HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, HAYNE, CALLINAN AND CRENNAN JJ

SZAYW APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR RESPONDENTS

SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] HCA 49
5 October 2006
S57/2006

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

I E Davidson with I G E Archibald for the appellant (instructed by Michael Jones Solicitor)

N J Williams SC with M A Wigney for the first respondent (instructed by Clayton Utz Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugees – Protection visa decision – Review by Refugee Review Tribunal – Hearing of an application for review by the Tribunal to be "in private" – Appellant making common cause with other visa applicants – Application for review conducted with other applicants present – Whether hearing of application conducted "in private".

Words and phrases – "in private".

Migration Act 1958 (Cth), s 429.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND CRENNAN JJ. Part 7 of the *Migration Act* 1958 (Cth) ("the Act") provides for administrative review, by the Refugee Review Tribunal ("the Tribunal"), which is the second respondent, of protection visa decisions[1]. Division 3 of Pt 7 deals with the manner of exercise of the Tribunal's powers. Section 420 provides that the Tribunal is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick. The Tribunal is not bound by technicalities, legal forms or rules of evidence. Division 4 of Pt 7 deals with the conduct of a review. It includes s 429, which provides that the hearing of an application for review by the Tribunal must be in private.

2 The appellant, who came to Australia from Lebanon in 1998, applied for a protection visa. His application was refused by a delegate of the first respondent. He applied for a review of that decision by the Tribunal. The Tribunal affirmed the delegate's decision. The appellant complains that there was non-compliance with s 429 of the Act because the hearing of his application for review was not in private. This complaint was upheld by Driver FM, who also held that the non-compliance with s 429 constituted jurisdictional error, and quashed the Tribunal's decision[2]. The appellant also complained that he was denied procedural fairness. This complaint was rejected by the learned magistrate, and does not form part of the present appeal. The magistrate's finding that there was a failure to comply with s 429 was reversed by the Full Court of the Federal Court (Moore and Weinberg JJ, Kiefel J dissenting)[3]. The appellant now appeals to this Court, seeking, in substance, to reinstate the decision of Driver FM.

3 The decision of the Full Court of the Federal Court should be upheld. In order to explain why that is so, it is convenient first to note some aspects of the statutory context in which s 429 appears, and then to explain the facts and circumstances which have given rise to the allegation of non-compliance with s 429, before turning to consider the meaning of the section.

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1 It is convenient to speak in the present tense of the provisions of the Act as they stood at the time relevant to this appeal (the Tribunal decision was made in July 1999), although in some respects they have since been amended.

2 *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 187 FLR 104.

3 *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* (2005) 145 FCR 523.

The statutory context

4 The immediate context of s 429 is Pt 7 of the Act and, in particular, Div 4 of Pt 7. The reference in s 429 to a hearing must be understood in that context. The procedure of review is inquisitorial, and does not involve an adversarial trial, at which evidence is adduced and tested, and issues are debated. There are no parties. The Tribunal investigates an applicant's claims in a process of administrative merits review of the delegate's decision.

5 Section 423 provides for an applicant for review to provide a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider, together with written arguments on the issues arising in relation to the decision under review. The Secretary of the Minister's Department may also submit written argument. Section 424 provides that, in conducting the review, the Tribunal may "get any information that it considers relevant". It may invite a person, including an applicant, to give additional information. The procedures to be followed in conveying to, and obtaining from, the applicant certain kinds of additional information were examined by this Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[4]. Section 425 provides that, subject to some presently immaterial exceptions, the Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review. Section 426 entitles the applicant to notify the Tribunal that the applicant wants the Tribunal to obtain evidence from some other person or persons. The Tribunal is empowered, by s 427, to take evidence on oath or affirmation, adjourn the review from time to time, and summon witnesses.

6 The wider context includes s 420, noted above. As the facts of the present case show, circumstances may arise in which the practical content of the requirement of privacy will need to allow for the capacity to meet the statutory objectives of fairness, economy and informality. Part 5 of the Act deals with review of certain decisions by another tribunal, the Migration Review Tribunal. Part 5 includes s 365, which may be contrasted with s 429. Section 365 provides that, subject to some qualifications, any oral evidence taken before the Migration Review Tribunal must be taken in public. The relationship between the expressions "in public" and "in private" will be considered below. Section 276, which is in Pt 3, dealing with migration agents, is also of relevance. It defines

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4 (2005) 79 ALJR 1009; 215 ALR 162.

"immigration assistance" to include representing an applicant in proceedings before a review authority, which, in turn, is defined to include the Tribunal. Registered migration agents may give immigration assistance. As will appear, the appellant was represented before the Tribunal by migration agents. Such representation is common. No one suggests that it is inconsistent with the requirement of privacy. Clearly then, the requirement of privacy does not mean that, apart from the Tribunal member and officers of the Tribunal necessarily involved, no one except an applicant may be present at a hearing. At least, the Act contemplates that migration advisers and witnesses may attend for the purpose of carrying out their functions.

7 Section 439 of the Act, which is in Div 7 of Pt 7, imposes obligations of confidentiality upon Tribunal members and officers. It does not apply to applicants or others. It does not, for example, prevent an applicant from disclosing what goes on in the course of a hearing. On the other hand, s 440 empowers the Tribunal, if satisfied that it is in the public interest so to do, to direct that evidence or information put before the Tribunal not be published or otherwise disclosed. It was common ground in argument that, in addition to the express power conferred by s 440, the Tribunal also has certain implied powers to regulate its proceedings. The precise extent of these powers was not explored but, subject to the ultimate question as to the meaning of s 429, and to any other relevant provision, in certain circumstances they would include a power to impose conditions subject to which a person might be permitted to be present at a hearing.

The proceedings before the Tribunal

8 Because this appeal turns upon the procedure adopted by the Tribunal it is unnecessary to describe the substance of the appellant's case before the Tribunal otherwise than in broad outline. It is, however, important to note certain features of that case, the involvement in it of three persons other than the appellant, and the submissions made to the Tribunal by the migration agents representing the appellant and those three persons.

9 The appellant, and three of his friends who were described as applicants 226, 228 and 229, were stateless Palestinians who had been living in Lebanon. They all left Lebanon and travelled to Australia. They all claimed to fear that, if they returned to Lebanon, they would be persecuted by Hezbollah or Islamic Jihad. The basis of that fear was said to be that together they had become involved with Hezbollah, and had received military training for the purpose of attacking Israel or Israeli interests in South Lebanon. They had lost their enthusiasm for the conflict, and left Lebanon. They feared that, if they returned,

they would suffer reprisals for desertion. The Tribunal rejected their claims that they had a well-founded fear of persecution. The Tribunal's reasons for that conclusion are not presently material. A substantial part of their evidence was disbelieved.

10 After the four original applications for protection visas were refused by a delegate of the first respondent, Refugee Advice and Casework Service (Australia) Inc ("RACS") wrote to the Tribunal on behalf of each man. The letter concerning the appellant said:

> "We confirm that we act for [the appellant] in his application for review of the decision refusing to grant a Protection Visa.
>
> Please find attached an application for review signed by him.
>
> We note that the four young men ... were together for the events which form *their claim*. We ask therefore that consideration be given to the same member being allocated to the four persons." (emphasis added)

11 The reference, in the singular, to the claim of the four men was consistent with the manner in which the matter was presented to the Tribunal. At no stage was there any suggestion that their interests, or their cases, conflicted. Evidently, RACS felt no embarrassment in representing them all. As the Tribunal member recorded in her reasons relating to the appellant's application for review, "the group's claims were based on experiences all four claimed to have shared in common". In argument to the Tribunal, RACS relied upon the consistency of the claims made by the four men and submitted that "their claims are furthermore strengthened by each other's testimony". The four applicants for review were making common cause, and argued that their individual claims should be regarded as more credible because of the consistency of their accounts of their shared experiences in Lebanon.

12 The Tribunal agreed to the request that the one member be assigned to deal with all four applications for review. The same date (7 April 1999) was fixed as the date for all four hearings. One applicant was a little late in arriving. All four were represented by RACS. The girlfriend of one of the applicants (not the appellant) was present. All applicants had previously received written notices, in standard form, from the Tribunal, inviting them to state whether they wanted to bring someone to the hearing, and indicating that such a person could be an adviser, friend or relative.

13 The appellant and the other two applicants who were present at the beginning were sworn in each other's presence. The latecomer was sworn when he arrived. The Tribunal member said that she would explain the Refugees Convention to all applicants collectively, and that she would then talk to them all individually. She said that the girlfriend of one of the applicants could be present for moral support while he gave evidence, but not while the appellant and the other applicants were being questioned. At that stage the Tribunal member intended to question the applicants separately. She offered the migration advisers the opportunity of being present during all four hearings, and the offer was accepted.

14 The Tribunal member took evidence from one of the applicants (not the appellant) in the absence of the others. This lasted about three hours. The member then decided to question the appellant and the other two applicants together. In her reasons she later explained that, by the end of the questioning of the first applicant, it had become apparent that the claims were all based on shared experiences. At the time, she said to the applicants:

> "[A]lthough your stories are very similar ... and I can think of you as a group in a certain way in listening to what you have to say at the same time I have to consider you as individuals and I don't want to lose sight of that fact."

15 The Tribunal member then questioned the three remaining applicants (including the appellant) together, in the presence of their migration advisers. This took about two hours. Two interpreters were used. No complaints or objections were raised about the procedure, either then or at any time before the Tribunal's decisions were made. After 7 April 1999, RACS made lengthy written submissions to the Tribunal concerning the claims of the appellant and the other applicants.

The complaints about the Tribunal's procedure

16 Following the Tribunal's decision to affirm the delegate's refusal to grant the appellant a protection visa, the appellant commenced proceedings to have the decision quashed. Those proceedings came before Driver FM.

17 The appellant complained of procedural unfairness, asserting, among other things, that he had been inhibited in putting his case to its best advantage. This complaint was rejected. The learned magistrate said:

> "I am satisfied, based upon the evidence of what occurred at the [Tribunal] hearing, that the hearing was conducted fairly by the presiding member. The [appellant] and his migration adviser were given ample opportunity to request to speak to the presiding member in private. They were given ample opportunity to reveal whatever they wished to reveal to the presiding member. I reject as false the [appellant's] claim that he was inhibited in revealing further details about his involvement with [a certain] group. The present application, to the extent that it relies upon asserted procedural unfairness under the general law, fails."

18 That aspect of Driver FM's decision was upheld by the Full Court of the Federal Court, and is not the subject of the present appeal. Before passing from the topic of procedural fairness, however, two matters should be noted. First, having regard to the nature of the cases that the four applicants were presenting, and the support they hoped to gain from the consistency of their stories, fairness would probably have obliged the Tribunal member to follow some procedure, in compliance with the Act, which would have enabled each applicant to know what the others had said. To the extent to which there were material inconsistencies, they were all entitled to deal with those inconsistencies. Since they were all relying on consistency, they were entitled to know of the extent of the consistency. Secondly, it was to the advantage of the applicants, in the particular circumstances of this case, to be questioned in the presence of one another. It assisted them to maintain consistency. These considerations may explain why it did not occur to anyone at the time that there might be some reason to object to the course that was taken.

19 As was noted earlier, Driver FM upheld an argument that there was a failure to observe the requirement of s 429 of the Act and, on that account, jurisdictional error. He said:

> "I find that the [Tribunal] breached s 429 in permitting three unrelated applicants to be in the hearing room at the time [the appellant] presented his evidence. I find that the section was breached notwithstanding that the [appellant] raised no objection to this procedure and may have even desired it. I find that the section was breached notwithstanding that there was no procedural unfairness in this procedure being followed by the [Tribunal]. I find that the section was breached notwithstanding that the [appellant] suffered no detriment from the breach. Adherence to s 429 is a jurisdictional pre-requisite to the exercise of power by the [Tribunal] and a breach of the section therefore constitutes jurisdictional error."

20 This decision of Driver FM was reversed, by the majority, in the Full Court of the Federal Court. That reversal presents the issue the subject of this appeal.

"In private"

21 Expressed in the language of s 429, the argument for the appellant is that the hearing of his application for review by the Tribunal was not in private. Expressed in concrete terms, by way of particulars, the complaint is that, while the appellant was giving evidence to the Tribunal, the other applicants were present in the hearing room and were able to hear what he said. The circumstances in which they came to be there are claimed to be irrelevant. Their very presence, it is said, meant that the hearing was not in private. Counsel for the appellant submitted that privacy demands that only the member and necessary officers of the Tribunal, and an applicant and his or her agent or agents, be present when an applicant is giving evidence. This submission should be rejected. It involves an unduly narrow and inflexible interpretation of s 429.

22 Under pressure of argument, counsel was obliged to give the concept of "agent" a rather expansive and unnatural meaning in order to accommodate some obvious practical difficulties. There is no problem about regarding a migration adviser as an agent. What, however, of a carer; or a friend, such as the girlfriend of one of the other applicants in this case, there to lend moral support? On the appellant's argument, the standard form inviting applicants to identify a friend or a relative they would like to bring with them would appear to be misleading, and to constitute an invitation to bring about jurisdictional error.

23 The concept of privacy is imprecise, and is not to be equated either with secrecy or isolation. Where, as in s 365, the Act requires that evidence be given "in public", then the requirement is satisfied if, subject to any relevant provisions of the Act, and to the exercise of a Tribunal's express or implied powers, the proceedings are open to the public in the sense that members of the public who wish to be present may attend and observe what is going on. Obviously, in order for a hearing to be in private it is necessary that it not be in public. However, it is not sufficient. A hearing would not be in private if, for example, a Tribunal member decided to invite a group of his or her acquaintances to be present. In such a case the hearing would not be open to the general public, but the applicant's entitlement to privacy would be disregarded. "Public" and "private" are words that are used in contrast, but they do not cover the entire range of

possibilities[5]. Furthermore, the question whether proceedings are taking place in public is not the same as the question whether there are present at the proceeding persons who, vis-à-vis an applicant, are to be regarded as members of the public[6]. The group of onlookers, in the example just given, would, vis-à-vis an applicant, properly be regarded as members of the public, but the hearing would not be open to the public because ordinary members of the public, other than members of the group of onlookers specially invited to be present, would be excluded.

24 It was noted earlier that Driver FM described the other three applicants as "unrelated" to the appellant. What exactly he meant by that is not clear. If all he meant was that they were not blood relatives, that is correct, but beside the point. The claims of the four men were certainly related, in the manner earlier explained. They were close associates. Their claims were based on shared experiences. Each was a witness in support of the others. They had the same migration agents. They had applied to have their cases heard by the same member. Each was entitled, as a matter of fairness, to know what evidence the others had given. There was no suggestion that any one of them wanted to say something that the others should not hear. If the learned magistrate was intending to convey that, vis-à-vis the appellant, the other three applicants were no more than members of the public, then such suggestion would be unwarranted. The hearing of the appellant's claim was not "in public" although, for the reasons already given, that does not of itself mean that it was "in private".

25 It was accepted on both sides that s 429 was enacted to benefit or protect applicants in at least two respects. It is in the nature of proceedings of the kind in question that an applicant may make allegations that could expose the applicant to a risk of reprisals, either in Australia or abroad, if they were made public. A related consideration is that applicants should feel uninhibited in presenting their cases to the Tribunal. Since the requirement of privacy is for the benefit of an applicant, it is not open to the Tribunal member to allow anyone to be present at the hearing so long as it is not open to the general public. On the other hand, persons whose presence is reasonably required for purposes of or in connection with the performance of the Tribunal's functions are clearly within the contemplation of the statute as persons who may be present at the hearing.

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5 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 [42].

6 cf *Lee v Evans* (1964) 112 CLR 276; *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201.

Obvious examples may include interpreters, security officers, necessary administrative staff and witnesses, although privacy may require the exclusion of witnesses when they are not giving evidence.

26 Subject to the powers of the Tribunal earlier mentioned, it is consistent with the statutory purpose, and with common use of language, to treat the concept of privacy as embracing, not only agents of an applicant, but also persons whom an applicant desires to be present and thus to be made privy to what occurs at a hearing. The girlfriend referred to earlier in these reasons provides an example. If one of the applicants wanted her to be with him for moral support, and the Tribunal member had no reasonable grounds for objecting to her presence during that applicant's evidence, then her presence would not destroy the privacy of the occasion. It is unnecessary for present purposes to examine the extent of a Tribunal member's powers to exclude such a person. No such issue arises in the present case. A meeting between A and B does not cease to be private if, by mutual consent, one is accompanied by a friend or supporter. There may be cases where a Tribunal member would feel a need to impose some requirement of confidentiality upon an applicant's friend or supporter but, again, that issue does not arise in this case.

27 Section 429 does not necessarily prevent hearings which are wholly or partly concurrent, if that course is dictated by the objectives stated in s 420 and is consistent with procedural fairness. It is not difficult to think of cases, such as those involving separate applications by members of the one family, where that could be appropriate. In some circumstances s 429 may present an obstacle to that course; but not in the circumstances of this case.

28 The other applicants who were present when the appellant was giving his evidence to the Tribunal were people with whom the appellant was making common cause. His migration agents had told the Tribunal that all four men knew what the others' claims would be. As a matter of fairness it appeared that the other applicants would have been entitled to be told what the appellant said in his evidence. The Tribunal thought it appropriate that they be present when the appellant gave his evidence. The appellant and his migration agents raised no objection to their presence. That presence caused no unfairness. It was to the appellant's advantage.

29 The procedure adopted by the Tribunal member in the present case did not infringe the privacy to which the appellant was entitled under the Act. It was consistent with the purpose of s 429. The proceedings were not open to the public. The other applicants were witnesses upon whose evidence the appellant intended to rely. Their presence at the hearing of his application was necessary

at least for the purpose of enabling them to give evidence in his support. He knew that his evidence was intended to be used in support of their claims. As Weinberg J pointed out in the Federal Court, the argument for the appellant seems to contemplate the use of some kind of "revolving door" process to accommodate the requirements of procedural fairness. This seems impossible to reconcile with the objectives stated in s 420. In the circumstances, the presence of the other applicants while the appellant was giving his evidence did not mean that the hearing of his application was not in private.

Other issues

30 The appellant having failed to establish non-compliance with s 429, it is unnecessary to consider, on the hypothetical assumption that the appellant's narrow construction of s 429 is correct, whether any failure to comply with s 429 involves jurisdictional error. It is also unnecessary to deal with discretionary considerations which, on the same assumption, were urged in opposition to a grant of relief.

Conclusion

31 The appeal should be dismissed with costs.