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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS
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The pages in this work were reissued in May 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the May 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

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AUTHOR'S NOTE

Every now and then, an unexpected event comes along that connects principles of administrative law with the broader culture and politics of the day. This type of connection occurred in *Djokovic v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, [2022] FCAFC 3. Over 80,000 people tuned into the livestream of the hearing before Australia's Federal Court of Appeal. After Novac Djokovic, the top ranked male tennis player in the world, had been deported, and the dust settled on his unsuccessful challenge of the Australian Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs' revocation of his visa, the question remains what this case says about administrative law and administrative justice.

The appeal unfolded with high drama. First, it was announced that Djokovic had been granted a "medical exemption" from Australia's vaccination requirements by the State of Victoria and, according to the organizers of the Australian Open, he would be able to participate in the upcoming tournament. He arrived in Australia on January 5, 2022. Upon his arrival, he was taken to immigration clearance and questioned by officers of the Department of Home Affairs until the early hours of 6 January 2022. After news of Djokovic's arrival and visa to enter the country broke, the Australian Government was heavily criticized for allowing an unvaccinated tennis star into the country and applying a double standard, under which ordinary Australians had to suffer through lockdowns and closed borders, but a rich and famous tennis star could flout Australia's rules and get away with it. In a stunning volte face, the Minister announced Djokovic's visa was being revoked. Djokovic was "detained" in a hotel near the airport while his lawyers challenged the decision on procedural fairness grounds.

A Judge of the Federal Court granted Mr Djokovic interim relief on January 6, 2022. The matter was set down for final hearing to commence on Monday January 10, 2022. At the hearing on that day, counsel for the Minister for Home Affairs conceded that the process adopted by her delegate was, as Djokovic alleged, legally unreasonable by reason of a denial of procedural fairness, or to use a synonymous phrase and one used in the Act, "natural justice". As a result, the Court made an order quashing the purported cancellation decision.

The Minister promptly cancelled Djokovic's visa once again, this time on public safety grounds, and accompanied by 10 pages of reasons. The Minister has the authority to cancel an entry visa where the visa holder is or may be, or might be, a risk to the health, safety or good order of the Australian community or a segment of it. The Government argued that Djokovic's unvaccinated status was a rallying point among Australia's anti-vaccination movement and his presence in the country would lead to further vaccine resistance.

The final hearing was transferred to the Federal Court of Appeal, presumably so as to ensure finality in the decision and sidestep the need for further appeal by the unsuccessful party. As the Court of Appeal reiterated, "The Court does not consider the merits or wisdom of the decision; nor does it remake the decision. The task of the Court is to rule upon the lawfulness or legality of the decision by reference to the complaints made about it."

The Court rejected Djokovic's challenge to the Minister's decision. After finding that Djokovic was indeed unvaccinated and had espoused anti-vaccination statements, and that it was open to the Minister to consider Djokovic's status as a role model and not just his own conduct, the Court considered whether the Minister's decision was unreasonable.

> 91 The Minister cancelled Mr Djokovic's visa because he was "satisfied" that the presence of Mr Djokovic in Australia may be a risk to the health or good order of the Australian community: D[25] and D[37].
>
> 92 In substance, Mr Djokovic contended that that decision was affected by jurisdictional error because the Minister reached the state of satisfaction illogically, irrationally or unreasonably and the discretion to cancel the visa was unreasonably exercised, because the Minister did not consider whether cancelling Mr Djokovic's visa may itself foster anti-vaccination sentiment in Australia.
>
> 93 In their written submissions, counsel for Mr Djokovic put their contention as follows (emphasis in original):
>
> > The vice with the Minister's reasoning, on this central premise, is that it involves an irrational, illogical or unreasonable approach to the purported formation of either or both of the requisite states of satisfaction in section 133C(3)(a) and (b), or the exercise of discretion:
> >
> > (1) to address the prospect of Mr Djokovic's presence in the Australia (consequent to a non-cancellation decision) "foster[ing] anti-vaccination sentiment"; but
> >
> > (2) not to address the prospect of the binary alternative outcome (consequent to a cancellation decision that the Minister ultimately selected), being Mr Djokovic's detention and expulsion from Australia and the attraction of consequential bars to re-entry "foster[ing] anti-vaccination sentiment", including at least potentially of an equal of not more deep or widespread kind.
>
> 94 It was further contended that "[i]t is even more obvious that a decision to detain and expel Mr Djokovic based on two historic statements about vaccination would be apt to 'foster anti-vaccination sentiment' ", in circumstances where the Minister assumed or found that Mr Djokovic posed a negligible COVID-19 risk to others, had a medical reason for not being vaccinated, had entered Australia lawfully and consistently with ATAGI documents and in circumstances where almost every discretionary factor weighed against cancellation.
>
> 95 Ground 1 should be dismissed. It was not necessary for the Minister to consider and weigh in the balance the two "binary" choices contended for by Mr Djokovic. The power to cancel relied upon by the Minister in this case arose once he was "satisfied" that "the presence of [the visa] holder in Australia ... may be ... a risk to ... the health, safety or good order of the Australian community". The words of the statute direct attention to the "presence" of the visa holder in Australia. No statutory obligation arose to consider what risks may arise if the holder were removed from, or not present in, Australia. The provision cannot be interpreted as requiring the Minister to examine the consequences of cancellation by way of a counterfactual, directed as it is to the considerations of risk by reference to presence.

> 96 That the statute does not require such a consideration to be examined does not foreclose the possibility that not to do so in a given circumstance would or might be irrational or unreasonable. However, it is not easy to contemplate such a circumstance. There is nothing by way of logic that demands it, bearing in mind that the statute refers to the consequences of presence of the visa holder in Australia. It may be that there would be an even greater risk to good order or health by the fostering of demonstrations if the visa was cancelled and the erstwhile visa holder removed from Australia, but that says nothing about the risk arising from the visa holder's presence in Australia, which is the statutory enquiry. The notion that the Minister must, to be logical, examine both hypotheses is only to force the Minister to adopt one way of approaching the exercise of the discretion.
>
> 97 That is not to say that if the Minister chose to examine the risk in the posited counterfactual, he could not do so (given the terms of the provision are directed to presence, it would be in evaluating the public interest or the exercise of the discretion to exercise the power). The Minister would not be prohibited by the section from doing so; and it is not an irrelevant consideration for these purposes in the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; 162 CLR 24.

Writing just before the release of the Court's decision, Professor Paul Daly highlighted what this case says about the exercise of public authority:

> Yet because the courts now stand ready to scrutinize executive action, ministers can no longer rely on authority alone to make decisions. They must engage in the reasoned exercise of public power (even where, as here, Djokovic is not entitled to any procedural fairness prior to its exercise) ... Administrative law is no panacea. Hardly any immigrant has Djokovic's resources and will receive the Cadillac justice he has been receiving. But today's hearing is an important reminder of the value of administrative law in pushing ministers and others to justify their exercises of public power in reasoned terms.

While administrative law may not be a panacea, the constraint posed by the obligation to act in ways that are legally defensible remains its signature contribution to the rule of law (at least since *Roncarelli v. Duplessis* in this country). While the Djokovic saga may be remembered more for its political dimensions than its contribution to the jurisprudence on legality, it stands as another reminder of the crucial role administrative justice plays in resolving disputes where the legitimacy of state action is impugned.

This release features developments in several areas of administrative law.

In *Sedoh v. Canada (Citizenship and Immigration)*, 2021 FC 1431, 2021 CarswellNat 6014 (F.C.), the Federal Court overturned a decision of a migration officer as unreasonable. The applicant sought the judicial review from Ghana. The migration officer had refused the applicant's application for a permanent resident visa as a member of the Convention refugees abroad class or as a member of the humanitarian-protected persons abroad under the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The officer found that the applicant did not meet the requirements of either class. The Court found that the standard of review of the officer's decision was reasonableness, per *Vavilov*. In the Court's view, the decision was unreasonable because the reasons were "conclusory." The Court also addressed the issue of whether staff notes should

be considered as part of the officer's reasons.

In *Bangloy v. Canada (Attorney General)*, 2021 FCA 245, 2021 CarswellNat 6509 (F.C.A.), the Federal Court of Appeal considered a decision of the Federal Court dismissing an application for judicial review of a decision of the Canadian Human Rights Tribunal dealing with education expenses and the applicant's Treaty No. 11 rights. The underlying treaty issues were the subject of several other decisions in this protracted litigation. The Court of Appeal found that the Federal Court was correct in determining that the Tribunal's decision dismissing the applicant's complaint on the basis of issue estoppel and abuse of process was reasonable.

In *Oxford v. Newfoundland and Labrador (Municipal Affairs and Environment)*, 2020 NLSC 102, 2020 CarswellNfld 178 (N.L. S.C.), the Newfoundland and Labrador Supreme Court considered an application from a person who was found not to be a "commercial property owner" for purposes of a government program relocating the community of Little Bay Islands. This was part of a provincial policy intended to rationalize and reduce the cost of the provision of public services. The policy also defined who qualified for relocation support, and included those defined as a commercial property owner. The Court determined that a reasonableness standard of review applied under the *Vavilov* framework. Applying that standard, the Court found the reasons provided in this case to be deficient.

In *Gomes v. Canada (Citizenship and Immigration)*, 2020 CF 506, 2020 FC 506, 2020 CarswellNat 1343, 2020 CarswellNat 2375 (F.C.), the Federal Court considered a judicial review from the Refugee Appeal Division (RAD). The applicant appealed from a negative decision of the Refugee Protection Division (RPD). In brief reasons, the RAD found that the RPD had not committed any errors. The applicant then sought to judicially review this decision before the Federal Court. The Court granted judicial review on the grounds of the RAD's paucity of reasons and its failure to address the specific findings of the RPD to the requisite standard of justification, transparency and intelligibility.

In *557466 Alberta Ltd v McPherson*, 2022 ABQB 23, 2022 CarswellAlta 88 (Alta. Q.B.), the Alberta Court of Queen's Bench considered a judicial review from a decision of the Alberta Human Rights Tribunal involving gender discrimination after a person was fired because they were pregnant. The Court granted the judicial review, holding that the hearing had been unfair and raised a reasonable apprehension of bias. The Tribunal had accepted "unrestrained bad character" evidence against the respondent and improperly interfered with his attempts the cross-examine the complainant.

In *A.B. v. Northwest Territories (Minister of Education, Culture and Employment)*, 2021 NWTCA 8, 2021 CarswellNWT 49, 2021 CarswellNWT 50, 90 Admin. L.R. (6th) 90, 463 D.L.R. (4th) 277, [2021] 12 W.W.R. 133 (N.W.T. C.A.), the Northwest Territories Court of Appeal heard an appeal from a decision of the Northwest Territories Supreme Court setting aside decisions of the Minister of Education, Culture and Employment denying French language school admission applications. Pursuant to s. 23 of the *Charter of Rights and Freedoms*, some families have a constitutional right to send their children to those schools. The applicant families in this case do not enjoy the constitutional right to send their children to French schools in the Northwest Territories, because they do not qualify under s. 23. They applied to the Minister of Education, Culture and

Employment to allow their children to attend the section 23 schools, even though they did not qualify. The Minister refused this application. A chambers judge set aside the Minister's decision on the basis that the Minister improperly fettered her discretion in her decision on the applications. That decision was appealed by the Government of the Northwest Territories. The NWT Court of Appeal allowed this appeal and restored the Minister's decision.

In *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112, 2020 CarswellSask 474, 453 D.L.R. (4th) 472, [2020] 12 W.W.R. 396, 467 C.R.R. (2d) 230 (Sask. C.A.) The Saskatchewan Court of Appeal heard an appeal relating to a disciplinary decision against a nurse by the Saskatchewan Registered Nurses' Association (SRNA). The decision arose after a complaint following comments a nurse posted about the end of life care her grandfather received at a hospital. The nurse was found guilty of professional misconduct, was reprimanded, fined, required to submit reflective essays and pay costs of $25,000. Her appeal to the Saskatchewan Court of Queen's Bench was dismissed. The Court of Appeal allowed her appeal, and concluded that the nurse should not have been found guilty of professional misconduct for the communications at issue.

In *Scarborough Health Network v. Canadian Union of Public Employees, Local 5852*, 2020 ONSC 4577, 2020 CarswellOnt 10555, 90 Admin. L.R. (6th) 334 (Ont. Div. Ct.), the Ontario Divisional Court heard a judicial review arising from an interest arbitration decision. The basis for the judicial review was the sufficiency of the reason given by the arbitrator. The Divisional Court found the reasons did not meet the standard of justification, transparency and intelligibility.

L.S.

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