

HIGH COURT OF AUSTRALIA

GAUDRON J

HERIJANTO (As the Representative of the Persons
listed in the Schedule)

PLAINTIFF

AND

REFUGEE REVIEW TRIBUNAL & ORS

DEFENDANTS

Herijanto v Refugee Review Tribunal [2000] HCA 16
31 March 2000
S97/1998

ORDER

- 1 *Interrogatories 3, 5, 6, 7(b), (c), (d) and (e) and 8 to 67 inclusive are set aside.*
- 2 *The plaintiff is to pay two-thirds of the defendants' costs.*

Representation:

M A Robinson for the plaintiff (instructed by Adrian Joel & Co)

No appearance for the first defendant

R T Beech-Jones for the second and third defendants (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

GAUDRON J

MUIN (As the Representative of the Persons
listed in the Schedule)

PLAINTIFF

AND

REFUGEE REVIEW TRIBUNAL & ORS

DEFENDANTS

Muin v Refugee Review Tribunal
31 March 2000
S36/1999

ORDER

- 1 *Interrogatories 3, 5, 6, 7(b), (c), (d) and (e) and 8 to 59 inclusive are set aside.*
- 2 *The plaintiff is to pay two-thirds of the defendants' costs.*

Representation:

M A Robinson for the plaintiff (instructed by Adrian Joel & Co)

No appearance for the first defendant

R T Beech-Jones for the second and third defendants (instructed by Australian Government Solicitor)

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HIGH COURT OF AUSTRALIA

GAUDRON J

LIE (As the Representative of the Persons
listed in the Schedule)

PLAINTIFF

AND

REFUGEE REVIEW TRIBUNAL & ORS

DEFENDANTS

Lie v Refugee Review Tribunal
31 March 2000
S89/1999

ORDER

- 1 *Interrogatories 3, 5, 6, 7(b), (c), (d) and (e) and 8 to 56 inclusive are set aside.*
- 2 *The plaintiff is to pay two-thirds of the defendants' costs.*

Representation:

M A Robinson for the plaintiff (instructed by Adrian Joel & Co)

No appearance for the first defendant

R T Beech-Jones for the second and third defendants (instructed by Australian Government Solicitor)

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Commonwealth Law Reports.

1 GAUDRON J. The plaintiff in each of these matters has brought proceedings as the representative of various persons who seek injunctive and other relief under s 75(v) of the Constitution. They seek that relief with respect to decisions of the Refugee Review Tribunal ("the Tribunal"), the first defendant in each matter. The plaintiff in each matter has administered Interrogatories to an individual member of the Tribunal, the three sets of Interrogatories being in identical or substantially identical form. Application has been made in each matter for all but one of the Interrogatories to be set aside.

2 Pursuant to O 32 r 5(1) of the High Court Rules ("the Rules"):

" Interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or may be struck out on the ground that they are prolix, oppressive, unnecessary or scandalous."

In essence, it is claimed in each matter that all but one of the Interrogatories are unreasonable or vexatious by reason that they infringe the protection and immunity which individual members of the Tribunal enjoy pursuant to s 435(1) of the *Migration Act* 1958 (Cth) ("the Act").

3 Section 435(1) of the Act provides that a member of the Tribunal "has, in the performance of his or her duties as a member, the same protection and immunity as a member of the Administrative Appeals Tribunal". By s 60(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"), a member of the Administrative Appeals Tribunal has, in the performance of his or her duties, "the same protection and immunity as a Justice of the High Court". The protection and immunity enjoyed by a Justice of this Court is not the subject of legislative provision. Rather, he or she has such protection and immunity as is conferred by the common law and, perhaps, such as is to be derived by implication from Ch III of the Constitution.

4 It is contended that the protection and immunity of a Justice of this Court is such that he or she cannot be compelled to disclose what material was read in reaching a decision – much less, when and where it was read and in what form. And it is argued that that is what the Interrogatories administered in these cases seek of members of the Tribunal. The plaintiffs contend that the Interrogatories do not require disclosure of what was actually read by members of the Tribunal, merely disclosure of the Tribunal's record. Moreover, they argue that s 435(1) of the Act simply confers protection or immunity from civil suit, not from compulsory disclosure.

5 In order to place the Interrogatories in proper context, it is necessary to say something of the proceedings brought by the plaintiffs. In general terms, each of the plaintiffs applied for a protection visa under s 36 of the Act, claiming to be a refugee as defined in 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. In each case, the application was rejected by the Minister's delegate. Each plaintiff then sought review by the Tribunal. The review proceedings were unsuccessful. They now seek relief in respect of the Tribunal's decisions. So far as is presently relevant, they seek relief on the basis that the Tribunal failed to comply with s 424(1) of the Act and, also, denied them procedural fairness.

- 6 The plaintiffs' claims with respect to procedural fairness and s 424(1) of the Act ultimately depend on s 418(3) of the Act. By sub-s (1) of s 418, the Registrar of the Tribunal ("the Registrar") is required, when a review application is lodged with the Tribunal, to give written notice of the making of the application to the Secretary of the Department of Immigration and Multicultural Affairs ("the Secretary"). Within 10 working days of being notified of the application, the Secretary must, pursuant to s 418(2) of the Act, give the Registrar copies of a statement setting out the findings of fact, the evidence on which those findings were based and the reasons for the decision under review. In that context, s 418(3) provides:

" The Secretary must, as soon as is practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision."

- 7 In each case, the Minister's delegate set out, in his or her reasons refusing the relevant application for a protection visa, a list of documents to which he or she had regard in reaching that decision. Those documents have come to be known as "the Part B documents". It seems that, in no case, were the Part B documents forwarded by the Secretary to the Registrar. Rather, many of those documents were on a computer data base to which members of the Tribunal had access. Others, it seems, were available only in libraries.

- 8 Section 424 of the Act, which it is alleged was breached by the Tribunal, is concerned with review "on the papers". Sub-section (1) of that section provides:

" If, after considering the material contained in the documents given to the Registrar under sections 418 and 423¹, the Tribunal is prepared to make the decision or recommendation on the review that is most favourable to the applicant, the Tribunal may make that decision or recommendation without taking oral evidence."

1 Section 423 is concerned with documents provided by an applicant for review.

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The plaintiff in each case claims that that sub-section obliges the Tribunal to conduct a review on the papers and that it did not do so because it did not have regard to the Part B documents.

9 In each case, the plaintiff also claims that he or she was denied procedural fairness by reason that the Tribunal wrote to him or her stating that it had "looked at all the papers relating to your application but [was] unable to make a favourable decision on this information alone". In essence, each plaintiff contends that he or she was denied procedural fairness because the Tribunal did not look at the Part B documents.

10 To establish their claim that the Tribunal did not have regard to the Part B documents, the plaintiffs have administered Interrogatories to individual members of the Tribunal. And because certain of those documents are on a computer data base, they have administered Interrogatories which, they believe, will ultimately enable them to ascertain whether the individual member of the Tribunal had access to that data base for the purpose of making a decision on the review application of the particular plaintiff concerned.

11 It is convenient, before turning to the Interrogatories, to consider the extent of the protection and immunity enjoyed by members of the Tribunal. As already indicated, the plaintiffs argue that the only protection or immunity conferred by s 435(1) of the Act is protection or immunity from civil suit. In this regard, they claim that the only protection or immunity which is peculiar to judges and which is not shared by other decision-makers is immunity from civil suit. Further, they claim that that is the only immunity that is conferred by s 435(1). That argument must be rejected.

12 Section 435(1) of the Act, which operates by reference to s 60(1) of the AAT Act, is not concerned with the protection and immunity that is peculiar to a Justice of this Court. Rather, it is concerned with the entirety of that protection and immunity, whether or not some aspect of it is also enjoyed by other decision-makers. And the entire general protection and immunity of a Justice of this Court is conferred on a member of the Tribunal by s 435(1) of the Act.

13 It has been settled law since *Knowles' Trial*² that judges cannot be compelled to answer as to the manner in which they have exercised their judicial powers. In *Hennessy v Broken Hill Pty Co Ltd*, the immunity was said to be such that judges cannot be compelled "to testify as to matters in which they have been judicially engaged"³. However, it was also pointed out in that case that "their

2 (1692) 12 Howell's State Trials 1167.

3 (1926) 38 CLR 342 at 349 per Knox CJ, Gavan Duffy and Starke JJ.

evidence has been received upon matters which did not involve the exercise of their judicial discretions and powers"⁴.

14 In *MacKeigan v Hickman*⁵, the Supreme Court of Canada held that judges could not be compelled to disclose what affidavit evidence had been received when that did not clearly appear from the record. However, Wilson J, in dissent on this point, would have held that they might be asked "what as a factual matter comprised the final record for purposes of their decision"⁶.

15 In *MacKeigan*, the immunity of judges from compulsory disclosure was rested on the principle of judicial independence. In *Sirros v Moore*, a case concerned with immunity from civil suit, Lord Denning MR suggested that the reason underlying that immunity was to ensure that judges "may be free in thought and independent in judgment"⁷. That, in my view, is also the true basis of the immunity from compulsory disclosure. And on that basis, I see no reason why a judge might not be compelled to disclose the record upon which he or she has acted. However, that is subject to the qualification that disclosure of the record cannot be compelled if it would also reveal some aspect of the decision-making process, as may well have been the case in *MacKeigan*⁸.

16 There is no difficulty in saying that, in an appropriate case, judges may be compelled to disclose the record on which they have acted. In the context of the judicial process, "the record" bears a clear meaning⁹. The same is not necessarily true in the context of administrative decisions. Thus, it is preferable to identify what is within the immunity, rather than that which is outside it. And in my view, the immunity is immunity from disclosing any aspect of the decision-making process. That is what is required to ensure freedom of thought and independence of judgment. And that approach is entirely consistent with what was said in *Hennessy*.

17 It is convenient now to turn to the Interrogatories. Interrogatory 1, which asks when the member concerned was constituted as the Tribunal to deal with the

4 (1926) 38 CLR 342 at 349.

5 [1989] 2 SCR 796.

6 [1989] 2 SCR 796 at 809.

7 [1975] QB 118 at 136.

8 [1989] 2 SCR 796 at 806 per Lamer J.

9 See *Craig v South Australia* (1995) 184 CLR 163.

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particular plaintiff's application, is not objected to. All others are the subject of objection.

- 18 Interrogatories 2 and 4 are designed to ascertain whether the member who finally determined the particular plaintiff's review application also decided that a decision could not be made in his or her favour "on the papers". Those Interrogatories are as follows:

"2 Did you come to the view that you could not make a decision in favour of the plaintiff in respect of the plaintiff's application without first conducting an oral hearing?

...

4 If the answer to interrogatory 2 is no:

(a) To your knowledge, did any person come to the view that that person could not make a decision in favour of the plaintiff in respect of the plaintiff's application without first conducting an oral hearing?

(b) If the answer to (a) is yes, who was that person?"

- 19 Interrogatories 2 and 4 must be considered in a context in which the Act permits of a favourable decision being made "on the papers" and in which each plaintiff was informed by the Tribunal that such a decision could not be made. In that context, disclosure of the identity of the person who constituted the Tribunal for the making of that decision does not result in disclosure of any aspect of the decision-making process. Accordingly, Interrogatories 2 and 4 should stand.

- 20 In each matter, Interrogatories 3, 5, 6, 8 and the remaining even-numbered Interrogatories are concerned with the formation of the view by the relevant member of the Tribunal that a decision could not be made "on the papers" in favour of the plaintiff concerned. Interrogatory 3 asks:

"If the answer to interrogatory 2 is yes:

(a) At what time and on what day did you come to that view?

(b) Over what period of time did you consider the plaintiff's application in relation to your coming to that view?

(c) At what physical address were you during the period of time you identified in answer to (b)?"

That Interrogatory seeks disclosure of aspects of the decision-making process and must be set aside. The same is true of Interrogatory 5 which requires

identification of each document "related to [the] consideration of the plaintiff's application" that the member read in the period between the time and date on which he or she was constituted as a Tribunal to deal with that application and the time and date when he or she came to the view that a favourable decision could not be made "on the papers".

21 Interrogatory 6 is designed to obtain information as to whether any of the documents read by the member in relation to the application of the plaintiff concerned was read "by way of a computer or computer terminal". If so, the Interrogatory seeks identification of that material and information as to when it was viewed, whether a password or code was used, where the material was stored and whether notes were made. If notes were made, the Interrogatory seeks information as to when and in what form they were made. The same Interrogatory inquires whether any requests were made "of the research area of the Tribunal" and, if so, what requests were made and when, and whether a note or record was made of the request. That Interrogatory clearly seeks information as to an aspect of the decision-making process and must be set aside.

22 Interrogatory 7 is in a somewhat different category from the other Interrogatories in that it is not directly concerned with the decisions about which the plaintiffs complain. Interrogatory 7 asks the following questions with respect to the period from when the member was constituted as the Tribunal until he or she came to the view that a favourable decision could not be made "on the papers":

- "(a) Did you do any Tribunal related work other than work [in] relation to the plaintiff's application?
- (b) If your answer to (a) was yes, did you personally operate a computer or computer terminal at all in respect of that work so as to view or search information stored or held on other computers?
- (c) If your answer to (b) was yes, on what dates and at what times did you do so?
- (d) If your answer to (b) was yes, what computer databases or computer systems did you view on that occasion or those occasions in relation to that work?
- (e) If your answer to (b) was yes, on each such occasion, what was the duration in time of your operation of the computer or terminal for that purpose?"

23 I can see no basis on which an answer to Interrogatory 7(a) would reveal any aspect of a member's decision-making process. However, the same is not true of Interrogatory 7(b), (c), (d) or (e). Although the information sought does

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not go to any decision in issue in these proceedings, it seeks information which necessarily bears on other decisions. The protection and immunity which is conferred on members of the Tribunal by the Act extends to all decisions made by them and, thus, Interrogatory 7(b), (c), (d) and (e) must be set aside.

- 24 In each matter, the remaining even-numbered Interrogatories ask whether, in the period between the date on which the member was constituted as the Tribunal for the purpose of considering the particular plaintiff's review application and the date on which he or she formed the view that a favourable decision could not be made "on the papers", he or she read a particular attached document, being one of the Part B documents. They also ask, among other questions, in what form the document was read, from where it was obtained and, if read by way of computer or computer terminal, whether there were any differences between it and the attached copy. These Interrogatories seek information with respect to the decision-making process and must, therefore, be set aside. The remaining odd-numbered Interrogatories ask the same questions with respect to the same documents but in relation to the period from the time when the member of the Tribunal came to the view that a favourable decision could not be made "on the papers" until he or she reached a final decision. For the same reason, they must also be set aside.

Orders

- 25 *Herijanto (As the Representative of the Persons listed in the Schedule) v Refugee Review Tribunal & Ors*
- 1 Interrogatories 3, 5, 6, 7(b), (c), (d) and (e) and 8 to 67 inclusive are set aside.
 - 2 The plaintiff is to pay two-thirds of the defendants' costs.
- 26 *Muin (As the Representative of the Persons listed in the Schedule) v Refugee Review Tribunal & Ors*
- 1 Interrogatories 3, 5, 6, 7(b), (c), (d) and (e) and 8 to 59 inclusive are set aside.
 - 2 The plaintiff is to pay two-thirds of the defendants' costs.

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27 *Lie (As the Representative of the Persons listed in the Schedule) v Refugee Review Tribunal & Ors*

- 1 Interrogatories 3, 5, 6, 7(b), (c), (d) and (e) and 8 to 56 inclusive are set aside.
- 2 The plaintiff is to pay two-thirds of the defendants' costs.