative law that all powers have limits. In a constitutional democracy like Australia, it is the presence of a strong and independent judicial system which ensures that the law is applied equally to citizens and the government. The major mechanism by which this occurs is our system of judicial review. Considering the breadth of powers under the Migration Act, judicial review is an important safeguard on individual rights. So while deterring unmeritorious litigation is an admirable policy objective various legislative attempts over the years to limit the scope of judicial review have largely been unsuccessful. That fact in itself speaks volumes as to the independence of the judiciary. It remains to be seen whether recent changes will have any lasting deterrent effect.