CITATION:	*Narjee v Commissioner of Northern Territory Police* [2005] NTMC 071
PARTIES:	RIC WAYNE NARJEE v COMMISSIONER OF NORTHERN TERRITORY POLICE
TITLE OF COURT:	FIREARMS APPEAL TRIBUNAL
JURISDICTION:	Firearms Act (NT)
FILE NO(s):	20517898
DELIVERED ON:	7 November 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	13 October 2005
JUDGMENT OF:	Mr Dale Egan, Commander Bert Hofer, Jenny Blokland SM (Chair)

CATCHWORDS:

Tribunals – Administrative Law – Revocation of Decision after Appeal Filed
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Autodesk Inc v Dyason (no 2) (1993) 176 CLR 300
Permanent Trustees Co (Canberra) Pty Ltd v Stocks & Holdings (Canberra) 15 ACTR 45
Leung (1997) 150 ALR 76
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) ALR 117
Sloane v Minister for Immigration, Local Government and Ethnic Affairs (1992) 28 ALD 480
Re Paterson and Department of Home Affairs and Environment (1985) 7 ALD 403
Re Cox and Commonwealth of Australia (1987) 12 ALD
R v Moodie; Ex parte Mithen (1977) 17 ALR 219
Re Bloomefield and Sub-Collector of Customs,ACT (1981) ALD 204
Re Hounslow and Department of Immigration and Ethnic Affairs (1985) 7 ALD 362
Re Sarina and Secretary, Department of Social Security (1988) 14 ALD 437

Allars, M, "Perfected judgements and inherently angelical administrative decisions: The power of courts and administrators to re-open or reconsider their decisions" Australian Bar Review Vol 21 No 50 (2001) at 66.

Campbell, “Revocation and Variation of Administrative Decisions” Monash Law Review Vol 30 No 22 1996 at 38.

Orr,R and Briese, R “Don’t think twice - Can Adminstrative Decision Makers Change Their mind?” AIAL Forum No 35 2003 at 11.

REPRESENTATION:

Counsel:

Appellant:	Self
Respondent:	Ms Chalmers

Solicitors:

Appellant:	n/a
Respondent:	

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 071
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IN THE FIREARMS APPEAL TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20517898

BETWEEN:

RIC WAYNE NARJEE
Appellant

AND:

COMMISSIONER OF NORTHERN TERRITORY POLICE
Respondent

REASONS FOR JUDGMENT

(Delivered 7 November 2005)

MR DALE EGAN

COMMANDER BERT HOFER

MS JENNY BLOKLAND SM:

Introduction

1. Ric Wayne Narjee, "the Appellant" applied for and was refused a Shooter's Licence. The primary decision maker, a delegate of the Commissioner of Northern Territory Police "the Respondent" communicated the decision with reasons in a letter to the Appellant dated 27 June 2005. The Appellant lodged an appeal to the Firearms Review Tribunal "the Tribunal" under the Firearms Act.

2. The appeal was listed for hearing on 13 October 2005. On that day the Tribunal was informed that the Respondent had revoked the decision of 27 June 2005. The Tribunal was invited by the Respondent to discontinue the

appeal or not proceed to hear the appeal as, it was argued, there was no longer a decision in existence capable of forming the basis of the appeal. The Appellant, who was unrepresented on 13 October 2005 did not consent to the appeal being discontinued. The Appellant advised the Tribunal he did not want to withdraw the appeal but wanted the appeal to be heard in relation to the decision to refuse him a shooter's licence.

3. The question to be determined as a preliminary point is whether there is an appeal to be determined. That question in turn can only be answered by determining whether the purported revocation is valid within the context of the *Firearms Act*. The Tribunal adjourned after hearing brief argument on the point to allow consideration of the matter further.

Relevant Documents Before the Tribunal

4. The letter to the Appellant refusing the Shooters Licence dated 27 June 2005 is headed: "NORTHERN TERRITORY POLICE. FIREARMS ACT – SECTION 10 – NOTICE OF REFUSAL IN RESPECT OF A LICENCE" and reads:

> "Dear Sir, Your application for a Shooter's Licence has been refused under Section 10(3)(b) of the *Firearms Act,* for the following reasons: You have displayed a total disregard for the law, as demonstrated by your extensive criminal history, including over 50 convictions for traffic offences in the last 10 years. In accordance with the provisions of Sections 58(4)&(5) of the *Firearms Act,* you may not possess or use a firearm for any reason while you are prohibited from applying for a licence. Subject to the provisions of Section 62 of the Act, you are required to dispose of any firearm\s immediately on receipt of this notice. Disposal of the firearm/s may be by sale to a licensed dealer or a person who may lawfully own and possess the firearm/s or by deactivation or surrender to the Commissioner for disposal. Subject to Section 62(4) of the Act, the disposal of the firearm/s must be notified to the Commissioner in writing within 14 working days, stating the details of the firearm/s sold/disposed, with name, address and firearm licence number of the person to whom sold/disposed to."

5. After the appeal to this Tribunal was lodged and prior to the hearing initially scheduled for 13 October 2005, the Respondent sent a further letter to the Appellant dated 5 October 2005 stating as follows:

> "Re: NOTICE OF REFUSAL IN RESPECT OF A LICENCE DATED 27 JUNE 2005. I refer to the above matter. On 27 June 2005 I notified you that your application for a shooter's licence had been refused under 10(3)(b) of the *Firearms Act.* That notice of refusal is hereby revoked. I am now in the process of considering your application dated 17 March 2005 afresh and will correspond with you in due course in that regard. A copy of this letter has been sent to the Firearms Appeal Tribunal. Please note that unless you file a Notice of Discontinuance, it is likely that your appeal will remain in the Court list for 13 October 2005. Any queries you may have in this regard should be directed to a legal practitioner or to the Court staff."

Arguments Raised Before the Tribunal on 13 October 2005

6. The Appellant made it clear he did not want to withdraw the Appeal but wanted to have the Tribunal determine it. Being unrepresented he tended to lapse into arguing the merits rather than being able to concentrate on the preliminary point. We make no criticism of him because of that – he still communicated clearly to the Tribunal that he wanted his appeal heard.

7. The arguments raised on behalf of the Respondent were firstly that as the decision to refuse a licence had been revoked, there was no longer an appeal before the Tribunal; that the nature and purpose of the *Firearms Act* concerned the regulation of firearms in the context of public safety and the Tribunal ought to have regard to that in decision making; that the Tribunal, by virtue of the *Firearms Act* is placed in the shoes of the primary decision maker and can make all decisions that the Respondent can make when considering a licence; that by virtue of *s 43 Interpretation Act*, a power to grant includes a power to rescind or revoke.

8. Counsel for the respondent did not advise the Tribunal of why the Respondent had rescinded or purported to rescind the original refusal. When

pressed about those reasons or whether there had been any legal advice to the Respondent on the original refusal to grant a licence, counsel stated such advice was protected by legal professional privilege. Although that may of course be the case, it leaves the Tribunal completely in the dark about why the Respondent purported to rescind the original decision. Counsel for the respondent hinted that there may be further material that has come to light, but the Tribunal could not put that any higher than a hint. If, as will be discussed below, the Respondent had acknowledged there was an error in the decision such that the decision was invalid, that may well support the Respondent's application, however, given no reason was disclosed, the Tribunal cannot assume this was the case.

Relevant Parts of the Firearms Act

9. I agree with counsel for the respondent that the issue of public safety is paramount concerning any discussion of the *Firearms Act.* In order to regulate the possession and use of firearms, the *Firearms Act* requires the Respondent Commissioner to keep a register of firearms and firearms licences and permits (*s 7 Firearms Act)*; as occurred with the primary decision maker in this matter, the Commissioner may delegate his or her powers and functions to certain other officers *(s 5 Firearms Act)*; a person who applies for a licence for a firearm, (aside special categories and exceptions that do not appear to be relevant here), makes application to the Commissioner pursuant to *s 9 Firearms Act*; the Commissioner (including his or her delegate) may grant or refuse to grant the licence (*s 10(1) Firearms Act)*; a number of restrictions on the Commissioner's power to grant a licence are listed under *s 10 Firearms Act* – of direct relevance here is *s 10(3)* – the Commissioner cannot grant a licence unless satisfied the applicant is a "fit and proper person".

10. It should be noted that if the Commissioner has granted a licence, there are specific powers of suspension or revocation that can be utilised if certain

criteria are made out, alternatively, some circumstances will give rise to automatic suspension or revocation of a validly granted licence.*(Part 6 Firearms Act).*

11. If the Commissioner refuses to grant or revokes a licence, the applicant cannot apply again until certain conditions are met and must deliver their licence and firearms to police or approved person *(s 43 Firearms Act).*

12. The Tribunal is established by *s 50 Firearms Act.* A person aggrieved by a decision or action of the Commissioner may appeal to the Tribunal. The appeal is in the nature of a rehearing and the Tribunal has all the powers, authorities, duties, functions and discretions that the Commissioner has in relation to the decision or actions the subject of the appeal *(s 52 Firearms Act). Section 54 Firearms Act* requires the Tribunal to determine an appeal by confirming the decision or action of the Commissioner or substituting its own decision for that of the Commissioner. A party who is aggrieved by a decision of the Tribunal may appeal to the Supreme Court on a point of law.

13. So far as I can ascertain, there is no express power in the *Firearms Act* granted to the Respondent to revoke a decision to *refuse* a licence, (in contrast to grants of express powers, indeed *obligations* on the Commissioner to revoke a decision to *grant* a licence). This would appear to be so whether the revocation is before or after the filing of an appeal to the Tribunal. The *Firearms Act* is silent on the situation. After the Tribunal is seized of the matter, there is no express power to require an appellant to withdraw an appeal in certain circumstances or for the Tribunal to strike out the appeal .(It is accepted that common law grounds such as want of prosecution may be implied). That is not the end of the discussion as there are other common law principles that may apply, but it is important to note that there is nothing express in the *Firearms Act* to support the argument on behalf of the respondent.

Relevant Administrative Law Principles

14. It is acknowledged there are major distinctions between judicial administrative decisions. It is useful however on the topic of revoking or revisiting decisions to discuss the occasions where it is legitimate for a court to revisit its own decisions and to vary or set them aside. Courts have a power to set aside or vary a judgement prior to its perfection. In *Autodesk Inc v Dyason* (no 2) (1993) 176 CLR 300*,* Mason CJ said at 302:

> "The public interest in the finality of litigation will not preclude the exceptional step of reviewing or re-hearing an issue when a court has good reason to consider that, in its earlier judgement, it has proceeded on a misapprehension as to the facts or the law. As this Court is a final court of appeal, there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgement. However, it must be emphasized that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that the misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases."

15. In relation to perfected orders or judgements, generally the court has no power to set it aside or vary it, aside from some very limited exceptions such as those authorized by statute or where the judgement is obtained by fraud or by agreement which is void or voidable or within the inherent power of the court to avoid injustice: (*Permanent Trustee Co (Canberra) Pty Ltd v Stocks and Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45.

16. By way of comparison, Professor Enid Campbell notes that "Generally speaking, administrative decisions which have yet to be perfected can be revoked or varied." (see Campbell, *Revocation and Variation of*

Administrative Decisions, 1996, 22 Monash Law Review, 30, 38). Professor Campbell states that what will be required to perfect an administrative decision may be prescribed by the legislation (for example, formal written notification). The *Firearms Act s 43* provides for a notice of refusal. I am treating the notice of 27 June 2005 sent to the Appellant as a perfected decision for the purpose of these reasons. The decision was operational in every sense and receipt of the notice of refusal places obligations on an applicant to take the steps as set out in the notice.

17. The question of whether a decision such as this can be revoked is problematic. There are a number of general schools of thought in administrative law about this problem. First, if the decision can be treated as absolutely or objectively invalid, the decision is invalid for all purposes. If that is the true situation, all parties can ignore the original decision. The original decision maker is free to ignore the decision without a court or review body declaring it to be invalid. This applies when the decision-maker has acted outside their jurisdiction or the decision is bad for some ground of jurisdictional error. (With respect we adopt here the analysis of Robert Orr and Robyn Briese in *"Don't Think Twice - Can Administrative Decision Makers Change Their Mind?" AIAL Forum No 35, 11*).

18. In *Leung* (1997) 150 ALR 76 at 88, Fingelstein J confirmed the approach that a decision tainted by jurisdictional error, fraud or misrepresentation, does not in fact have the character of a decision and can simply be ignored. It does not require a judicial determination to be treated as a nullity. If this were the case with the Respondent's decision to refuse the licence, all parties could ignore the decision. The Respondent could revisit the decision and there could be no complaint. There is nothing before the Tribunal to indicate that this was the problem with the original decision.

19. As Orr and Briese (referred to above) identify, the second school is known as "Relative Invalidity". The approach here is in favour of a presumption of

validity. The decision is treated as valid until there is a court decision to declare it invalid. There is nothing in the circumstances of the Respondent's original decision that the Tribunal is aware of that would allow the Tribunal to treat the decision as invalid. Orr and Briese (referred to above) also point to a third position that they refer to as the "middle position" where the presumption of validity applies to decisions that are "latently invalid" while decisions that are "patently invalid" are treated as nullities. With respect, we agree with the learned authors that the character of the original decision will have important implications for whether the original decision-maker can ignore or revoke the decision. Once again, there is nothing in the material before the Tribunal to conclude invalidity of the original decision.

20. The High Court have considered the issue generally but in a much different statutory and review context in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 187 ALR 117. At first blush the reasoning of the majority may lend some support to the Respondent in this matter but on closer analysis it does not. Mr Bhardwaj sought review in the Immigration Review Tribunal ("IRT") of the Minister's decision to cancel his student visa. The IRT invited him to attend a hearing; the IRT received a letter from his agent stating he was unwell, could not attend the hearing and requested an adjournment; the letter was not brought to the attention of the IRT member who conducted the review of his case; the review occurred in his absence and an adverse decision was made confirming cancellation of his visa; on discovering what had occurred, the IRT arranged a new hearing, revoked the first decision and published a second decision. The Minister appealed to the Federal Court and later the High Court. The majority held the IRT had failed to perform its function at the first hearing and that the IRT were not required to treat the decision valid until it was overturned by a Court. The revocation of the first decision in those circumstances was valid. In our view *Bhardwaj* was an extraordinary case on its facts, being a total failure of a proper process. There is nothing to indicate there was any

fundamental procedural failure in the matter currently under consideration. However, in favour of the Respondent in this case, the majority in *Bhardwaj* have rejected the existence of a general principle that once a power to make and administrative decision is exercised, it is spent.

21. On the contrary side there are a number of cases, most of them capable of distinction here that stand for the proposition that once a valid and perfected decision of an administrative character is made which affects individual rights or liabilities, such a decision cannot be revoked without statutory authority.(see Campbell, cited above at 49). According to Campbell this rule has applied even where the decision has been based on some error of fact or has been sought to be reopened after discovery of fresh evidence. Most of those cases deal with decisions that have affected financial obligations, rights and liabilities of third parties but also, relevantly here, decisions to grant or refuse to grant permits.

22. Bearing in mind these general matters, the answer comes down to statutory interpretation and consideration of whether revocation of a perfected decision is expressly or impliedly authorised by the statute. The two competing policies are noted in cases concerning the situations where the applicant is requesting re-consideration or re-hearing such as in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 28 ALD 480 by French J at 486 who says on the one hand to imply into a statutory power a power to reconsider "*would be capable, if not subject to limitation, of generating of endless request for reconsideration on new material or changed circumstances".* On the other hand, there was:

> "the convenience and flexibility of a process by which a primary decision-maker may be persuaded on appropriate and cogent material that a decision taken ought to be reopened without the necessity of invoking the full panoply of judicial or express statutory review procedures. There is nothing inherently angelical about administrative decision-making under the grant of a statutory power that requires the mind that engages in it to be unrepentantly set upon each decision taken"

23. Arguments against implying a power to revoke a refusal under the *Firearms Act* include the fact that the *Firearms Act* expressly provides for suspension or revocation of licences that have been *granted*; applicants who have been refused licences of various kinds must wait for particular periods before they can re-apply – there is no statutory provision obliging re-consideration; there is an appeals mechanism. As Professor Allars states in "*Perfected judgements and inherently angelical administrative decisions: The power of courts and administrators to re-open or reconsider their decisions"* (2001) 21 Australian Bar Review 50 at 66, "*When an administrator ignores a decision, so as to set it at naught, he or she as a matter of fact, re-exercises the power and must have express or implied power to do so"* Professor Campbell (cited above at 56) concludes her review of this subject stating that "*where a statute expressly authorises revocation or variation of decisions of one or more types, it may be implied that decisions of other types are not susceptible of revocation or variation."* Such an interpretation would be open under the *Firearms Act.*

24. It is not necessary to finally decide that matter as there is a material difference between a revocation prior to the filing of an appeal and here where an appeal has been filed and the Respondent seeks to revoke the decision after the appeal is filed. We are of the view that a revocation can take place safely and lawfully with consent of the other party in either of these situations, however we are dealing with circumstances where there is not consent.

The Effect of Filing the Notice of Appeal to the Tribunal

25. It must be remembered that this is essentially a merits appeal. In our view it would be an error for the Tribunal to consider it was deprived of jurisdiction because of a purported revocation after the lodgement of the appeal. The Administrative Appeals Tribunal has considered this is the case in terms of its own jurisdiction: (eg *Re Paterson and Department of Home Affairs and*

Environment (1985) 7 ALD 403; *Re Cox and Commonwealth of Australia* (1987) 12 ALD.) In *R v Moodie; Ex parte Mithen* (1977) 17 ALR 219 the High Court held that in relation to the *Student Assistance Act 1973* (Cth), after a re-consideration of the matter at the applicant's request, the applicant sought review in the *Student Assistance Review Tribunal.* At that point the High Court held the officer was *functus officio* and could not re-open the decision. Applying this reasoning in the Administrative Appeals Tribunal in *Re Bloomefield and Sub-Collector of Customs, ACT* (1981) 4 ALD 204 Senior Member Todd stated "*in the absence of power suitably conferred, it is not open to a decision-maker to revoke, vary or otherwise amend a decision once it has become subject to the process of review."* The same reasoning has been applied in the context of authorized officers under the *Freedom of Information Act,* where the AAT rejected that those officers had a residual authority to alter decisions after an appeal had been lodged (*Re Hounslow and Department of Immigration and Ethnic Affairs* (1985) 7 ALD 362 and in relation to whether the authorising officer could re-open the refusal to grant a pension and replace it with another decision cancelling the pension on another ground (*Re Sarina and Secretary, Department of Social Security* (1988) 14 ALD 437).

26. In my view this principle is firmly entrenched and the same principle applies to the *Firearms Act.*

The Effect of *s 43 Interpretation Act NT*

27. Section 43 *Interpretation Act* reads as follows:

> "Where an Act confers a power to take an action or to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend or vary any such action or instrument". In commenting specifically on this section, and other comparable provisions, Professor Campbell (cited above) states (at 64) "These sections must, of course, give way to contrary indications in the statute conferring

> power. And neither can be construed as imposing any legally enforceable duty to reconsider a decision. On the other hand both could be invoked as a source of authority to revoke or vary administrative decisions which, under the general law, would be regarded as irrevocable."

28. With respect we agree, sections such as *s 43 Interpretation Act* give way to the express or implied interpretations of the specific statute. In our view there are persuasive considerations that lead The Tribunal to the conclusion that this section cannot be called in to validate a revocation of an apparently valid decision after an appeal has been lodged with the Tribunal. The *Firearms Act* has set up the process of appeal to deal with such situations. There is a danger that the primary decision-maker could attempt to amend decisions repeatedly and there would be no finality. It is not necessary to determine whether *s 43 Interpretation Act* can validate a pre-appeal revocation of a refusal to grant a licence under the *Firearms Act*. In the face of the structure of the *Firearms Act* it is not as clear as it may appear at first.

Consent to Revocation and Reconsideration

29. We have alluded to the exception of consent or agreement between the parties throughout these reasons. We note that although there are some debates on the finer points of whether the decision-maker and an affected person can agree to a revocation or re-opening of a decision, generally the authorities permit such action if there is consent and the rights of a third party who may have relied on the decision are not infringed. The overriding policy consideration is that the law will encourage dispute resolution by allowing the parties to attempt to resolve their differences. By this decision the Tribunal is not intending to discourage the parties from attempting to resolve the matter themselves.

Order

30. The Respondent's application to discontinue the appeal is dismissed.

31. The Tribunal will hear the parties on setting a date for hearing the appeal and any further directions.

Dated this day of 2005.

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Mr Dale Egan

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Commander Bert Hofer

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Jenny Blokland (SM) (Chair.)