HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

APPLICANT VEAL OF 2002 APPELLANT

AND

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS
& ANOR RESPONDENTS

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72
6 December 2005
M16/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court made on 9 July 2004 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

D S Mortimer SC with R M Niall for the appellant (instructed by Victoria Legal Aid)

A L Cavanough QC with J D Pizer for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

CATCHWORDS

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Application for protection visa – Decision of Refugee Review Tribunal – Procedural fairness – Where Tribunal reviewed an unsolicited letter received by the Department of Immigration and Multicultural and Indigenous Affairs, which made allegations against the appellant – Where Tribunal did not inform the appellant of the existence of the letter or its contents – Where Tribunal affirmed decision under review and said that in reaching its decision it gave no weight to the letter – Whether procedural fairness required the Tribunal to inform the appellant of the existence of the letter or its contents.

Words and phrases – "procedural fairness", "credible, relevant and significant".

Migration Act 1958 (Cth), ss 418(3), 424A, 438.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. In June 2001, the appellant and his partner applied for protection visas. In December 2001, a delegate of the Minister refused those applications. The appellant and his partner each sought review by the Refugee Review Tribunal ("the Tribunal") of the refusal of their applications. After those applications for review had been made, but before the Tribunal had completed its review, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") received a letter about the appellant. The letter was unsolicited but not anonymous; it gave the author's name and address.

2 The author of the letter made allegations against the appellant. First, the author said that the appellant had admitted that he had been accused of killing a person prominent in the political affairs of the appellant's country of origin (Eritrea). Secondly, the author alleged that the appellant was in fact a supporter of, and working for, the government of Eritrea. The author concluded the letter by advising the Department "to keep [this] information secret".

3 When an application for review is made to the Tribunal, s 418(3) of the *Migration Act* 1958 (Cth) ("the Act")[1] obliges the Secretary to the Department, as soon as is practicable after being notified of the application, to give to the Registrar of the Tribunal, all documents in the possession or control of the Secretary considered by the Secretary to be relevant to the review. The Department sent the letter to the Tribunal. But it seems that it sent the letter after the Secretary had transmitted documents to the Tribunal in the intended performance of the obligation imposed by s 418(3).

4 In conducting its review, the Tribunal did not tell the appellant that it had received the letter; the Tribunal did not tell the appellant that the allegations made in the letter had been made; the Tribunal did not ask the appellant about the substance of any of the allegations made in the letter.

5 The Tribunal affirmed the decisions not to grant protection visas to the appellant and his partner. At the end of its reasons, the Tribunal said that in reaching its findings it "gives no weight" to the letter sent to the Department and forwarded to the Tribunal. The Tribunal said:

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1 References to the Act are to the form in which it stood at times relevant to this matter.

> "The writer of that letter makes clear that the material therein is provided confidentially. The Tribunal has been unable to test the claims made in the letter and, accordingly, gives it no weight. The Tribunal has decided this matter solely for reasons outlined above."

The Tribunal went on to say that, because the letter had been provided in confidence to the Department and the Tribunal considered that it was in the public interest that the content of the letter be regarded as non-disclosable information for the purpose of s 424A(3)(c) of the Act, the Tribunal made a direction (under s 440(1) of the Act) that the content of the letter not be published or disclosed.

6 The appellant applied to the Federal Court of Australia for relief under s 39B of the *Judiciary Act* 1903 (Cth). In his application, as amended, he alleged, among other things, that he had been denied procedural fairness. He succeeded at first instance[2], but the Minister appealed to the Full Court of the Federal Court. By majority (Whitlam and Mansfield JJ; Gray J dissenting), that Court allowed the Minister's appeal[3]. By special leave, the appellant appeals to this Court.

The issue

7 In the appeal to this Court, the appellant and the Minister treated the determinative question as being whether procedural fairness required the Tribunal to inform the appellant of the existence of the letter, or its contents, before the Tribunal decided to affirm the refusal to grant the appellant a protection visa. That question, framed as it is by reference to common law principles of procedural fairness rather than by reference to the application of particular provisions of the Act, should be answered "yes". It was right for the Tribunal not to have provided a copy of the letter to the appellant and not to have disclosed to the appellant any information that may have revealed the identity of its author. Before reaching its decision, however, the Tribunal should have told the appellant the substance of the allegations made in the letter.

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2 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741.

3 *Minister for Immigration and Multicultural and Indigenous Affairs v VEAL* (2004) 138 FCR 84.

8 Because the parties identified the critical question in the way they did – what did common law principles of procedural fairness require in this case? – much of the argument was directed to examining how judicial statements of general principle should be applied to the way in which the Tribunal had conducted its review of the refusal to grant the appellant a protection visa. Before embarking upon an examination of the application of general principles it is as well to identify the premises from which the parties' arguments about the application of those principles proceeded. In particular, it is necessary to begin from an explicit recognition of the fact that the Tribunal was exercising powers and performing functions specified by the Act.

Relevant provisions of the Act

9 Section 414(1) of the Act obliged the Tribunal to review the decision to refuse the appellant's application for a protection visa. Section 415(1) empowered the Tribunal, for the purposes of the review, to "exercise all the powers and discretions that are conferred by this Act on the person who made the decision". Section 65(1) of the Act obliged the Minister to grant a visa if satisfied that the criteria for granting that visa had been satisfied. If the Tribunal was satisfied that the criteria for the visa were satisfied, the Tribunal was bound to set the delegate's decision aside and substitute a new decision granting the visa. Thus, the Tribunal was bound to set aside the delegate's decision and substitute a decision granting a visa if satisfied[4] that the appellant was a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol[5]. Conversely, if not satisfied that the appellant was a person to whom Australia had protection obligations, the Tribunal was bound to affirm the delegate's decision.

10 The statutory specification of the Tribunal's duty and power to conduct the review was to be read as conditioned upon the Tribunal's observance of the requirements of procedural fairness[6]. The content to be given to that obligation

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4 s 36(2)(a).

5 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

6 *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 40 per Brennan J; *Annetts v McCann* (1990) 170 CLR 596 at 598-600 per Mason CJ, Deane and McHugh JJ, 604-605 per Brennan J;

(Footnote continues on next page)

to accord procedural fairness must, of course, accommodate the particular provisions made in the Act which regulated how the Tribunal was to go about its task. Nonetheless, in the form the Act took at the times relevant to this matter[7], the particular provisions made in the Act to regulate the way in which the Tribunal went about conducting its review were not to be understood as an exhaustive statement of the steps that the Tribunal may have to take in any particular case in order to accord procedural fairness to the applicant for review.

11 Neither party contended that the Act prescribed the course that the Tribunal should have taken in the present matter. In particular, although the Act made provision, in s 424A, for an applicant for review to be given certain information and, by s 438, gave the Tribunal what the heading to that section described as a "discretion in relation to disclosure of certain information etc", neither party contended in this Court that those provisions had been engaged or that the present matter was to be decided by the application of those provisions.

12 It is as well to explain why that was so. As for s 424A, it is enough to notice that that provision is directed to "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". The Tribunal said, in its reasons, that it did not act on the letter or the information it contained. That is reason enough to conclude that s 424A was not engaged. A little more must be said about s 438.

13 Section 438 applied to a document given to the Minister, or an officer of the Department, in confidence. If in compliance with a requirement of or under the Act the Secretary gave to the Tribunal a document to which s 438 applied, the Secretary was bound, by s 438(2)(a), to notify the Tribunal that s 438 applied in relation to the document or information and "may give the Tribunal any written advice that the Secretary thinks relevant about the significance of the document

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Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 at 591 per Brennan J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 99-100 [38]-[39] per Gaudron and Gummow JJ. See also at 89 [5] per Gleeson CJ, 131 [132] per Kirby J, 142-143 [168] per Hayne J.

7 Before the amendments made by the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth), which, among other things, inserted s 422B providing that Div 4 of Pt 7 of the Act "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with".

or information"[8]. In this case, the Secretary did not notify the Tribunal that s 438 applied in relation to the letter or the information it contained. Why this was so was not explored in evidence in the proceedings in the courts below or in argument of the appeal to this Court. Nor was there any examination of whether s 418(3) was to be given an ambulatory effect requiring the Secretary to give to the Registrar of the Tribunal any document coming into the Secretary's possession or control after the Secretary had first transmitted relevant documents to the Tribunal. There was, therefore, no examination of whether the condition for engaging s 438(2) (the Secretary giving the Tribunal "in compliance with a requirement of or under this Act" a document or information to which the section applied) was met. For present purposes, it is enough to notice that the Tribunal not having been notified by the Secretary that s 438 applied in relation to the letter or the information it contained, the precondition to the operation of s 438(3) ("[i]f the Tribunal is given a document or information and is notified that this section applies in relation to it") was not met. There is, therefore, no occasion to consider the meaning or effect of those provisions of s 438(3) that would have been engaged if that condition had been met[9].

What did procedural fairness require?

14 In the courts below much emphasis was given to the Tribunal's statement, in its reasons, that it gave no weight to the letter or its contents. This statement was treated as inviting two questions: was the statement to be taken at face value and, if it was, could the letter nonetheless have had some influence upon the outcome of the matter? As these reasons will show, it is not useful to begin the inquiry about procedural fairness by looking to what the Tribunal said in its reasons. Rather, as procedural fairness is directed to the obligation to give the appellant a fair hearing, it is necessary to begin by looking at what procedural fairness required the Tribunal to do in the course of conducting its review.

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8 s 438(2)(b).

9 Section 438(3) provided that, in such a case, the Tribunal:

> "(a) may, for the purpose of the exercise of its powers, have regard to any matter contained in the document, or to the information; and
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> (b) may, if the Tribunal thinks it appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the applicant."

15 The appellant and the Minister each began their analysis of what procedural fairness required by examining the well-known statement of Brennan J, in *Kioa v West*[10], of what is to be done when a decision-maker has information available that is adverse to the interests of the person who will be affected by an administrative decision. Particular emphasis was given in argument in this Court, as it had in the courts below, to two propositions stated[11] by Brennan J. The first proposition was that "in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made"; the second proposition was that "[i]nformation of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information". At once it can be seen why argument was directed to what, if any, significance was to be attached to the Tribunal's statement that it gave no weight to the letter. Did this, as the Minister contended, show that the letter and the information it conveyed was not relevant or significant to the Tribunal's decision? Was there, nonetheless, a real risk of subconscious prejudice? Was this a case, as the Minister contended, where the "problem of confidentiality" required some different treatment of adverse information even if that information appeared to be credible, relevant and significant?

"Credible, relevant and significant"?

16 What is meant by "adverse information that is credible, relevant and significant to the decision to be made"? As is always the case, what is said in reasons for judgment must be understood in the context of the whole of the reasons. Examining sentences, or parts of sentences, in isolation from the context is apt to lead to error. In particular, what Brennan J said about "information that is credible, relevant and significant" takes its meaning from the point his Honour had made[12] only a few sentences earlier: that "[a]dministrative decision-making is not to be clogged by inquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made".

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10 (1985) 159 CLR 550 at 628-629.

11 (1985) 159 CLR 550 at 629.

12 (1985) 159 CLR 550 at 628.

Moreover, what is meant by "credible, relevant and significant" must be understood having regard also to the emphasis that his Honour had given earlier in his reasons[13] to the fundamental point that principles of natural justice, or procedural fairness, "are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise". Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do *in the course of* deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.

17 It follows that what is "credible, relevant and significant" information must be determined by a decision-maker before the final decision is reached. That determination will affect whether the decision-maker must give an opportunity to the person affected to deal with the information. And that is why Brennan J prefaced his statement about a person being given an opportunity to deal with adverse information that is credible, relevant and significant, by pointing out that there may be information, apparently adverse to the interests of a person, which can and should be put aside from consideration by the decision-maker as not credible, not relevant, or of little or no significance to the decision to be made. "Credible, relevant and significant" must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss information from further consideration unless the information is evidently not credible, not relevant, or of little or no significance to the decision that is to be made. References to information that is "credible, relevant and significant" are not to be understood as depending upon whatever characterisation of the information the decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached.

18 It follows that the Tribunal's statement, that it gave no weight in reaching its decision to the letter or its contents, does not demonstrate that there was no obligation to reveal the information to the appellant and to give him an opportunity to respond to it before the Tribunal concluded its review. Deciding that it could reach its conclusion on other bases did not discharge the Tribunal's obligation to give the appellant procedural fairness.

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13 (1985) 159 CLR 550 at 622.

Subconscious effect?

19 Is it nonetheless relevant to ask whether the letter had or might have had some subconscious effect on the Tribunal in this case? Again, what Brennan J said about subconscious effect and prejudice must be read in its context. It was said in explanation of why it is that fairness requires that the person whose interests are likely to be affected by a decision should be given an opportunity to deal with the adverse information. As has later been rightly said[14], "the necessity to disclose such material in order to accord procedural fairness is not based on answering a causal question as to whether the material did in fact play a part in influencing the decision". It follows that asking whether, despite what was said in its reasons, the Tribunal may have been subconsciously affected by the information distracts attention from the relevant inquiry. The relevant inquiry is: what procedures should have been followed? The relevant inquiry is neither what decision should the decision-maker have made, nor what reasons did the decision-maker give for the conclusion reached.

The letter and its contents

20 The information set out in the letter about the appellant could not be dismissed from further consideration by the Tribunal as not credible, or not relevant, or of little or no significance to the decision. The author of the letter purported to record what the appellant had told him; the author alleged that the appellant was working for the present government of Eritrea. What the appellant was alleged to have admitted, and whether the appellant was working for the present government of his country of origin, were matters that bore upon whether he had a well-founded fear of persecution for a Convention reason. Both what he was alleged to have done, and the fact that the allegation had been made, could be seen as a reason not to wish to return to Eritrea. His alleged support of the current government of Eritrea reflected upon whether he had a well-founded fear of persecution in that country. Neither the alleged admission nor the allegation of support for the current government could be dismissed as a matter of no relevance or of little or no significance to the decision. Further, neither the alleged admission, nor the allegation about where the appellant's political sympathies lay, could be dismissed from consideration as material to which the Tribunal could not give credence.

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14 *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561 at 583 [84] per Allsop J.

21 It follows that procedural fairness required that the Tribunal draw the appellant's attention to the information. But how should that have been done? The appellant contended that he should have been shown the letter.

22 The fact that the author of the letter asked the Department to keep it secret did not mean that equitable principles about confidential information were to be engaged in deciding what course the Tribunal took. Rather, the nature and extent of the Tribunal's obligation to disclose the information were regulated by the Act and the obligation to accord the appellant procedural fairness.

23 In this case, the particular content of the obligation to accord procedural fairness was to be identified having regard not only to the particular provisions of the Act that regulated the Tribunal's work but also to the scope and objects of the Act as a whole. In that latter regard, it is necessary to keep two propositions at the forefront of consideration. First, the Act required that those entitled to a particular visa be granted the visa they sought, and that those not entitled be refused. Secondly, the Act committed the decision to grant or refuse a visa to the Executive government and the Tribunal was likewise exercising executive power, not judicial power.

24 It follows from this second proposition that the steps the Tribunal was bound to take in order to afford procedural fairness are not necessarily to be identified with the steps that should be taken by a court deciding a matter by adversarial procedures[15]. Nonetheless, it must be recognised that just as courts mould their procedures to accommodate what has become known as public interest immunity[16], so too the content of the Tribunal's obligation to accord the appellant procedural fairness may be informed by those same considerations. No doubt care must be exercised in transposing what is said in the context of adversarial litigation about public interest immunity and its application to those who inform police about criminal activity to the wholly different context of inquisitorial decision-making by the Executive where the subject-matter of the information imparted was not that someone had committed a crime in Australia. Nonetheless, in identifying what the Tribunal had to do in order to give the

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15 *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 315 per Gibbs CJ; Allars, "Neutrality, the Judicial Paradigm and Tribunal Procedure", (1991) 13 *Sydney Law Review* 377.

16 *Sankey v Whitlam* (1978) 142 CLR 1 at 42-43 per Gibbs ACJ, 95-96 per Mason J; *Alister v The Queen* (1984) 154 CLR 404 at 412 per Gibbs CJ.

appellant procedural fairness, it is necessary to recognise that there is a public interest in ensuring that information that has been or may later be supplied by an informer is not denied to the Executive government when making its decisions[17].

25 The existence of that public interest is not to be understood as requiring the conclusion that there is an absolute rule against an administrative decision-maker disclosing to a person, whose interests may be affected by the decision that is to be made, information that has been supplied by an informer. Nor does it necessarily mean that there is an absolute rule against disclosing the identity of an informer to such a person. It is neither necessary nor appropriate to attempt to state some all-encompassing rules about how administrative decision-makers should deal with information supplied in this way. Not least is that because use of the expression "informer" in the context of administrative decision-making not only does not reveal what kind of information is conveyed by the informant, but also does not reveal what relevance the information may have to the decision that is to be made. The application of principles of procedural fairness in a particular case must always be moulded to the particular circumstances of that case[18].

26 What is important to notice in the present case, however, is first, that information was supplied confidentially to the Department by someone who sought to remain unknown to the appellant, and secondly, that the information bore on whether the appellant was entitled to a protection visa. The Tribunal was not an independent arbiter charged with deciding an issue joined between adversaries. The Tribunal was required to review a decision of the Executive made under the Act and for that purpose the Tribunal was bound to make its own inquiries and form its own views upon the claim which the appellant made. And the Tribunal had to decide whether the appellant was entitled to the visa he claimed.

27 The information which was contained in the letter was relevant to that inquiry and it could not be ignored by the Tribunal. The Tribunal was able to put the information aside from consideration in its reasons only because it reached the conclusion, on other bases, that the appellant was not entitled to a visa. But

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17 cf *Alister v The Queen* (1984) 154 CLR 404.

18 See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13-14 [37] per Gleeson CJ, 16 [48] per McHugh and Gummow JJ.

that step, of putting the information in the letter aside from consideration, could not be taken before reaching the conclusion that the application should be refused. It follows that to conduct the review with procedural fairness, the appellant had at least to know the substance of what was said against him in the letter. Only then could he attempt to answer the suggestions made by the author of the letter that the appellant had reasons other than Convention reasons to absent himself from Eritrea and that he did not have a well-founded fear of persecution for a Convention reason.

28 The appellant submitted that procedural fairness further required that he be given the letter because, if he did not know who had written the letter, one obvious form of answer to the allegations made in it would be denied to him. He could not say that the author of the letter was not to be believed. That is, he could not attack the credibility of the informer unless he knew who the informer was.

29 So much may readily be accepted. But it by no means follows that the Tribunal was bound to give the appellant a copy of the letter, or tell him who had sent it, or even tell him that the information had been sent in written form. To give the appellant a copy of the letter or tell him who wrote it would give no significance to the public interest in the proper administration of the Act which, as pointed out earlier, required that those entitled to a visa be granted one and those not entitled be refused. It is in aid of that important public interest that, so far as possible, there should be no impediment to the giving of information to authorities about claims that are made for visas. That public interest, and the need to accord procedural fairness to the appellant, could be accommodated. They were to be accommodated, in this case, by the Tribunal telling the appellant what was the substance of the allegations made in the letter and asking him to respond to those allegations. How the allegations had been given to the Tribunal was not important. No doubt the appellant's response to the allegations would then have had to be considered by the Tribunal in light of the fact that the credibility of the person who made the allegations could not be tested. And that may well leave the Tribunal in a position where it could not decide whether the allegations made had substance. But the procedure outlined would be fair to the appellant and it would be a procedure which accommodated what Brennan J described in *Kioa*[19] as the "problem of confidentiality". Although it may be accepted that the Tribunal sought to act fairly, the procedure it in fact adopted was not fair.

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19 (1985) 159 CLR 550 at 629.

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J

Orders

30 The appeal should be allowed with costs. The orders of the Full Court should be set aside and in their place there should be an order that the appeal to that Court is dismissed with costs.