

**Australian Lawyers Alliance
NSW State Conference**

***“Judicial Review of Administrative Decisions”*
Paper by The Honourable Justice Stephen Rothman AM
Supreme Court of New South Wales**

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Introduction

I recently had occasion to Chair a book launch by Mark Robinson SC on Judicial Review and heard the suggestion that in dealing with judicial review of administrative action, and in particular from Tribunals, one should start with the proposition that the administrative decision contains an error of law in one or more of the usual grounds and work backwards, throwing all of them up to the Supreme Court in the process. Such an approach is not one that I encourage. Not only is it not encouraged from the perspective of a judge who must sift through unarguable points to get to something of worth, but it is also a poor tactic when there is a good point to be argued to have it surrounded by points that display a lack of real understanding of administrative law.

Findings of Fact

The starting point in discussing judicial review of administrative decisions is to accept and understand the distinction between judicial review, on the one hand, and merits review, on the other.

One of the distinctions, if not the most essential one, is the finality of the fact finding exercise. This was given expression by the High Court¹ in *D’Orta-Ekenaike v Victoria Legal Aid*,² in dealing with immunity, in which their Honours said:

“...the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called ‘fresh evidence rule’) are all rules based on the need for finality.”³ [Footnotes omitted]

While some of the comments about finality refer specifically to jury trials, it is fair to say that no court, whether the Supreme Court at divisional level, or the Court of Appeal, or, indeed the High Court, treat the fact-finding process “as a preliminary skirmish in a battle destined to reach finality before a group of appellate judges”.

The statutory history of the rehearing provisions in appeals to the Court of Appeal in New South Wales has resulted in a different initial approach by the Court of Appeal to first instance decisions (either of the Court, another court or some tribunal) than is the approach from some others, say, the

¹ Gleeson CJ, Gummow, Hayne and Heydon JJ.

² [2005] HCA 12; (2005) 223 CLR 1.

³ *Ibid*, at p 35.

Full Court of the Federal Court. Those differences are often nuanced and not obvious from any expressed view; but, generally, the Court of Appeal, and, to some extent, the whole of the Supreme Court is less deferential to first instance fact finders.

In making that comment I should add that the attitude of the High Court, like the Federal Court, is more deferential to findings of fact. Part of that historical difference lies in the nature of s 75(v) of the Constitution and the absence of certiorari. Of course, in truth, the Federal Court of Australia, in this area, exercises the jurisdiction of the High Court and it is the Federal Court that has adopted the High Court approach, not the other way around.

The High Court's attitude has been forged by the nature of their view that their supervisory jurisdiction excluded certiorari and excluded (other than on appeal) error of law that is not an error of jurisdiction.

This is not the time or place to agitate whether, in so confining itself, the High Court's view is correct. Certainly, that is the present view and that view defers to the original fact-finder to a greater degree than the Supreme Court does.

As you all know, mandamus and prohibition issue only for jurisdictional error. Certiorari issues for both jurisdictional error and error of law on the face of the record.

For reasons associated with the terms of s 69 of the *Supreme Court Act 1970*, the record in this State includes the reasons for judgment of the court or tribunal, the judgment of which is sought to be impugned. As a consequence, in this State (and most others), but not in the Commonwealth jurisdiction, far more attention is paid to the reasons for judgment.

Of course, there may be an error of law in the process of finding facts, in which case one can invoke the exercise of the court's supervisory jurisdiction, vitiate the fact finding exercise and persuade the court to find the facts, as the law requires them to be found.

Merit v Error of Law

Classically in determining whether judicial review runs against a decision, the courts apply what has been referred to as the "Atkin Dictum", being a reference to the passage of Atkin LJ (as he then was) in *R v Electricity Commissioners*⁴ in which his Lordship said:

"Where ever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in exercise of their legal authority they are subject to the controlling jurisdiction ... exercised in these writs."

As a consequence of this doctrine, combined with the terms of s 69 of the *Supreme Court Act 1970*, orders in the nature of writs such as certiorari will issue for an error of law on the face of the record,

⁴ [1924] 1 KB 171 at 205.

including the reasons for judgment,⁵ but the error must be in the ultimate determination of the court or tribunal and only if that determination has been made on the basis of the error alleged.⁶

As earlier stated, there is a fundamental distinction between correcting administrative injustice or error by a review of the merits of that administrative conduct, on the one hand, and, on the other hand, determining the extent of power and legality of the exercise of the administrative function: *Attorney-General (NSW) v Quin* ('*Quin*').⁷ The High Court, in *Quin*, said:

"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. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.

There is one limitation, 'Wednesbury unreasonableness' (the nomenclature comes from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223), which may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, Wednesbury unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: *Nottinghamshire County Council v Secretary of State for Environment* [1985] UKHL 8; [1986] AC 240 at 249. Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined." (per Brennan J at 35-36)

When a decision-maker has failed to take into account a criterion required by law to be considered, or has taken into account a criterion that was impermissible, or utilised the wrong test or asked itself the wrong question, or misapprehended the nature or limits of its power as a consequence of which it performed an act or made a decision which authority does not sanction, there will be jurisdictional error or error of law.⁸ Jurisdictional error will also occur where there has been a denial of procedural fairness.

⁵ See s 69(4) of the *Supreme Court Act 1970*.

⁶ See s 69(3) of the *Supreme Court Act 1970*.

⁷ [1990] HCA 21; (1990) 170 CLR 1.

⁸ *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24.

One of the more interesting aspects of the approach to judicial review, as adumbrated by the High Court in *Minister for Immigration and Citizenship v Li*,⁹ is the debate between current members of the High Court to the approach or attitude to the comments of Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,¹⁰ in particular, on the reliance on a ground that the decision is 'manifestly unreasonable'. There is no doubt a difference between one or more Judges of the High Court on this issue, but those differences may be matters of form rather than substance.

Current educational theory reflects Aristotelian distinctions relating to expertise. Aristotle classified, in broad, expertise into four categories: unconscious ignorance; conscious ignorance; conscious expertise and unconscious expertise. Expertise, in the true sense, which Aristotle said was the sum total of a person's experience, formal and informal, was when the person exercised unconscious expertise. In other words, the person was such an expert that when dealing with a problem the person unconsciously applied the expertise as if it were common sense. Most judicial officers, having spent their lives in more interesting pursuits than the arcane areas of administrative law, apply the doctrines of judicial review consciously; rather than as a matter of "common sense".

In other words, what to some may be categorised only as "manifest unreasonableness" to others will be pigeonholed in one of the more commonly applied grounds for judicial review. Those commonly applied grounds, if utilised, give a greater sense of transparency, whether or not accurate. In other areas it reflects the difference between intuitive synthesis in sentencing and multi-staged sentencing processes.¹¹

In *Re Refugee Review Tribunal; Ex parte Aala*¹² the High Court referred to the requirement of reasonableness as representing the development of legal thought which began before Federation and accommodated s 75(v) of the Constitution in that development.

"[66] This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.

...

[72] The more specific errors in decision-making, to which the courts often refer, may also be seen as encompassed by unreasonableness. This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that 'all these things run into one another'. Further, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Mason J

⁹ [2013] HCA 18; (2013) 249 CLR 332.

¹⁰ [1986] HCA 40; (1986) 162 CLR 24.

¹¹ See, for example, the difference in the reasons of McHugh J and Kirby J in their judgments in *Markarian v R* [2005] HCA 25; (2005) 228 CLR 357.

¹² [2000] HCA 57; (2000) 204 CLR 82.

considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is ‘manifestly unreasonable’. Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

...

[76] As to the inferences that may be drawn by an appellate court, it was said in *House v The King* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion ‘if upon the facts [the result] is unreasonable or plainly unjust’. The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.” [Footnotes omitted] (*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332)

Others take a narrower view. Justice Gaegler is one of those others. The resolution of the differences in this approach is awaited and may broaden the scope for judicial review. However, as earlier stated, this esoteric difference may be more a matter of description than offering a different result. Whatever be the approach that the High Court ultimately adopts as normative in judicial review, there is and always will be an area within which a decision maker has a genuinely free discretion. To fail to draw the distinction between a proper subject for judicial review and an exercise in merit review is “apt to encourage a slide into impermissible merit review”.¹³

Notwithstanding the foregoing, it is essential that the tribunal or the decision maker at first instance give a “proper, genuine and realistic consideration”¹⁴ to the merits of the case. The failure to consider the merits of the case is itself an error of law. But the failure must be to merits that are substantial, clearly articulated, relying on established facts, the failure of which would be to fail to accord procedural fairness.¹⁵

Ultimately the constitutionally guaranteed supervisory jurisdiction of the Supreme Court is invoked when the decision maker below misapprehends the nature or limits of power being exercised; does not deal with the correct question to be decided; does not take into account all relevant material (being material that is required, in the mandatory sense, to be considered); takes into account

¹³ *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45], per Basten JA.

¹⁴ *Broussard v Minister for Immigration and Ethnic Affairs* [1989] FCA 857; (1989) 21 FCR 472 at 483, per Gummow J.

¹⁵ *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 at [24] (Gummow and Callinan JJ, Hayne J agreeing) and at [86]-[88], per Kirby J; *Spanos v Lazaris* [2008] NSWCA 74 at [19], per Basten JA, Beazley and Bell JJA agreeing.

irrelevant material; misunderstands the function to be performed or was made in bad faith. Each of the foregoing deserves its own treatment, well beyond the reach of this address. Each of the foregoing amounts to jurisdictional error.

As earlier stated, the supervisory jurisdiction may also be invoked where there has been an error of law which error is determinative of, or operative on, the result.

Error of Law

What then is an error of law? There are a number of classic definitions to which every party should refer.¹⁶

Notwithstanding the settled meaning for the distinction between error of law and error of fact, the application of those principles has often led to difficulty and confusion.¹⁷ Further, as is made clear by the High Court in *Kostas v HIA Insurance Services Pty Limited*,¹⁸ an attempt at a taxonomy of errors of law is inappropriate and will necessarily lead to error if used as a starting point.

If a taxonomy were to be used as a starting point, it should be one that incorporates the broadness of the concepts and starts from first principles adumbrated, as earlier stated, by Sir Frederick Jordan and the High Court, adopting the Federal Court.

Jurisdictional Fact

The grounds of review for jurisdictional error or error of law can be found summarised in many textbooks. Again, unless I were to recite a meaningless list of some such grounds, without explanation, it would require a series of addresses, well beyond this paper.

Nevertheless, it is important to deal with a couple of issues, the first of which is the issue of jurisdictional fact. As all of you would be aware, the term “fact” in the expression “jurisdictional fact” is a misnomer.¹⁹

A jurisdictional fact is a criterion (whether of fact, opinion or law) that must be satisfied in order to enliven the exercise of the statutory power reposed in the decision maker. The question whether a circumstance or fact or such a criterion is ‘jurisdictional’ depends upon the construction of the statute conferring power. That then depends upon a determination as to whether the legislature intended that the absence or presence of the objective criterion will or will not invalidate action under the statute.²⁰

¹⁶ *Collector of Customs v Agfa-Gevaert Limited* [1996] HCA 36; (1996) 186 CLR 389; *Australian Gaslight Co v Valuer-General* (1940) 40 SR (NSW) 126.

¹⁷ *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32.

¹⁸ [2010] HCA 32.

¹⁹ *Singh v Motor Accidents Authority of NSW* [2010] NSWSC 550; *Gideon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; (2008) 236 CLR 130 at 139.

²⁰ *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355; *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at [37] et seq; *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442.

While it cannot be denied that the legislature can make the jurisdiction of the court or tribunal contingent upon the existence of an objective fact (including in this context law or opinion) as distinguished from the opinion or determination of the court or tribunal that the criteria exist, it is a most inconvenient result. It is so inconvenient as to be resisted, unless there is an express statement to that effect or words of necessary intendment that allow for no other reasonable construction.²¹

Further, the existence of criteria as a matter of “objective fact”, rather than being dependent upon the decision maker’s opinion that the circumstance exists, will depend largely on the objectivity of the criterion to be satisfied. Highly evaluative criteria are less likely to be considered jurisdictional preconditions to the exercise of a power than easily ascertainable objective facts.

Moreover, reading a criterion as jurisdictional involves the proposition that there can never be a final determination by the decision maker until a court has authoritatively determined the jurisdictional fact. The inconvenience of such an approach and its effect on the finality of decisions are manifest.

Procedural Fairness

Justice McHugh in *Public Service Association of South Australia v Federated Clerks’ Union of Australia (SA)*²² discussed the distinction between excess and want of jurisdiction. Want of jurisdiction is an incapacity to decide the matter or make orders of the kind issued by the decision maker. An excess of jurisdiction is an act within the general power or authority of the decision maker, but which was done in breach of the conditions which authorised the doing of acts of that class or nature.

On the foregoing basis a breach of the rules of procedural fairness (or natural justice) is jurisdictional error. Whether it is properly categorised as jurisdictional error or error of law matters little. Even in those areas where only jurisdictional error will vitiate a decision, a breach of the rules of procedural fairness, if applicable, will be sufficient to overturn the decision.

The content of the rules of procedural fairness will depend on the circumstances of any particular case, but there are some fundamental aspects that apply to a decision maker that is required to act judicially, which would include the Motor Accidents Authority and the Workers’ Compensation Commission.

A party to a proceeding must be given a reasonable opportunity to prepare and to present that party’s case. This is at the heart of natural justice. Such a right includes the right to a reasonable opportunity to prepare the case. A refusal to provide such reasonable opportunity will be a denial of procedural fairness and bring in to play the supervisory jurisdiction of the courts. Such an opportunity will involve providing any party with the ability to adduce relevant material and the time to obtain relevant material. In some circumstances the refusal of an adjournment, in order to obtain that material, or present it, may amount to a denial of procedural fairness and will render the decision unlawful.

²¹ *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1938) 59 CLR 369.

²² [1991] HCA 33; (1991) 173 CLR 132.

However, it should always be borne in mind that it is not a decision maker's task to ensure that a party, given an opportunity to prepare and to present a case, takes best advantage of that opportunity. Such a task would be impossible.²³

Conclusion

Natural justice or procedural fairness may not only include a proper opportunity to prepare and to present a case, it will also include a proper opportunity for the case to be considered. This may involve the absence of bias and the consideration of every substantive point based upon cogent reasons and proper material (see, *infra*). At the heart of administrative law is the notion the government and its officer are bound by the law and any decision must be legal and regular, not arbitrary, vague and fanciful.²⁴ Unreasonable in the decision making process may be a conclusion that may be inferred from the lack of an evident and intelligible justification.

Just as the outcome of an exercise of discretion will often depend upon the identity of the judicial officer or tribunal that exercises it, so too the description of unreasonableness may depend upon the judicial officer and the extent to which such judicial officer is an expert in administrative review. Whatever be the identity, unreasonableness will not depend on a matter of taste or opinion or policy.

²³ *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343; *Re Association of Architects Ex Parte Municipal Officers Association of Australia* [1989] HCA 13; (1989) 63 ALJR 298 at 305, per Gaudron J.

²⁴ *Li*, *supra*, at [65].