

Episode 29: Summary

Episode name: The Moment of Decision: How Judges Judge

Guest(s): The Hon Michael Kirby AC CMG (MK)

What area(s) of law does this episode consider?

How judges approach the process of making a decision, after a hearing ends.

Why is this topic relevant?

While lawyers might spend their entire careers presenting and formulating the best arguments possible for consideration by a court, many do not understand the process by which a judgement is made. In this episode, the Hon Justice Michael Kirby discusses subconscious intuition, bias and values as obstacles by which judges must overcome in order to make a legal decision.

What legislation is discussed in this episode?

- *Migration Act 1958* (Cth)

What cases are discussed in this episode?

- *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365

This case involved a family from Afghanistan who were part of the Hazara minority and fled to Australia due to a fear of persecution. In accordance with the *Migration Act 1958* (Cth), when they arrived without papers they were placed into detention.

Two of the children in their family (by their mother as their next friend) made an application in the Family Court of Australia seeking orders that the Minister for Immigration and Multicultural and Indigenous Affairs be required to release the children from detention, under the Court's welfare jurisdiction. At first instance, the Family Court declined to make the orders; Dawe J held that the Court had no jurisdiction, but on appeal, the Full Court of the Family Court held that it had jurisdiction to order the children's release from detention, holding that the *Family Law Act* had conferred jurisdiction on the Court "*in respect of children of marriages without limitation*". The Full Court also held that an interpretation of the Act on those terms gave effect to the United Nations Convention on the Rights of the Child, to which Australia is a signatory.

Further questions arose as to whether the provisions of the *Immigration Act* requiring the mandatory detention of "unlawful non-citizens" should be read down to exclude children. The definition of a "non-citizen" under that Act was merely "a person who is not an Australian citizen". As Kirby J held in the case, 'self-evidently, a child is a "person"'.

In the episode, Kirby J discusses how his intuition initially led him to draw a conclusion that favoured the non-detention of the two boys, however upon consideration of the executive's intention, ultimately, Kirby J and the other Justices of the High Court unanimously held that the application be dismissed.

- *Mabo v Queensland (No 2)* (1992) 175 CLR 1

A case in which the High Court held that native title rights, deriving from Indigenous customary law existing before English settlement, were not extinguished by the doctrine of "terra nullius", and were only extinguished by subsequent laws which were inconsistent with customary law (such as Crown grants of fee simple). As a consequence, the potential for proprietary "native title" rights were recognised.

- *Wik Peoples v The State of Queensland* (1996) 187 CLR 1

An influential native title case that determined that the granting of a pastoral lease does not extinguish native title rights, on the basis that a pastoral lease does not confer rights of exclusive possession on the leaseholder. The case, while legally uncontroversial, was the subject of much political comment and controversy.

- *Minister for Immigration & Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559

Mr Guo and Ms Pan were a couple from China who travelled to Australia in 1993 and made an application for refugee status due to a fear of persecution for their political opinions and possible forced sterilisation upon return. In 1994, their applications were rejected by the Minister as it was established that they had no real fear of returning to China. This decision was later ultimately upheld by the High Court.

What are the main points?

- In the High Court, judges meet in the anteroom to discuss preliminary thoughts on a case after reading the written submissions. Then a week later after the hearing, they converse via video to have a more in-depth discussion.
- Judges do not decide based on political views or personal values; the role of the judiciary is to apply the law to legal questions as it stands, and as was intended by the executive.
- Dissenting judgments are valuable because they allow judges to express their true, honest opinions and validate the differences in logical legal conclusions.
- Consultation with other judges to discuss cases safeguards against a particular judge's overreliance on their own values, bias or intuition.
- The judicature in Australia is an effective system in which one can disagree with a judge's decision and have remedies available to them, which upholds the integrity of the office.
- 'Where the rights of vulnerable persons under valid legislation are in question, it is often necessary to keep judicial intuition in check, for sometimes it will be based unconsciously on the very attitudes that the law is designed to correct and redress.'¹

What are the practical takeaways?

- Judges and advocates may use different ways of analysing an argument, from Kirby J's tree diagrams, compared with Mahoney J's more formal sentence

¹ *Minister for Immigration and Multicultural and Indigenous Affairs v B* 219 CLR 365 [121] (Kirby J).

writing approach, to just 'letting the case wash over'.

- Judges' decisions can vary within the limits of the law as they may adopt a more literalistic interpretation or a more purposive interpretation of statutory or constitutional language or of the language of the previous common law decision, depending on the case.

Show notes

[The Hon Justice Kirby's article 'Judicial Dissent - Common law and civil law traditions'](#)

[John van Kooy's research briefing note](#)

[The Hon Justice Kirby's Symposium speech to mark the 50th anniversary of the publication of *Province and Function of Law* by Professor Julius Stone](#)

[The Refugee Council's film 'Stop the Boats' \(2018\)](#)