FEDERAL COURT OF AUSTRALIA

SZNMT v Minister for Immigration & Citizenship [2010] FCA 338

Citation:	SZNMT v Minister for Immigration & Citizenship [2010] FCA 338
Appeal from:	SZNMT v Minister for Immigration & Anor [2009] FMCA 778
Parties:	**SZNMT v MINISTER FOR IMMIGRATION & CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number(s):	NSD 990 of 2009
Judge:	**GRAY J**
Date of judgment:	9 April 2010
Catchwords:	**MIGRATION** – visa – protection visa – Tribunal hearing – whether Tribunal obliged to insist that appellant use interpreter instead of answering questions in English – whether denial of procedural fairness because appellant misunderstood questions – Tribunal's obligation to provide particulars of information and indication of its relevance – whether Tribunal relied on any information of which it was obliged to provide particulars and an indication of relevance – whether Tribunal understood its task – whether Tribunal took into account irrelevant considerations
Legislation:	*Acts Interpretation Act 1901* (Cth), s 33(2A) *Migration Act 1958* (Cth), ss 36, 91R(1)(b), 91R(2), 91R(3), 366C(3), 420, 420(2)(b), 424, 424A, 424A(1), 424A(1)(a), 424A(3)(b), 425, 427(7) *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* *Protocol relating to the Status of Refugees done at New York on 31 January 1967*
Cases cited:	*House v The King* (1936) 55 CLR 499 referred to *M175 of 2002 v Minister for Immigration & Citizenship* [2007] FCA 1212 cited *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 cited *SZNMT v Minister for Immigration & Anor* [2009] FMCA 778 cited

Date of hearing:	16 November 2009
Date of last submissions:	27 November 2009
Place:	Melbourne (Via video link to Sydney)
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	62
Counsel for the appellant:	The appellant appeared unrepresented
Counsel for the respondents:	Mr D Godwin
Solicitor for the respondents:	DLA Phillips Fox

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 990 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZNMT**
Appellant

AND: **MINISTER FOR IMMIGRATION & CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **GRAY J**

DATE OF ORDER: **9 APRIL 2010**

WHERE MADE: **MELBOURNE (VIA VIDEO LINK TO SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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JUDGE: **GRAY J**
DATE: **9 APRIL 2010**
PLACE: **MELBOURNE (VIA VIDEO LINK TO SYDNEY)**

REASONS FOR JUDGMENT

The nature and history of the proceeding

1 The principal question raised in this appeal is whether the Refugee Review Tribunal ("the Tribunal"), the second respondent to the appeal, denied the appellant procedural fairness by restricting the appellant's use of an interpreter during a hearing relating to the appellant's claim for a protection visa. Numerous other issues have also been raised.

2 The appeal is from the judgment of the Federal Magistrates Court of Australia, delivered on 20 August 2009, and published as *SZNMT v Minister for Immigration & Anor* [2009] FMCA 778. The learned federal magistrate dismissed an application by the appellant to set aside the decision of the Tribunal affirming a decision of a delegate of the Minister for Immigration and Citizenship ("the Minister"), the first respondent to the appeal.

3 By s 36 of the *Migration Act 1958* (Cth) ("the Migration Act"), there is a class of visas known as protection visas. A criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

4 The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the Migration Act to mean respectively the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* and the *Protocol relating to the Status of Refugees done at New York on 31 January 1967*. It is convenient to call these two instruments, taken together, the "Convention". For present purposes, it is sufficient to say that, pursuant to the Convention, Australia has protection obligations to a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country

5 The appellant is a citizen of Bangladesh. He arrived in Australia on 14 July 2008. On 25 August 2008, he applied for a protection visa. On 19 November 2008, the Minister's delegate made a decision refusing to grant the appellant a protection visa. The appellant applied to the Tribunal for review of that decision. The Tribunal conducted a hearing on 25 February 2009, at which the appellant gave evidence and presented arguments. He was assisted by a Presbyterian clergyman, Dr Brown. The Tribunal's statement of decision and reasons is dated 22 March 2009 and was handed down on 24 March 2009. On 15 April 2009, the Tribunal published a corrigendum. In [120] of its original statement of reasons for decision, the Tribunal expressed findings that it was satisfied that the appellant was a person to whom Australia had protection obligations under the Convention and that the appellant therefore satisfied the criterion for a protection visa. By the corrigendum, the Tribunal substituted a paragraph, also numbered [120], stating that the Tribunal was not satisfied that the appellant was a person to whom Australia had protection obligations under the Convention and did not satisfy the criterion for a protection visa. No change was made to the expression of the decision, which was to affirm the decision not to grant the appellant a protection visa.

6 The appellant's application to the Federal Magistrates Court was dated 22 April 2009 and was given the number SYG 937/2009. Following the dismissal of that application on 20 August 2009, the appellant filed a notice of appeal in this Court on 9 September 2009.

7 The appellant did not have the benefit of legal representation, although someone with some knowledge of processes under the Migration Act assisted him with the preparation of his notice of appeal and his written outline of submissions. In the course of the hearing of the

appeal, on 16 November 2009, it emerged that the case the appellant wished to make about the involvement of the interpreter in the Tribunal hearing was different from that which appeared to have been made in the Federal Magistrates Court, and from that in the notice of appeal and the appellant's outline of submissions.

8 The appellant's argument had been that the Tribunal prevented him from speaking in his first language and using the interpreter. Several passages in the transcript of the Tribunal hearing, to which the appellant referred, showed that, although the appellant was attempting to use the English language, the interpreter intervened on occasions to assist him when it seemed that the appellant did not understand properly what the Tribunal member was asking him. When I pointed out to the appellant that the interventions of the interpreter on his behalf were inconsistent with his assertion that the Tribunal had prevented him from using the interpreter, he explained that his submission really was that the Tribunal had failed to insist that he speak in his native language and use the interpreter, when it was clear that he was not coping using English. I asked the appellant to refer me to passages in the transcript of the Tribunal hearing that would support his claim that he was not able to cope using English. He said that he would be unable to do this without assistance from the person who had assisted him with the preparation of other documents. As a consequence, I reserved my judgment on the appeal and gave the appellant seven days to file a further written submission, giving references to passages in the transcript of the Tribunal hearing which he said show that he had difficulty understanding the proceedings or giving evidence in English and was not assisted by the interpreter. I also gave the Minister a further seven days to file any written submissions in reply to the appellant's further submission. The appellant filed a further written submission on 23 November 2009 and the Minister filed a submission in reply on 27 November 2009.

The facts

9 When the appellant made his application for a protection visa, he was assisted by a registered migration agent. His claim was that he had a well-founded fear of persecution, if he should return to Bangladesh, for reasons of his religion and his political opinion. He said that he was a Roman Catholic who had experienced persecution on a daily basis in his home area. He also said that he was a member of and an activist for the Bangladesh Nationalist Party ("BNP") and had been threatened by activists of the rival Awami League. He also

feared the caretaker government that was then in office, because it was arresting BNP activists and leaders.

10 At the Tribunal hearing, the appellant told the Tribunal that the claims made in his application for a protection visa were largely false. He no longer claimed that he had been a BNP activist, although he said that he was a member of a family that tended to support the BNP and lived in a predominantly BNP area, and so he did not feel safe after the Awami League came to power. The principal claim of the appellant to the Tribunal was that he had been a Roman Catholic in Bangladesh and that he had become a Protestant in Australia. He had only been a nominal Catholic but was now motivated to proselytise if he should return to Bangladesh.

The Tribunal's reasons for decision

11 The Tribunal dealt with the appellant's claims at considerable length in its reasons for decision. It accepted that the appellant is a Christian, but found that "the mere fact of being a Christian in Dhaka does not establish a real chance of Convention-related persecution." The Tribunal also found that the appellant had not experienced discrimination amounting to persecution on the basis of his religion or any other Convention ground.

12 The Tribunal found the appellant's evidence on his family's political leanings to be "generally unimpressive" and described him as "mainly reactive to the Tribunal's questions and not fully engaged in these matters." The Tribunal nonetheless accepted that the appellant's family and inhabitants of his local area favoured the BNP. It did not accept that he was involved directly in politics, that he experienced any persecutory treatment at college (such as threats to his life), that he suffered any other harm or disadvantage for reasons of any religious or political association, or that he had any political or religious commitment that he needed to modify for his safety. The Tribunal found that the appellant would not engage in any relevant political conduct if he returned to Bangladesh. There was no real chance of persecution on political grounds, from the newly formed Awami League Government, or any political groups.

13 The Tribunal accepted that the appellant had been attacked by two men on 10 June 2006 and received medical treatment following that attack. It did not accept that there was any Convention ground for such an assault. It did not accept that the appellant had good

reasons for not approaching the police about the incident. The Tribunal found other claims made by the appellant "to be confused and often vague." It found these claims exaggerated and spuriously linked with the appellant's claimed Christianity, and therefore completely unreliable. The Tribunal found that the appellant's personal circumstances, and information from sources other than the appellant about circumstances in Bangladesh, indicated that the appellant did not have a well-founded fear of persecution as a Christian in Dhaka. In relation to broader security concerns, the Tribunal found that there was no real chance that the appellant would be denied state protection on Convention-related grounds.

14 The Tribunal then turned to deal with the appellant's claim to have become an evangelical Protestant since arriving in Australia. The Tribunal expressed serious concerns about the appellant's motivation for his engagement with the Presbyterian Church in Australia. It found his vehement rejection of the Catholic Church "contrived and overdone." The Tribunal thought that the appellant was "tailoring his claims and also his conduct to maximise his chance for permanent residency." It was not satisfied that the appellant had engaged in this conduct in Australia other than to strengthen his claim for entitlement to a protection visa. Section 91R(3) of the Migration Act therefore required the Tribunal to disregard his conduct in Australia.

15 The Tribunal did not accept that the appellant or his family would have to avoid going to church in Bangladesh for their safety. It found that the appellant would be able to pursue any religious interest he had, either as a nominal Catholic or as a Protestant, without having to refrain from or modify his conduct so as to avoid persecution. It did not accept that he would evangelise or promote Protestantism if he returned to Bangladesh.

The application to the Federal Magistrates Court

16 In his application to the Federal Magistrates Court, the appellant relied on 10 grounds. To some extent, these grounds overlapped and involved repetition. The first ground alleged actual or apprehended bias on the part of the Tribunal. The second ground alleged an unspecified error of law and an unspecified failure to follow the proper procedure. The third ground alleged apprehended bias. The fourth ground alleged denial of procedural fairness "pursuant to s.420 and s.425 of the Migration Act 1958." The fifth ground alleged a failure to comply with s 424A of the Migration Act, by failing to put important information to the appellant to comment on. The sixth ground alleged a denial of procedural fairness in failing

to give the appellant an opportunity to present his case. The particulars of this ground referred again to the failure of the Tribunal to give him adverse information referred to in its decision. A failure to follow s 424 of the Migration Act was alleged. The seventh ground alleged that the Tribunal exceeded its jurisdiction or constructively failed to exercise its jurisdiction by asking itself the wrong question. There was a further reference to procedural fairness. The eighth ground revisited bias as a ground. The ninth ground contained a claim of failure to put to the appellant inconsistencies between his claims and information from other sources, on which the Tribunal relied. The tenth ground stated the proposition that denial of procedural fairness is jurisdictional error, which removes the protection of the privative clause in the Migration Act.

The Federal Magistrate's reasons for judgment

17 The federal magistrate dealt with the 10 grounds expressed in the appellant's application. His Honour rejected an argument that the manner in which the Tribunal dealt with a letter it had received from the appellant's former employer, providing information that the appellant had not been politically active, compromised the presentation of the appellant's case and thereby demonstrated the bias of the Tribunal. The appellant argued that the Tribunal wanted to shock or surprise him with this information at the hearing, rather than provide the information to him before the hearing, and that the revelation of the letter during the hearing unnerved him and interrupted his case. The appellant also submitted that the Tribunal was desperate to damage his credibility. The federal magistrate held that there was no obligation on the Tribunal to provide the appellant with the letter beforehand. The letter had been revealed late in the hearing, after the appellant had given most of his evidence and made most of his submissions. The transcript of the Tribunal hearing did not support a conclusion that the letter's disclosure interrupted the flow of the hearing or made the appellant nervous. His Honour held that there was no failure to comply with s 424A of the Migration Act, and no denial of procedural fairness. No case of actual bias, or of apprehended bias, was made out.

18 The federal magistrate then dealt with a submission of the appellant that the Tribunal had prevented him from using an interpreter at the hearing, apparently with the intention of disadvantaging him in the presentation of his case. The submission was that, to save time and make its job easier, the Tribunal insisted upon the appellant giving his evidence in English.

The federal magistrate found that the submission was not borne out by the transcript of the Tribunal hearing. His Honour referred to passages in that transcript in which the Tribunal did tell the interpreter that he did not need to translate Dr Brown's evidence. The appellant claimed that he had misunderstood the meaning of the word "follow", when the Tribunal asked him if he was able to follow that evidence without the assistance of the interpreter. He did not point to any part of Dr Brown's evidence that he had failed to understand, nor to the significance of any lack of understanding if it had occurred. His Honour also held that the transcript of the hearing provided no support for the proposition that the Tribunal insisted that the appellant give his oral evidence in English. Although he did speak English for much of the hearing, the appellant was assisted by the interpreter.

19 The Tribunal then dealt with allegations of failure to comply with s 424A of the Migration Act. His Honour rejected arguments that the Tribunal was obliged to provide the appellant with particulars of the information on which it relied from the reasons for decision of the Minister's delegate, or with a copy of the sound recording of his interview with an immigration official. The appellant had not specified what information was contained in the delegate's reasons and the recording of the interview on which the Tribunal relied in its reasons for decision. With respect to any other information that the appellant referred to, the federal magistrate held that s 424A of the Migration Act did not require that the Tribunal provide him with particulars of that information.

20 The appellant also put his argument that he had not been given a proper hearing, because he was required to use the English language, by referring to s 425 of the Migration Act. The federal magistrate rejected the argument that the Tribunal prevented the appellant from utilising the services of the interpreter. His Honour also rejected an argument that the interpretation provided was of such a poor quality that the appellant was effectively prevented from giving evidence at the hearing.

21 The federal magistrate rejected an argument that the Tribunal had failed to comply with s 420 of the Migration Act. In particular, his Honour said that s 420(2)(b), which provides that the Tribunal "must act according to substantial justice and the merits of the case", did not impose any procedural requirement on the Tribunal. His Honour held that this argument was an attempt to engage in merits review, which was impermissible.

22 The federal magistrate rejected the appellant's argument that the Tribunal had misconstrued the law and constructively failed to exercise its jurisdiction. His Honour said that the Tribunal's discussion of the relevant law disclosed that it had understood correctly the tests it was required to apply. It applied the law correctly.

23 The federal magistrate also referred to other arguments that the appellant had put in written submissions. One such argument related to internal relocation in Bangladesh. His Honour pointed out that the Tribunal concluded that the appellant did not have a well-founded fear of persecution. It was therefore not called upon to consider whether the appellant might be able to avoid persecution by moving elsewhere in Bangladesh. His Honour rejected an argument that one finding of the Tribunal was not supported by evidence. His Honour also found that the Tribunal undertook a proper examination of the appellant's claim and did not fail to have a "fresh look" at that claim.

24 The federal magistrate concluded that jurisdictional error on the part of the Tribunal had not been demonstrated.

The notice of appeal

25 The notice of appeal filed in this Court contained four grounds of appeal. Again, these grounds were overlapping and repetitive. There was an allegation of "numerous errors of law", and the failure to exercise proper procedure, on the part of the Tribunal. The appellant alleged that the federal magistrate had "ignored some legal issues which were not clearly explained" in his Honour's judgment. He alleged denial of natural justice by the federal magistrate and that there was "no reason to make decision in favor [*sic*] of the respondent." The appellant alleged a denial of procedural fairness and a failure to act in accordance with the provisions of the Convention. He also alleged actual or apprehended bias, as well as repeating the allegation of denial of procedural fairness.

26 Although these grounds were not the subject of any particulars, the appellant expanded upon them in his written outline of submissions and his further written submissions, as well as in oral argument through an interpreter on the hearing of the appeal. The points raised can be dealt with under the following headings.

The use of the interpreter

27 Section 427(7) of the Migration Act provides:

> If a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter.

28 The use of the word "may" in this provision is apt to confer on the Tribunal a discretion, rather than an obligation. See s 33(2A) of the *Acts Interpretation Act 1901* (Cth). The appellant's argument that the Tribunal was obliged or required to compel him to use the interpreter during its hearing cannot be sustained. A decision-maker's exercise of a discretion, or failure to exercise a discretion in a particular way, may be set aside by a court with powers of judicial review, but only in certain circumstances. The principles upon which an appeal court can overturn the exercise of a discretion by a court are set out in the judgment of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

29 The powers of a court reviewing the exercise of a discretion by an administrative decision-maker are even more limited. The Court cannot decide that the decision-maker has mistaken the facts. It may be that the exercise of an administrative discretion can be set aside by a court on the basis that the decision is so unreasonable that no reasonable decision-maker exercising the relevant power could have made it. Short of errors of law or principle, or manifest unreasonableness, the decision-maker's exercise of a discretion must stand. The Court cannot substitute its own view of how the discretion should have been exercised.

30 When the Tribunal has exercised the discretion in favour of directing that evidence be given through an interpreter, jurisdictional error may occur because of the lack of competence

of the interpreter chosen. This is because the applicant before the Tribunal is deprived of the opportunity to give evidence and present arguments to the Tribunal at its hearing. The Tribunal's obligation pursuant to s 425 of the Migration Act to invite an applicant to a hearing at which the applicant can give evidence and present arguments is not complied with if, having issued the invitation, the Tribunal does not provide a hearing that makes the invitation a reality. See *M175 of 2002 v Minister for Immigration & Citizenship* [2007] FCA 1212 at [34]-[39] and the cases there cited.

31 In the present case, the Tribunal made available an interpreter. That interpreter was present throughout the hearing. For significant parts of the hearing, the appellant elected to rely on the Tribunal member's English questions and to give his answers in English. On a number of occasions, the appellant departed from this practice and relied on the interpreter to translate the Tribunal member's questions, and gave his answers through the interpreter. By this means, the Tribunal member was obviously aware that the appellant felt that he could use the interpreter when he needed to do so. There is nothing to suggest that the Tribunal member ought to have taken the view that the appellant was struggling to understand questions expressed in English, or to give responsive and coherent answers to those questions in English. There is nothing to show that the Tribunal's failure to exercise the discretion, conferred by s 427(7) of the Migration Act, to direct that communication with the appellant proceed through the interpreter was the result of any error, much less any jurisdictional error.

32 To the contrary, the transcript of the Tribunal hearing discloses that the appellant coped well with the use of English, while feeling free to avail himself of the interpreter if he wished. Further, there were several occasions on which the interpreter intervened to assist the appellant when there may have been doubt about the appellant's understanding of a particular question or his ability to give a coherent answer in English. In this way, the Tribunal member was no doubt led to believe that the hearing was being conducted in an appropriate way, so that a direction pursuant to s 427(7) of the Migration Act was not necessary. The transcript of the hearing does not support any suggestion that the appellant was afraid to admit any difficulty in coping with using the English language. He was clearly in control of the occasions on which he was prepared to answer in English and the occasions on which he wished to rely on the interpreter. No error has been demonstrated in relation to the Tribunal's failure to give a direction pursuant to s 427(7) of the Migration Act.

33 The appellant made no complaint as to the inadequacy of the interpreter's understanding of either Bengali or English, or as to the accuracy of the interpreter's rendition of the Tribunal's questions into Bengali and the appellant's answers into English on the occasions when the interpreter was used.

34 In the course of the evidence of Dr Brown, quite early in the Tribunal's hearing because Dr Brown wished to be released from attendance, it appears from the transcript that the interpreter may have been having difficulty keeping pace with the evidence, which was in the form of a monologue. The Tribunal member interrupted and the following exchange occurred:

> THE TRIBUNAL MEMBER: Okay. I need to stop you just there for a second. Are you following all of this, Mr [name of appellant]? Are you able to follow?
>
> THE APPELLANT: Yeah.
>
> THE TRIBUNAL MEMBER: All right, in that case, you get a rest, Mr Interpreter.
>
> THE INTERPRETER: No, no, no. I can - - -
>
> THE TRIBUNAL MEMBER: Yes. No, no, in that case you don't need to be - - -
>
> REV. BROWN: He doesn't have to - - -
>
> THE TRIBUNAL MEMBER: - - - able to whisper, Interpreter, or sequential interpretation. You can have a rest while - - -
>
> THE INTERPRETER: Okay.
>
> THE TRIBUNAL MEMBER: Reverend Brown and I are speaking.

35 The appellant attempted to characterise this exchange as the Tribunal assuming that the appellant had proficiency in English and deciding to dispense with the interpreter's services, without asking the appellant. He complained in his written submissions that he misunderstood the word "follow", thinking he was being asked whether he had the same faith as Dr Brown, rather than that he was being asked whether he understood what was being said. He also said that he was partly or completely unaware of what was being said by his witness. The appellant claimed that this was a contravention of s 427(7) of the Migration Act (although the person assisting him with his written submissions referred to s 366C(3) of the Migration Act, the provision equivalent to s 427(7) but in respect of the Migration Review Tribunal).

36 The appellant submitted that a reading of the transcript made it clear that his English was not sufficient to communicate with the Tribunal and that he struggled without the assistance of the interpreter. He referred to a passage in which he gave evidence that a named person was his partner in a business. The Tribunal member then asked "And who is the owner of the flats and of the business?" the appellant answered that the named person was. In his written submissions, the appellant said that this was an incorrect answer, as the building owner was another person. He claimed that similar confusion occurred throughout the hearing when the interpreter was not used. The appellant claimed that the Tribunal did not have power to assess his English proficiency and could not make a decision to dispense with the interpreter. He referred to an exchange early in the hearing, when the Tribunal member referred to the interpreter and asked whether the appellant was having any difficulty understanding the interpreter. The appellant replied to this question directly, in English, saying "No." The following exchange then occurred:

> THE TRIBUNAL MEMBER: That's fine, so you understand my questions in English?
>
> THE APPELLANT: Yes.
>
> THE TRIBUNAL MEMBER: But the interpreter's fine?
>
> THE APPELLANT: Yes.
>
> THE TRIBUNAL MEMBER: All right. If you think we're having any communication problems, whether through the interpreter or you think that we're not understanding each other's comments, it's important that you alert me to those immediately.

37 The appellant said that he was under stress and pressure and that cultural, social and religious issues could be misunderstood by reason of communication breakdown. He referred to an exchange in which the Tribunal asked him about joining the BNP when he went to school. The appellant corrected the Tribunal member by saying it was "College not school." He then responded to a question from the Tribunal member about one incident in which he had been threatened by a BNP leader who wanted an actor's job in a play. The Tribunal member then asked "Were there any serious incidents that happened while you were at the College apart from that?" The appellant gave a lengthy answer about matters that had occurred when he was working at the Notre Dame College. The appellant characterised this exchange as involving a misunderstanding. He said he thought that the Tribunal was asking him about his employment at the Notre Dame College and not about his time as a student and

his political involvement during that time. He contended that the Tribunal must have understood that he had switched to a different episode of his life. Despite this, the Tribunal did not request the interpreter, who was having a rest, to take part in the conversation and help the appellant.

38 It is by no means clear from the exchange referred to in [34] that the appellant did misunderstand the word "follow". The question "Are you able to follow?" followed immediately the question "Are you following all of this...?" The appellant has not provided any material by way of affidavit that would support the allegation of fact that he was confused about the meaning of the word "follow". In the context in which the question using that word occurred, it is unlikely that he was confused. He has not provided affidavit material to the effect that he failed to understand the evidence of Dr Brown, or any evidence of any way in which his ability to give evidence and present arguments to the Tribunal was affected by any failure to understand anything that Dr Brown said.

39 It was clear that the Tribunal member was not giving the interpreter a rest throughout the entire hearing. The Tribunal member only indicated to the interpreter that he could have a rest while Dr Brown was giving his evidence. The Tribunal did not dispense with the services of the interpreter for the appellant's evidence. The Tribunal member did not tell the interpreter that he need not interpret for the appellant, and did not tell the appellant that he did not need an interpreter. The non-use of the interpreter arose from the appellant's own willingness to respond to questions in English, without interpretation of the questions. He certainly did not give the impression that he was struggling when he did so. As I have said, when he did appear to be having difficulty, the interpreter was willing to intervene and did so.

40 Contrary to the appellant's submission, s 427(7) of the Migration Act does give to the Tribunal a power to assess an applicant's proficiency in English. The occasion for exercising the discretion to direct that communication with an applicant proceed through an interpreter arises only if that applicant is not proficient in English. The only person who can assess such proficiency is the member constituting the Tribunal.

41 The appellant did not make clear, by affidavit evidence or otherwise, that his case suffered from any inaccuracy in his evidence about the ownership of the building in which the business was conducted. As to the exchange set out in [37], it is clear that the appellant

was answering the Tribunal member's question about an incident in which he had been threatened by a BNP leader while he was a student. The fact that the appellant then went on to talk about what had occurred while he was employed at Notre Dame College does not support the argument that he was confused in the exchange. He did not refer to any cultural, social or religious issue on which he had given evidence in English that was inaccurate. He gave no evidence about how any stress or pressure from being involved in the Tribunal hearing affected his use of English.

42 Contrary to the appellant's submission, the Tribunal does not have an absolute obligation to ensure that an applicant whose first language is not English suffers no disadvantage at all for that reason. Some disadvantage is inevitable when an applicant has no English or a command of English that is less than fluent. The Tribunal's obligation is to afford procedural fairness. This involves doing what is reasonable to alleviate the disadvantage. The Tribunal's obligation includes exercising the discretion conferred on it by s 427(7) of the Migration Act when it sees that there is confusion or misunderstanding in communication. The present case was not one in which such confusion or misunderstanding appeared to the Tribunal. The appellant opted to use English when it suited him, and to use the interpreter when he wished to do so. The interpreter remained available and intervened to assist the appellant when he thought the appellant was having any difficulty. No disadvantage to the appellant from conducting the hearing this way has been demonstrated. The appellant has failed to show that the Tribunal did not comply with any statutory or other obligation in relation to the use of the interpreter. He has failed to show that the way in which the hearing was conducted, with respect to the use of the interpreter, gave rise to any denial of procedural fairness or provided any indication of bias on the part of the Tribunal member. The federal magistrate was correct to reject any challenge by the appellant to the Tribunal's exercise of its powers, based on the way in which the interpreter was used.

Failure to give information

43 The appellant made a number of allegations of failure to comply with s 424A of the Migration Act. That section provides:

> (1) Subject to subsections (2A) and (3), the Tribunal must:
>
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear 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; and
>
> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
>
> (c) invite the applicant to comment on or respond to it.
>
> ...
>
> (3) This section does not apply to information:
>
> (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or
>
> (b) that the applicant gave for the purpose of the application for review...

44 In [102] of its reasons for decision, the Tribunal referred to a claim, made both in a letter of Dr Brown and again in the appellant's post-hearing submission to the Tribunal, that he feared reprisals from Muslims for having arranged for a local Muslim girl who worked for his mother to go to a Christian school. This was information that the appellant gave to the Tribunal for the purpose of the application. Section 424A(3)(b) excluded it from any obligation of the Tribunal pursuant to s 424A(1).

45 The appellant also relied on s 424A of the Migration Act in relation to what he described as the Tribunal's reliance on an extract from the reasons for decision of the Minister's delegate. The Tribunal did set out in [32] of its reasons for decision a summary of the reasoning of the Minister's delegate. There is nothing to indicate that anything in that summary was information that the Tribunal considered would be the reason, or a part of the reason, for affirming the delegate's decision. All that the Tribunal was doing was giving an account of the history of the proceeding before it. The appellant also relied on s 424A of the Migration Act in relation to what the Tribunal said about the activity of his former migration agent.

46 At [117]-[119] of its reasons for decision, the Tribunal recounted the allegations about the migration agent's preparation of a false case for the appellant and said that it appeared that the appellant was apprehensive about making any complaint. The Tribunal recorded its impression that the appellant's concerns were genuinely held, despite its doubts about other aspects of his credibility. There is nothing to indicate that anything the appellant said was a

reason, or a part of the reason, for affirming the decision of the Minister's delegate. Further, any information the Tribunal had about the former migration agent was given to it by the appellant for the purpose of the application, and so was the subject of s 424A(3)(b).

47 The appellant also alleged that the Tribunal had failed to comply with s 424A of the Migration Act in relation to the letter from Notre Dame College and the audiotape of his interview with an immigration officer. The Tribunal did raise with the appellant in the course of its hearing the contents of the letter from Notre Dame College. The only information in that letter adverse to the appellant was the information that he had not engaged in any political activity while at Notre Dame College. As the appellant had expressly abandoned in the Tribunal hearing any attempt to rely on the Convention ground of political opinion, the information in the letter was not something that the Tribunal could have regarded as information that would be the reason, or a part of the reason, for affirming the decision of the Minister's delegate. Although the Tribunal set out in [29] of its reasons for decision a summary of what the appellant had said to the immigration official, which was contained in the recording of the interview, there is nothing to indicate that the Tribunal derived from the recording of the interview any information that fell within s 424A(1)(a) of the Migration Act. The purpose of summarising the interview in the Tribunal's reasons for decision again appears to have been to set out the history of the proceeding.

48 The appellant also referred to the Tribunal's acceptance that the appellant had been attending the Presbyterian Church, and engaging in bible studies, while in Australia. He suggested that the Tribunal's finding that it did not "accept the implied claim that he has also promoted or defended the church and its practices" involved the Tribunal relying on information that fell within s 424A of the Migration Act. The Tribunal's conclusion that it did not accept a claim, whether the claim was express or implied, is not "information" for the purposes of s 424A(1)(a) of the Migration Act. The conclusion is merely the end result of the Tribunal's reasoning process. The same can be said of the Tribunal's finding that the appellant "may be critical of aspects of church life [in Bangladesh], and disappointed that the Catholic Church did not provide assistance with his protection visa application", which the appellant sought to bring within s 424A.

49 There was therefore no failure to comply with s 424A of the Migration Act. The appellant's attempts to rely on such failure to comply as evidence of the Tribunal's bias

against him and denial of procedural fairness must fail. The federal magistrate was correct to reject these grounds of the application before him, to the extent that they were based on s 424A.

Misunderstanding the Tribunal's task

50 The appellant alleged that the Tribunal applied the wrong test in determining his case, by failing to ask itself whether there was a real chance that he would suffer persecution if he returned to Bangladesh. He also alleged that the Tribunal did not apply the correct meaning of the term "persecution". He asserted that:

> The Tribunal did nothing more than use the template of the usual recital of the law relating to the convention and the four elements to the Convention definition but failed to show in its reasoning how the concept was in fact applied to the claims made by the applicant and evidence given by the applicant in support of his claim.

51 This submission appears to have been based solely on the proposition that the Tribunal should have found that the appellant was at risk of being persecuted for his religious faith and perhaps his political opinion. The Tribunal certainly did set out the law in the form of a standard passage, used in reasons for decision by most, if not all, members of the Tribunal. There is nothing to show that it failed to understand the task it had to perform, or that it applied any wrong test. The fact that the appellant is dissatisfied with the result is not indicative of error by the Tribunal in these respects. The appellant did not point to any specific passage in the Tribunal's reasons for decision that might demonstrate an incorrect approach to the Tribunal's task. To the extent that this argument was encompassed by the grounds of appeal, it must be rejected.

Relevant and irrelevant considerations

52 The appellant alleged that the Tribunal took into account irrelevant considerations and failed to take into account relevant considerations. The allegation of taking into account irrelevant considerations appears to mean nothing more than that the Tribunal reached the wrong conclusion on the facts. The allegation of failing to take into account relevant considerations concerned a specific passage from the 2008 Human Rights Report of the US Department of State. That passage was as follows:

> Although the government was secular, religion shaped the platforms of certain political parties. Discrimination against members of religious minorities existed at both the governmental and societal levels, and religious minorities were

> disadvantaged in practice in such areas as access to government jobs, political office, and justice. - - - - Religious minorities were disadvantaged in seeking government jobs and political office. Selection boards for government services often lacked minority group representation.

53 Even if the appellant had referred the Tribunal to this passage, and the Tribunal had accepted it, the content of the passage would not have assisted the appellant to establish that he had a well-founded fear of persecution for reasons of his religion. Discrimination of the kinds mentioned in the passage does not amount to persecution, either within the meaning of that term as construed in the authorities, or within its meaning of "serious harm", as defined in s 91R(1)(b) of the Migration Act. The kinds of examples of "serious harm" given in s 91R(2) demonstrate this.

54 There is nothing to show that the report referred to in the appellant's written submissions was a consideration required by the Migration Act to be taken into account by the Tribunal in the present case. What is a relevant consideration that a decision-maker is bound to take into account is to be determined by an examination of the statute conferring the function on the decision-maker. See *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40 per Mason J. It will be rare that a particular item of evidence will achieve the status of a relevant consideration that the decision-maker is bound to take into account. In the present case, the Tribunal certainly took into account evidence about the conditions under which Christians live in Bangladesh. At [80] of its reasons for decision, the Tribunal quoted from the US Department of State report entitled *International Religious Freedom Report for 2008 – Bangladesh*. The passages it quoted were more helpful to the appellant's case than the passage to which he referred in his written submissions would have been. Nevertheless, the Tribunal found that there was no real chance that the appellant would be met with serious harm as a Christian in Bangladesh.

55 The appellant cannot succeed on any ground relating to the failure to take into account relevant considerations, or the taking into account of irrelevant considerations. His attempt to reargue the facts cannot be entertained in this Court, and could not be entertained in the Federal Magistrates Court.

Other issues

56 In his oral submissions on the hearing of the appeal, the appellant made it perfectly clear that he wished to challenge the correctness of the Tribunal's decision by arguing that it should have determined the facts more favourably to his case than it did. I endeavoured to explain to him that the function of this Court, and the function of the Federal Magistrates Court, did not include investigating the facts and determining them differently from the way they were determined by the Tribunal.

57 The appellant said that he needed another hearing before the Tribunal to explain more about the issue of the Muslim girl he sent to a Christian school. The Tribunal said at [103] of its reasons for decision that it found his claims and evidence regarding this (and other incidents) to be "confused and often vague." Neither this Court nor the Federal Magistrates Court has power to set aside a decision and remit the case to the Tribunal for further hearing simply to give an applicant for a protection visa a second opportunity to state his or her claims more fully than he or she stated them to the Tribunal in the first place. The appellant could only succeed in the Federal Magistrates Court if he could establish jurisdictional error on the part of the Tribunal. Effectively this means that the Tribunal has failed to discharge its statutory function of reviewing the decision of the Minister's delegate. The Tribunal in the present case did discharge that function. The federal magistrate did not find any jurisdictional error on the part of the Tribunal. The appellant has not demonstrated any error on the part of the federal magistrate. He needed to demonstrate such error in order to succeed on his appeal.

58 The appellant also attempted to argue that he had not received a proper hearing before the Tribunal because he was nervous and tense and not able to express himself properly. He conceded that the Tribunal had not cut off his answers, so as to deny him the opportunity to say all he wanted to say. He did allege that the Tribunal brought the hearing to a sudden end. This assertion is not borne out by reference to the transcript of the Tribunal hearing. Towards the end of the hearing, the Tribunal member said "unless there's anything you want to add regarding specifically, persecution, I'll call the hearing to a close now". The Tribunal member then raised the question of the appellant's allegations about his former migration agent. The appellant then asked whether he could provide the Tribunal with anything written. He told the Tribunal member that he had matters he wished to submit in writing. Although

indicating that it was not satisfactory that the appellant had left it to the day of the hearing to make new claims, the Tribunal member allowed him one week to make further submissions.

59 The appellant's oral submissions at the hearing of the appeal did not support the proposition that there was jurisdictional error on the part of the Tribunal. I have also examined closely the Tribunal's reasons for decision. I am unable to detect any jurisdictional error on the part of the Tribunal. I have also read closely the reasons for judgment of the federal magistrate. I have been unable to detect any error on the part of the federal magistrate.

60 In his written submission after the hearing of the appeal, the appellant attempted to raise an issue about the letter from Notre Dame College, suggesting that a Tribunal officer had assured him that the Tribunal would provide him with a copy of that letter before it made its decision, but the Tribunal had not provided him with that copy. He referred to provisions of the Migration Act relating to the Migration Review Tribunal, not the Refugee Review Tribunal. This submission travelled beyond the grant of leave to the appellant to make a further submission in writing, which was limited very specifically to references to the transcript of the Tribunal hearing. The submission raised a new issue. Because it was submitted without leave, I do not deal with the submission.

Conclusion

61 The appellant has failed to establish that the Federal Magistrates Court was in error in dismissing his application to that court. He has failed to establish that the federal magistrate should have made a finding of jurisdictional error on the part of the Tribunal. Accordingly, the appeal must be dismissed.

62 No reason was advanced, and none appears, why the usual principle, that costs follow the event, should not be applied. Accordingly, the appellant will be ordered to pay the Minister's costs of the appeal.

I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Gray.

Associate:

Dated: 9 April 2010