

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 [No 2] [2000] HCA 21
17 April 2000
S97/1998

ORDER

Application for further discovery dismissed with costs.

Representation:

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

No appearance for the first defendant

J Basten QC with 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 [No 2]
17 April 2000
S36/1999

ORDER

Application for further discovery dismissed with costs.

Representation:

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

No appearance for the first defendant

J Basten QC with 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 [No 2]
17 April 2000
S89/1999

ORDER

Application for further discovery dismissed with costs.

Representation:

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

No appearance for the first defendant

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

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1 GAUDRON J. The plaintiff in each of these matters seeks further discovery of various documents relating to the computer system of the first defendant, the Refugee Review Tribunal ("the Tribunal"), and its computer records. In order to understand their applications it is necessary to say something of the background to these proceedings.

2 Each plaintiff applied for a protection visa pursuant to s 36 of the *Migration Act* 1958 (Cth) ("the Act"). In each case, the application was refused by a delegate of the Minister. Each then applied to the Tribunal for review of the delegate's decision. In each case, the review application was unsuccessful. Each plaintiff now seeks relief in this Court under s 75(v) of the Constitution.

3 So far as is presently relevant, each plaintiff claims that the Tribunal failed to comply with certain provisions of the Act and failed to observe the requirements of procedural fairness by reason that it did not have regard to certain documents to which the delegate referred in his or her reasons for refusing that plaintiff's visa application. Those documents have come to be known as "the Part B documents". In no case were the Part B documents physically provided to the Tribunal for the purposes of the review application. Instead, the documents were available in libraries or on computer data bases to which individual members of the Tribunal could gain access by means of a computer terminal.

4 At an earlier stage of these proceedings, orders were made, by consent, for Discovery and Interrogatories. Each plaintiff administered Interrogatories to the Tribunal and, later, to the individual members who constituted the Tribunal for the purposes of his or her review application. The primary objective of the Interrogatories delivered to individual members of the Tribunal was to ascertain whether, during the period he or she constituted the Tribunal for the purposes of the particular review application in issue, he or she had or had not read or, alternatively, had or had not gained access to the Part B documents referable to that application. On 31 March 2000, I set aside various of those Interrogatories on the ground that they infringed the protection and immunity conferred on members of the Tribunal by s 435(1) of the Act¹. As I explained in my reasons for setting aside those Interrogatories, that protection or immunity extends to protection from compulsory disclosure of any aspect of the decision-making process.

5 As earlier indicated, each plaintiff now seeks the further discovery of documents relating to the Tribunal's computer system and its computer records. If orders are made for further discovery, they intend to have the documents and

1 *Herijanto v Refugee Review Tribunal, Muin v Refugee Review Tribunal, Lie v Refugee Review Tribunal* [2000] HCA 16.

computer records inspected and analysed by an expert who, it is believed, will be able to say whether, at any time during which the individual member was seized of the review application of the particular plaintiff concerned, he or she had access to any of the Part B documents which were on any of the Tribunal's computer data bases.

6 The documents in respect of which discovery is sought may well be extensive. They include all documents describing the Tribunal's computer network and its data base known as "CISNET"², including those describing the "network operating system, server applications, directory/authentication services ... email system ... version numbers, backup and recovery procedures". Those documents may be in hard copy, they may be recorded within the computer system or they may consist of a combination of both.

7 Discovery is also sought of "[a]ll authentication and access control records which record or evidence Tribunal members [sic] activity in accessing any of the CISNET databases". It would seem likely that that material is stored in the Tribunal's computer and would require what counsel for the plaintiffs described as "a dump of computer records".

8 It may well be that the documents and records which the plaintiffs seek to have discovered extend well beyond those which relate to CISNET access by the individual members of the Tribunal whose decisions are in issue in these proceedings. However, in the view that I take, that is not a matter that need be explored.

9 So far as the plaintiffs seek discovery to ascertain whether the individual members concerned with their review applications gained access to the Part B documents stored in computer data bases, they seek to achieve indirectly what they cannot achieve directly by means of Interrogatories. The protection afforded to individual members of the Tribunal by s 435(1) of the Act would be illusory if, although they could not be compelled to disclose their decision-making processes, those processes could be revealed by analysis of computer records.

10 In my view, the protection and privilege conferred by s 435(1) of the Act extends not merely to disclosure by the individual member concerned, but the revelation, by whatever means, of any aspect of his or her decision-making process. This seems to have been the basis for the decision in *Zanatta v McCleary*³. In that case the evidence of counsel was not admissible to

2 Country Information Service of the Department of Immigration and Ethnic Affairs.

3 [1976] 1 NSWLR 230.

3.

prove an out of court statement by a judge as to his decision-making process. And it may also be the rationale for the decision of the Privy Council in *Ramlochan v The Queen*⁴ in which it was held that a defendant in criminal proceedings was not entitled to production of the notes of the judge who presided at his previous trial.

- 11 Whether or not the privilege conferred by s 435(1) of the Act extends to the revelation, by whatever means, of the decision-making processes of individual members of the Tribunal, it would not be right, in my view, to order discovery to enable the plaintiffs to do indirectly what they cannot do directly. Accordingly, in each case, the application for further discovery is dismissed with costs.

4 [1956] AC 475 at 483.