

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 3] [2000] HCA 49
8 September 2000
S97/1998

ORDER

1. *Costs of the hearing of this aspect of the proceedings to be costs in the cause.*
2. *Certify that it was proper for the attendance of counsel.*
3. *The parties are directed to prepare draft questions to be reserved for the consideration of a Full Bench on or before Monday, 23 October 2000.*
4. *The matter is stood over until 9.30 am in Sydney on Monday, 23 October 2000.*

Representation:

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

No appearance for the first defendant

J Basten QC 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 3]
8 September 2000
S36/1999

ORDER

- 1. Costs of the hearing of this aspect of the proceedings to be costs in the cause.*
- 2. Certify that it was proper for the attendance of counsel.*
- 3. The parties are directed to prepare draft questions to be reserved for the consideration of a Full Bench on or before Monday, 23 October 2000.*
- 4. The matter is stood over until 9.30 am in Sydney on Monday, 23 October 2000.*

Representation:

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

No appearance for the first defendant

J Basten QC 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 3]
8 September 2000
S89/1999

ORDER

1. *Costs of the hearing of this aspect of the proceedings to be costs in the cause.*
2. *Certify that it was proper for the attendance of counsel.*
3. *The parties are directed to prepare draft questions to be reserved for the consideration of a Full Bench on or before Monday, 23 October 2000.*
4. *The matter is stood over until 9.30 am in Sydney on Monday, 23 October 2000.*

Representation:

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

No appearance for the first defendant

J Basten QC for the second and third defendants (instructed by Australian Government Solicitor)

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1 GAUDRON J. In each of these matters, the plaintiffs, who sue on their own behalf and as representatives of the persons named in the schedule to the Statement of Claim filed in his or her matter, seek relief under s 75(v) of the Constitution with respect to a decision of the first defendant, the Refugee Review Tribunal ("the Tribunal").

2 The plaintiffs are Indonesians of ethnic Chinese background. Each applied for a protection visa under s 36 of the *Migration Act* 1958 (Cth) ("the Act") claiming that he or she was a refugee for the purpose of 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 (together referred to as "the Convention"). In each case, the Tribunal affirmed an earlier decision of a delegate ("the delegate") of the Minister for Immigration and Multicultural Affairs that the relevant plaintiff was not a refugee as defined in the Convention and, hence, not entitled to a protection visa under s 36 of the Act.

3 In each matter, the parties have agreed that, for the purpose of determining the substantive issues involved, questions should be reserved for the consideration of a Full Bench pursuant to s 18 of the *Judiciary Act* 1903 (Cth). In broad terms, the issues are whether, in the circumstances, there was a breach of ss 418 and 424 of the Act and/or a denial of procedural fairness and, if so, whether the plaintiffs are entitled to relief under s 75(v) of the Constitution.

4 Before questions can be reserved for the consideration of a Full Bench, factual matters must be clarified. In this regard, the parties have prepared an agreed draft statement of facts in each matter but have not been able to agree on all matters. They have agreed, however, that to the extent necessary, I should determine the facts in issue.

5 The facts in issue relate to three broad areas: the transmission of documents to the Tribunal pursuant to s 418 of the Act; the Tribunal's consideration of, or, failure to consider, documents to which the relevant delegate referred in his or her decision; and, in the Herijanto and Muin cases, but not in the Lie case, the Tribunal's consideration of material which was not before the delegate and which was not drawn to the attention of the plaintiffs.

Transmission of documents: s 418 of the Act

6 Section 418 of the Act provides, in sub-ss (2) and (3):

"(2) The Secretary must, within 10 working days after being notified of [an] application [for review by the Tribunal], give to the Registrar the prescribed number of copies of a statement about the decision under review that:

2.

- (a) sets out the findings of fact made by the person who made the decision; and
 - (b) refers to the evidence on which those findings were based; and
 - (c) gives the reasons for the decision.
- (3) 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 delegate referred in his or her decision to documents which he or she had considered. These documents have come to be known as "the Part B documents" and it is convenient to refer to them as such. The Part B documents were not physically transferred to the Tribunal.

8 In the draft agreed statement of facts prepared by the parties in each case, there appears this paragraph:

"At the time of the making of [the delegate's] decision, the Part B documents were documents:

- (a) Relevant to the review of [the delegate's] decision by the Tribunal;
- (b) In the possession and control of the Secretary of the Department ... or his delegate, at all material times; and
- (c) Considered by the [Secretary] to be relevant to the review of [the delegate's] decision by the Tribunal."

The parties are agreed as to all matters stated in that paragraph, save for what appears in sub-par (a). The plaintiffs submit that I should make a finding in terms of that sub-paragraph. As the operation of s 418 is not dependent on the relevance of the documents to the Tribunal's decision, I decline to make that finding.

9 Although I decline to make a finding that the Part B documents were relevant to the Tribunal's review of the delegate's decision, the Part B documents which were not referred to in the Tribunal's decision, should, in each case, be annexed either to the final agreed statement of facts or to the question to be reserved for the consideration of a Full Bench, and their contents described. Unless the parties can agree on some other formulation, I would describe the Part B documents in question as documents "relevant to the position in Indonesia

3.

of Indonesian nationals of ethnic Chinese background and, also, to the ability and willingness of the Indonesian authorities to provide for their protection".

The Tribunal and the Part B documents

10 The parties are also agreed that, in each case, the Tribunal wrote to the plaintiff stating that it had "asked the Department to send a copy of its documents about your case to the Tribunal" and that it would "look at them along with any other evidence on the Tribunal file to determine whether it [could] make a decision in your favour immediately". The plaintiffs contend that I should make findings that that letter contained various representations, including that the Tribunal had received the Part B documents and would look at them.

11 The letter sent by the Tribunal speaks for itself and, if it becomes necessary to determine what representations it contains, that can be done by the Full Bench when considering the ultimate questions posed for its consideration. Moreover, it is not at all clear that that precise question will arise given that the parties are agreed that, having read the letter in question, the plaintiffs each believed that the Tribunal would be sent a copy of each of the Part B documents and that the Tribunal would look at those documents in making its review on the papers.

12 The plaintiffs also ask that I find, as a fact, that the member of the Tribunal who determined the particular plaintiff's application for review "constituted the relevant First Defendant in these proceedings"¹. The Act contains provisions with respect to the constitution of the Tribunal for the purpose of a particular review² and, if anything turns upon whether or not a particular member constituted the Tribunal, which I doubt, that question can be answered by reference to the Act. It is not a matter upon which I need make any finding.

13 The parties in each case also differ as to the facts to be recorded with respect to the Tribunal's review on the papers of the plaintiffs' applications for review pursuant to s 424 of the Act. For present purposes, it is sufficient to refer to what is recorded in the draft statement of agreed facts in the Herijanto matter. It is said in that document that "[a] review on the papers was [purportedly] conducted by Member Herron and was completed on 7 May 1998". The parties differ as to the use of the word "purportedly". As the plaintiffs contend that there was a breach of s 424 of the Act, there is no reason why the word "purportedly" should not be included. The question whether or not the requirements of that

1 It is not clear whether the finding is sought in the Herijanto case.

2 See ss 421, 422.

section were breached, if it arises, can be decided by the Full Bench in its determination of the ultimate issues in each case.

- 14 The parties are also in disagreement with respect to letters sent by the Tribunal to the plaintiffs with respect to the review which it was conducting. Again it is sufficient to refer to the Herijanto matter. The draft agreed statement of facts records that the Deputy Registrar of the Tribunal wrote to the plaintiff stating, *inter alia*:

"The Tribunal has looked at all the papers relating to your application but it is not prepared to make a favourable decision on this information alone. You now have an opportunity to come to a hearing of the Tribunal to give oral evidence in support of your claims."

The plaintiffs contend that I should find that that letter also contains various representations, including that the Tribunal had received all the Part B documents and had looked at them. That letter also speaks for itself and, for the reasons given in relation to the letter earlier referred to, I decline to make any finding as to the representations contained in it.

- 15 It is necessary, at this point, to say something further as to the availability of the Part B documents to the Tribunal. Some, but not all, of the documents to which the delegate referred in his or her decision were available on computer databases, known as the CISNET³ databases, to which the Tribunal had access. Other Part B documents could be obtained by the Tribunal from its library, the Country Information Service library of the Department of Immigration and Multicultural Affairs or on inter-library loan. The parties are not agreed as to what should be said of the CISNET databases. The plaintiffs seek a finding in these terms:

"Not all of the documents contained on the CISNET database comprised the full text of the original article. Some of the documents on that database were abstracts or summaries of the original articles. Some of the documents were index entries only to the original articles and did not contain the full text, summary or abstract of the original article. Different versions of the documents on the database were kept on the database at different times. Entries to the said database were added to and removed from the database from time to time during the relevant period".

- 16 Counsel for the plaintiffs pointed to only one Part B document which, although on a CISNET database, was not fully recorded. That document was a

3 Country Information Service of the Department of Immigration and Multicultural Affairs.

report, *The Chinese of South-East Asia*, by the Minority Rights Group International. The article contains general background information, detailed information as to several countries in South-East Asia, general conclusions, endnotes and bibliography. Only the section dealing specifically with Indonesia found its way onto the relevant CISNET database.

17 In my view, it should be recorded that, at least in the case of the report by the Minority Rights Group International, entitled *The Chinese of South-East Asia*, the relevant CISNET database contained only that section of the article which dealt specifically with Indonesia. Otherwise the only other finding that should be made is that entries to the databases were added to and removed from time to time during the relevant period and that different versions were recorded at different times. The latter finding is supported by the Procedures Advice Manual of the Department of Immigration and Multicultural Affairs annexed to the affidavit of Adrian Phillip Joel of 27 March 2000.

18 The main issue presently in contention between the parties relates to the question whether, in each particular case, the Tribunal had regard to the Part B documents which were not specifically referred to in its decision. In this regard, the plaintiffs ask that I infer from the evidence that it did not, and that I record findings to that effect. Again it is sufficient to refer to the two findings sought in the Herijanto matter, namely that:

"In conducting the review on the papers and in making his decision in that regard, Member Herron did not have before him and/or he did not read the Part B documents in electronic or hard copy form, save that he did have before him Item numbers 4, 7, 9, 12, 17 and 19 of the documents listed in Schedule 1 herein";

and

"In the making of his decision of 29 June 1998, Member Herron did not have before him and/or he did not read the Part B documents in electronic or hard copy form, save that he did have before him Item numbers 4, 7, 9, 12, 17 and 19 of the documents listed in Schedule 1 herein".

The documents identified as "Item numbers 4, 7, 9, 12, 17 and 19" in the schedule attached to the draft statement of agreed facts are documents referred to in the Tribunal's decision, but were the only Part B documents to which reference was made.

19 The other facts upon which the plaintiffs rely for the inferences which they contend I should make with respect to the Tribunal's consideration of the Part B documents are either agreed or not in dispute. For example, it is not in dispute that the Part B documents were not physically delivered to the Tribunal. Nor is it in issue that the Part B documents in issue were not all recorded on the

CISNET databases. Moreover, it is not in issue that none of the members who constituted the Tribunal for the purposes of reviewing the delegates' decisions with respect to the plaintiffs has given evidence that he or she had regard to those Part B documents in issue.

20 Additionally, the parties are agreed that the material discovered in these proceedings does not disclose any material positively suggesting that the relevant Tribunal member had or had regard to the Part B documents in issue. For example, the draft agreed statement of facts in the Herijanto matter records:

"No document discovered by the [Tribunal] ... (other than the decision of the Tribunal) records or notes in any fashion that Member Herron:

- (a) sought access to, by any means;
- (b) obtained access to, by any means; or
- (c) read, considered or took into account,

the Part B documents during the period from 31 March 1998 (the date on which he was constituted as the member of the Tribunal for the purpose of this review) to 29 June 1998 (the date of his decision)."

And in regard to the absence of file notes, the plaintiffs point to the Registry Manual annexed to the affidavit of Adrian Phillip Joel of 27 March 2000 which refers to the keeping of file notes.

21 In relation to the inferences which they contend should be drawn from the facts set out above, the plaintiffs point to ss 430(1)(d) and (3)(b) of the Act. In general terms, those paragraphs require the Tribunal to refer in its decision to the evidence or material upon which factual findings were based and, thereafter, to give a copy of any document containing that evidence or material to the Secretary of the Department of Immigration and Multicultural Affairs ("the Secretary").

22 In my view, the question whether the inferences for which the plaintiffs contend should be drawn from the material referred to above can conveniently be decided by a Full Bench in determining the questions to be reserved. Accordingly, I decline to make the findings sought. I should add, however, that there is a need for the factual matters to which reference has been made, other than those presently agreed, to be included either in the final agreed statement of facts or the question to be reserved. Moreover, it will be necessary for the relevant parts of the Registry Manual to be annexed to one or other of those documents.

Material which was not before the delegate (Herijanto and Muin cases only)

23 In order to understand this issue it is necessary to note that the Tribunal issued a Practice Direction which provided, amongst other things, that:

"The applicant will be given an opportunity to respond to any relevant and significant material which is or may be adverse to his or her case."

It is agreed that, in making its decision in relation to the two applications in question, the Tribunal had regard to information which has become known as "Country Information" and which was not brought to the attention of the relevant plaintiffs. They seek a finding that that information was "adverse", in the sense in which that word is used in the Practice Direction.

24 It is sufficient, in my view, that the general nature of the Country Information be described and the relevant documents annexed to the final agreed statement of facts. In this regard, unless the parties agree otherwise, I would describe the documents as "containing information capable of supporting the conclusion that Indonesian authorities were willing and able to provide protection for Indonesians of ethnic Chinese background".

25 Similar considerations apply to a submission made to the Tribunal by the Secretary pursuant to s 423 of the Act. In each of the two cases in which this issue arises, the plaintiffs ask that I find that that submission "[r]elated to [his] case" and constituted "adverse materials". As with the other material which was not brought to the attention of either plaintiff, the submission should be described as relevant to the question whether Indonesian authorities were willing and able to provide protection for Indonesians of ethnic Chinese background and the submission and its Annexures should be annexed either to the question reserved or the final agreed statement of facts.

Ultimate issues

26 The plaintiffs also seek two findings which, in my view, go to the ultimate issues to be decided by a Full Bench. In essence, the findings they seek are that had they taken the steps they claim they would have taken if they had known that the Tribunal did not have the Part B documents or that the Tribunal had additional Country Information material that was not before the delegate, they may have obtained a favourable decision or, alternatively, by not taking those steps they lost all chance of receiving a favourable decision. Clearly, they are matters which go directly to the ultimate issues to be determined by a Full Bench and should be decided at that stage. I therefore decline to make findings of the kind sought.

Orders

1. In each matter, costs of the hearing of this aspect of the proceedings will be costs in the cause.
2. In each matter, certify that it was proper for the attendance of counsel.
3. In each matter, direct the parties to prepare draft questions to be reserved for the consideration of a Full Bench on or before Monday, 23 October 2000.
4. Stand the matters over until 9.30 am in Sydney on Monday, 23 October 2000.