Administrative
Appeals Tribunal

Registrar's Opening Statement

Senate Legal and Constitutional Affairs Legislation Committee

Budget Estimates Hearing

25 May 2017

Opening Statement

I appear before the Committee in my capacity as Registrar of the Administrative Appeals Tribunal. Under the *Administrative Appeals Tribunal Act 1975* (AAT Act), the President is responsible for managing the administrative affairs of the Tribunal. My role is to assist the President in the management of those administrative affairs. As Registrar, I am also the Tribunal's accountable authority for the purposes of the *Public Governance, Performance and Accountability Act 2013.*

The President [s 7(1)] or the Acting President [s 10(1)] of the Tribunal must be a judge of the Federal Court of Australia and thus the holder of a judicial office under Chapter III of the Constitution. It is a long standing convention that judges holding office under Chapter III do not customarily appear before Committee hearings. That is why the Acting President of the Tribunal, the Hon Justice John Logan, does not appear. However, he is aware of my appearance today on behalf of the Tribunal and has approved my making this opening statement.

The Tribunal was established by Parliament over 40 years ago in recognition of a need identified by the landmark reports of the Kerr and Bland Committees for a safeguard in relation to executive decision-making. All appointments to the Tribunal are made by the Governor-General on government advice. Apart from the President, the Tribunal's membership includes some other judges of the Federal Court and also some Family Court judges but most members do not additionally hold judicial office. All appointees must make an oath or affirmation of loyalty to the Crown and to "faithfully and impartially perform" the duties of their office.

Under section 2A of the AAT Act, in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is accessible, fair, just, economic, informal, quick and proportionate to the importance and complexity of the matter. The final

aspect of our statutory objective is to promote public trust and confidence in the decision-making of the Tribunal.

It would not be appropriate for me to discuss individual cases or particular decisions. Given our objective, it may be helpful to provide more information about the Tribunal's broader function and jurisdiction, as well as some information concerning the types of decisions the subject of recent media coverage.

Function and Jurisdiction of the Tribunal

On 1 July 2015 the former Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) and Social Security Appeals Tribunal (SSAT) were merged with the Administrative Appeals Tribunal.

The Tribunal conducts independent merits review of administrative decisions made under more than 400 Commonwealth Acts and legislative instruments. The most common types of decisions we review relate to child support, Commonwealth workers compensation, family assistance and social security, migration and refugee visas, taxation and veterans entitlements. We also review decisions relating to bankruptcy, customs, corporations and financial services regulation, freedom of information and the National Disability Insurance Scheme among many others.

The Tribunal stands in the shoes of the original decision-maker to review administrative decisions 'on the merits'. The reviews are conducted 'de novo'. That means the Tribunal has regard to *all* of the facts and circumstances of the matter, *including material that may not have been before the original decision-maker*. The Tribunal is responsible for reaching the *correct decision according to law*. In cases where there is a discretion, it must make the *preferable decision* but that discretion is not a matter of personal preference. Discretionary decisions must be made having regard to any matters set out in the law and any relevant policy.

The Tribunal has the power to:

- affirm a decision
- vary a decision
- set aside a decision and substitute a new decision, or
- remit a decision to the decision-maker for reconsideration.

In many cases where the Tribunal sets aside a decision, it will be at least partly because additional information became available during the course of the review which was not available to the original decision-maker or there has been a change in circumstances since the original decision was made.

If an applicant or a decision-maker thinks a decision made by the Tribunal is incorrect in law, a judicial review application or, as the case may be, an appeal on a question of law can be lodged with the Federal Circuit Court or Federal Court against the Tribunal's decision, depending on the type of decision.

During the 2015-16 financial year, 3,381 appeals were lodged in the courts against decisions of the Tribunal, 97 per cent of which arose from decisions made by the Migration and Refugee Division (MRD) or the former MRT or RRT. The Tribunal's records indicate that all of these appeals were lodged by applicants. The Tribunal's decision was set aside in 24 per cent of all appeals finalised in that financial year, representing approximately 3 per cent of all decisions made by the AAT, MRT, RRT or SSAT that could have been appealed during the previous financial year.

In addition to the availability of judicial review, for decisions relating to visas, the Minister for Immigration and Border Protection has the power to personally substitute a more favourable decision or set aside certain decisions of the Tribunal.

Caseload

In the current financial year to 30 April 2017, the Tribunal has received a total of 42,743 applications for review and finalised a total of 34,153 matters. Approximately half of these applications were lodged in the MRD, which reviews decisions to refuse or cancel a broad range of visas, including bridging, business, family, partner, protection (refugee), student, visitor and work visas. Character-related decisions are reviewed in the Tribunal's General Division rather than in the MRD.

In practice, decisions relating to visas reviewed by the Tribunal are not made by the Minister for Immigration and Border Protection personally. They are made by officers of the Department delegated to exercise that responsibility by the Minister. The Tribunal cannot review a decision to cancel a visa or any other decision made on character grounds that is made by the Minister personally.

Recent media reporting

In an article dated 9 May 2017, the Herald Sun reported that the Tribunal overturned the Minister's visa decisions 4,389 times. These figures relate to general *migration* visa decisions. They represent approximately 39 per cent of all general migration applications finalised in the period from 1 July 2016 to 30 April 2017. The partner, student, visitor and work visa categories make up the highest number of set aside. The figures do not relate to protection matters nor character matters dealt with by the Tribunal's General Division.

Recent media coverage has focussed on some Tribunal decisions: firstly, relating to the cancellation of protection visas and, secondly, relating to decisions made on character grounds.

Protection matters

The cases referred to in an article in the Herald Sun dated 16 May 2017 appear to relate to decisions made by a delegate of the Minister to cancel protection or refugee visas on the basis of incorrect information said to have been provided to the Department. Visas may be cancelled under section 109 of the *Migration Act 1958* where incorrect information is provided at the time of application. Cancellation is not automatic and the decision-maker, including the Tribunal, must consider whether there was non-compliance by the visa holder and, if so, whether the visa should be cancelled having regard to the factors set out in the *Migration Regulations 1994* and departmental policy.

Tribunal decisions about protection matters involving applicants from Iran are not published and are not publicly available. This practice has been in place since at least 2011 following a request made to the former MRT and RRT by the Department of Foreign Affairs and Trade not to publish information relating to Iran that may jeopardize bilateral and other Government interests.

While the Tribunal has not published any protection visa cancellation decisions relating to Iran since 2011, it does publish decisions on AustLII that relate to other countries, including decisions to both affirm and set aside the visa cancellation. These decisions set out the relevant law, findings and reasoning process followed by the Tribunal in those cases.

Information available from the Tribunal's databases indicates that, since 1 July 2014, the MRD has set aside a total of 60 decisions to cancel visas of protection or refugee visa holders. This represents less than 1 per cent of the total number of protection visa applications that have been finalised in the same period.

Character-related decisions

The cases referred to in an article in the Herald Sun of 22 May 2017 are character-related decisions.

A visa may be refused or cancelled under section 501 of the *Migration Act 1958* on the basis that a person does not pass the character test. Since 23 December 2014, a visa must be cancelled in certain circumstances. A person can then apply to have this decision revoked under section 501CA. A decision of a delegate of the Minister either to refuse or cancel a visa or not to revoke a mandatory visa cancellation can be reviewed by the Tribunal.

In reviewing these decisions, the Tribunal is required to apply the direction made by the Minister under section 499 of the *Migration Act 1958*. The direction sets out primary considerations and other considerations that are to be taken into account where relevant and assigns the relative weight to be given to those considerations. Tribunal decisions in these types of cases, setting out the relevant law, findings and reasoning process are generally published on AustLII.

Between 1 July 2014 and 30 April 2017, the AAT has finalised 156 applications for review of these types of decisions. The Tribunal set aside the decision in 35 cases.