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LAWS2201 Administrative Law 1st Semester 2011

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PROBLEM

(i) Jurisdiction - BL

S this is a Cth Act, the ADJR (under s 8) can be heard in the FC. The HCA ≠ apply as it normally sends down applications to the FC per JA s 44(2A)

The decision must = decision of admin character made under enactment ADJR s 3 (1)

‘Decision’: Here, the decision to adopt “best practice” = a “determination” (s 3(2)(a)). Also, it seems a final one (Bond)

Special case involving private body

The main analysis with BL’s decision falls under whether or not it is a private body which ≠ JRable by the ADJR. A highly analogous case = (NEAT). There, the Act gave WEA permission to export wheat only with the written permission of the AWB (private). The HC found that WEA’s decision = mere “conditions precedent” therefore ≠ a decision to which the Act applied therefore not “under” the Act. Also, the nature of the body (private, commercial) led to incompatibility with admin law obligs therefore ≠ JRable. Here, s 60(a) requires a draft by the Panel before giving authority. The Panel, unlike in (NEAT), ≠ require any written approval from anyone but merely adopted them as a subcontractor. If in (NEAT) a written permission note = not linked to the gov sufficiently, then here, a fortiori, there is even less reason to link BL to the Panel and therefore it seems that BL = a private, unreviewable body. Also, BL’s obj. to “provide financial research/advice to business”, i.e. likely = a commercial purpose and shows that BL = a commercial body whose obj. ≠ compatible with admin law, analogous to NEAT, therefore overall, BL’s decision ≠ reviewable

Decision - minister

The decision of the Min (M) = satisfies s (3)(1) as the decision is made under the Act (s 58) and is clearly admin = officer of the Cth

Standing

Here, under ADJR s 3(4)(a)(i), UC = aggrieved person whose private law rights /interest (ACF) are clearly affected by the M’s decision.

Grounds of review – FH error

Under ADJR s 5(1)(a), where the DM ≠ taken a relevant consideration into account, there is error. Here, UC’s rights are being affected in an “immediate” way > those of the public (Kioa) as UC = a uni whose right to grant “higher edu awards” = imposed and obviously to > extent than the public, therefore there is a duty to afford UC FH. Here, there was no opp. Given to UC to comment/present their views (Kioa). Also, more important/grave the decision is, the more the

DM must give FH (Miah). Here, the giving of “awards” = the whole work of uni, therefore without this ability, the UC = crippled therefore very important.

Considerations error

Under s 5(2)(b), where the DM has not taken a particular consideration into account, there is error. Here, the statute explicitly mentions (Peko) that the M must have regard to 60(b) submission by universities. Here, the M did not consider this consideration as “no submissions” are received from the universities. If the court agrees that the fact that no submissions were received = amounting to failure to consider (added to the fact that 60(b) uses the compulsory “MUST” in considering the consideration), this may be an error.

Duty to inquire

Under s 5(1)(a) and (SZIAI), there is a duty to inquire by the M if the information = critical to making the decision and it is readily available. Here, the “must” in s 60(b) imposes a prohibition on M to make the decision w/o satisfying 50(b). The fact that there was no inquiry when it was both readily available (i.e. just sending a letter to the unis) and critical (per 50(b) may show an error.

No evidence

Here, s 60(b) requires consideration of submissions by unis. That there was no submission at all means that there was no evidence at all on which to base a critical step in the M’s decision (s 20). This is distinguished from a scenario where there is some proof that there is no evidence – here, there was no evidence at all that there was consideration of a submission i.e. a jurisdiction error. [very thorough]

(ii) Green – standing

Green’s rights = clearly affected as she is someone with a > interest in the matter than the general public (ACF). Also, as Panel members = likely paid, she has \$ rights affected (ACF), there she has standing.

AB (bias)

There is bias (Jia) if an obj. person might reasonably apprehend bias in the DM. [apparent bias] Here, analogous to (Hot), there was a pecuniary interest by the DM’s subordinates. However, the DM was not made aware of this. Furthermore, the subordinate’s financial interest in the matter was highly peripheral and ≠ likely to affect their views at all. Here, the advisor’s (A) father = the MD of BL, which = a closer degree of interest than in BL, where the person had shares in a company with an option to buy shares in the affected company. However, just as in (Hot), the DM was not aware at all of this knowledge, and the Act here specifies that it is the Minister (s 169) who makes the suspension order. Hence, likely that AB ≠ proved by G.

LE?

Is the fact that in the past, students have been continually reappointed to the Panel an LE made by the M? As aforementioned, G's rights are affected in a direct way that is distinct from the public (Kioa) and therefore should enjoy NJ to have LE heard. The test for LE only passes (Lam) if there is procedural unfairness which leads to practical injustice and which induced a reasonable belief that the LE would be followed. Here, there is likely procedural unfairness as G ≠ given an opportunity to comment/present a case for her dismissal (violating NJ right under Miah). However, it is unlikely to hold because that is no undertaking/holding out by M at all that G will enjoy this LE at all (past experience ≠ the M olding something out) therefore overall, ≠ LE.

FH

As above, G = directly affected (Kioa) and therefore has right to FH (Kioa). The right to have notice that decision will be made/disclosure for adverse info not supplied (VEAL) = rights accorded under FH. Here, the instant dismissal of G = final and cannot be appealed de novo. Also, less regulation amongst students may be injured by her ignominious dismissal (Miah), all of which indicate that she should have received FH. Also, the adverse info by the advisor was not brought to her attention by M although it was “credible + significant” (VEAL). There is also a legislative presumption to FH (Annetts) which has not been displaced on the facts, therefore breach of FH [VG]

(iii) Standing + jurisdiction

As with UC, UV clearly has standing per s 3(4)(a)(i) and ACF. Also, the decision to cancel its registration per s 84 by the M is an act made under the Act of an admin character (s 3(1) etc. as similar to UC's case.

Grounds of review – purpose

Under s 5(2)(c), and Schielske, a decision by the DM can be an error if it was made for a purpose which was extraneous/unauthorized by the Act which conferred the power (Schielske). In determining the purpose of the Act, we look to the provs defining the Act's purpose (in this case, the purpose of the Act is to “enhance the quality and integrity of uni education”). Prima facie, the increase of levels of students from low socio-economic backgrounds ≠ something which goes to further the quality of uni education. This is arguably the case as they may be in less of a financial position to attend/they have lower educational qualifications, and thus their forced entry into IV could arguably even detract from the standards of UV education. However, we notice that on the facts, the object of the Act merely “includes” enhancing the...etc and is not exhaustive. Furthermore, under Schielske, where the unauthorized purpose = one of many purposes, there is only error if this is the substantial purpose, which does not seem to be the case as there are no

other indications indicating that the M has tried to overturn the ability of the Act to increase educational uni standards through this policy decision, therefore improper purpose ≠ likely.

Unreasonable? – 30% too high?

Under s 5(2)(g), and Wednesbury, there is error if the decision is a discretionary decision (SZMDS) and is so unreasonable that no reasonable person would have done it (Wednesbury). Here, the decision to impose additional standards to UV is a discretionary power (per s 21(2), satisfying the first limb. The next limb is stricter as it is historically very hard to prove Wed unreasonableness. Here, it is arguable that the 30% hurdle within 12 months is too high and givestoo little time for UV to implement it successfully. This is difficult to gauge accurately as we are not uni administrators, however, it is likely to be a very high hurdle (especially assuming UV started from a baseline of 0%) because it entails replacing nearly 1/3 student body with low socio-economic students. Furthermore, while the improvement is required w/i 3 years, a 7% increase has caused the M to withdraw the licence despite it being close to the 10% year on year improvement needed. While some sympathy for the M's position may be acceptable considering the advice that it was due in some extent to increase in enrolments, 7% is more than double the improvement UV otherwise would have had which should have showed “substantial improvement” in willingness, if not in letter. Therefore, this is likely to be something that no reasonable person would have done, even considering the fact there was ideological bias on UV's part. **[good answer – unflex. application of policy?]**

(iv) Standing

B's personal rights as a student are affected by the decision in a manner > than that of the public (ACF) as he is a student. Also, it is not that he is a mere busybody meddler with a mere intellectual connection (ACF), therefore likely has standing.

Remedy

In order to seek a declaration that the condition is invalid (which is allowed as declaration may be given to all errors both JE and non-JE), we must determine that the condition is indeed invalid if breached. Applying (PBS), we look at the scope, nature and object of the Act. Here, it is to enhance the quality + integrity of uni education. Also, considering the fact that s 58(1)(a) increases quality of learning, B may argue that the Act places great importance on education. But this is ≠ likely to help if the court holds that the condition to increase disadvantaged students falls within the “integrity” requirement of the Act's purpose or if a more diverse student population indeed increases the quality of education. If not, then clearly the condition ≠ invalid. Of course, this = depends on the court's construal of the terms and language of the Act (PBS) and whether P intended a breach = invalid. **[Good, but focus on standing -> could he?]**

(v)

(s 202) of the Act is similar to a no-considerations clause (NCC). This is similar to that found within (M61) where the M was under no duty to even consider whether to exercise powers. The practical effect of this NCC is that the remedy of mandamus is not allowed as it is only given if there is a duty to exercise a power (R v Inner London Education), cf. a discretion. If no mandamus is given, then the ancillary remedy (Aala) of certiorari is also unavailable (unless the court finds that that prohibition is allowed in which case certiorari = allowed as ancillary). Here, UV wants a remedy of the M's decision which will likely be in the form of certiorari (quashing the old decision to revoke UV's registration) and to mandate (mandamus) the re-registering of its licence. If there is an NCC in (s 202), then these remedies ≠ available regardless of whether there is successful JR of the M. In other words, while UV may succeed in JR, it cannot get a practical benefit by a remedy from the courts. In this sense (practical benefit), the NCC = very effective at limiting the effectiveness of UV's JR application. [VG]

QUESTIONS

A

(1) Normally, under the principles espoused in Bhardwaj, and together with the interpretative principles in Blue Sky, (i.e. consider the nature, scope, purpose, object etc. of the Act), I there is a clear intention by P to invalidate a certain decision if there was a breach of the head statute, then the decision is taken to be a non-decision (Bhardwaj)/ “purported decision” and is normally a JE which can attract the whole range of constitutional remedies. [sentence too long!] In SZIZO, the HCA did not come to this expected conclusion on the grounds that there was a privative clause (PC) embedded in the Migration Act (MA) that precluded the applicant's right to obtain procedural fairness. In examining the effect of the PC, we consider the decision in (S157) regarding PCs in general. In (S157), the HCA held that PCs must be read as restrictively as possible and cannot be enlarged to abrogate the HC's inherent constitutional powers under (C s 75(v)) to JR any JEs before it and to dispense remedies. This strict cannon shot across the bows of encroaching P interference with the SoP doctrine (Boilermakers) meant that although the HCA did not completely strike down PCs as being constitutionally invalid, they managed to effectively invalidate the PC in (S157) all while warning the P that further intrusions into its s 75(v) power would not be tolerated. The tenuous concessions that both the P and HCA granted each other thus manifested itself in the SZIZO case where instead of striking down the entire PC as being invalid, the HCA compromised by holding that there was invalidity despite there being a breach so as not to infringe the doctrine of Parliamentary Supremacy, but yet at the same time to preserve judicial independence and the SoP doctrine. [Thorough analysis 16/20]

(2) Objective

The test for apprehended bias (AB) is in Jia which holds that there is bias if whether or not an informed lay observer (i.e. obj. standard) might reasonably apprehend that the DM is not

bringing an impartial mind to the decision before him. The threshold is that of a “firm possibility” (Ebner). The consideration of the merits of the case, on the other hand, is something that has subjectively happened or not. For instance in (British Oxygen), the case turned on the fact that the DM there must have been willing to make exception to a blanket policy by subjectively considering the merits of the indiv. case. There is no objective test or standard as to whether this has happened.

Own volition

In AB, the bias shown is something that is usually self-volitional, i.e. that it is an internal bias with an internal source. For example, the derogatory comments said to the applicant in (Vakonta v Kelly) demonstrated an existing bias against the applicant’s racial background and predisposition, whereas in merits consideration, the influence that ostensibly causes the equivalent of “bias” is external in nature in that it is attributable to a governmental policy. However, on closer inspection, this particular difference may not be as disparate because AB may also originate from external sources (e.g. the alleged pecuniary interest that was said to have influenced the Min’s decision-making in (Hot Holdings))

Higher threshold

The 3rd difference b/w AB and indiv consideration of merits is that the standard required to show AB is very high. There has to be a “firm possibility” (cf. a mere possibility) that the DM has not brought an impartial mind to the decision. Furthermore, a DM is allowed, as happened in Jia, to reiterate gov. policy (on a radio talk show) and this mere reiteration of policy was not held to be AB. In considering the indiv. merits of a case, the test is a presumption, i.e. there must be a constant and presumed willingness to consider the indiv merits regardless of gov policy, and the exercise of power cannot (an absolute, cf. a test) be so influenced by policy that it disregards the indiv merits, therefore overall, the standard for AB is far higher to show, cf. the presumed and constantly applied presumption to consider indiv merits [Excellent 17/20]

(3) FH

The FH rule is a fundamental plank of admin JR. However, this right is only awarded and found if (Kioa) the decision by the DM affects, in an immediate way (distinct from the general public), an indiv’s rights + interests/LE. In doing so, the court safeguards that indiv’s right to have a FH by granting him the ability to demand that there will be notice that a decision will be made (Kioa), disclosure by the DM of the case to be met (incl. credible + significant info adverse to the indiv’s case), and the opp. to comment on and present the indiv’s own case. The rationale for doing so is that it protects and safeguards the ability of the private indiv to defend him/herself from the decisions (interference) of the government/administration, and also indirectly promotes the norms of good admin/government by promoting the doctrine of gov accountability and the RoL. However, the fact that the FH rule protects and promotes these underlying principles and

doctrines is not without limit. This is where the connection b/w FH and standing (S) becomes clear. S is the flip obverse side to the FH rule as it ensures that only those people whose property/private rights are directly affected by a decision (ACF) are allowed S to defend a case. In other words, the only time that there is a need to invoke the underlying principles of RoL and gov accountability etc. in the context of FH is when a person has actually been proven to have been affected. Where there is no interference or effect on one's private rights (ie. no problem with RoL etc.), thus there is no need for either standing or the FH rule. This point is made particularly clear when considering Brennan J's formulation of the FH test in Kioa where he characterized the right to FH as existing only where an indiv has been affected "more so than the general public", which means that, similarly, S prevents the public at large from bringing a case as they have not been especially affected by a potential breach of the RoL/gov accountability principles [good understanding, but structure hard to follow 15/20]

(4) Obj. of FoI + balancing act

The obj of the FoI is to increase public participation in gov processes, to promote greater public scrutiny of gov decisions (i.e. keeping the gov accountable, as per the doctrine of gov accountability) and to promote better decision-making through the increase in information. However, there is also the vexed and perennial question of how much public disclosure should be given? i.e. there is a conflict b/w the demands of transparency + disclosure vs the public interest/privacy/practical difficulties.

Key FoI changes

Recently, the FoI was amended to allow for: email applications, the slashing of application fees/charges, the narrowing of exemptions to the FoI and the decrease in the 30 yr rule down to 20 years, all of which ostensibly augment the role of disclosure and the overall accountability of government

Analysis

In determining whether the changes have actually improved gov accountability, we must examine each carefully in turn.

Email appl: The allowing of email applications is undoubtedly a positive step. The ubiquity of email coupled with its speed ensures that a response is both quick and forthcoming. Of course, this increase in access means that there is danger that the relevant depts will be swamped by such FoI email requests, which may interfere with good administration, but this is not an insuperable concern as proper filters weeding out vexatious/frivolous requests can be implemented

Fees/charges: Just as with the move to email, this change increases access to documents and is likely a net positive change. While the same concerns regarding swamping and interference with

admin duties can be made as with the email change, the same filtering process will likely solve these concerns [I hope so!]

FoI exemptions: The narrowing of FoI exemptions is perhaps the most significant of the changes on our list. Whereas previously, there was an absolute exemption on Cabinet files, this has been now narrowed down to a “dominant purpose” test, which means that Cabinet papers are now available for the public. This is a change which affects the doctrine of Cabinet secrecy/privilege and may have effects on Cabinet decision-making as Cabinet MPs may now be less likely to write/do anything incriminating for fear of an eventual release to public. This may affect robust decision-making as sometimes expeditious decision-making necessitates controversial words/documents. However on balance, if we apply the logic that the public right to know > the potential for Cabinet embarrassment, then this change = positive. Furthermore, we note that not all Cabinet papers are exempt which further alleviates any worries on this head.

Overall, the key FoI changes will likely lead to increased gov accountability w/o detracting from good admin. [Excellent. Any potential threats? 17/20]

(5) In defining “merits” in the question, we will adopt the meaning of “taking the individual merits of the case into account”

Consideration grounds

This ground of review exists at ADJR s 5(2)(a) as well as in CL in Peko. In making a consideration error, we must determine whether there has been (1) “genuine” consideration, (2) determine the relevance of the consideration, (3) consider the most up to date info, and (4) demonstrate the decision materially affected the decision. Only (1) and (3) ostensibly allows judges to undertake a MR of the case.

(1) Relevance of the fact

In a MR, the AAT/other body will normally attempt to come up with the best possible decision using the best possible info (Shi). This is because MR seeks to analyze the merits cf. judges who analyse the law. However, judges may still have an effect/indirectly impose their own views on the merits of the case by determining whether or not a particular fact is “relevant”, as per (Peko). By weeding out facts/considerations as being irrelevant and therefore not reviewable, judges may impose their own views on the merits of facts as they necessarily have to turn their minds towards how “meritorious” a fact is, therefore usurping the MR of tribunals and violating the SoP doctrine (Boilermakers). Of course, while the judicial consideration of a fact may be framed as a judicial function as it involves considering the purpose and object of an Act (which is a judicial function), there is no denying that by casting aside certain facts, there is an element of MR in that the merits of facts are being considered.

(2) Up to date

Just as with the AAT's ability to inquisitorially investigate + consider + obtain the best possible information, so too must the DM do so at the time of the making of a decision. If not done, the judge can invalidate the decision as having been conditioned on out of date info, similar to Peko, where the most up to date mining maps were not consulted. While here, the judge has less scope and discretion to determine the merits of a particular fact, by declaring a fact out of date, there is some (weak) semblance to how the AAT conducts its MR. However, this is a weak influence. Overall, while judges' discretion to determine the relevance and up-to-date-ness of a fact may have some semblance/impact on the case, it is not as large as that in MR, which is as it should be, as declared by Boilermakers [VG analysis of salient points 16/20]