FEDERAL COURT OF AUSTRALIA

NBMB v Minister for Immigration & Citizenship [2008] FCA 149

ADMINISTRATIVE LAW – Refugee Review Tribunal – apprehension of bias – test to be applied – leave to raise a new ground of appeal refused

MIGRATION LAW – *Migration Act 1958* (Cth) – s 425(1) does not confer upon an applicant a unilateral right to secure an adjournment of proceedings so that particular evidence can be presented – s 425(1) complied with as long as applicant is given a meaningful opportunity to give evidence and present arguments

Acts Interpretation Act 1901 (Cth) s 33(1)
Federal Court of Australia Act 1976 (Cth) s 28(1)(b)
Federal Court Rules (Cth) O 13, r 2
Migration Act 1958 (Cth) s 414, s 421, s 422, s 422A, s 424, s 425, s 427

Abebe v Commonwealth [1999] HCA 14; 197 CLR 510 followed
Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 72; 222 ALR 411 considered
Australian Trade Commission v Underwood Exports Pty Ltd (1997) 49 ALD 426 followed
Industry Research & Development Board v IMT Ltd [2001] FCA 85 followed
Jones v Australian Competition & Consumer Commission [2002] FCA 1054; 76 ALD 424 followed
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32; 207 ALR 12 followed
Minister for Immigration & Multicultural Affairs v Eshetu [1999] HCA 21; 197 CLR 611 followed
Minister for Immigration & Multicultural Affairs v Wang [2003] HCA 11; 215 CLR 518 followed
NADH v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 328; 214 ALR 264 applied
NAJT v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 134; 147 FCR 51 applied
Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal (1990) 26 FCR 39 followed
Re BHP Petroleum Pty Ltd and Collector of Customs, Vic [1987] AATA 13 followed
Re Briggs and Australian Taxation Office (No 1) (1986) 86 ATC 2034 followed
Re Hulls and Department of Social Security [1990] AATA 198; 21 ALD 322 followed
Re JRL; Ex parte CJL (1986) 161 CLR 342 followed
Re Ljubo Mihajlovic and Snowy Mountains Hydo-Electric Authority [1990] AATA 293 followed
Re Mcintyre and Repatriation Commission [1990] AATA 225 followed

Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S154/2002 [2003] HCA 60; 201 ALR 437 followed
SAAP v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 24; 228 CLR 294 cited
Sun Zhan Qui v Minister for Immigration & Ethnic Affairs (Unreported, Federal Court of Australia, Lindgren J, 6 May 1997) followed
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs [2006] HCA 63; 228 CLR 152 cited
SZBLY v Minister for Immigration & Citizenship [2007] FCA 765; 96 ALD 70 followed
SZEJF v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 724 followed

NBMB AND NBMC v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 1806 OF 2007

FLICK J
26 FEBRUARY 2008
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1806 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**FLICK J**
DATE OF ORDER:	**26 FEBRUARY 2008**
WHERE MADE:	**SYDNEY**

THE ORDERS OF THE COURT ARE:

1. Leave be granted to file the *Amended Notice of Appeal* dated 19 February 2008.

2. Leave to raise Ground 3 in the *Amended Notice of Appeal* be refused.

3. The orders of the Federal Magistrates Court as made on 17 August 2007 be set aside.

4. The Second Respondent review, according to law, the decision of the First Respondent made on 25 November 2005 refusing the applications of the Appellants.

5. The Second Respondent for the purposes of conducting that review be differently constituted.

6. The First Respondent is to pay 75% of the costs of the Appellants of and incidental to the appeal.

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

GENERAL DISTRIBUTION

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NEW SOUTH WALES DISTRICT REGISTRY **NSD 1806 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NBMB** **First Appellant**
	NBMC **Second Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**FLICK J**
DATE:	**26 FEBRUARY 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The First Appellant is a national of Nepal. The Second Appellant is her stepson.

2 The First Appellant arrived in Australia in May 2004 and made an application for a Protection (Class XA) Visa. She claimed to be a refugee. An application was also made by the Second Appellant, that being an application made as a family member but not asserting a personal claim to be a refugee. The fate of the Second Appellant's appeal depends upon that of the First Appellant.

3 The applications were rejected by a delegate of the Minister on 25 November 2004. An application for review was lodged with the Refugee Review Tribunal on 16 December 2004. The Tribunal by way of its decision dated 2 June 2005 affirmed the decision not to grant the protection visas but that decision was set aside by the Federal Magistrates Court on 2 May 2006 and the matter remitted to the Tribunal. By way of a second decision dated 11 January 2007 a differently constituted Tribunal again affirmed the decision not to grant

protection visas to the Appellants.

4 On 17 August 2007 the Federal Magistrates Court dismissed an application to review the second decision made by the Tribunal.

5 The Appellants now appeal to the Federal Court. A proposed *Amended Notice of Appeal* was served upon the Respondent Minister on 16 November 2007 and seeks to raise three *Grounds of Appeal*, namely:

> 1.The Tribunal decision is affected by apprehended bias.
>
> 2.The Tribunal failed to comply with *the Migration Act 1958* s. 425.
>
> 3.The Tribunal lacked the authority or power to make the decision.

Particulars are provided in respect to each of these grounds. The Respondent Minister does not oppose the first two grounds being now considered; the third ground is opposed.

FIRST GROUND: APPREHENDED BIAS

6 The task entrusted to the Refugee Review Tribunal is, as stated in s 414(1) of the *Migration Act 1958* (Cth), to conduct a "*review*." Section 415 sets forth the powers of the Tribunal. Section 420 sets forth as follows the manner in which the Tribunal is to carry out its functions:

> **Refugee Review Tribunal's way of operating**
>
> (1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case.

This section contains "*exhortatory provisions*": *Sun Zhan Qui v Minister for Immigration & Ethnic Affairs* (Unreported, Federal Court of Australia, Lindgren J, 6 May 1997). It, as with like provisions, is:

> …intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals: *Minister for Immigration & Multicultural Affairs v Eshetu* [1999] HCA 21 at [49], 197

CLR 611 at 628 per Gleeson CJ and McHugh J.

7 In conducting its "*review*", the Tribunal is conducting an "*inquisitorial hearing*": *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S154/2002* [2003] HCA 60 at [58], 201 ALR 437 at 451. Such an obligation is different to that discharged by superior courts and may be more onerous: *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* [2004] HCA 32 at [73], 207 ALR 12 at 33. Albeit in dissent as to the ultimate conclusion, the following observations of Kirby J are apposite:

> …the Tribunal is not a body engaged in purely adversarial proceedings. It operates according to inquisitorial procedures. This feature of the Tribunal's operation casts obligations upon it that are different from, and in some respects more onerous than, those applicable to more traditional bodies acting according to the more passive decision-making virtues of adversarial trial.

This "*inquisitorial*" nature of the hearing is emphasised by s 424(1) and the conferral upon the Tribunal of power to "*get any information that it considers relevant*". See also *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 24 at [111]–[123], 228 CLR 294 at 330–3 per Gummow J. As correctly noted by the Federal Magistrate, the task of the Tribunal was to undertake a "*proper, genuine and realistic consideration* [of] *the merits of the case*": *SZEJF v Minister for Immigration and Multicultural & Indigenous Affairs* [2006] FCA 724 at [39] per Rares J. The task of this Court is to ensure that any decision of the Tribunal is a decision authorised by the 1958 Act; the task of this Court is not to review the merits of the decision reached: Cf *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 72 at [16], 222 ALR 411 at 416 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

8 The task of the Tribunal is also to discharge its functions in a manner both free from bias and in a manner which is seen to be free from bias. The principles to be applied when considering an allegation as to apprehended bias are clear; difficulty, however, is frequently encountered in the application of those principles to the facts in issue. In *NADH v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 328, 214 ALR 264 Allsop J (with whom Moore and Tamberlin JJ agreed) summarised the general test as follows:

> [14] The general test for apprehended bias is whether the relevant circumstances are such that a fair-minded and informed person might reasonably apprehend that the decision-maker might not bring or have brought an impartial mind to bear on the decision…

His Honour thereafter went on to consider the approach to be adopted when the decision-maker was an administrative tribunal such as the Refugee Review Tribunal. His Honour continued:

> [17] To identify the obligation of the tribunal, and the content of the necessary apprehension in the circumstances here, a number of matters need be recognised. First, while it is necessary to demonstrate that the circumstances are such as would give rise to the relevant apprehension, the apprehension itself is not as to the fact or likelihood of a lack of impartiality, but of a possibility (real and not remote) thereof…
>
> [18] Second, the identity, nature and function of the decision-maker are important influences on the content of the requirement to conduct the relevant task with the observance of procedural fairness by not being tainted by the appearance of disqualifying bias…
>
> [19] Third, the place of a decision-maker such as the tribunal here should be recognised as different from a judge in open court…. The tribunal does not administer public justice. The elements which affect the public confidence in the adjudication of disputes by an independent and impartial arm of government (in the broad sense) and which may be seen to inform what might be said to be freestanding norms of conduct and behaviour by judges conducting public hearings are not necessarily as easily transposable as strict obligations of administrative decision-makers acting in private. The tribunal here must investigate the facts for itself unaided by counsel presenting the parties' cases, to the degree and extent it thinks appropriate. The tribunal which has to reach a state of satisfaction may want to test and probe a recounted history. It may have particular matters troubling it for resolution, which require questioning and expressions of doubt which are entirely appropriate, but which if undertaken or said by a judge in open court in adversary litigation might give rise to an apprehension of a lack of impartiality.
>
> [20] At least in the absence of the identification of some prejudice or interest in the tribunal, for a complaint of apprehended bias based on the conduct of the tribunal in its procedure and the dealing with material before it in its reasons to be meaningful, it must carry with it an assertion of the apprehension of a possibility of predisposition. That is, the predisposition of the tribunal towards a result, other than a result reached by an evaluation of the material before it in a fair way with a mind that was open to persuasion in favour of the person in question. Unless that be demonstrated, it is hard to see how a decision-maker has failed to conform to standards of procedural fairness. Such an approach accords with the need for neutral and fair decision-making, without imposing on decision-makers in an administrative context the burden of behaving at all times as would a judge in public in the deployment of judicial power.
>
> [21] The enquiry is not directed to the personal thought processes of the decision-maker. It is directed to his or her conduct "objectified" through the prism of what a fair-minded and informed observer would reasonably apprehend … It goes without saying that a conclusion, from all the materials, including the decision and the reasons for decision, that a fair-minded informed observer would reasonably apprehend a lack of impartiality in the sense discussed, does not carry with it the conclusion that there was a lack of impartiality.

9 It is considered that the Tribunal in the present proceedings as reconstituted conducted its review in such a manner as to attract a reasonable apprehension of bias. It was accepted by the Respondent Minister that if that conclusion was reached, the Tribunal's decision was vitiated by jurisdictional error.

10 This conclusion is reached upon the basis of a review of the transcript of the proceedings before the Tribunal as reconstituted. The transcript records a number of exchanges soundly basing a conclusion as to apprehended bias.

11 Thus, for example, a recurring concern being advanced by the Tribunal to the First Appellant was the proposition that Christianity was a fast-growing religion in Nepal and that there was no evidence that "*proselytisers are being persecuted or gaoled*". A series of questions advancing this concern of the Tribunal was put to the First Appellant. One of those exchanges was as follows:

> MR HARDY: Okay. Well, the point is the Christian churches are growing, okay? So proselytising is working, okay? There must be some kind of culture of people talking about Christianity and people listening, because Christian numbers in Nepal are increasing. Okay? But there's no evidence that proselytisers are being persecuted or gaoled. So the point is – let me try and bring it back to you – why can't you go back to Nepal and be part of one of the greatest and fastest growing religious phenomena in the country?
>
> INTERPRETER: Whatever they speak in the churches increasing in the - - -
>
> MR HARDY: Just start again.
>
> INTERPRETER: However church is going, people who believe previously Christian, they are growing, not others, and the proselytisers by the missionary, and the church established by missionary - - - -
>
> MR HARDY: Yes, you're saying the converts used to be Christian to start with. Is that what you're saying?
>
> INTERPRETER: I was a proselytiser.
>
> MR HARDY: Look, non-Christians are becoming Christians in Nepal at a phenomenal rate. It's the fastest growing religious change in the country. Christians are on the increase, okay, and they weren't Christians before, the ones who are becoming Christians. So someone must be showing them how to be Christian.
>
> [NBMB]: Yeah.
>
> MR HARDY: Okay, and from what we can see it is these evangelical churches that are claiming the most success, you know, the proselytising churches. So why aren't they in gaol? They must be proselytising in an inoffensive way.
>
> INTERPRETER: They are in gaol but it's not in the record.

12 The inquisitorial nature of the Tribunal's functions cannot be ignored. Indeed, it was the very task of the Tribunal to seek the response of the First Appellant to its concerns. But the above exchange provides a basis, as do other exchanges in the transcript, for

apprehending that the Tribunal had formed its own view, even a firmly held view, that proselytisers were not encountering the persecution being contended by the First Appellant. The exchanges also provide a basis for apprehending that the responses being provided by the First Appellant were not being properly considered. Comments by the Tribunal member, such as his comment that "*they must be proselytising in an inoffensive way*", provide a basis for a "*fair minded and informed bystander*" to conclude that, to the contrary, the evidence of the First Appellant was being summarily, if not cynically, dismissed.

13 It is considered that there is in the present proceedings a reasonable apprehension that the Tribunal exhibited a "*predisposition … towards a result, other than a result reached by an evaluation of the material before it in a fair way with a mind that was open to persuasion in favour of the person in question*": *NADH v Minister for Immigration & Multicultural & Indigenous Affairs*, *supra*, at [20].

14 This conclusion is only reinforced by the refusal of the Tribunal to adjourn or postpone its hearing to enable a witness to be called on behalf of the First Appellant, a Pastor David Boyd. This witness, it is understood, was proposed to be called to give evidence as to the First Appellant's "*Christian commitment and also the situation for Christians in Nepal*". The request for the adjournment was made on 24 July 2006 and dates provided as to the time when he would be unavailable to attend. The Tribunal unquestionably has a discretionary power to adjourn proceedings: *Migration Act 1958* (Cth), s 427(1)(b). Decisions as to whether or not hearings should be adjourned are largely within the discretion of administrative decision-makers. Relevant to the exercise of that discretion by the Tribunal in the present context is the legislative direction that it must conduct its review in a manner which "*is fair, just, economical, informal and quick.*" Procedural decisions of tribunals such as the Refugee Review Tribunal should not be lightly disturbed. Of present concern is not the decision in fact made to refuse to adjourn the proceedings; of present concern is that the refusal to do so only goes to reinforce an apprehension as to a lack of impartiality. Of itself, the refusal to adjourn the proceedings may have assumed little relevance; in context, however, it is yet a further factual basis upon which an informed bystander may question the impartiality of the Tribunal. The evidence sought to be called was not of marginal relevance but a matter of central relevance to the issues sought to be pursued by the Appellants.

15 A review of the transcript also provides a basis for an informed observer concluding that the Tribunal was becoming anxious to confine the explanation being provided by the First Appellant or indeed concerned as to the manner in which it was approaching its own task. Thus, for example, at one point the Tribunal was questioning the First Appellant as to why she did not seek an explanation from her migration agent and her statement that "*there was no point in making an application*". The following exchange thereafter took place:

> MR HARDY: But you didn't ask him why.
>
> INTERPRETER: He just told me that - - -
>
> MR HARDY: But you didn't ask him why. So did this conversation take place? Because this is about your life and death here, and you didn't ask him why?
>
> INTERPRETER: What I told – why I couldn't get protection, because he said to me that in – because no-one can get it because your case will fail. If you apply to the skilled migration you've got right age and I don't – I found a number on my point that can – I can get from my age because of my cooking skill, and if I've got one sponsorer it will be easy for you to get permanent resident here. So you don't need to apply for protection visa.
>
> After that I came to Lockman. I told him, because I was advised that to apply for migration, skilled migration, if I applied for a refugee application it would be unsuccessful. After that, then, we went again to understand further and we went, four people, Lina, Lockman, my husband and myself. We asked and we asked and we asked to apply for protection but again we were advised that not to apply for because of unsuccessful. Then I was advised that he needed one sponsor that he could help my case. After that we came back home. He called me on the phone – I mean, he phoned me and then talk about that, that I found a sponsor to help you, and asked to go to Parramatta, that he had made an appointment to see the man, and then there is a restaurant that you can go to a restaurant where we met him.
>
> After that, Lockman took me over there. Then we talk about it and he said yes. The owner of the restaurant agreed that he could help me. After that, we left Pawar. After that, when we understood that he said that we already applied, he had already applied, and you could – and you had been successful. It's been applied. And (indistinct) you could go, and you could return within month. At that time, Lockman Limbu was (indistinct).
>
> After that, my husband went. After two or three weeks after he left the application was rejected but the Pawar didn't tell us, and visa was not in my passport at that time and it was going to be expired. When I went in they said to me that I have the letter, it is rejected, and the letter – there was only two days left, and what you have to do, and he told me that whatever he could, do it.
>
> MR HARDY: Can you wind up this a little bit soon? Yes, go on.

The following exchange also took place:

> MR HARDY: No, I can't do anything with that. No, no, I can't do anything with that. How can it be that they're in gaol and it's not on the record? Where does your investigation come from?

> INTERPRETER: When I heard the – can I speak some – I would like the applicant to repeat the – because it's very long, so - - -
>
> MR HARDY: Yes.
>
> INTERPRETER: - - - I didn't understand to – yes.
>
> MR HARDY: You're speaking very, very fast, okay? Maybe I am too. Yes. But also, the interpreter is. So it might have become – it might have just got a little bit jammed, yes.

16 Again, considerable reservation must be expressed with too readily drawing conclusions based upon individual exchanges recorded in a transcript. Tribunal members must be free to control their own procedures and to confine, when appropriate, evidence being given. Further, given the importance of the issues being addressed by the Tribunal, it must be recognised that it may not only be the applicant in those proceedings who may experience distress but also Tribunal members themselves may understandably exhibit a degree of frustration. As noted by Gummow and Hayne JJ in *Abebe v Commonwealth* [1999] HCA 14, 197 CLR 510 at 577–8:

> [191] …the fact that an applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself. But those difficulties are to be confronted by the Tribunal in the execution of its tasks, not by a court that is asked to review the way in which the Tribunal reached its decision.

17 It is of importance that a party to administrative proceedings is confident that the proceedings have been conducted fairly. A comment to "*wind it up*" undermines that confidence. So, too, does another exchange when a Tribunal member observed: "*Do I have to squeeze information from you… ?*" Not only could the First Appellant's confidence in the impartiality of the proceedings have been undermined by such exchanges, the fair-minded observer would also be similarly concerned. Even though it may be accepted that a Tribunal member, in the context of an inquisitorial review, may well frame questions differently to the manner in which questions may be asked by counsel or judges in judicial proceedings, the manner in which these questions — and other questions — were pursued was inappropriate. It is of obvious importance that a Tribunal member remains, and is seen to remain, measured in the manner in which a hearing proceeds and is not seen to rush questions and answers such that an informed observer may justifiably form a view that the Tribunal is not carefully seeking and considering the evidence being adduced in a measured and careful manner.

18 It is accepted that a reasonable apprehension of bias must be "*firmly established*": *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352. It is also accepted that it is not sufficient if the reasonable bystander merely "*has a vague sense of unease or disquiet*": *Jones v Australian Competition & Consumer Commission* [2002] FCA 1054 at [100], 76 ALD 424 at 441. And the question as to whether a reasonable apprehension of bias has been "*firmly established*" must also necessarily take into account the manner in which the legislature has directed the Tribunal to carry out its functions (ie s 420 of the 1958 Act) and the inquisitorial nature of the review being undertaken.

19 Further submissions relied upon by the Appellants focussed upon lengthy questions being put to the First Appellant and her expressed lack of understanding. Submissions also focussed upon an exchange between the Tribunal member and the First Appellant as to what was stated by the Tribunal to be an "*inconsistency*" in evidence. Those submissions are rejected. Although there are instances where long and perhaps complex questions were being asked of the First Appellant, a review of the transcript also records the Tribunal member thereafter attempting to address the lack of understanding being expressed by the First Appellant. Further, to the extent that the perceived "*inconsistency*" was the subject of questioning, the oral submission made during the hearing that the questioning evidenced the Tribunal "*going out of its way to find an inconsistency where none existed*" is rejected.

20 It is thus considered that the appeal should be allowed by reason of a reasonable apprehension of bias.

SECOND GROUND: S 425 OF THE *MIGRATION ACT 1958* (CTH)

21 The second of the three *Grounds of Appeal*, it should be noted, raises as a discrete contention the proposition that s 425 of the *Migration Act 1958* (Cth) was breached by reason of the failure to adjourn proceedings to allow Pastor Boyd to attend to give evidence. Considered as a discrete ground, and not as a further way in which a reasonable apprehension of bias may be supported, the ground is rejected.

22 The opportunity was extended to the Appellants to "*give evidence and present arguments relating to the issues arising in relation to the decision under review*" within the meaning of s 425(1). That section confers upon an applicant an opportunity to "*appear*

before the Tribunal to give evidence and present arguments"; the section does not confer upon an applicant a unilateral right to secure an adjournment of proceedings so that some particular evidence of a witness is in fact available. So long as an applicant has been given a meaningful opportunity to "*give evidence and present arguments*", even if it is not the particular evidence which an applicant may prefer, there has been no breach of s 425. The issues being inquired into by the Tribunal, it is considered, were clearly identified with the First Appellant and she was given an opportunity to expand upon those issues. See *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] HCA 63 at [47], 228 CLR 152 at 164–7.

LEAVE TO RAISE GROUND 3?

23 In advance of the hearing, the Appellants provided a proposed *Amended Notice of Appeal* and had served upon the First Respondent a *Notice to Produce*. The Appellants correctly accepted that they would require leave to rely upon the third proposed *Ground of Appeal*, that being a ground not raised for resolution before the Federal Magistrate.

24 Although the First Respondent opposed the granting of leave, Counsel quite properly had in Court those documents which answered the *Notice to Produce* and those documents were made available to the Appellants. Ultimately those additional facts which were relevant to the further ground, should leave be granted, became the subject of a "*Note of Facts Agreed*". By means of that *Note* it became common ground that the Senior Member who in fact reconstituted the Tribunal had an appropriate delegation from the Principal Member to exercise the powers conferred by s 421 and/or s 422 and that s 422A(2) of the 1958 Act had not been complied with.

25 The course pursued at the hearing was to reserve the question as to whether leave should be granted and to hear submissions on the additional ground.

26 The resolution of the appeal in favour of the Appellants in accordance with their first *Ground of Appeal* necessarily has the consequence that it is unnecessary to further consider the fate of the additional further third *Ground of Appeal*, should leave be granted. Submissions were, however, made in respect to both the granting of leave and the substantive ground and it may be prudent to address both matters briefly.

27 The additional ground not pursued before the Federal Magistrate is a contention that the Tribunal on the second occasion had not been properly constituted. The *Particulars* provided in respect to this new *Ground of Appeal* were as follows:

> (a) The reconstitution of the Tribunal is provided for in the *Migration Act 1958* ss. 422 and 422A.
>
> (b) There is no evidence that the Tribunal was reconstituted in accordance with these provisions. The Tribunal therefore lacks the authority to make the decision.

28 It was not disputed that the Court has ample power to allow both an amendment to a *Notice of Appeal* (see *Federal Court of Australia Act 1976* (Cth), s 28(1)(b); *Federal Court Rules* (Cth), O 13, r 2) and to allow further evidence, if appropriate, on the appeal *(Federal Court of Australia Act 1976* (Cth) s 27). The power is to be exercised in an appropriate case: see *White v Minister for Immigration & Multicultural Affairs* [2000] FCA 232, 96 FCR 511; *SZBLY v Minister for Immigration & Citizenship* [2007] FCA 765, 96 ALD 70.

29 In *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158, Kiefel, Weinberg and Stone JJ summarised the approach to be pursued as follows:

> [46] In our view, the application for leave to rely upon the sole ground of appeal now raised should be refused. Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so…
>
> [47] In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:
>
> > It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.
>
> [48] The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

In giving further consideration to the approach to be pursued, in *NAJT v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 134 at [163], 147 FCR 51 at 84 Madgwick J (with whom Conti J agreed) referred to these comments of Kiefel, Weinberg and Stone JJ and continued:

> [166] Thus, relevant questions include:
>
> 1) Do the new legal arguments have a reasonable prospect of success?
> 2) Is there an acceptable explanation of why they were not raised below?
> 3) How much dislocation to the Court and efficient use of judicial sitting time is really involved?
> 4) What is at stake in the case for the appellant?
> 5) Will the resolution of the issues raised have any importance beyond the case at hand?
> 6) Is there any actual prejudice, not viewing the notion of prejudice narrowly, to the respondent?
> 7) If so, can it be justly and practicably cured?
> 8) If not, where, in all the circumstances, do the interests of justice lie?

In the present statutory context it has, not surprisingly, been further concluded that:

> …the serious consequences that may attend a wrongful refusal of a protection visa may be taken into account in determining whether it is expedient in the interests of justice for leave to be granted where the appellant has been legally represented at all times: *SZEPN v Minister for Immigration & Multicultural Affairs* [2006] FCA 886 at [16] per Branson J.

30 It is not understood that there was any dispute as to the principles to be applied when considering whether to grant or refuse leave — the dispute was as to the application of the principles to the facts now before the Court.

31 In the present appeal there is no satisfactory explanation as to why the ground was not pursued before the Federal Magistrate. The now Appellants were represented in that Court. The explanation now provided to this Court is simply that a "*different mind*" has now conceived an argument not previously contemplated.

32 Considerations in favour of granting leave undoubtedly include the absence of any factual dispute between the parties and the further additional facts necessary for the resolution of the appeal being within a very confined compass. The serious consequences attendant upon a wrongful refusal of a protection visa also supports the grant of leave.

33 Notwithstanding such considerations, it is considered that leave should be refused. There may be little — if any — prejudice to the Respondent Minister if leave were granted. But simply for a "*different mind*" to devise a new basis for challenge is not considered sufficient to warrant the now Appellants departing from the manner in which their case was

presented to the Federal Magistrates Court.

34 Moreover, it is considered to be a particularly unmeritorious course for a legally represented party to participate in Tribunal proceedings, to take no objection to the then constitution of the Tribunal, and to thereafter raise the issue – not before the Federal Magistrates Court – but in this Court. Having participated in the Tribunal proceedings after it was reconstituted, questions also arise as to whether the Appellants had thereby waived any entitlement to challenge the manner in which it was constituted. Presumably no such argument would have been pursued by the Appellants had they been successful before that Tribunal. No submission, however, to this effect was relied upon by the Respondent Minister. It is, however, considered relevant to also take such considerations into account when refusing leave.

THE RESOLUTION OF GROUND 3

35 Even had leave been granted, however, the third *Ground of Appeal* would have been resolved adversely to the Appellants.

36 The Respondent Minister contends that the authority to reconstitute the Tribunal was conferred by either s 421 or s 422 of the *Migration Act 1958* (Cth). The contention advanced on behalf of the Appellants was that there was "*no evidence that the Tribunal was reconstituted in accordance with*" ss 422 and 422A. The Minister accepts that no steps were taken in accordance with s 422A(2). The Minister's position was simply that s 422A was not the section relied upon; the authority to reconstitute the Tribunal was that conferred by ss 421 or 422. Sections 421 and 422 provide as follows:

> **421 Constitution of Refugee Review Tribunal for exercise of powers**
>
> (1) For the purpose of a particular review, the Tribunal is to be constituted, in accordance with a direction under subsection (2), by a single member.
>
> (2) The Principal Member may give a written direction about who is to constitute the Tribunal for the purpose of a particular review.
>
> **422 Reconstitution of Refugee Review Tribunal--unavailability of member**
>
> (1) If the member who constitutes the Tribunal for the purposes of a particular review:
>
> (a) stops being a member; or

> (b) for any reason, is not available for the purpose of the review at the place where the review is being conducted;
>
> the Principal Member must direct another member to constitute the Tribunal for the purpose of finishing the review.
>
> (2) If a direction is given, the Tribunal as constituted in accordance with the direction is to continue to finish the review and may, for that purpose, have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.
>
> (3) In exercising powers under this section, the Principal Member must have regard to the objective set out in subsection 420(1).

37 The Appellants' contention was that the member of the Tribunal who constituted the initial Tribunal could not be said to be "*not available*". Given the common ground between the parties, no question arose as to the authority of the delegate who exercised the power of the "*principal member*" to reconstitute the Tribunal.

38 The submission of the Respondent Minister in respect to s 421, it is considered, should be accepted.

39 The decision of the Tribunal as initially constituted had been set aside by the Federal Magistrates Court. Where such an order is made, "*justice is in general better seen to be done if the Court or the Tribunal is reconstituted for the purposes of the rehearing*": *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 43. See also *Australian Trade Commission v Underwood Exports Pty Ltd* (1997) 49 ALD 426 at 427. The "*usual position* [is] *that remission to a differently constituted tribunal is the ordinary way to proceed*": *Industry Research & Development Board v IMT Ltd* [2001] FCA 85 at [40].

40 There is no reason to impose any constraint upon the power conferred by s 421(2). The decision of the initial Tribunal having been set aside, the exercise of the power conferred by s 421(2) thereafter arose for consideration. It is a power that can be exercised from time to time: *Acts Interpretation Act 1901* (Cth), s 33(1). The discretion to be exercised by the Principal Member — or his delegate — was a discretion to be exercised in light of all the circumstances, including the order of the Federal Magistrates Court and what is recognised as "*justice being seen to be done*." Section 421(2) confers a power of appointment upon the Principal Member — or his delegate: *Minister for Immigration & Multicultural Affairs v Wang* [2003] HCA 11 at [40], 215 CLR 518 at 532 per McHugh J. In the present proceedings, that power was exercised by a person with an appropriate delegation.

41 Further, for the purposes of s 422, a member of a tribunal may "*not* [be] *available*" where (for example) his or her term of appointment has expired: Cf *Re Briggs and Australian Taxation Office (No 1)* (1986) 86 ATC 2034 at 2040. Nor is that expression confined to circumstances in which a tribunal member has died (eg, *Re Hulls and Department of Social Security* [1990] AATA 198, 21 ALD 322 at 323; *Re BHP Petroleum Pty Ltd and Collector of Customs, Vic* [1987] AATA 13). The expression also extends to those situations where a tribunal member has resigned (eg, *Re Ljubo Mihajlovic and Snowy Mountains Hydo-Electric Authority* [1990] AATA 293 at [9]; *Re Mcintyre and Repatriation Commission* [1990] AATA 225 at [2]. But these are not the only circumstance in which a member may "*not* [be] *available.*" Although it is not necessary to resolve the point, a member may also "*not* [be] *available*" where an order is made quashing the decision of the Tribunal as originally constituted. For the purposes of s 422(1)(b), it is considered that the member constituting the initial Tribunal may thereby become "*not available*". Any contrary conclusion may involve embracing a proposition that a member remains "*available*" even though "*justice in general is better seen to be done*" if that member did not further participate in any rehearing. This construction of s 422(1)(b) may be further reinforced when consideration is given to the terms of that provision, namely a member ceasing to be available "*for any reason*."

42 Relevant to the exercise of the discretion to grant or refuse leave to amend is, of course, an assessment as to the prospects of success of the additional ground sought to be pursued. Having considered the additional ground, and having concluded that it should be rejected, the decision to refuse leave to amend is only further reinforced.

COSTS

43 An order as to costs is, of course, within the discretion of the Court.

44 In the present appeal the Appellants have been successful. But some time and costs would inevitably have been incurred by the Respondent Minister in preparing for the application for leave to appeal and the resolution of the further *Ground of Appeal*, should leave be granted. On the application for leave, the Appellants have been unsuccessful. They have also been unsuccessful in respect to the second of their *Grounds of Appeal*.

45 It is considered that an appropriate exercise of discretion is that the First Respondent

should pay 75% of the costs of the Appellants.

ORDERS

46 The orders of the Court are:

1. Leave be granted to file the *Amended Notice of Appeal* dated 19 February 2008.

2. Leave to raise Ground 3 in the *Amended Notice of Appeal* be refused.

3. The orders of the Federal Magistrates Court as made on 17 August 2007 be set aside.

4. The Second Respondent review, according to law, the decision of the First Respondent made on 25 November 2005 refusing the applications of the Appellants.

5. The Second Respondent for the purposes of conducting that review be differently constituted.

6. The First Respondent is to pay 75% of the costs of the Appellants of and incidental to the appeal.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 26 February 2008

Solicitor for the Appellants	R Turner (Parish Patience)
Counsel for the First Respondent:	G Johnson
Solicitor for the First Respondent:	B Rayment (Sparke Helmore)
Date of Hearing:	19 February 2008
Date of Judgment:	26 February 2008