

Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326

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Facts

- WZARH, a Sri Lankan Tamil, entered Australia by boat in about November 2010 and was classified as an "offshore entry person".
- WZARH was denied an application for refugee status. WZARH applied for an independent merits review. A recording and transcript of an interview with the reviewer were produced and documents tendered by WZARH to the reviewer.
- The initial reviewer was unavailable to complete the process and the application was transferred to a second reviewer. This reviewer, after examining the transcripts and documents, found that WZARH was not eligible for a protection visa.
- WZARH claimed a denial of procedural fairness because he was not heard in person by the final reviewer and that the final reviewer did not take into account the scarring on his arm.
- The Full Federal Court allowed WZARH's appeal, agreeing that he had been denied procedural fairness because he had a legitimate expectation that either the first reviewer would complete the recommendation or that any replacement would conduct a new interview, but rejected the relevant consideration argument regarding the scarring.
- Appealing to the High Court, the Minister argued that the Federal Court erred in using the concept of 'legitimate expectation' in its analysis of procedural fairness requirements, and that the Full Court erred in finding that there had been a denial of procedural fairness without indicating why denying a second review was procedurally unfair.

Issues

- Had WZARH been denied procedural fairness?

Held

- The High Court unanimously dismissed the appeal.
- The joint judgment of Kiefel, Bell and Keane JJ agreed that while the 'legitimate expectation' criteria had been rejected as 'unnecessary and unhelpful' and may distract from the real questions of the requirements of procedural fairness, the conclusion in the Federal Court's decision was that the second reviewer's failure to observe the requirements of procedural fairness involved a 'fundamental change to the administrative process being pursued without [the respondent] being alerted to the change'. This conclusion 'might have been more readily apparent' had the concept of legitimate expectation been omitted.
- The joint judgment also agreed with the Full Court's conclusion that there was no reasonable

basis on which the second reviewer could fairly have refused the respondent an opportunity to be heard on how the review process should proceed after the withdrawal of the first reviewer.

- Gageler and Gordon JJ emphasised that the change in procedure without notice to the respondent constituted a failure to afford the respondent a reasonable opportunity to be heard.

Quotes

"The 'legitimate expectation' of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness. It is sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions. Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; namely, what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made."

(Kiefel, Bell and Hayne JJ at paragraph [30])

Full Text

The full text is available here:

<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2015/40.html>

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