# CASE NOTE

## TABAG v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS[1]

*Administrative Law — Administrative Appeals Tribunal — Deportation order — Weight to be given to different factors in exercising discretion — Significance of family break-up and hardship to innocent members of family — Human Rights Commission Act 1981 (Cth) — Migration Act 1958 (Cth) s 12.*

*Background*

On 15 June 1979 the County Court in Mildura convicted a Turkish immigrant, Ahmet Tabag, of an offence relating to the attempted cultivation of a commercial crop of marijuana. Tabag was sentenced to five years imprisonment with a non-parole period of three years. The fact of his sentencing, together with his status as an alien,[2] meant that Tabag was liable to deportation under s 12 of the Migration Act 1958 (Cth).[3]

On 9 April 1981, shortly before Tabag's release from prison, the Minister for Immigration and Ethnic Affairs, in purported exercise of his power under s 12, ordered that Tabag be deported from Australia.

Tabag applied to the Administrative Appeals Tribunal for review of the Minister's decision.[4] On 30 March 1982 the Tribunal, constituted by McGregor J, affirmed the decision to deport.

The subsequent appeal to the Federal Court of Australia was made pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 (Cth). On 23 December 1982, the Full Court of the Federal Court ordered that the appeal be dismissed.

*Grounds of Appeal*

The appellant relied on nine grounds of appeal; the grounds placed at the forefront of the appellant's case, and those with which this case note is concerned, were paraphrased by Woodward J[5] as follows:

> (a) the break-up of the appellant's family and the hardship caused to members of it . . . as a result of his deportation, were such powerful factors in this case that no reasonable tribunal acting according to law could have reached the decision appealed against;
> (b) alternatively, the Tribunal's reasons for its decision showed that it failed to give due weight to these matters, which should have

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[1] (1983) 45 ALR 705 Federal Court of Australia, Woodward, Keely and Jenkinson JJ.

[2] S 5(1) of the Migration Act 1958 (Cth) defines an "alien" as a person who is not (a) a British subject; (b) an Irish citizen; or (c) a "protected person" as defined by the Australian Citizenship Act 1948 (Cth).

[3] S 12 of the Act provides that: "Where . . . an alien . . . has been convicted in Australia of any . . . offence for which he has been sentenced to imprisonment for one year or longer, the Minister may . . . order the deportation of that alien."

[4] Administrative Appeals Tribunal Act 1975 (Cth), s 25; Migration Act 1958 (Cth), s 66E.

[5] (1983) 45 ALR 705, 707-708.

> received very great weight, and that failure was of such significance as to amount to an error in law; and
> (c) had due regard been given to the provisions of the Human Rights Commission Act 1981 and the International Covenant on Civil and Political Rights, the Tribunal could not have reached the decision it did.

*Family Hardship in Deportation Cases*

The approach taken by counsel for the appellant placed no reliance on any hardship to Tabag himself—he had committed a serious offence, the punishment for which could be expected to include deportation. Rather, it was argued that the innocent members of the appellant's family were being asked to pay a price disproportionate to the offence committed.

Tabag had come to Australia in 1970 with his wife and their four children (who, in 1982, were aged 15, 19, 22 and 25). By all accounts they were a close-knit family. Mrs Tabag had indicated that, in the event of her husband's deportation, she would undoubtedly accompany him back to Turkey. Immediate and indefinite separation from her elder daughter and two infant grandchildren would result. In addition, she would be separated from her two sons. The position with respect to her younger (15 year-old) daughter was uncertain. It was possible that she too would return to Turkey, but if she did so she would be entering an alien environment, as she could neither speak nor write Turkish and would be leaving all her friends and other immediate relatives. This would clearly have an adverse effect on her education and subsequent employment prospects. The alternatives were for the daughter to remain with relatives in Australia or to return to this country after two or three years. In either case, deportation would result in indefinite separation from her parents.

It was the contention of counsel that these factors of family disintegration and hardship to innocent members of the family must, as a matter of law, be afforded special weight which could be categorized as "paramount", "compelling" or "of a different order" from other relevant factors.

Reliance was placed on a number of statements emphasizing the significance of family hardship in deportation cases; the Administrative Appeals Tribunal has recognized that, in certain circumstances, deportation can be a "shattering blow"[6] to other members of the family, and that, in view of this, it is appropriate for the Tribunal to give "considerable weight" to the hardship factor when reviewing a decision to deport.[7]

The Federal Court in *Nevistic* v *Minister for Immigration and Ethnic Affairs*[8] described the then current government policy relating to the deportation of suppliers of illicit drugs as "callous" and "draconian". Deane J, in that case, recognized the problem of identifying circumstances

> in which Australia, as a mature civilized nation, should act in a manner which entails depriving four vulnerable and innocent young Australian

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[6] *Re Georges and Minister for Immigration and Ethnic Affairs* (1978) 1 ALD 331, 339 *per* Fisher J.
[7] *Re Stone and Minister for Immigration and Ethnic Affairs* (1981) 3 ALD N129, N132 *per* Davies J.
[8] (1981) 34 ALR 639.

> children either of their father or the opportunity of growing up in their native land.[9]

Counsel also referred to an English deportation case where the Court of Appeal said that no court would wish to "break up families or impose hardship on innocent people."[10]

The response of the Federal Court was less than enthusiastic. Woodward J pointed out that none of the judgments to which counsel had referred actually indicated that the factors of family break-up, or hardship to innocent members of the family should be regarded as compelling by a decision-maker. Indeed, the only authority for the suggestion that these factors should be different in their legal effect from other relevant considerations was the decision of Murphy J in the recent High Court case of *Pochi* v *Macphee*.[11]

Murphy J, in that case, described the limitations which he considered to be imposed on the power conferred by s 12 of the Migration Act 1958. In short, his Honour said that s 12 did not permit the deportation of an alien in circumstances which would either break up his family or compel his wife and children to leave a community into which they had been fully absorbed. The steps in his Honour's process of reasoning are readily identifiable. In the first place, Murphy J considered that

> in the absence of unmistakable language to the contrary, every statutory power although not expressly qualified, is subject to unexpressed qualifications.[12]

There is ample authority for this proposition.[13] In the opinion of Murphy J, one such unexpressed qualification in the case of the Migration Act was that the deportation power under s 12 must be exercised with due regard to those affected—that is, not only the deportee, but also others who "by family relationship or other association may be affected".[14] "Due regard", in this context, meant that the power was to be exercised according to the standards of civilized society. To exercise the power in circumstances which would involve the separation of an alien from his family in Australia would, in the opinion of Murphy J, be "inhumane and uncivilized".[15]

Counsel for the appellant did not ask the Federal Court to hold, as a matter of law, that circumstances of family break-up precluded the making of a valid deportation order under s 12. Instead, the judgment of Murphy J in *Pochi's* case was cited as authority for the proposition that family disintegration is a consideration of such importance that it should operate to prevent deportation in all but the worst of cases. As this was not such a case, it followed that the deportation of the appellant would be unjustified.

Jenkinson J, with whom Keely J agreed on this point, queried whether

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[9] *Ibid* 647.
[10] *R* v *Nazari* [1980] 1 WLR 1366, 1374.
[11] (1982) 56 ALJR 878.
[12] *Ibid* 883.
[13] *Shire of Swan Hill* v *Bradbury* (1937) 56 CLR 746, *Arthur Yates and Co Pty Ltd* v *Vegetable Seeds Committee* (1945) 72 CLR 37, and *Forbes* v *NSW Trotting Club Ltd* (1979) 25 ALR 1 are leading examples.
[14] (1982) 56 ALJR 878, 883.
[15] *Ibid* 884.

the *Pochi* statement was intended to be of general application. If it was, his Honour respectfully declined to accept such a general proposition.

Had Murphy J intended his statement to extend beyond the particular facts of *Pochi's* case, Jenkinson J considered that a finding that deportation was inhumane or uncivilized could not be made without the disclosure of circumstances additional to those referred to in the statement. Furthermore, the respective roles of the Minister for Immigration and Ethnic Affairs and the Administrative Appeals Tribunal gave rise to a fundamental objection to counsel's submission.

Section 12 of the Migration Act confers upon the Minister a discretion in relation to the making of a deportation order. The Act itself makes no reference to any principles governing the exercise of this discretion. Instead, the Minister is required to act in accordance with natural justice and the general limitations placed on the exercise of statutory power.[16] (He must, for example, act in good faith.) The Administrative Appeals Tribunal, when exercising its function of reviewing a decision made under s 12, is required to determine the "correct or preferable" decision on the material before it.[17]

Yet the contention of counsel was founded upon the acceptance, as a rule of law regulating both the exercise of the Minister's discretion and the Tribunal's function of reviewing the merits of a decision made pursuant to s 12, of the proposition that "a defined relative weight or importance is to be given to one of the considerations relevant to the exercise of those functions."[18]

Jenkinson J was not prepared to uphold a contention which impinged upon the functions of both the Minister and the Tribunal. He therefore concluded that:

> A rule or principle according [the harmful effects of deportation] a relative weight independent of the circumstances of the particular family or of the particular persons liable to be harmed could not . . . be justified.[19]

The third judge of the Federal Court, Woodward J, accepted that in deportation cases the breaking-up of a close-knit family was a consideration of major significance. The same could be said of the likely consequences for a child such as the appellant's daughter.

However, having regard to the circumstances in which a decision of the Tribunal would involve an error of law,[20] his Honour concluded that since McGregor J had not overlooked the matters relating to family disintegration, or dismissed them as being relatively unimportant in the instant case, it was open to the Tribunal to treat these matters as subsidiary to the public interest in deterring marijuana production. Thus, Woodward J tacitly declined to accept the *Pochi* statements as being of general application.

*Attribution of Weight to Relevant Considerations*

Counsel for the appellant submitted, in the alternative, that the Adminis-

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[16] *Nevistic* v *Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639, 640 *per* Franki J.
[17] *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.
[18] (1983) 45 ALR 705, 732.
[19] *Ibid.*
[20] Below pp 273-274.

trative Appeals Tribunal had failed to give "due" weight to the circumstances of family hardship.

Section 44 of the Administrative Appeals Tribunal Act 1975 (Cth) provides that appeal from the Tribunal to the Federal Court is limited to questions of law. Thus, the success of counsel's submission was initially dependent upon when, if ever, the weight attributed by the Tribunal to a relevant consideration would give rise to a question of law.

Keely J, referring to *Nevistic* v *Minister for Immigration and Ethnic Affairs*,[21] emphasized that the power and duty to conduct a review on the merits of the Minister's decision was entrusted to the Tribunal and not the Federal Court.[22] It followed, in his Honour's opinion, that

> in hearing an appeal from the Tribunal on "a question of law" it is not open to this Court to allow the appeal on the basis that in its opinion the Tribunal attached "undue" importance to one matter or failed to have "due" regard to another matter. The question of what weight should be given to . . . [a relevant consideration] is a matter for the Tribunal.[23]

Jenkinson J agreed, at least in part, with Keely J. His Honour considered that, within certain limits, the attribution of weight to relevant considerations was a matter for the Tribunal and not the appellate court.

Drawing a distinction between a decision which was wrong and worked injustice to a party, and a decision which no person acting judicially could have reached, Jenkinson J expressed the view that if the wrong weight was given to a relevant consideration, and this resulted in a wrong and unjust discretionary decision, that did not *necessarily* involve an error of law.[24] Only if the decision was one to which, on the material before the Tribunal, no reasonable mind could have come, could it be said to be tainted by error of law. His Honour considered that the conclusion reached by the Tribunal in this case was within the range of opinions which might reasonably be entertained. This being so, the Tribunal had committed no error of law.

Woodward J referred to *Nevistic* v *Minister for Immigration and Ethnic Affairs*[25] where Lockhart J expressed concern as to whether the Tribunal in that case had *sufficiently* recognized that the effects of deportation would include family break-up.[26] Woodward J considered this to be in accordance with his own view that

> the giving of inadequate weight to a consideration which should have great weight could amount to an error of law which would concern an appellate court.[27]

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[21] *Supra* n 16. Reference was also made in this context to *Steed* v *Minister for Immigration and Ethnic Affairs* (1981) 37 ALR 620, *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, and *Blackwood Hodge (Australia) Pty Ltd* v *Collector of Customs (NSW)* (1980) 47 FLR 131.

[22] (1983) 45 ALR 705, 715.

[23] *Ibid.*

[24] *Ibid* 727.

[25] (1981) 34 ALR 639.

[26] *Ibid* 652.

[27] (1983) 45 ALR 705, 710.

Although the allocation of weight to a relevant consideration would rarely involve any question of law, an error of law would have been committed if the Tribunal had ignored an important relevant consideration or had given it such little weight as to amount to virtually ignoring it. Once the appellate court was satisfied that an error of law had contributed to a result which it regarded as being "wrong and unjust" it would substitute its own discretion for that of the Tribunal.[28] His Honour did not consider that this was such a case.

*Human Rights Commission Act*

In developing the argument relating to the importance of family disintegration, counsel for the appellant referred to the Human Rights Commission Act 1981 (Cth), which came into operation while the Tribunal hearing was in progress. The Tribunal had not considered the Act. It was the contention of counsel that if "due regard" had been given to the Act and to the International Covenant on Civil and Political Rights (which is set out in a Schedule to the Act) it could not have affirmed the Minister's decision.

The Articles of the Covenant most relevant in this case were Articles 13, 23(1) and 24(1). These provisions refer to the protection to be afforded to the family unit and its children, and describe the manner in which an alien lawfully in a country may be expelled.

Jenkinson J, with whom Keely J agreed, found that the material before the Court was not supportive of counsel's submission; the apparatus for review of a decision to deport and the significant weight which the Tribunal attached to circumstances of family hardship in such a case were in compliance with the terms of the Covenant. In any case, as Woodward J pointed out, the International Covenant is to be used as a "yardstick for domestic laws and practices", but it is not made part of Australian law.[29]

*Observations*

This is a significant decision on the role of the Administrative Appeals Tribunal in criminal deportation cases and, in particular, the weight to be given to circumstances of family hardship and disintegration in a deportation situation.

The Federal Court once again has shown a disinclination to place constraints upon the discretionary powers of the Tribunal.[30] The width of these powers is such as to enable the Tribunal to determine for itself whether the decision under attack was the correct or preferable one on the material before the Tribunal.[31] Accordingly, the Federal Court stopped short of specifying the weight which was to be given to a relevant consideration. To have done so would have been tantamount to an abrogation of the power entrusted to the Tribunal.

Instead, the Court labelled hardship to the family of the deportee as an

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[28] *Ibid* 711.
[29] *Ibid* 709.
[30] See, in particular, *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 590 *per* Bowen CJ and Deane J; *Nevistic* v *Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639, 645 *per* Deane J; *Steed* v *Minister for Immigration and Ethnic Affairs* (1981) 37 ALR 620, 621.
[31] *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

"important relevant consideration" which should be given "great weight". To this extent, at least, the Federal Court was prepared to rule on the weight which the Tribunal may attach to a particular matter.

The case also provided the Federal Court with an opportunity to consider the role of the Administrative Appeals Tribunal as it extends to the review and application of government policy. In *Drake* v *Minister for Immigration and Ethnic Affairs*[32] a differently constituted Federal Court held that lawful government policy was not necessarily beyond the scope of the Tribunal's powers of review. Indeed, in the absence of a specific statutory provision requiring it to apply such policy, the Tribunal is obliged to make an independent assessment of the propriety of the policy in question.

Although the Tribunal has, in general, adopted a restrained approach,[33] the decision in *Drake* makes it plain that the Tribunal is entitled to depart from government policy if it considers that its application would not lead to the "correct or preferable" decision in any particular case.

This principle has been criticized for not providing the Tribunal which adequate guidance in its review of government policy.[34] It is said that a general rule is needed to identify more precisely the extent to which the Tribunal should take such review. On the other hand, the view has been put that the courts should not be too overbearing in their supervision of the Tribunal's functions.[35] Such an approach, it is argued, would jeopardize the Tribunal's legitimate role of resolving disputes "in a manner different from, and without the constraints imposed upon, courts".[36]

The ministerial guidelines in the present case provided that, in the absence of "compelling circumstances", aliens convicted of producing, or trafficking in, illicit drugs, should be deported. The guidelines go on to provide that the presence in Australia of the offender's spouse or children did not necessarily constitute "compelling circumstances".

Keely J considered that the question of what weight the Tribunal should give to the relevant government policy is a matter for the Tribunal and not an appellate court.[37] Jenkinson J was also mindful of the limits to the Federal Court's appellate function in relation to the Tribunal. It is not enough, in his Honour's opinion, that, by reason of the Tribunal attaching (what the court regards as) excessive importance to ministerial policy statements, the Tribunal arrives at a conclusion which the court considers to be "wrong and unjust". Only if it considers the conclusion reached by the Tribunal to be outside the range of opinions which might reasonably be entertained will the court intervene. Given the status of the Tribunal in the administrative structure, this range is likely to be of considerable width.[38]

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[32] *Ibid*, Bowen CJ, Smithers and Deane JJ.

[33] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634; *Re Jeropoulos and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 891; *cf Re Gungor and Minister for Immigration and Ethnic Affairs* (Federal Court of Australia, 30 May 1980, unreported decision of Smithers J).

[34] M D Kirby, "Administrative Review: Beyond the Frontier Marked 'Policy—Lawyers Keep Out' " (1981) 12 FL Rev 121.

[35] D Pearce, "Judicial Review of Tribunal Decisions: The Need for Restraint" (1981) 12 FL Rev 167.

[36] *Ibid* 181.

[37] (1983) 45 ALR 705, 715.

[38] *Blackwood Hodge (Australia) Pty Ltd* v *Collector of Customs (NSW)* (1980) 47 FLR 131, 145 *per* Fisher J.

Both Keely J and Jenkinson J can therefore be seen as recognizing the need to allow the Tribunal to exercise its powers with a minimum of judicial supervision—even when that exercise involves the review of lawful government policy.

Woodward J considered the implications of the Tribunal's allocation of weight to relevant considerations in general. There was nothing in his Honour's judgment to suggest that his analysis was not intended to extend to the Tribunal's treatment of relevant government policy. Even so, on the Woodward J view, the weight given by the Tribunal to a relevant consideration will rarely involve any question of law. The Tribunal would have to virtually ignore government policy before the Federal Court would even consider intervention.

As so often happens, the manner in which reasons are couched can mean the difference between an exercise of discretion being reversed or upheld. Provided that the requirements of *Drake's* case have been met, in that the Tribunal makes it clear that it has considered the propriety of the policy in question, the words "taken into account" will go a long way towards ensuring the survival of a Tribunal decision in the Federal Court. This is of particular importance in deportation cases where the Tribunal might consider the application of a "draconian" government policy to be wholly inappropriate. The decision in the instant case, therefore, poses no real threat to the ability of the Tribunal to conduct substantial review of the merits of government policy.[39]

A L DUTHIE*

[39] It is interesting to note that the order for Tabag's deportation was subsequently revoked by the Minister for Immigration and Ethnic Affairs in the new Hawke Government, the Honourable Mr S J West. The execution of the deportation order was accordingly prevented by s 20 of the Migration Act 1958 (Cth).

* BEc (ANU).