FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZQOY [2012] FCAFC 131

Citation:	Minister for Immigration and Citizenship v SZQOY [2012] FCAFC 131
Appeal from:	*SZQOY v Minister for Immigration & Anor* [2012] FMCA 289
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZQOY and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 655 of 2012
Judges:	BUCHANAN, LOGAN AND BARKER JJ
Date of judgment:	12 September 2012
Catchwords:	**MIGRATION** – whether the tribunal was *functus officio* at the time it received further documents from a party – time at which a decision is finally made – whether internal transmission of a decision to a registry represents a final decision. **Held:** decision final only when manifested externally – decision-maker not before then precluded from revisiting the decision at his or her option.
Legislation:	*Income Tax Assessment Act 1936* (Cth) *Migration Act 1958* (Cth) ss 410, 411, 414, 415, 420A, 421, 422, 422A, 430, 430A, 457, 458, 430A, 430D, 457, 458, 460, 472, 478 *Migration Legislation Amendment Act (No 1) 2008* (Cth)
Cases cited:	*Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 *Pongrass Group Operations Pty Ltd v Minister for Planning* (2007) 156 LGERA 250 *Semunigus v The Minister for Immigration & Multicultural Affairs* [1999] FCA 422 *Semunigus v Minister for Immigration and Multicultural*

	Affairs [2000] FCA 240; (2000) 96 FCR 533 *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275 *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18
Date of hearing:	16 August 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	58
Counsel for the Appellant:	Mr S Lloyd SC
Solicitor for the Appellant:	DLA Piper Australia
Counsel for the First Respondent:	Mr M J Darke with Ms N Zerial
Solicitor for the First Respondent:	Dobbie and Devine Immigration Lawyers Pty Ltd
Counsel for the Second Respondent:	The second respondent submitted save as to costs.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 655 of 2012**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGES:	**BUCHANAN, LOGAN AND BARKER JJ**
DATE OF ORDER:	**12 SEPTEMBER 2012**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGES:	**BUCHANAN, LOGAN AND BARKER JJ**
DATE:	**12 SEPTEMBER 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BUCHANAN J:

1 The central issue in this appeal is whether the Refugee Review Tribunal ("the RRT"), constituted under the *Migration Act 1958* (Cth) ("the Act"), became *functus officio* when a member of the RRT electronically transmitted to the Registry of the RRT a written decision, with a view to the decision being notified to the first respondent and to the Secretary of the Department of Immigration and Citizenship.

2 The first respondent to this appeal (to whom I shall refer hereafter as the respondent) is a citizen of Nepal who arrived in Australia on 12 September 2008 as the dependent spouse of an overseas Nepali student. She remained in Australia after her husband returned to Nepal in January 2011. On 17 January 2011 she lodged an application for a protection visa. The grounds for that application do not require discussion on this appeal.

3 On 10 March 2011 a delegate of the appellant refused the application for a protection visa. The respondent then applied to the RRT for review of that decision. The RRT affirmed the decision of the delegate. However, it was what occurred shortly before the RRT made

that decision available to the respondent which raises the matters to be examined on the appeal. Those matters are referred to hereunder.

4 After receiving the decision of the RRT, the respondent applied to the Federal Magistrates Court of Australia ("FMCA") to set aside the decision of the RRT on the grounds that the RRT had committed jurisdictional error. A number of grounds were relied upon. Those grounds do not require consideration on the appeal. The grounds relied upon by the respondent were rejected by the FMCA (*SZQOY v Minister for Immigration & Anor* [2012] FMCA 289).

5 However, at the hearing before the FMCA the Minister properly raised for consideration by the FMCA the question whether the RRT had arguably committed a jurisdictional error of a different kind. The Minister, although raising the issue for consideration, argued that no jurisdictional error had been committed. The FMCA found that the RRT had made a jurisdictional error. It is that issue which requires consideration on the appeal. The issue turns upon some procedural steps taken within the administrative environs of the RRT on the day that its decision was published. I shall refer to those issues in more detail shortly. First, the history of the RRT proceedings should be identified.

6 The respondent's application to the RRT was received by the RRT on 7 April 2011. On 10 May 2011 the respondent was, by letter, invited to attend a hearing before the RRT on 15 June 2011. On 9 June 2011 the RRT was advised by Mr D Bitel, a partner in Parish Patience Immigration Lawyers, that his firm had received instructions to act for the respondent.

7 A hearing took place on 15 June 2011. The respondent was represented at the hearing by Mr Bitel. A note made in the file of the RRT, which was in evidence before the FMCA, recorded that the hearing before the RRT had been completed on 15 June 2011. It also recorded that Mr Bitel was to provide further submissions by 29 June 2011. On 28 June 2011 Mr Bitel sent long and detailed written submissions extending over more than 43 pages to the RRT. The letter containing the submissions concluded: "We request the opportunity to make further submissions as appropriate at or after the forthcoming interview." This statement was obviously a mistake, or the result of carelessness. There was no further interview or hearing scheduled.

8 According to another file note, on 27 July 2011, almost one month after the written submissions were made on behalf of the respondent, an officer of the RRT rang Mr Bitel's office and spoke to his secretary. The file note entry read:

> At the Member's request I called the rep. He was not available so I left a message with his secretary stating that in Mr Bitel's submission dated 28 June 2011 he requested "the opportunity to make further submissions as appropriate at or after the forth coming interview". I said the Member asked me to call him and inform him that the Member did not say he would hold a second hearing and he has decided not to do so. I said that the Member will consider any submissions the [sic] Mr Bitel wishes to submit up until he makes a decision. She asked when the member will make a decision and I said I did not have a confirmed date but it could be at any time. The secretary said so there will not be a second hearing and Mr Bitel should make submissions asap. I said yes, if he wishes to do so.

9 That file note bore a time of 9.18 am. Seven minutes later, at 9.25 am, the same officer made a further file note in the following terms:

> Further to the previous casenote, I left my name and number for Mr Bitel in the event that he had any further questions. His secretary said she would pass the message on.

10 At 4.57 pm on 27 July 2011 Mr Bitel sent the RRT by facsimile a short letter enclosing two documents, each dated before 15 June 2011. The first was, in form, a short statement by a Nepali gynaecologist dated 11 February 2007, more than four years earlier. The second was a letter from the respondent's aunt, written in support of her application for a protection visa, which on its face verified certain claims the respondent had made. Mr Bitel's letter did not say to what use the documents should be put, why they had not been provided at the hearing on 15 June 2011 or with the written submissions dated 28 June 2011, or why there had been a delay in providing them to the RRT. Mr Bitel's letter concluded:

> Should you have any questions, please advise.
>
> We await the Tribunal's further advice.

11 The evidence before the FMCA included an internal memorandum within the RRT to the effect that the member of the RRT saw the additional material with Mr Bitel's letter of 27 July 2011 but "decided there is no jurisdictional error in this matter and the case cannot be reopened".

12 Subsequently Ms Marina Osmo, Registry Manager for the New South Wales Registry of the RRT, wrote to Mr Bitel on 28 July 2011 in the following terms:

> The Tribunal received your submission dated 27 July 2011 by fax on 27 July 2011 at 4:57 p.m.
>
> The submission was forwarded to the Presiding Member and your request was carefully considered. However, the Presiding Member has decided not to reopen this case.
>
> The Tribunal made its decision in this case on 27 July 2011 at 2:34 p.m. Once the Tribunal has made a decision under the Migration Act 1958, it becomes *functus officio* and has no power to take any further action on the review.
>
> The Tribunal is not in a position to assist you any further on this issue.

13 The remaining evidence before the FMCA concerned the internal administrative arrangements within the RRT leading to publication of decisions of members of the RRT. Ms Osmo's affidavit contained the following statements:

> 3. The Tribunal maintains an online case management system called CaseMate. CaseMate is used to record the main steps in progressing an application from lodgement to finalisation. It is also a repository for case related correspondence including the Tribunal decision. As a Registry Manager I am familiar with CaseMate.
>
> …
>
> 7. In CaseMate, there are various Work Steps, which are carried out at different stages of the review process. In the 'Decision' Work Step, once a Member has drafted a decision, it is 'checked in' to CaseMate. The Member will then click on a 'send to next Work Step' option. That will move the case from the 'Decision' Work Step to the 'Finalisation' Work Step, which is the step that alerts the relevant Registry officer to notify the decision to the applicant.

14 Ms Osmo referred to material which recorded the following "Work Steps":

Action	Information	Date
Work Step Completed	Hearing_Preparation	10/06/2011 11:12
Work Step Completed	Hearing_Completion	15/06/2011 14:45
Work Step Completed	Decision	27/07/2011 14:34
Work Step Completed	Case_Finalisation	27/07/2011 18:39
Notification Sent to DIAC [Department of Immigration and Citizenship]	Decision & Finalisation of Review	27/07/2011 18:42

15 Despite the fact that the electronic record of the RRT recorded that the review being conducted of the respondent's application was finalised at 6.42 pm on 27 July 2011, the

submission made to the FMCA (and to this Court on appeal) was that the review was in fact finalised at 2.34 pm on 27 July 2011 when the member of the RRT sent his decision through the RRT electronic system to the next Work Step. The next Work Step was "Case Finalisation".

16 It is convenient to state at this stage that, in my view, the records of the RRT itself give no evidentiary support to the proposition that the review of the respondent's application was complete before 6.42 pm (or at worst 6.39 pm) on 27 July 2011. That is so whatever view is taken of the legal principles yet to be discussed.

17 In its decision the FMCA held (relevantly to the present point) as follows:

> 43. … In this case there was no direct evidence to the effect that the presiding member could have recalled his decision at any point prior to its despatch but I infer that he could have. Nothing in Ms Osmo's affidavit suggests that the presiding member could not have spoken to the Tribunal's registry and countermanded the electronic instruction to send out the decision. In this regard it is significant that the decision was sent under cover of a letter signed by the same Tribunal officer who electronically recorded the finalisation of the file at 18.39 on 27 July 2011, shortly after the fax sending the letter and the decision had been despatched. That is to say, the despatch of the decision was not the product of an automated and irreversible process but was effected through the actions of a Tribunal officer.
>
> 44. Because this final step was not taken until after the applicant's solicitors had sent their further submissions, the Tribunal was not *functus officio* at the time those submissions were received. Consequently, the presiding member erred when he concluded that the matter was concluded at the time he saw the additional submission.

18 In my view, this conclusion was correct and the appeal should be dismissed.

19 The RRT is established under s 457 of the Act. It consists of a Principal Member and other members (s 458). The core function of the RRT is to review decisions which are made reviewable by it under s 411 (s 414). The RRT, upon such a review, may exercise all the powers and discretions conferred by the Act on the person who made the decision under review (s 415(1)). The RRT may affirm such a decision, vary it, set it aside and substitute a new decision, or remit the matter for reconsideration (s 415(2)). For the purpose of any particular review the RRT is constituted by a single member (s 421), although the Principal Member has powers and discretions to reconstitute the RRT in appropriate circumstances (ss 422 and 422A).

20 The Principal Member is the executive officer of the RRT and is responsible for the overall operation and administration of the RRT (s 460). The Principal Member may give directions as to the operations of the RRT, including directions about the application of efficient processing practices (s 420A). Under s 472 a Registrar of the RRT is to be appointed, together with "such other officers" as are required. Officers of the RRT have such duties, powers and functions as are conferred by the Act and the regulations thereunder, and also "such other duties and functions as the Principal Member directs". There is no reason to suppose, in the present case, that the administrative arrangements to which Ms Osmo deposed before the FMCA, were not administrative arrangements properly authorised by the Principal Member, to which officers of the RRT gave effect.

21 So far as is relevant to the present case, when the RRT makes its decision on a review it must prepare a written statement which sets out the decision, the reasons for the decision, its findings on any material questions of fact, and references to the evidence or other material on which the findings of fact were based (s 430). The RRT must notify the applicant for review of its decision by giving the applicant a copy of the written statement (s 430A). That may be done in various ways within 14 days of the date that the written statement setting out the decision bears. A copy of the written statement must also be given to the Secretary of the Department of Immigration and Citizenship. If an oral decision is given, the RRT must give the applicant and the Secretary a copy of the statement prepared under s 430 also within 14 days.

22 At the heart of the Minister's argument on the present appeal was the proposition that the RRT has completed its review in any case when the member who constitutes the RRT for the purpose of that review has prepared a written statement under s 430 and has transmitted that written statement to the Registry of the RRT. This argument attributes, to one aspect of the internal processes to which Ms Osmo deposed, a finality and legal significance which, in my view, is unjustified by reference to the provisions of the Act, or any relevant legal principle.

23 Although the RRT is constituted by one of its members for the purpose of any particular review (subject to any directions from the Principal Member that it be reconstituted for that purpose) any decision which is "made", is made by the RRT as a body established by

statute. That is so even though an individual member decides what the outcome of a particular review will be and prepares the statement required by s 430 setting out the decision, reasons, material facts and evidence relied on. I do not accept that a decision is "made" by the RRT in the requisite sense at the time of an internal communication by a member of the RRT to the Registry of the RRT which is expected to lead (sometime in the next 14 days) to notification of the decision to the effective parties to the review – i.e. the applicant and the Secretary of the relevant government department from whence came the decision under review. A conclusion to that effect would entail, and depend upon, the accompanying conclusion that within the intervening period the statement of reasons and, if necessary, the decision on the outcome, was incapable of recall, revision, amendment or, if appropriate, reversal.

24 It is not necessary to speculate on all the circumstances where that might be appropriate. They could certainly include an important development in the law, or the emergence of some critical fact. I am not saying that the RRT is bound to receive new material up to the date of a decision, or that it should reasonably have done so in this case. However, I reject the idea (necessarily embedded in the appellant's argument) that the RRT has no legal authority to do so in an appropriate case. The period in which the RRT retained its legal authority to do so in the present case did not end upon the occasion, or at the time, of an internal communication to its own Registry.

25 The present case is not the first time that an issue of this kind has arisen for consideration, although there have been some alterations to the statutory framework in the intervening period. In *Semunigus v The Minister for Immigration & Multicultural Affairs* [1999] FCA 422 Finn J considered the date upon which the RRT was *functus officio*, having regard to the statutory arrangements then in place. His Honour said (at [19]):

> 19 For present purposes I am prepared to hold that the making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion - as precludes the conclusion being revisited by the decision-maker at his or her option before the decision is to be regarded as final.

26 On appeal (*Semunigus v Minister for Immigration and Multicultural Affairs* [2000] FCA 240; (2000) 96 FCR 533) Madgwick J said, in a passage with which I agree, (at [102]-[103]):

> 102 As a matter of undoubted fact, the conclusion to which the RRT member had arrived in his own mind had not been communicated to anyone outside the RRT's own staff. The taking of administrative steps, as part of an orderly general system of case management, to have support staff communicate the decision (and the reasons for it) to the parties could therefore plainly have been halted or countermanded by the RRT member. That must be the case, as a matter of administrative necessity: a RRT member might have had second thoughts about the proper factual conclusions in a case; or a new judicial decision might change the member's understanding of the relevant law. Mere case management practices, even if publicly decreed, cannot stand in the way of justice being done: *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.
>
> 103 In a case of the kinds dealt with by the RRT, a decision is no decision, in my opinion, until either it has been communicated to the applicant or irrevocable steps have been taken to have that done. I speak of communication to the applicant because, before the RRT, the applicant is the only party. There is no need to regard a decision as irrevocable before it must be considered to have passed into the public domain.

27 Spender J was less definite, saying (at [12]):

> 12 There is little evidence touching the question whether the decision by the Member of the RRT, in this particular case, was "beyond recall". I think it likely that, had the Member wanted to recall his signed decision, because, for example, he had changed his mind or had realised that he had made a mistake, he would have been able to retrieve the decision at any time prior to a copy of it having been sent to either the Minister or the applicant as then required by s 430(2) of the *Migration Act 1958* (Cth) ("the Act").

28 Higgins J took a different view. His Honour said (at [78]):

> 78 … Given the procedures adopted by the RRT, it seems to me that once the reasons for decision were delivered to and recorded in the Registry of the RRT, the decision was made.

29 In my view, the observations of Higgins J have no application to the facts of the present case and, with respect, I am unable to agree with them as a matter of principle. In my respectful opinion the principles stated by Madgwick J and echoed by Spender J are a correct statement of the legal position. All three judges endorsed the statement of principle made by Finn J. That statement of principle incorporates a critical consideration. A decision maker must be precluded from revisiting the decision at his or her option before it is to be regarded

as final in the relevant sense. In the present case there was, in my view, no support in the evidence or in any of the statutory provisions relied upon by the appellant to suggest that it was beyond the power of the member of the RRT to recall the decision which had been sent to the Registry through the RRT's electronic case management system. In so far as the member of the RRT concluded that it was beyond his power to do so he made a jurisdictional error.

30 In my view the judgment of the FMCA was correct and should not be disturbed. The appeal should be dismissed and the respondent should have her costs.

31 Counsel for the Minister asked, in the event that the appeal was dismissed, for costs of a notice of contention upon which we refused leave to rely at the appeal. There is no reason to think that costs were materially increased by reason of the notice of contention. I would not make a separate costs order in this case in that respect.

32 In my view, the appropriate order is "the appeal is dismissed with costs".

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 12 September 2012

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 655 of 2012**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZQOY** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**BUCHANAN, LOGAN AND BARKER JJ**
DATE:	**12 SEPTEMBER 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

LOGAN J:

33 I have had the advantage of reading in draft the reasons for judgment prepared by Buchanan J. I agree with the order which his Honour proposes. I am also in general agreement with his Honour's reasons. As Buchanan J highlights, differing views were expressed in *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422 (Finn J) (*Semunigus*) and, on appeal, in *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 as to when the Refugee Review Tribunal (RRT) became *functus officio*.

34 Like Buchanan J, I consider that the RRT's decision was not beyond recall by the member constituting the RRT for the purposes of the review until it was manifested to the applicant for review (the first respondent) and to the Secretary to the appellant Minister's department by some overt act. That was the view expressed in *Semunigus* by Finn J at first instance (at [19]) and, on appeal, certainly by Madgwick J (at [102] - [103]) and also, I consider, by Spender J (at [12]), in contrast to that of Higgins J (at [78]) who considered that

communication of the member's decision on the review to the registry put it beyond that member's recall. Because we are differing from Higgins J on a point not just of considerable practical importance in relation to the administration of the RRT but also one of principle, which may be of more general relevance to administrative decision making, I wish to amplify why I am in general agreement with Buchanan J.

35 The RRT owes its existence to and exercises no greater jurisdiction than that conferred by the *Migration Act 1958* (Cth) (the Act). It is therefore the text of the provisions of the Act concerning these matters, the context in which they appear and the subject, scope and purpose of those provisions which one must examine in order to determine when after an application for review has been lodged with it the RRT becomes *functus officio*.

36 Materially, the following emerges from such an examination.

37 Most importantly, and as French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed in their joint judgment in *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [18]:

> The core function, in the words of s 414 of the Act, is to 'review the decision' which is the subject of a valid application made to the Tribunal under s 412 of the Act.

The type of review function consigned to the RRT has a lengthy provenance in Australian law, which may be traced back via, notably, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 (*Drake*) to *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275 at 296-298. On such a review, the question is what is the correct or preferable decision on the material before the administrative tribunal: *Drake* at 419 per Bowen CJ and Deane J.

38 Though the RRT is a body established under the Act (s 457), it is not constituted as a body corporate. The Act sometimes uses the terms "Refugee Review Tribunal" or "Tribunal" (defined by s 410 to mean the Refugee Review Tribunal) in a collective sense, as for example in s 458 to refer to the Principal Member, Deputy Principal Member (if appointed), Senior Member and the other members of which it consists and, on other occasions, to refer to the RRT as constituted by the particular member who conducts the review of a particular decision (s 421).

39 That it is a single member of the RRT who, by virtue of s 421, undertakes the "core function" of review in a particular case is instructive. It highlights that the focus must be on when that particular member becomes *functus officio*. It is on the RRT as constituted by that particular member on whom falls the responsibility not only of conducting the review but also of recording the decision and reasons as required by s 430 of the Act and either notifying the applicant for review and the Secretary to the Department of Immigration and Citizenship (Secretary) as required by s 430A of the Act or, if that member delivers the Tribunal's decision orally, notifying the Secretary as required by s 430D of the Act.

40 The intellectual process in undertaking the core function of review is not an end in itself. The decision and reasons which are the result of that intellectual process must be made known to the persons interested. Those persons are the applicant for the review and the Secretary. It is only when the decision of the RRT as constituted by the particular member has either been pronounced orally or, if given in writing, sent to the applicant and to the Secretary in accordance with the notification obligation that the core function of review is complete. Before then, the member is entitled to have second (or more) thoughts perhaps on the basis of further reflection on all of the material hitherto to hand, perhaps stimulated by further material. At that stage, the matter is entirely intramural. Depending on the nature and source of that further material there may be procedural fairness obligations which fall upon the member before a final decision is made. That member is entitled to entrust to a registry officer the tasks of recording the decision and of notifying the applicant and the Secretary of that decision but the responsibility for so doing remains that of the member who has conducted the review. Until the decision has been sent out, that member is also entitled to countermand a direction to the registry to record and send out what has proved, upon the member's reflection, to be an earlier version of that member's decision.

41 A distinction between the intellectual process of administrative decision-making and its culmination by manifestation to the interested party is also evident in the analysis made by Kitto J (Menzies J agreeing) in *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 (*Batagol*) of the process of assessment laid down in the *Income Tax Assessment Act 1936* (Cth). His Honour's conclusion was that assessment in the sense of a mere calculation produced no legal effect, the process of assessment not being complete until notice of the assessment had been given to the taxpayer, "[N]othing done in the Commissioner's office can

amount to more than steps which will form part of an assessment if, but only if, they lead to and are followed by the service of a notice of assessment". In this case, an analysis of the provisions of the Act relating to the RRT's core function of review yields a similar type of conclusion. Nothing done within the RRT's office can amount to more than steps which will form part of the review of the decision if, but only if, they lead to and are followed by the oral pronouncing or other notification of the decision of the particular member constituting the RRT for the purpose of that review.

42 The decision which has to be made and recorded under s 430 of the Act is the decision which that particular member has either pronounced orally or finally intends to be notified under s 430A. To construe, as was promoted by the Minister in submissions, s 430(2) of the Act as having the effect that some initial decision which may be reached by the particular member but never communicated other than to RRT registry staff became that member's decision on the review to the exclusion of that member's being able to have second thoughts is to read that provision out of context. In context, what must be recorded under s 430 is the final decision to which that particular member has come before the matter is beyond recall.

43 Were there a direction given by the Principal Member under s 420A of the Act which purported to preclude the ability of the particular member conducting a review to recall a decision communicated to registry staff but not notified that direction would be inconsistent with when the RRT's "core function" is concluded and, to that extent be invalid. Though the Act has been much amended since 2001, the observation to this effect made by Merkel J in *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18 at [53] remains true of the Act as it stood at the time when the RRT conducted the review under present consideration.

44 The current procedure for the notifying the decision to the applicant and to the Secretary of the decisions of the RRT is the result of amendments made to the Act by the *Migration Legislation Amendment Act (No 1) 2008* (Cth) (the 2008 Amendment Act). Prior to the 2008 Amendment Act, the Act required that the RRT's decision be "handed down". That entailed a requirement that the applicant and the Secretary be invited to be present at a time when the member constituting the RRT would then announce the decision orally. An

announcement of the decision orally is still possible under the current procedure but the alternative of notification by other means is now offered. As part of that current procedure, s 430(2) seems to have no higher purpose than giving precision to what is to be the date of the decision when the RRT avails itself of that alternative. It is no part of the sub-section's role to preclude the member constituting the RRT for the purpose of a particular review from changing his or her mind before notification by that alternative occurs.

45 Entitlement to look at material sent by an applicant after a hearing is one thing; whether there is any obligation so to do either in the circumstances of the particular case or otherwise is another. The error in this case was in the RRT's concluding that there was no entitlement to consider the further material. It is not necessary to consider whether the RRT had any obligation so to do.

46 Though the question is always one of construction of the governing legislation, the conclusion that the Act does not preclude revision by an administrative decision-maker until the decision has been externally notified accords with the way in which a like question was answered by Jagot J, when a judge of the New South Wales Land and Environment Court in *Pongrass Group Operations Pty Ltd v Minister for Planning* (2007) 156 LGERA 250 (*Pongrass*) at [26] and at [33] in respect of another statutory decision-making task.

47 In *Pongrass*, the role of decision-maker was consigned by statute to a Minister. The statute concerned was regarded by Jagot J as operating against the background of an assumption by Parliament, grounded in principles of good public administration, that there would be a "dialogue" between the Minister and the permanent head and other officers of the department with respect to a decision. It was held that if, in the course of that dialogue and as in that case, the Minister's proposed decision had become known within the department, that would not, before its external notification, preclude the Minister from coming to a different decision.

48 Here, in providing in Div 10 of Pt 7 of the Act for the RRT to have a registry, a registrar and other officers, Parliament provided for administrative assistance for the members who would constitute the RRT. That, in the course of rendering that assistance, a registry officer might come to know of a member's decision may be taken to have been assumed if not expected by Parliament. That knowledge is not to be equated with the

conclusion of the review process. Neither expressly nor by implication does the Act dictate that.

49 The position in the present case is to be contrasted with that in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (*Bhardwaj*). In that case, what purported to be the decision of the tribunal was communicated but it was later appreciated that the making of that decision had been attended by a jurisdictional error (denial of procedural fairness). That error meant that in law there had never been a valid decision on the review by the tribunal and hence nothing which rendered the tribunal *functus officio*. Here, the RRT was not, when the further material was received from the migration agent, *functus officio* because no decision had yet been pronounced or notified. In deciding that it was not possible to "re-open" the review, the RRT made a jurisdictional error.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 12 September 2012

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 655 of 2012**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR CITIZENSHIP AND IMMIGRATION** **Appellant**
AND:	**SZQOY** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**BUCHANAN, LOGAN AND BARKER JJ**
DATE:	**12 SEPTEMBER 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BARKER J:

50 I have had the advantage of reading in draft the reasons for judgment prepared by both Buchanan J and Logan J. I agree with the order which Buchanan J proposes. I am also in general agreement with his Honour's reasons. I agree also with the reasons of Logan J.

51 As Logan J points out, in deciding the question whether the member of the Refugee Review Tribunal (RRT) was precluded as a matter of law from deciding to consider the materials lodged late by the representative of the appellant before the RRT, given the statutory nature of the RRT and the functions that it performs, it is necessary to regard the terms of the statute that governs the review functions that it performs.

52 When this examination is conducted there is no particular reason to think that the Parliament anticipated that the review function of the RRT would come to a halt because the RRT, by its human member or members, came to a point in their mental or intellectual consideration of the issue or issues under review that the review should be determined in a

particular way. To come to such a conclusion would not only be artificial but could hardly be said to serve any public policy reason for the establishment of the RRT and the review function that it performs.

53 To read the relevant provisions of the *Migration Act 1958* (Cth) in this way, as the Minister proposes, by drawing some strict division between the making of a decision on review and the subsequent provision of reasons for that decision, is highly artificial. Apart from anything else, it may not necessarily be the case that any decision-maker, including in the RRT, finally decides what the resolution of an issue or issues should be until concluding the required written reasons for that decision. The decision and the reasons to be expressed for the decision may in any given case be arrived at simultaneously.

54 The position taken by the member of the RRT was, in effect, that short of a *Bhardwaj* issue (see *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597) arising (as discussed in the reasons of Logan J), having signed his decision and, in effect, instructed that it be released to the affected party and thereafter to the Secretary to the appellant Minister's department, in accordance with the requirements of the Act, he was statutorily prevented from reconsidering what he had decided and signed off on.

55 In my view, as tempting as that course may be on many occasions, and as appropriate as it may be on some occasions not to reopen a matter, it is not, as a matter of proper construction of the Act, the position under the Act. As Buchanan J has pointed out, and as the majority in *Semunigus v Minister for Immigration and Multicultural Affairs* [2000] FCA 240; (2000) 96 FCR 533 emphasised, there may be a number of reasons that, in practice, might arise following the formal signing of a decision and instruction that it be sent out in accordance with the Act, that might lead the decision-maker to realise that some aspect, if not the whole of, the decision recorded should be changed and corrected and to that end the materials that have been ordered to be sent out recalled for those purposes.

56 In the present circumstances, for example, it may have been appropriate for the decision-maker to have considered the materials submitted extremely late in the piece on behalf of the appellant. That, however, is not the issue in this proceeding. The issue is whether the member was right to conclude he could not take such a step.

57 The Act, as Logan J, with respect, demonstrates in some detail, indicates communication to a party – and probably to the Secretary too – as a critical point in the process by which the decision arising from the review process is "beyond recall". I would also emphasise, however, that it is only following receipt of the reasons given for a decision that parties such as an appellant and the Minister or where appropriate the Secretary will be in a practical position to take advantage of their rights to make an application in respect of the decision as provided for by s 478 of the Act.

58 As I observed above, there is no compelling reason in public policy why the RRT should not be able to recall the reasons recording a decision arising from the review process under the Act before it has been communicated to a party. While finality is important in any decision-making process, there is a much greater public policy to be served if, despite having written up the reasons for a decision and instructed they be despatched to the affected party and the Secretary, the RRT has the flexibility to correct any error made so as to avoid legal error or to take steps to avoid any possible injustice. After all, the whole point of the review process is to ensure that good and fair decisions are made in the course of the public administration of the Act in this difficult area of decision-making.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 12 September 2012