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References

- 1 Edited address by Senator McKiernan to the Bureau of Immigration, Population and Multicultural Research National Outlook Conference, Adelaide, 23 February 1995
- 2 Joint Standing Committee on Migration (chairman, Senator Jim McKiernan), the Parliament of the Commonwealth of Australia, *Asylum, Border Control and Detention*, Australian

Government Publishing Service (AGPS), Canberra, 1994, Catalogue no. 93 2591 4

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THE LAW AND THE MANAGEMENT OF AUSTRALIAN IMMIGRATION

Katharine Betts

Two new reports document the growing role of migration advisers, lawyers and the courts in Australian immigration, as well as the conflict between the judiciary and the executive over immigration control. One consequence of this conflict is that some foreigners now have a legal right to immigrate. Foreigners continue to be able to draw on legal aid to enforce this right and the Attorney General's Department does not record the costs.

Two government-sponsored reports were launched in February this year dealing with the considerable changes which have taken place in Australia's immigration procedures since 1989: Sean Cooney, *The Transformation of Migration Law* and Jonathon Duignan and Frances Staden, *Free and Independent Immigration Advice*, both published by the Australian Government Publishing Service. They help describe these changes and, in themselves, provide further evidence of them.

Cooney's title is to the point; immigration law has indeed been transformed. First, review procedures have altered. In the 1980s there were internal review panels which made recommendations to the Minister, but disappointed applicants often moved on from these to appeal to the Federal Court under the Administrative Decisions Judicial Review (ADJR) Act. Over the last six years the internal panels have been replaced by the Immigration and Refugee Review Tribunals. The tribunals are independent, statutory bodies. They provide merits review and produce, not recommendations, but determinative judgements in a setting which should be less formal, legalistic and expensive than the courts.¹

As a corollary, under the Migration Reform Act of 1992, disappointed applicants are no longer able to use the ADJR Act to appeal to the Federal Court. This portion of the Reform Act came into effect in September 1994. However, there is still a large back-log of cases before the Federal Court which

predates this change, and applicants who can no longer seek judicial review in the Federal Court may resort to the High Court, using common law rights rather than the ADJR Act. Access to the High Court is guaranteed in the Constitution.²

In a second set of changes, migration policy has been codified into legally binding regulations. Since the Migration Amendment Act was implemented in December 1989, these regulations have, in most circumstances, eliminated the power of the Minister or his delegates to use discretion in individual cases. In principle, an applicant either meets the criteria spelled out in the regulations, and has a legal right to immigrate,³ or he or she does not. (The right of foreigners to immigrate can, however, be modified by executive decisions to suspend processing in one or more sub-categories of the program.⁴)

The codification of policy and the curtailment of Ministerial discretion were intended to decrease the possibility of legal challenges and to make the system fairer. Under the new system there would be less scope both for personal interpretations of the rules by selection officers and for lobbying on behalf of well-connected individuals. Irrespective of the predispositions of migration officers, or the outcome of deals between Ministers, back-benchers and pressure groups, similar applicants should now receive similar decisions.

Cooney writes from a particular point of view, as all commentators must. This is a book written from the perspective of

migration advisers and their clients. He consistently uses the word 'migrant' to refer to persons merely applying for migrant visas, and the term 'irregular migrant' where he means a person whose presence in Australia is illegal. Chapter 8 on 'accountability and enforceability' is about the accountability of immigration officials to applicants and the applicant's ability to enforce his or her right to immigrate. It is not about the accountability of policy-makers to the Australian people or the ability of these policy-makers to enforce their immigration policies. Nonetheless, Cooney is not blind to the national interest and has some sensible remarks to make about the need to monitor the effects of decisions which may be favourable to individual applicants whose circumstances excite compassion, versus the flow-on effects to policy in general if such decisions were to apply universally. He gives qualified approval to all the reforms he discusses, except the restriction on the use of the ADJR Act.

The book is an evaluation of the legal transformation, particularly the codification of policy into regulations, as judged against the criteria of rationality, consistency, accessibility, fairness, accountability and enforceability, but it is also a useful summary of a complex set of changes. For example, there have been 16 amendments to the Migration Act itself since 1989 and many more amendments to the regulations (1109 in 1993 alone).⁵ Cooney provides a general overview. Chapter 3, 'The history of Australian migration law', and Chapter 4 'The codification', will be particularly helpful to students of Australian immigration.

The transformation of migration law grew out of conflict between the judiciary and the executive over the control of immigration policy, a conflict which began in the 1980s. The flood of post-1989 amendments is largely a product of this conflict as the executive continues to try to plug gaps and loopholes uncovered by the courts and tribunals.⁶ In Cooney's judgment the executive is now in front.⁷ For example, the validity of the regulations was challenged in the *Eremin* case. Eremin was a citizen of the USSR who had entered Australia illegally in February 1990. He used the ADJR Act to appeal against the Department's refusal to grant him a residence permit, arguing that the particular regulation upon which the refusal was based

was not authorised by the Migration Act. The case was lost both in the Federal Court and on appeal to the Full Court of the Federal Court. The grounds for this were that, even though a regulation might seem 'harsh in some respects' or form part of a 'draconian' system, it was consistent with a legislative scheme which reflected policy 'the formulation of which is not for the judicial branch of government.'⁸

But, while the courts have confirmed the right of the Government to make regulations under the legislation, the Immigration Department's interpretations of these regulations is under continual legal scrutiny. Challenges to decisions on these grounds under the ADJR Act actually increased after codification, with applicants claiming that a departmental officer had either misinterpreted a regulation or had made a procedural error.⁹ While the courts may have endorsed the executive's right to make policy, legal squabbles over the interpretation of the details continue. Irrespective of whether the High Court takes up the former role of the Federal Court or not, lawyers will still be involved in preparing cases for the tribunals. They play a key role in immigration today, a role that they lacked 15 years ago.

The cost of legal challenges to immigration decisions is unclear, but Cooney estimates that an applicant in a Federal Court proceeding that progresses to a final hearing would usually pay at least \$10 000 in legal fees and, if unsuccessful, might have to pay the Department's costs 'which would be at least a further \$10,000'.¹⁰ There were 95 Federal Court cases on immigration and refugee matters in 1988-89; 113 in 1989-90; 147 in 1990-91; 151 in 1991-92; and 428 in 1992-93.¹¹

How are these cases funded? Applicants making use of the courts in immigration cases are eligible to apply for legal aid but the amount of public money spent on this is not a matter of public record. Indeed, the Attorney General's Department cannot tell us how much is spent on legal aid to foreigners challenging immigration decisions. This is because the legal aid commissions do not ask people applying for assistance to disclose their citizenship status. Cooney neither poses nor answers questions about the role of legal aid in challenges to migration decisions but, whatever it may be, the cost to the taxpayer of applicants claiming and attempting to

enforce entitlements to permanent residence cannot be trivial.

As well as the historical survey of the changes themselves, Cooney provides a social survey of the migration agents and others who work with them. The qualitative data from the interviews are particularly interesting. For example, has codification improved consistency in decision-making? Or has the uncertainty formerly nurtured by political favouritism simply been replaced by uncertainty created by complexity and change? Are immigration decisions now more impartial and less subject to bias than before? Only 42 per cent of migration advisers felt that post-codification decision-making was more consistent.¹² Comments from the interviews include:

The African community will ... get into an area that will allow them to have their applications processed by [x] because they know they've got a more humane migration officer. (Non-legal community sector adviser)¹³

[X office is] faster and they're more reasonable [than y]¹⁴

The [x] office refused [a student permit]. Now the [x] office has a reputation ... for being very tough ... so what we said was, give us all your papers again and we'll use the [y] office and we ... did it all over again. There were inconsistencies between offices. (Education sector adviser)¹⁵

There's always that nagging feeling of 'I've overlooked something or it has been amended last night or this morning and nobody told me yet' ... You frequently have to try to reconstruct what the law was on a certain date, and even that task is made more difficult by the fact that you might have to take into account amendments that are retrospective ... I think that makes life incredibly difficult for practitioners to be sure they're giving correct advice, and frightfully difficult for anyone to keep on top of it. (Government official)¹⁶

Even if officials and advisers are neither 'tough' nor 'humane' and even if they are confident that they understand the current regulations, ambiguous situations can still remain. Cooney argues that a clear statement of the objectives of immigration policy would help practitioners resolve ambiguous situations in a consistent manner.¹⁷

Such a statement, as well as helping selection officers in their profession, would

provide an answer to the question raised by the FitzGerald Inquiry seven years ago: What is immigration policy for? The FitzGerald Inquiry found that the Australian Government and people did not know the answer then, and Cooney finds that his particular respondents are no wiser now. Regulating the details has not helped us to discover the broader purpose. Cooney favours the proposed statement of objectives offered by FitzGerald but reports that some of his respondents were opposed to any general statement because it might cause controversy. He considers this response inadequate; if objectives are unacceptable for some reason they should be publicly explained and debated.¹⁸

The FitzGerald objectives do have merit but they are devoted more to specifying the way in which immigration should take place rather than outlining the ends that it should serve.¹⁹ The Parliamentary Committee for Long Term Strategies recommended last year that immigration policy be recast as a subset of an explicit population policy. If this were to happen, political élites could set immigration policy more squarely within the framework of the national interest. The authors write:

... it is essential that Governments ... understand that establishing a population policy is a *primary* goal and that setting immigration levels is a *secondary* consequence of the population goal. The cart must not be placed before the horse making population policy merely an undefined, inexplicit consequence of immigration policy.²⁰

IMMIGRATION ADVICE

Duignan and Staden's report on the Immigration Advice and Rights Centre (IARC) is part of an interesting spin-off from the growing role of lawyers in immigration and the codification of selection procedures – the growth of a new industry of legal and non-legal migration advisers. Many of these advisers operate on a commercial basis. Others, like those working for the IARC, have operated on a not-for-profit basis, often acting as volunteers. (Just as some advisers in the migration industry work for charity while others work commercially, so some are ethical and others crooked. In June 1992, the Government moved to regulate all immigration advisers. From that date it became illegal to offer migration advice, gratis or for

a fee, unless the adviser was registered with the Migration Agents Registration Board.²¹⁾

The IARC was formed during the 1980s, apparently drawing both on charitable groups and on lawyers funded through legal aid programs. It publishes a quarterly newsletter, *Immigration News*, which covers changes in the law, as well as an 'Immigration Kit' which sets out the current regulations in plain English. In addition, it works for legal changes in keeping with its client-oriented, 'social justice perspective',²² tests the limits of law and policy,²³ and gives free immigration advice, both to Australian residents anxious to sponsor relatives from overseas and to foreigners currently in Australia. In 1993 the organisation was granted direct funding from the Immigration Department and it now employs six full-time staff and one part-timer, as well as numerous volunteers.

It may seem bizarre that the Government should directly fund such an enterprise, especially as the Immigration Department maintains a network of regional offices which provide immigration advice. But, if support for the IARC leads to fewer demands on legal aid and fewer formal applications and appeals from people who clearly fall outside the guidelines, there may logic in the policy. (Besides, as Duignan and Staden point out, illegals are reluctant to approach the Department.²⁴⁾

The authors report on the use made of the IARC's services between July 1990 and November 1992. During this period just under 11 000 people either rang in with questions or appeared in person. Records were kept of the nature of their inquiries (as well as country of origin and other details). Table 1 summarises the main findings.

Marriage and its substitutes now play an important role in immigration and Table 1 records many inquiries to the IARC about migration based on these grounds. Though not all of the questions about 'Preferential migration' would have involved marriage, this would have been of true of many. If the figures for Preferentials are added to the marriage and de facto change-of-status inquiries, up to 40 per cent of the clients recorded in Table 1 had asked

for help about permanent residence on the grounds of marriage (or de facto relationships).

Time-series data show that this group has grown from 32.5 per cent in 1990 to 42.7 per cent in 1992, a change which coincides with a fall (from 15.3 to 9.2 per cent) in inquiries from illegal migrants wanting to acquire permanent-resident status.²⁶ The authors point out that these changes are related: 'As the options for onshore change of status have become increasingly restricted, particularly for those with illegal status, the offshore Preferential Family immigration programs are often the only alternative.'²⁷ This echoes Birrell's finding about the expanding role of off-shore spouse migration in Australia. In the past, growing numbers of temporary and illegal migrants who were on-shore attempted to regularise their status on the grounds of marriage to an Australian resident. The regulations governing this were tightened in 1991 and, in consequence, some applicants

Table 1: Clients' inquiries to IARC July 1990 to November 1992, percentage of problems, and of clients, by area of inquiry²⁵

Area of inquiry	problems ^a	clients ^b
Migration (off-shore)		
Preferential family (includes marriage)	11.0	18.8
Concessional family	5.8	10.0
Special humanitarian and refugee	1.7	3.0
Other	4.8	8.1
Total migration (off-shore)	(23.3)	(39.9)
Temporary migration	10.4	17.9
Change of status		
Marriage or de facto grounds	12.4	21.2
Humanitarian or refugee grounds	4.3	7.2
Other grounds	11.3	19.3
Total change of status	(28.0)	(47.7)
Illegality	15.7	26.6
Entitlements (Medicare etc.)	6.2	10.7
Other	9.7	19.4
Total (Number)	100.0 (18 646)	- (10 915)

^a Clients' inquiries were coded for up to five problems. Of the 10 915 clients 49.1% were coded for only one type of problem, 47.4% were coded for two or three types of problem, and 3.5% were coded for four or five types, giving a total of 18 646 problems. (See Duignan and Staden, p. 36.) In the first column the unit of analysis is a problem.

^b This column shows the percentage of clients mentioning a specific problem. Because many were coded for more than one problem, percentages add to more than 100 (173.5%)

seem to have moved off-shore to apply from overseas. Unlike the spouses, fiancé(e)s and de facto who obtain visas on-shore, overseas applicants are subject to few checks on their bona fides and no restrictions on their eligibility for welfare and higher education benefits.²⁸

As push factors in many areas of the world intensify, migration flows across borders are growing. While receiving countries may resist some of these pressures, intervening variables such as cheaper transport, social networks and improved communication modify that resistance. A growing interest in the rights of applicants is also an important modifier. When nation states grant foreigners a legal right to entry, and give public money to them so that they may enforce this right (and give it in such a way that the sums cannot be traced), the concept of the nation and its borders have changed.

In Australia the executive has regained the authority to make migration policy, but at the price of giving some foreigners a legally enforceable right to immigrate. In the meantime, tussles about the interpretation of the now codified policy continue. Though the 1992 Migration Reform Act has ruled the Federal Court out of bounds for most new cases, if some of these cases flow to the High Court instead, the conflict between the two arms of government will gain a new twist.

References

- ¹ See S. Cooney, *The Transformation of Migration Law*, Australian Government Publishing Service (AGPS), Canberra, 1995 (catalogue no. 94 2153 2), pp. 35, 104, 120, n. 41.
- ² See 'What the Migration Reform Act really means', *Immigration News*, no. 33 October/November, 1993, pp. 8-9.
- ³ On the right to immigrate, see Cooney, op. cit., 1995, pp. 29, 95, 101, 110.
- ⁴ See *ibid.*, pp. 31, 32.
- ⁵ *ibid.*, pp. 56-57.

- ⁶ See *ibid.*, pp. 16-18, 60-61, and K. Cronin, 'A culture of control: an overview of immigration policy-making', in J. Jupp and M. Kabala (Eds), *The Politics of Australian Immigration*, AGPS, Canberra, 1993.
- ⁷ See Cooney, op. cit., pp. 38-39.
- ⁸ Judgment quoted in *ibid.*, p. 39.
- ⁹ *ibid.*
- ¹⁰ *ibid.*, p. 128, n. 4.
- ¹¹ *ibid.*, p. 129, n. 38.
- ¹² *ibid.*, p. 48.
- ¹³ *ibid.*, p. 48.
- ¹⁴ Unspecified adviser (B4), *ibid.*, p. 49.
- ¹⁵ *ibid.*, p. 49.
- ¹⁶ *ibid.*, p. 57.
- ¹⁷ *ibid.*, pp. 63-67.
- ¹⁸ *ibid.*, p. 75.
- ¹⁹ See S. FitzGerald (Chairman), *Immigration: A Commitment to Australia*, AGPS, Canberra, 1988, pp. 21-22.
- ²⁰ B. Jones, *Australia's Population 'Carrying Capacity' One Nation - Two Ecologies, Report by the House of Representatives Standing Committee for Long Term Strategies*, AGPS, Canberra, 1994 (catalogue no. 94 2906 7), p. 19.
- ²¹ See S. Cooney, op. cit. p. 6.
- ²² J. Duignan and F. Staden, *Free and Independent Immigration Advice: An Analysis of Data collected by the IARC July 1990-November 1992*, AGPS, Canberra, 1995 (catalogue no. 94 2146 3), p. 43.
- ²³ *ibid.*, p. 78.
- ²⁴ In one in five cases dealt with by the IARC 'illegality is relevant to the client's inquiry.' *ibid.*, p. 41. See also pp. 29, 78. (In fact Table 1 set out here shows that illegality was relevant to 26.6% of inquires, more than one in four.)
- ²⁵ Source: Derived from Table 4.10 in *ibid.*, pp. 32-33.
- ²⁶ *ibid.*, p. 35.
- ²⁷ *ibid.*, p. 33.
- ²⁸ R. Birrell, 'Spouse migration to Australia', *People and Place*, vol. 3, no. 1, 1995, pp. 9-16.

(Editors' note: copies of both reports are available from the AGPS: Cooney at A\$19.95 and Duignan and Staden at A\$14.95. The Jones report is also available for A\$16.95. Overseas readers can order from the AGPS at GPO Box 84, Canberra, ACT 2601, Australia, or by fax: 616 295 4888. Surface mail is included in the price. Ask for a quote for air mail.)