FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v MZXPA [2008] FCA 185

MINISTER FOR IMMIGRATION AND CITIZENSHIP v MZXPA AND REFUGEE REVIEW TRIBUNAL
VID 1001 OF 2007

SUNDBERG J
29 FEBRUARY 2008
MELBOURNE

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1001 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**MZXPA** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**SUNDBERG J**
DATE OF ORDER:	**29 FEBRUARY 2008**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Magistrates Court be set aside and in lieu thereof it be ordered that the application to that Court be dismissed with costs.
3. The first respondent pay the appellant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1001 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**MZXPA** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**SUNDBERG J**
DATE:	**29 FEBRUARY 2008**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 This is an appeal by the Minister for Immigration and Citizenship against a judgment of a Federal Magistrate allowing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal). Pursuant to s 25(1AA)(a) of the *Federal Court of Australia Act* 1976 (Cth) the appeal is heard by a single judge.

2 The first respondent (the respondent) is a Lebanese citizen who arrived in Australia on 12 July 2002. On 21 August 2002 he lodged an application for a protection (Class XA) visa. A delegate of the Minister refused the application. The respondent applied to the Tribunal for a review of that decision. That application was dismissed.

3 The respondent claimed that due to his political opinion and support for Lebanese Forces (LF), and his comments critical of the Syrian President, he held a well-founded fear of persecution by Syrians, pro-Syrian Palestinians and pro-Syrian Lebanese. He also claimed that his brother had been killed and that he had been threatened by Syrians and Palestinians.

4 The Tribunal found that the respondent's brother was not killed by Syrians, as the respondent's evidence on the date on which, and the place where, his brother was killed was inconsistent with what appeared on his death certificate.

5 The Tribunal also found that the respondent was not a member of the LF as his evidence was vague and contradictory, and country information indicated that the LF was a Christian group, and he was unable to explain why this organisation would accept a Muslim as a member. As such, the Tribunal found that the respondent was not imputed with any political opinion that attracted adverse political attention. The Tribunal further stated that the respondent's claim that, as an anti-Syrian nationalist, he found the LF to be a natural political home for his views, was inconsistent with information that there were other anti-Syrian groups of a secular nature, (with non-Christian supporters), who were also operating in Lebanon.

6 The Tribunal also found that the respondent did not make any critical comments about the Syrian President as he failed to outline when, and to whom, such comments were made, and the details on how the Syrian and pro-Syrian Lebanese came to know about such comments. The respondent was also unable to provide details of when he was attacked as a result of such comments being made.

7 The Tribunal noted that the respondent's evidence suggesting that he was on a Lebanese computer blacklist was vague, and found that alleged arrest warrants for his apprehension were not genuine.

8 On the respondent's application for judicial review in the Federal Magistrates Court, he pressed only two grounds. The first was that the Tribunal's decision was affected by apprehended bias because of a letter dated 4 July 2006, sent to him pursuant to s 424A of the *Migration Act* 1958 (Cth), which stated:

> *The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa.*
>
> *The Tribunal received written and verbal evidence on your behalf from [14 named persons]. All of these people are either close relatives of yours or have*

been known to you for many years. As such, they have a strong incentive to ensure the success of your application for protection.

This information is relevant because an inference may be drawn that the witness evidence provided by these people is not genuine and lacks credibility.

You are invited to comment on this information.

9 His Honour found that the Tribunal's decision was affected by bias. He said at [19] to [32]:

… the first part of that statement ["All of these people … protection"] is unobjectionable …

The second part of the Tribunal's letter is, however, problematic. It does indicate a predisposition.

…

That, however, is not the end of the matter. The Tribunal's reasons for decision were lengthy and detailed and traversed all the matters before it. There is nothing in the reasons that suggests that the Tribunal gave any effect to the predisposition to which I have referred.

As I have said, the central critical finding, as it seems to me, made by the Tribunal was its rejection of the 1981 incident involving the death of the Applicant's brother. In the entire narrative, that was the most compelling piece of evidence advanced by the Applicant, and was clearly on one view the wellspring of all his subsequent misfortunes.

Having disbelieved the Applicant about that incident, it is not surprising that the Tribunal went on to dismiss numerous other aspects of the Applicant's story.

Similarly, the findings made by the Tribunal about the other witnesses to whom reference has been made turned upon detailed analyses of what it was that the witnesses actually said to the Tribunal. The real issue is whether, taking the [s 424A] letter in context and looking at the Tribunal's reasons as a whole, the Tribunal was open to persuasion.

This is a finely balanced matter. Apart from the single offending sentence set out in paragraph 18 above the Tribunal's reasons for decision were unimpeachable. They contained findings which could have been fatal to the application even if one wholly ignores the material about which the Tribunal expressed its scepticism.

Nonetheless, if one accepts, as I do, that the Tribunal had a preconceived bias about the Applicant's friends and relatives, how can one be sure that that did not affect the other findings the Tribunal made? I am not able to be so.

> *In the circumstances of this case the "hypothetical fair-minded lay person … might reasonably apprehend that the Tribunal … might not have brought an impartial mind to the resolution of the assertion to be denied" (per Mansfield J in SZCSC v Minister [2007] FCA 418 at [38]).*

10 The second ground was that there was no evidence to support the Tribunal's finding that there were other anti-Syrian groups of a secular nature in existence for many years. His Honour found at [12] to [13] that this issue was not critical to the Tribunal's findings, and that there was country information referred to by the Tribunal to support its conclusion.

11 The appellant contends that the Magistrate erred in finding that the Tribunal's letter disclosed a predisposition or preconceived bias about the genuineness or credibility of the named persons, and that a hypothetical fair-minded lay person might reasonably apprehend that the Tribunal might not have brought an impartial mind to the resolution of the matter. It is contended that the Magistrate should have held that:

> *(a) having regard to the content and purpose of the s 424A letter, as well as the Tribunal's reasons as a whole, the Tribunal did not have a predisposition about the genuineness or credibility of the applicant's witnesses, or alternatively did not have a predisposition that was incapable of alteration; and/or*
> *(b) a hypothetical fair-minded lay person who was properly informed about the nature of the proceedings before the Tribunal and the statutory provisions applicable to those proceedings would not reasonably apprehend that the Tribunal might not have brought an impartial mind to the resolution of the question to be decided.*

12 In order to establish apprehended bias on the part of the Tribunal, it must be demonstrated that a fair-minded and informed person might reasonably apprehend that it might not have brought an impartial mind to bear on its decision: *NADH v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328 at [14]. In *R v George* (1987) 9 NSWLR 527 at 536 Street CJ, with whom Yeldham and Finlay JJ agreed, considered the import of the word "reasonably" in that formulation:

> *The reasonable apprehension of bias, which is the core of the test, turns very much upon the adjective 'reasonable'. It is not enough that there be some apprehension of some uninformed and [uninstructed] person.*

To the same effect are the observations of Priestley and Clarke JJA in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 379-380.

13 The hypothetical fair-minded and informed person would be aware of the nature of the Tribunal's review functions and proceedings, and that the Tribunal would not invite an applicant to a hearing unless, on the material available to it, it had already reached a preliminary view unfavourable to the applicant. That follows from s 425 of the Act, which provides in part:

> *(1) 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.*
> *(2) Subsection (1) does not apply if:*
> *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it …*
> …

Such a preliminary view does not establish apprehended bias: *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 872 at [23] and *SZBAE v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 965 at [15]-[16].

14 An informed and instructed hypothetical person would also know that the Tribunal is an inquisitorial body, and is not required uncritically to accept an applicant's claims: *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 596. It is required under the Act, in performing its review function, to consider whether or not it is satisfied that an applicant meets the criteria for a protection visa. If not so satisfied, it must refuse to grant the visa. See *Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003* [2005] FCAFC 73 at [16]-[18]. The Tribunal is accordingly required to assess the probative value of evidence put before it by an applicant. Where the Tribunal perceives weaknesses in that evidence, it is entitled vigorously to test that evidence: *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at [30].

15 Accordingly, under the Act, the expression of a preliminary view, even on a critical matter, does not establish bias. At common law (that is independently of the special features of the Act that bear on the ambit of apprehended bias), the courts have accepted that judges,

tribunals and administrators may properly, and indeed sometimes should, express a preliminary view so as to alert a party to concerns they may have and thus afford the party an opportunity to rebut that view. Thus in *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310 at 319 a Full Court (Lockhart, Pincus and Gummow JJ) said:

> *expression by a court or tribunal of its current view of an issue may be advantageous on occasions, rather than otherwise. The rules as to apparent bias must be balanced against the desirability of a thoroughly fair contest and the latter may positively favour a disclosure, without any equivocation, of an opinion held by the court or tribunal at a particular stage of the proceedings. In the absence of such disclosure, there may be a justified resentment on the losing side, based on their not having been made aware of the direction of the thinking of the court or tribunal on a particular issue and not having been given a fair opportunity to turn it into another path.*

16 In *Richmond River Broadcasting v Australian Broadcasting Tribunal* (1992) 106 ALR 671 at 681 Wilcox J, after referring to the *Kaycliff* passage quoted at [15], said:

> *It is an everyday event for judges to indicate to counsel, during the course of a hearing, their impressions of a case, including their impressions of witnesses and of the facts. They do so to assist counsel. It is always an advantage for counsel to know the way in which the judge's mind is working; submissions may be targeted to the aspect of the case which is troubling the judge. Where a judge takes this course nobody would suggest that the judge ought to be disqualified from concluding the case. The reason is that the judge is merely expressing a tentative view and inviting a response which he or she may take into account in determining whether to adhere to, or abandon, that view in the final decision. The readiness to listen and be persuaded is the critical matter.*

17 The critical matter to which his Honour referred in the final sentence is reflected in the observations of Gaudron and McHugh JJ in *Laws v Australian Broadcasting Tribunal* (1991) 170 CLR 70 at 100:

> *When suspected prejudgment of an issue is relied upon to ground disqualification of a decision maker, what must be firmly established is a reasonable fear that the decision maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion, irrespective of the evidence or arguments presented.*

See also *Vakauta v Kelly* (1989) 167 CLR 568 at 571, *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214 at 219 and *Minister for Immigration and Multicultural and Indigenous Affairs v Jia Legeng* (2001) 205 CLR 507 at 532, 564. As Dr Forbes puts it, there will be no apprehension of bias if a tribunal tries to assist the parties, or

to enlighten itself, by indicating that it has a provisional view, subject to further evidence or argument: *Justice in Tribunals* 2nd ed (2006) at 301-302.

18 Section 424A is important in this connection. It is a statutory variant of the concept the subject of the discussion in [15] to [17]. Subsection (1)(a) requires the Tribunal to

> *give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.*

19 In the present case the Tribunal was not satisfied, on the material initially before it, that the respondent was entitled to a visa. It therefore invited him to appear before it to give evidence and produce argument. After that, it still had concerns, and drew them to the respondent's attention by way of the s 424A letter. The final sentence of the letter, which is all that troubled the Magistrate, said that an inference may be drawn that the evidence of the relatives and friends lacks credibility. It does not even express a tentative or provisional view. It alerts the respondent to a possibility. Having regard to what has been said at [15] to [17], that warning, or that encouragement to the respondent to supplement his material or dispel the Tribunal's concerns, is not a prejudgment and does not show a mind so prejudiced in favour of a conclusion already formed that will not be altered irrespective of the evidence or arguments presented. As Finn J said in *SZJDTU v Minister for Immigration and Citizenship* [2007] FCA 1135 at [8]:

> *It is not bias for a Tribunal conscientiously to follow and apply procedures prescribed in the statute under which it is acting. Section 424A is such a procedure.*

20 This conclusion is borne out by what happened. The respondent provided additional material from his relatives and friends. The Tribunal based its decision on its adverse findings about the respondent's credibility. That is not in issue on the appeal. It then gave its reasons for attaching no weight to the evidence of the relatives and friends. For example, it gave no weight to the evidence of Hassan Hassan because of the vague, undetailed and general nature of his evidence. It particularised these deficiencies: he did not state why the police were actually looking for the respondent despite the opportunity to do so. He said he did not know what the respondent's problems actually were: just that he had problems. He did not provide

any explanation as to how he knew the people who were looking for the respondent were Syrians.

21 Similarly with the respondent's daughter Fatima. Her evidence was accorded no weight. Her claims were vague and lacking in detail. She did not say where the events she described took place or why the authorities had a particular interest in the respondent. The respondent's wife's evidence was given no weight because it contained no details of time, context or why swearing at President Assad caused the respondent problems. The respondent's son Hussein's evidence was accorded no weight because it was vague and was inconsistent with documentary evidence.

22 The evidence of the other witnesses (whom it identified) was also accorded no weight. At page 37 the Tribunal said these witnesses made more general claims than those it had specifically dealt with:

> *The general claims made in this regard by the witnesses over time, apart from the claims specifically discussed above, are vague and undetailed. They refer to the applicant's problems with Syrians, the Ba'ath Party and Lebanese authorities over time but apart from essentially restating the applicant's own claims or making vague comments that the applicant had 'problems' with Syrians and others in Lebanon they do not provide any direct or first-hand evidence of when the applicant suffered any specific or particular problems, what these specific or particular problems were or how the witnesses in each case came to know about them. Based on the vague and undetailed nature of this evidence I have not placed any weight on it when making my decision in this matter.*

23 What is important about the Tribunal's treatment of this evidence is that it did not reject it because it was given by the respondent's relatives and friends. It does not make *any* adverse credibility findings about these witnesses, let alone on the basis of their ties with him. It is clear, therefore, that while the Tribunal's letter referred to the possibility that an adverse inference might be drawn as to the credibility of their evidence on the ground of relationship or friendship with the respondent, it did not in its decision do that. That strongly suggests that the Tribunal's mind was not closed and was capable of change.

24 The Magistrate said it was not necessary for the Tribunal to write the s 424 letter; it could have made adverse findings about the witnesses without it. It is not clear what, if anything, the Magistrate made of this, assuming it to be correct. On the assumption that the

"information" in the letter did not attract s 424A, this can have no bearing on the prejudgment issue. That the Tribunal may have gone further than required to provide the respondent with an opportunity to comment cannot lead to the inference that it had a closed mind and was incapable of persuasion.

25 As is apparent from the foregoing discussion, the formation of a preliminary view or predisposition does not establish apprehended bias. However the Magistrate's reasons appear to equate a predisposition with bias. The "predisposition" referred to in the second and third paragraphs of the passage from the reasons quoted at [9] becomes "preconceived bias" in the eighth paragraph, without any reasoning process justifying the conversion.

26 Allegations of bias, whether actual or apprehended, must be firmly established: *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at [90]. The evidence does not establish a reasonable apprehension of bias, let alone firmly establish it. The appeal must be allowed.

27 Even if a case of apprehended bias had been made out, relief should have been refused. A party aware of the right to claim bias may expressly or impliedly waive that right, despite the rule that bias destroys jurisdiction: *Vakauta v Kelly* at 587. An informed waiver cures the defect, and the party cannot challenge the tribunal's decision for bias unless a new course of complaint arises: Forbes, op cit, at 285.

28 A claim of bias should be made at the commencement of the hearing or so soon thereafter as the relevant facts are known: *Vakauta* at 577-579 per Dawson J. A party who is legally represented is not generally allowed to raise bias for the first time in later court proceedings, unless unaware of it until after the decision was made: *Wentworth v Rogers (No 12)* (1987) 9 NSWLR 400. And see Forbes, op cit, at 286. *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 contains a detailed examination of the matter. There McInerney J found there was a reasonable apprehension of bias on the part of the magistrate. However his Honour refused to grant certiorari because the appellant, with knowledge of the facts entitling him to object to a continuance of the proceeding before the magistrate, did not object but took an active part in the proceeding down to judgment.

29 That is what happened here. The respondent was at all relevant times legally represented. His lawyers were aware of the facts upon the basis of which, much later, a bias claim was based. That is to say, they and their client were aware of the Tribunal's letter from the moment it was received. Yet they made no complaint of bias, and no request that the Tribunal member stand aside. Rather the respondent acted upon the Tribunal's hint that further material might be in order, and assembled numerous statutory declarations from many of the witnesses named in the letter. Most of them, in their declarations, objected strongly to the Tribunal's suggestion that they might not be telling the truth. Yet the bias claim was kept under cover, and was used only when the case went against the respondent. For those reasons I would have refused relief, in the exercise of my discretion, had the bias case been established.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sundberg.

Associate:

Dated: 29 February 2008

Counsel for the Appellant:	C Horan
Solicitors for the Appellant:	Clayton Utz
Counsel for the Respondent:	J Gibson
Solicitors for the Respondent:	Erskine Rodan & Associates
Date of Hearing:	25 February 2008
Date of Judgment:	29 February 2008