6

Constitutional Validity of Section 486A

Background

6.1 This chapter deals with the constitutional validity of section 486A of the Migration Legislation Amendment Bill (No. 2) 2000 which is designed to place a time limit of 28 days on the jurisdiction of the High Court to undertake judicial review of certain immigration decisions in the following terms:

> 486A **Time Limit on applications to the High Court for Judicial Review**
>
> (1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a decision covered by subsection 475(1), (2) or (3) must be made to the High Court within 28 days of the notification of the decision.
>
> (2) The High Court must not make an order allowing, or which has the effect of allowing, an application mentioned in subsection (1) outside that 28 day period.
>
> (3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this action.[1]

6.2 New subsection 486A(1) provides that an application to the High Court in its original jurisdiction under the Constitution for judicial review of a decision covered by subsection 475(1), (2) or (3) must be made within 28 days of the notification of the decision. This is intended to ensure that challenging a subsection 475(1), (2) or (3) decision in the High Court does

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1 Migration Legislation Amendment Bill (No. 2) 2000, loc cit.

not become a way of circumventing the time limits for applications to the Federal Court under Part 8 of the Act.[2]

6.3 New subsection 486A(2) prevents the High Court from making an order allowing an application to be made outside of the 28-day period provided for in new subsection 486A(1).[3]

Evidence concerning constitutional validity

6.4 Several submissions suggested that section 486A may be unconstitutional. For example, ECC warned that:

> It may…be unconstitutional, in which case the legislation itself is likely to be subject to challenge if passed.[4]

6.5 Amnesty also expressed its concern about subsection 486A(2):

> Whilst not seeking to provide a legal opinion on this issue, Amnesty International is concerned by this proposed limitation upon the High Court's original jurisdiction, a limitation which would appear to contravene the doctrine of the separation of powers…[5]

6.6 RILC expressed the view that:

> Although the proposed time limit on appeal could be broadly characterised as a "procedural" measure, its effect would appear to substantively interfere with the exercise of federal judicial power. These provisions specifically effect writs issued in the High Court's original jurisdiction, a jurisdiction preserved by Chapter III, s 75(v) of the Constitution…The High Court sets its own time limits on applications under the High Court rules. The High Court also has a discretion to accept applications out of time. Laws of the Parliament which restrict access to the High Court's jurisdiction, a matter which under the Separation of Powers doctrine are strictly the preserve of the Court, have clear Constitutional implications. It is likely that the proposed s 486A of the Bill would be the subject of a constitutional challenge.[6]

6.7 LCA asserted that:

> This might be tantamount to an interference with the judicial power of the High Court under Chapter III of the Australian

2 *Explanatory Memorandum*, p. 5.
3 *Explanatory Memorandum*, p. 5.
4 ECC, Submission, p. 28.
5 Amnesty, Submission, p. 275.
6 RILC, Submission, p. 38.

> Constitution. Although there are precedents for imposing time limits on actions seeking certain of the prerogative writs under the common law, the Bill seeks to limit the power of the High Court to provide remedies under s 75 of the Constitution. The Law Council predicts that one question that will arise is whether the legislation goes beyond the regulation of the judicial process to interfere with or otherwise prohibit that process.[7]

6.8 In his submission Mr Colin McDonald QC submits that section 486A is:

> arguably unconstitutional…section 486A may infringe the constitutional jurisdiction of the High Court to review officers of the Commonwealth. Arguments may well also arise concerning the inherent jurisdiction of the High Court to extend time in migration issues despite the wording of the section. Under section 75(v) of the Australian Constitution, the High Court exercises original jurisdiction and exercises powers directly conferred on it by the section. The High Court is not a statutory court. A section such as the proposed section 486A cannot prevent the High Court from exercising powers directly conferred on it by the Constitution.[8]

6.9 Mr McDonald added:

> Insofar as the argument goes that mere restrictions of time in which to access the High Court do not prevent the High Court from exercising its powers, I am still of the opinion that the section may well be invalid or may well be read down. I refer to *R v Bloomsbury Court; Ex Parte Villerwest Ltd* [1976] 1 WLR 362; [1976] 1 Au ER 897; *Samuels v Linz Ltd* [1981] QdR 115; *Re Coldham Ex Parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 522, 530. These cases, inter alia, decided that a court has a inherent power to control its own procedure and extend time after a prescribed time has elapsed.[9]

6.10 NCCA also expressed its view that:

> The right of any person to go to the High Court to seek orders against an officer of the Commonwealth is enshrined in the Constitution in section 75(v). The Parliament is unable to interfere with the Constitution directly, so the constitutional validity of the indirect limitations on the High Court's original jurisdiction in the new Part 8A would seem to be at least questionable. The High

7 LCA, Submission, p. 78.

8 Mr Colin McDonald QC, Submission, p. 179.

9 Mr Colin McDonald QC, Submission, pp. 179-180.

> Court has previously commented in obiter that time limits without the discretion to review particular circumstances might be seen as "an attempt to control the Court, and an interference with the judicial process itself."[10]

6.11 DIMA claims, however, that the 28-day time period is within constitutional power as it is a reasonable time to access legal advice and to make an application to the High Court.[11]

6.12 According to the Deputy Secretary, DIMA:

> …we made some concessions to ensure that we were within power. For example, the fact that the 28-day time limit in the High Court from date of actual notification rather than deemed notification – as is the case with the Federal Court – was done specifically on the basis of legal advice. Our advice is that imposing a 28-day time limit goes to a matter of procedure within the court and not to the fundamental right to access the High Court.[12]

6.13 DIMA stated in its submission that the Chief General Counsel of the Australian Government Solicitor advised that interference with judicial power would be unconstitutional but that, in his view, "all aspects of the Bill are constitutionally sound".[13]

6.14 The Committee was concerned that the question of constitutional validity of section 486A had been raised in a substantial number of submissions. DIMA was asked to provide the advice that it had received on the issue of constitutional validity when drafting the proposed legislation to the Committee. Excerpts from that advice follow.

6.15 The Australian Government Solicitor stated:

> In my opinion, there is a real risk that the draft provision (proposed s.486A) imposing a time limit of 28 days from the 'notification' of a decision for a judicial review application to be made to the High Court will be interpreted in a way which requires actual notification of the decision. Unless the section is interpreted in this way, I consider it could be held invalid. The assumption, I understand, is that Migration Regulation 5.03, in particular, is to apply to the new section, so that a person in circumstances where they do not actually receive notification will still be precluded from seeking judicial review 28 days after the

10 NCCA, Submission, p. 119.

11 DIMA, Submission, p. 54.

12 Mr Metcalfe, Deputy Secretary, DIMA, Evidence, p. 11.

13 DIMA, Submission, p. 56.

date of deemed notification under that regulation. I consider the High Court could well hold the application of the regulation to s.486A to be beyond constitutional power, at least so far as it applied to applications for remedies provided for under s.75(v) of the Constitution.

The relationship between the similar time limit provision contained in s.478 of the Migration Act and regulation 5.03 has been considered in a number of Federal Court cases. A recent review of those authorities is contained in *Kumar v. Minister for Immigration and Multicultural Affairs* [1999] FCA 1233. In that case, Mansfield J held that the regulation as it now reads operates on s.478 so that actual knowledge or receipt of a communication is not required. The judgment refers, however, to other Federal Court cases which saw such a result as 'extraordinary' but nevertheless he felt the result was dictated by the language used in the regulation. Different considerations, however, arise where what is at issue is the right to obtain a constitutionally mandated remedy under s.75(v) of the Constitution. In an opinion I gave dated 21 July 1999, I discussed whether it was constitutionally permissible to impose non-extendable time limits on the making of applications to the High Court. I concluded that 'the risk of the High Court striking down any statutory time limit would be particularly acute if the time limit was unreasonably short and capable of operating unfairly in certain circumstances'. I do not regard 28 days as unreasonably short. However, the fact remains that the proposed section is capable, if regulation 5.03 applies, of operating unfairly in the sense that it could operate to deny a person a right to seek judicial review in a situation where they were entirely ignorant of a decision made in relation to them.

It seems to me that while draft s.486A contained in the above Bill should be held to be valid as it stands (imposing as it does a reasonable time limit after notification), any regulation under the Migration Act which purported to deem, or had the effect that, a decision was taken to be 'notified' for the purpose of that section even though not actually received, could itself be held to be unconstitutional. Consideration could be given to having a separate regulation covering High Court applications. It is possible that if reliance is placed on the existing regulation and the High Court decides the regulation is invalid it will strike down the regulation to the extent it covers Federal Court applications as well as High Court applications on the ground that it is not severable. Even in relation to s.486A as drafted, one cannot rule out at least some High Court judges finding that a time limit as proposed, that

> is not subject to some power of judicial dispensation, goes beyond constitutional power. I continue to consider, however, that a reasonable time limit for s.75(v) applications as proposed in s.486A based on actual notice would be held to be valid.[14]

6.16 Advice was also obtained from Dr John McMillan, Reader in the Faculty of Law at the Australian National University.

Section 486A and the Constitution

6.17 Section 486A has to be read in the light of section 75(v) of the Constitution, which grants the High Court a jurisdiction to issue three of the remedies referred to in section 486A. Section 75(v) provides as follows:

> 75. In all matters –
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> …
>
> (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:
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> the High Court shall have original jurisdiction.

6.18 According to Professor Cheryl Saunders' notes on the Constitution:

> the "writ of mandamus" orders government to do something, the "writ of prohibition" and the injunction prevent things being done. These three are the most important remedies that can be sought from a court against government when someone thinks the government is acting unlawfully. There are two other remedies as well. One is the writ of certiorari to "quash" action that has been taken. The other is the declaration, which merely states the law. Neither is expressly mentioned in the paragraph but both may be sought with one of the other remedies. The effect of the section in practice is to give the High Court automatic jurisdiction in most cases in which action is brought against the Commonwealth government ("officer of the Commonwealth").[15]

6.19 The jurisdiction conferred upon the High Court by section 75(v) of the Constitution to grant three particular remedies is a jurisdiction that cannot be taken away by Parliament.

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14 DIMA, Submission, pp. 236-237.

15 Professor Cheryl Saunders, Australian Centenary Foundation, *The Australian Constitution*, 1997, p. 86.

6.20 Clearly, a law which openly declared that the High Court could not grant those remedies would be invalid. Arguably, section 486A cannot be characterised as a law which curtails the jurisdiction of the High Court.

6.21 It would appear that the purport of section 486A is to *regulate* the jurisdiction of the High Court to undertake judicial review of certain decisions, by placing a time limit within which the remedies to facilitate judicial review can be granted by the Court.

6.22 The Committee was advised by Dr McMillan that, provided an application is made to the High Court within the 28-day period, the jurisdiction of the Court to grant the remedies is not impaired by the proposed amendments.

Subsection 486A(1)

6.23 Dr McMillan argued that subsection 486A(1) could be regarded as a law which regulated the way in which the High Court's jurisdiction was to be exercised and thus was a valid enactment of the Parliament. This view is supported on the following grounds:

- Bill regulates but does not remove court jurisdiction;
- time limits are not unprecedented;
- time limits are in the public interest;
- Parliament's regulatory role; and
- policy aims.

Bill regulates but does not remove court jurisdiction

6.24 Section 486A does not have the effect of *depriving* the High Court of its judicial review jurisdiction, but of *regulating* the way in which that jurisdiction is to be exercised. There is no reason in principle why it should be beyond the capacity of the Parliament to control or regulate the exercise of the High Court's jurisdiction. This already occurs in relation to section 75, inasmuch as the High Court has accepted that the Parliament can alter the substantive law of judicial review that would be applied by the High Court in the exercise of its section 75(v) jurisdiction. Notably, Constitution section 73 provides that the right to appeal to the High Court from a State or Federal superior court shall be subject to "such exceptions and … such regulations as the Parliament prescribes". The jurisdiction of the High Court to entertain cases arising under the Constitution or involving its interpretation is also within the control of the Parliament

under section 76, and is not part of the guaranteed original jurisdiction of the Court.

Time limits are not unprecedented

6.25 Time limits on the right to initiate judicial review proceedings are an established feature of administrative law. The *High Court Rules* (which are made by the High Court: see *Judiciary Act 1903* (Cth) section 86) stipulate time limitations within which two of the remedies can be sought: *certiorari* must be applied for not later than six months after the date of the judgment etc that is sought to be quashed (O 55, r 30); and *mandamus* must be applied for within two months of the date of refusal by a tribunal to hear and determine a matter, or within such further time as the Court allows (O 55, r 30).[16]

Time limits are in the public interest

6.26 A time limit of 28 days is not unusual or unparalleled in administrative law. It is the period currently found both in the *Migration Act 1958* (Cth) section 478(2) with regard to applications for review by the Federal Court of a judicially-reviewable decision and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11(3) with respect to an application for an order of review by the Federal Court or the Federal Magistrates Court.

6.27 The justification for the imposition of a strict time limit has customarily been the public interest in clarifying the validity of administrative decision-making at an early stage, particularly where a detrimental exercise of public sector power (such as deportation) hinges on the validity of a decision. It is noteworthy that courts have not evinced hostility to time limitation periods, in the same fashion that they have to privative clauses. That is, whereas a range of interpretive principles have been developed to limit the operation of privative clauses that would deny the availability of judicial review, there is no similar trend in relation to time limitation periods that would work a similar effect.

Parliament's regulatory role

6.28 The practical considerations weigh in favour of allowing the Parliament to regulate the jurisdiction conferred by section 75(v). A broad view of

16 It is interesting to compare the different time limits that apply in some other jurisdictions: the prima facie period for seeking mandamus and certiorari varies from 60 days in Victoria and the Northern Territory; to 3 months in Queensland; and 6 months in South Australia, Tasmania, and Western Australia. As that variation indicates it would be difficult to establish a proposition that a particular time limit was inherently part of the common law substance of the remedies and was thereby incorporated as an element of the remedies under s 75(v).

section 75 which would deny that role to the Parliament would produce the consequence that the High Court's jurisdiction would often be broader than that of the Federal Court. For example, it would be open to the Parliament to amend the *Administrative Decisions (Judicial Review) Act 1977* by providing that the Federal Court could not extend the period of 28 days for commencing an action. Very likely, this would produce the consequence that applications outside that period would then be brought into the original jurisdiction of the High Court. In *Abebe*, three judges referred to the immense inconvenience for the High Court that flows from the restricted scheme of immigration review.[17]

Policy aims

6.29 The policy arguments also weigh against taking a broad view of section 75(v). As Kirk notes:

> The transaction costs of recognising constitutional rights are not insignificant. They occasion further litigation, uncertainty, cost and delay. They reduce flexibility in seeking solutions to complex problems and balancing equations. Further, a danger of recognising a 'constitutional right to X' is that the very act of recognition tends to add weight to the protected interest, inflating its true value as against other competing interests.[18]

In Kirk's view, those considerations against the extension of constitutional guarantees should be outweighed only where there is a strong constitutional or normative imperative which points in the other direction. Here there is no such imperative. The invalidation of section 486A would merely extend the period for exercising an existing right to judicial review.

6.30 The Committee has been advised that the High Court has not previously been called on to decide whether the Parliament can regulate the exercise of the jurisdiction conferred by section 75(v) in the manner proposed by section 486A.

Subsection 486A(2)

6.31 Subsection 486A(2) determines that the High Court must not make an order allowing, or which has the effect of allowing, an application

17 *Abebe v Commonwealth* (1999) 162 ALR 1 at para 50 per Gleeson CJ and McHugh J, and 207 and 237 per Kirby J.

18 J Kirk, "Administrative Justice and the Australian Constitution" (1999 Paper to AIAL National Conference).

mentioned in subsection (1) outside that 28 day period. The subsection removes any discretion of the Court to extend the period for commencing proceedings under section 75(v).

6.32 This feature of 486A is in line with the current scheme of the *Migration Act 1958* which provides in section 478(2) that:

> The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period [of 28 days specified in the section].

6.33 The Federal Court however has been critical of the injustice that can arise from the inflexibility of the provision in relation to applications for review of RRT-reviewable decisions. For example, in *Fernando v Minister for Immigration and Multicultural Affairs [1999] FCA 1375* the Honourable Justice Finn expressed his observation that in many decisions the judges have adverted, sometimes critically, to the harshness of the results that the inflexibility of the provision can occasion.[19]

6.34 The position in the *Migration Act 1958* is to be contrasted with the position in other administrative law legislation. For example, the *Administrative Decisions (Judicial Review) Act* provides that proceedings are to be commenced within the prescribed period of 28 days:

> or within such further time as the Court (whether before or after the expiration of the prescribed period) allows.

6.35 The *High Court Rules* similarly allow the Court to extend a time period. The two months time limitation for seeking mandamus can be extended to include:

> such further time as is, under special circumstances, allowed by the Court or a Justice (O 55, r 30).

6.36 Further, Order 60, rule 6 confers a general discretion on the Court to extend any time period:

> A court or Justice may enlarge or abridge the time appointed by these Rules or fixed by an order of the Court or a Justice for doing an act upon such terms, if any, as the justice of the case requires.

6.37 The reason for allowing a court to extend a time limitation period is to avoid injustice to the parties. There can be many reasons why an application is not commenced within time, including reasons that are beyond the effective control of the parties.

6.38 Other reasons can be imagined as to why an extenuation of time may be a meritorious option, for example, a delay in commencing proceedings may

19 See para. 5, *Fernando v Minister for Immigration and Multicultural Affairs [1999]FCA 1375.*

be attributable solely to fault on the part of an applicant's legal advisers; or through illness or adversity a party may be unaware of when the time period has commenced running.

6.39 Setting a time limitation however has the advantage of focusing the attention of lawyers on the matter and ensures that proceedings are commenced in a timely fashion. Proceedings can be commenced by simply lodging an application form outlining the grounds for the appeal and the applicant's details. There is no requirement to assemble a full case or present an argument within the designated 28-day time-frame.[20]

6.40 The Committee was advised that, were the validity of section 486A to come under challenge, it is not out of the question that the High Court would rule that section 486A was invalid by imposing a strict time limit that is not capable of extension. For example, the Court could reason that the underlying purpose of section 75(v), as a constitutional guarantee, was to facilitate administrative justice by allowing questions about the legality of federal authority to be tested in a judicial forum. An unreasonable restriction on the ability of the Court to deliver that objective would contravene the spirit of the guarantee, to the point of curtailing its effective enjoyment.[21]

Conclusion

6.41 Although the Australian Government Solicitor did not regard the 28-day provision unreasonable, the Committee accepts that the 28-day provision could cause injustices if it is not made clear at the time the person is informed of the decision.

6.42 On the range of opinions given to the Committee, views were divided. The Committee concluded that, as long as the time limit is clarified to potential applicants, the Committee does not regard as onerous that proceedings commence within the time-frame. Initially, an applicant has only to lodge an application outlining the claim.

6.43 However, to ensure the safety of applicants, the Committee believes that the 28-day limit should be extended to 35 days.

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20 See para 7.27.

21 It is worth noting that in *Abebe* the High Court was narrowly split, 4:3, on an issue which in some respects was less controversial, that is, the restriction of the jurisdiction not of the High Court but of the Federal Court.

6.44 The issue of the constitutionality of the Bill is one upon which the Committee is unable to comment. The matter can only be resolved in the event of a constitutional challenge.