

Background and dissent from teoh law constitutional administrative essay

Law



**ASSIGN
BUSTER**

Under Commonwealth of Australia of Australia Constitution Act s51 (29), the commonwealth government has the power to make laws regard to external affair, including ratification of a treaty.[2] However, if the treaty is not legislated into domestic statute, it does not form a part of the municipal law. The question of whether Australia is legitimately expected to follow the international treaty is being discussed in Teoh and Lam.

Background and dissent from Teoh[3]

In Teoh case, the applicant, Mr Teoh had been involved into a deportation after his criminal conviction for possession of heroin in Australia. Mr Teoh had seven dependants in Australia, including his biological and step-children. In consideration of Mr Teoh's case from Immigration Review Panel and Covenant on the Rights of Child, the court must examine the impact of deportation to his children. The High Court combines different opinions on the concept of legal expectation. The majority of the High court simply re-articulated the existing principles regarding to the concept of legitimate expectation. In the dissent of Mason CJ and Deane J, the court should favour the ratified international treaty since it holds significant meaning to municipal law.[4] Mason CJ and Deane J stated: The fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party,[5]...It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of

international law.[6]...The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.[7]On the other hand, McHugh J disagreed with the majority, he treated the legitimate expectation identified by the majority as one involving the substantive protection of the treaty, rather than being concerned with procedural requirements.[8](1) the doctrine of legitimate expectations is concerned with procedural fairness and imposes no obligation on a decision-maker to give substantive protection to any right, benefit, privilege or matter that is the subject of a legitimate expectation;(2) the doctrine of legitimate expectations does not require a decision-maker to inform a person affected by a decision that he or she will not apply a rule when the decision-maker is not bound and has given no undertaking to apply that rule;(3) the ratification of the Convention did not give rise to any legitimate expectation that an application for resident status would be decided in accordance with Art 3. McHugh J also concerned the objective nature of the expectation in Teoh. He questioned the dissent of reasonableness from Mason CJ and Deane J:[9]It must be an expectation that is objectively reasonable for a person in the position of the claimant. But that does not mean that the state of mind of the person concerned is irrelevant. ... If a person does not have an expectation that he or she will enjoy a benefit or privilege or that a particular state of affairs will continue, no disappointment or injustice is suffered by that person if that benefit or privilege is discontinued. A person cannot lose an expectation that he or she does not hold.

Background and dissent from Lam[10]

In this case, the applicant, Mr Lam was convicted for serious offences and sent to prison. During his imprisonment, the Department of immigration cancelled his transitional (permanent) visa. Like Teoh, Mr Lam had established a family in Australia. He had two daughter, whom had been born in Australia in 1989 and 1993 respectively. Under international convention, his children are protected by The United Nations Convention on the Rights of the Child.[11]The department wrote to him on 7 Nov 2000 seeking details of the carer of his children, so to contact them to assess their relationship with Mr Lam. However, the department neither followed through the letter and contacted his carer, or inform Mr Lam before making a deportation. The majority of High court decided there was no breach of natural justice, nor legal expectation.[12]In Gleeson CJ's dissent, he expressed that the legitimate expectation is not existed when the applicant had no subjective expectation:[13]The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed... Yet no attempt is made to show that the applicant held any subjective expectation in consequence of which he did, or omitted to do, anything... No practical injustice has been shown. The applicant lost no opportunity to advance his case.

Difference between Teoh and Lam

The case of Teoh and the case of Lam shares varies of similarities. They both concerned the ratification of an international treaty and the legitimate expectation on those treaties. Inevitably, the concept of legitimate expectation were discussed heavily on both cases. In Teoh's case Mason CJ

and Deane J established that legitimate expectation exist even when the applicant was not aware of the expectation. While in Lam, Gleeson CJ opposed the argument, saying that legitimate expectation only exist if the applicant was aware of the expectation.[14] However, in both cases, McHugh J maintain his concern with legitimate expectation, he pointed out the concept of legitimate expectation still contains varies uncertainties, and may have minimal effect on municipal law.[15] In Teoh's case, Mason CJ and Deane J talked about the status of the convention in Australian law. They stated international treaty do not form a part of Australian law unless those provisions have been validly into our municipal law by statute.[16] However, they accepted that international law can affect the development of municipal law in Australia, as long as it is in conformity and does not conflict with the municipal law.[17] Since international law is ratified by the good will of the government, the court does have the obligation to follow the international law. On the other hand, McHugh disagreed with Mason CJ and Deane J with a strong dissent. He stated international treaties will not give rise to legal expectation, he questioned if the ratified treaty give rises to procedural fairness, and it will damage Australia's legal system in a whole.[18] On the other hand, in Lam's case, the status of convention in international law is rarely touched. In Lam's case, the only dissent concerning the convention is from McHugh and Gummow J, they rejected that a reasonable expectation could arise unless the executive expressed an intention to comply with the Convention.[19] The major difference in both cases is, are there any procedural fairness involved? In Teoh's case, the majority stated uneven the applicant is not aware of the expectation, legal expectation still applies. The

existence of legitimate expectation requires the decision maker act as a way to achieve procedural fairness. If the decision maker propose to make a decision inconsistent with a legitimate expectation, the person affected should have been given a notice. The decision of Teoh does not require any understanding of the law. However, in Lam's case, the majority delivered a completely different judgement. In Gleeson CJ's dissent, he stated that since the applicant did not have any expectation, there were no procedural fairness involved. The decision maker does not requires to give notice to the applicant if there is no procedural fairness is involved.[20]Even if the legitimate expectation is to remain in law, it should only apply where the plaintiff possesses the expectation. The judgement is similar to Kioa, which an expectation held by individual cannot alter the administrative law.[21]In both cases, the opinion towards procedural fairness varies. However, in both cases, there are still concern with the doctrine of legitimate expectation. In Teoh's case, McHugh has expressed his concern with legitimate expectation from treaty ratification.[22]He expressed it would be too complicated for decision makers to comply with all nine hundred treaties. He believes it is not reasonable for decision makers to follow all terms and conditions of all the treaties. In Lam's case, the majority also expressed a similar dissent with McHugh. Gummow JJ, Callinan J and Hayne J agreed that legitimate expectations has no role to play in determining the threshold question. [23]Hayne J in particular questioned the concept of legitimate expectation. He said the concept of legitimate expectation is not yet explained in Teoh. [24]While Glesson CJ find out it will be very difficult to follow indication lay down by international law, as Teoh provides an unclear definition on

legitimate expectation.[25]With the confusion and question regards to legitimate expectation. Teoh and Lam are a good opportunity to review the procedural fairness on existing international human rights. In doing so, it may be that more substantive protection of rights is the outcome. Perry J of the South Australian Supreme Court made the following statement after the decision of Lam is delivered.[26]He stated that Teoh is only relevant to the process of administrative- making. It has nothing to do with substantive as opposed to procedural rights, and it does not assist the courts as opposed to administrators in their decision-making. It does not provide a satisfactory platform from which to develop and expand the relationship between international human rights norms and the domestic law of Australia. As procedural fairness is one of the foundation in Administrative law. Australian courts have little explanations on whether ratification of international treaties create legitimate expectation on municipal law. However, English courts have gone further in explanations.[27]In Coughlan case, the English court has enforced to a legitimate expectation, to the extent of a relevant consideration. However, Australian law does not follows the English explanation.[28]Instead, we are more focus on Teoh and Lam's judgement. From the later cases, we can see Teoh is more favoured, although the judgement of Lam is laid down, there are rarely any case which adopts its principle. Bibliography

Legislation

Constitution ActThe United Nations Convention on the Rights of the Child