FEDERAL COURT OF AUSTRALIA

SZGCK v Refugee Review Tribunal [2007] FCA 1247

MIGRATION – protection visa – whether Refugee Review Tribunal failed to accord procedural fairness – whether apprehended bias – whether non-compliance with s 424A of the *Migration Act 1958* (Cth)

Freedom of Information Act 1982 (Cth)
Migration Act 1958 (Cth) s 422B, 424A, 424A(1)(b)

Applicant S416 of 2003 v Refugee Review Tribunal [2003] FCA 1630 referred to
Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 222 ALR 411 applied
VWFP v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 231 followed

SZGCK v REFUGEE REVIEW TRIBUNAL AND MINISTER FOR IMMIGRATION AND CITIZENSHIP

NSD 2382 OF 2006

MARSHALL J
17 AUGUST 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2382 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZGCK**
Appellant

AND: **REFUGEE REVIEW TRIBUNAL**
First Respondent

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Second Respondent

JUDGE: **MARSHALL J**
DATE OF ORDER: **17 AUGUST 2007**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The name of the second respondent is amended to "Minister for Immigration and Citizenship".
2. The appeal is allowed.
3. Orders 1 and 4 of the Federal Magistrate's orders of 16 November 2006 are set aside.
4. An order in the nature of certiorari issue to quash the decision of the Refugee Review Tribunal.
5. An order in the nature of mandamus issue to compel the Refugee Review Tribunal to hear and determine the review of the decision of the Minister's delegate according to law.
6. The matter is remitted to the Refugee Review Tribunal.
7. The second respondent pay the appellant's costs of the appeal and the proceeding below.

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

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BETWEEN:	**SZGCK** **Appellant**
AND:	**REFUGEE REVIEW TRIBUNAL** **First Respondent**
	MINISTER FOR IMMIGRATION AND CITIZENSHIP **Second Respondent**
JUDGE:	**MARSHALL J**
DATE:	**17 AUGUST 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The appellant appeals from a judgment of the Federal Magistrates Court. The Federal Magistrate dismissed his application for judicial review of a decision of the Refugee Review Tribunal (Tribunal). The Tribunal had affirmed a decision of a delegate of the respondent Minister not to grant the appellant a protection visa.

2 The appellant is a citizen of Bangladesh. He claimed to fear persecution if returned to Bangladesh by reason of his political opinion, religion and membership of a particular social group.

3 Before the Court below, the appellant claimed that the Tribunal was affected by apprehended bias, denied him procedural fairness and failed to comply with s 424A of the *Migration Act 1958* (Cth) (Act). The Federal Magistrate rejected those submissions. The appellant contends that his Honour erred in doing so.

4 The issues for determination on this appeal are:

(a) Did the Tribunal fail to accord procedural fairness to the appellant by not

providing him with an opportunity to comment on allegations made about him, in writing, which were read by the Tribunal but not conveyed to the appellant?

(b) Was the Tribunal's decision affected by apprehended bias as a consequence of it being aware of the allegations made against the appellant?

(c) Did the Tribunal fail to comply with s 424A of the Act by not providing the appellant with certain information, in writing, which the appellant alleged formed part of the reasons for the Tribunal's decision to affirm the delegate's decision to reject his application?

The procedural fairness/bias issues

5 The appellant attended a "pre-hearing interview" with the Tribunal on 5 August 2004. The Tribunal hearing was also conducted on that day. The Tribunal's decision record, handed down on 22 March 2005, states that on that day the appellant raised with the Tribunal his concern that certain information contained in documents which were "exempt" from disclosure to the appellant under the *Freedom of Information Act 1982* (Cth) (exempt documents) might be taken into account by the Tribunal in considering the appellant's "good faith".

6 At p 4 of its decision record, the Tribunal said:

> As discussed with the Applicant on 5 August 2004, the exempted documents are not considered by the Tribunal to be relevant to his protection visa application and have been put aside. Neither those documents nor any references to them in any other document form any basis for the Tribunal's decision in the present matter.

7 The Federal Magistrate said in his Honour's reasons for judgment at [17]:

> It is common ground that the confidential material in question…was never seen by the applicant or his representatives at any time prior to the hearing in this Court on 10 August 2006. At all times after its existence was discovered, the Minister has claimed public interest immunity in relation to its disclosure upon grounds which were previously upheld by Madgwick J and which, on my own reading of the material, appear to have justification. Although the material is exhibited to an affidavit, I have ordered that its publication should be severely confined.

8 His Honour observed at [18]:

> …the Minister consented to disclosure of the material to such of the applicant's legal representatives who have given the Court an undertaking in terms acceptable to the Minister.

9 The Federal Magistrate observed at [22] that at a hearing on 19 November 2003, Madgwick J upheld the Minister's claim for public interest immunity in respect of the exempt documents. His Honour set out some extracts from the transcript of that hearing. Those extracts showed that Madgwick J had a concern that "a reasonable outsider knowing that the…adjudicator has read that material would have a reasonable suspicion…that the adjudicator couldn't bring a fair and unbiased mind to bear on the subject matter". Justice Madgwick was inclined to the view that "the Tribunal should do what it can to inform the applicant of the burden of the material…" and said that "…procedures would have to be crafted probably by the President of the Tribunal by which the matter is reassigned without that material".

10 That proceeding before Madgwick J was a challenge by the appellant to a previous Tribunal's decision to affirm the delegate's decision not to grant him a protection visa. Justice Madgwick, on 5 December 2003, set aside that Tribunal's decision by consent, on the basis that certain country information which the Tribunal relied on was not brought to the appellant's attention, nor was he given a chance to comment on it. In *Applicant S416 of 2003 v Refugee Review Tribunal* [2003] FCA 1630 (*Applicant S416 of 2003)*, Madgwick J said at [3]:

> There may well have been other reasons which the applicant would have wished to urge as to why the Tribunal Member's decision should be quashed. I am aware, for example, that certain material was sent to the authorities on a confidential basis, making serious allegations against the applicant. I upheld a claim for public interest immunity, made by the Minister, against a requirement that the relevant documents making allegations should be produced to the applicant's legal advisers. **The nature of that material, it seems to me, was such that it might well give rise to a claim that if a Member of the Tribunal were to look at it and not show it to the applicant or apprise him of sufficient of the substance as to enable him to deal with it for fear of compromising the identity of the informant, among other things that could give rise to a claim of apprehended bias on the part of the Tribunal Member. It therefore seems to me that in order to forestall, so far as possible, any such dispute, it**

> **would be desirable upon the remitter of the matter to the Tribunal for re-consideration according to law that the President of the Tribunal should, with the benefit of legal advice, give the matter his consideration.** (Emphasis added.)

11 The Federal Magistrate set out this paragraph of Madgwick J's judgment in *Applicant S416 of 2003* [2003] FCA 1630 at [23] of his Honour's reasons and emphasised a passage commencing with the words "(t)he nature of that material" until the end of the paragraph.

12 The Federal Magistrate considered at [25] that "a fair-minded lay observer" would appreciate Madgwick J's warning offered to the Tribunal, but would also note that Madgwick J had left it to the Tribunal "to form its own judgment on how to deal with that material".

13 The Federal Magistrate said at [28]:

> …once the material did reach the Tribunal, it was the duty of the member constituting the Tribunal personally to consider its potential relevance, weight and usefulness. To allow another person to perform this assessment, would mean that the Tribunal, as properly constituted by a member designated under ss. 421 and 422, had failed to perform the "review" required by ss. 414 and 415.

14 The Federal Magistrate set out passages from the transcript of the hearing before the Tribunal on 5 August 2004 at [33]. At those passages, the Tribunal:

- referred to the appellant's concern about the exempt documents unfairly influencing the Tribunal's decision;
- said it could not go into much detail about the contents of the exempt documents;
- said the accusations in them were "unsupported"; and
- said it would not be taking them into account but would "put them aside".

15 It is not entirely clear from the Federal Magistrate's reasons for judgment whether these comments were made at the pre-hearing interview on 5 August 2004 or at the actual hearing which occurred later on 5 August 2004, but it appears they were

made at the hearing. In any event, approximately halfway through the transcript of the hearing, the Tribunal said it would not have regard to the material.

16 The Federal Magistrate found at [36] that the Tribunal treated the exempt documents as "not '*credible, relevant and significant to the decision to be made*'" (original emphasis) and that it decided the review application without relying on them. His Honour accepted that some of the material in the exempt documents "was potentially derogatory of the character of the applicant and the credibility of his refugee claims", but said that he was "not satisfied that the material in fact had any influence on [the Tribunal's] decision" and that it was "probable that it had no influence".

17 In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411 (*VEAL*), the High Court considered the Tribunal's obligation to accord procedural fairness in circumstances where it was aware of allegations against a protection visa applicant and where the author of the information containing the allegations has requested it be confidential. In that case, the Tribunal did not inform the applicant about a letter containing allegations which were adverse to his application, but said in its reasons for decision that it gave the letter no weight. The High Court said the Tribunal should have told the applicant of the substance of what was said against him.

18 The Court said at [17]:

> …what is "credible, relevant and significant" information must be determined by a decision-maker before the final decision is reached. That determination will affect whether the decision-maker must give an opportunity to the person affected to deal with the information. … "Credible, relevant and significant" must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision.

19 In the instant case, the Tribunal informed the appellant prior to making its decision that it would not take the exempt documents into account. However, this does not mean that the Tribunal applied proper procedure in not telling the appellant the substance of the allegations and allowing him to comment.

20 In *VEAL*, the Court said at [20]:

> The information set out in the letter about the appellant could not be dismissed from further consideration by the tribunal as not credible, or not relevant, or of little or no significance to the decision.

The Court considered the material to bear "upon whether [the appellant] had a well-founded fear of persecution for a Convention reason".

21 As discussed at [16], the Federal Magistrate said in his Honour's reasons for judgment at [36] that some of the material in the exempt documents was "potentially derogatory of…the credibility of [the appellant's] refugee claims". It may be logically considered that the material in the exempt documents bore directly on whether the appellant had a well-founded fear of persecution for a Convention reason. It is immaterial that the Federal Magistrate was not satisfied the exempt documents had any influence on the Tribunal or whether it was probable that they did. The exempt documents were tendered, confidentially, on appeal. In my view, they had the potential to impact adversely on the credibility of the appellant's refugee claims.

22 Counsel for the Minister submitted that what is "credible, relevant and significant" material is a matter for the Tribunal alone and that a degree of latitude should be given to the Tribunal's views, in circumstances where it announces before making its decision that it will not take the material into account. However, counsel conceded that the Tribunal's view on the credibility, relevance and significance of material could be reviewed by a Court in circumstances where the material is, of its nature, so obviously credible, relevant and significant that a reasonable tribunal could not regard it as otherwise.

23 As indicated at [21], the exempt documents were tendered confidentially on the appeal. Having read them, I cannot fathom how any reasonable tribunal would not be influenced by them to form an adverse view of the appellant's credibility generally and in respect of his refugee claims. Some of the allegations raised in the exempt documents against the appellant are very serious.

24 In my view, no reasonable tribunal could consider that the documents were not "credible, relevant and significant". Some of the material in the exempt documents

was supported by other parts of it. That impacts on its potential credibility. The exempt documents could not be divorced from an assessment of the appellant's claim to have a well-founded fear of persecution. At the very least, they could not, by their nature, be reasonably dismissed as not bearing on the credibility of the appellant's refugee claims in a real and substantial way such that the material in them could be put to one side and out of the decision-maker's mind.

25 I note the Tribunal's decision preceded the High Court's judgment in *VEAL* 222 ALR 411 by about ten months. However, in accordance with *VEAL* 222 ALR 411 at [29], the Tribunal, to accord procedural fairness to the appellant, should have informed him of the substance of the allegations made in the exempt documents and asked him to respond to them, or at the very least informed him of the substance of those parts of the exempt documents which bore on the credibility of his claims to have a well-founded fear of persecution, and asked him to respond. In failing to do so, the Tribunal failed to accord the appellant procedural fairness.

26 The decision of the Tribunal must be set aside and the matter remitted to a differently constituted Tribunal. The failure to accord the appellant procedural fairness having been established, it is unnecessary for the Court to consider whether the Tribunal's decision was affected by apprehended bias, as a consequence of it being aware of the allegations made against the appellant. There is no utility in examining this issue because if the matter is remitted to the Tribunal it will bring the substance of the exempt documents, which bear on the appellant's credibility, to his attention and no issue of apprehended bias should arise.

The s 424A issue

27 The Tribunal dealt with the appellant's claim to fear persecution on account of his political opinion at pp 9-27 of its decision record under the heading "Claims and Evidence". Essentially, the appellant claimed to be involved with and to support the Bangladesh National Party (BNP). At p 13, the Tribunal noted the appellant's claim that, in 1992, the BNP appointed him regional director of the AsiaNews Network Overseas (Network), which he described as "a joint venture between BNP and overseas supporters".

28 Later at p 13, the Tribunal referred to "a reference letter from AsiaNews Network Overseas, which the Applicant submitted in connection with his migration application, and which the Tribunal shared with him for comment prior to the 5 August 2004 hearing…". The Tribunal then observed the Network's head office was in the United States of America and that it was a "foreign company".

29 At p 15, the Tribunal referred to evidence given by the appellant to a previous Tribunal that the Network supported the BNP and had to set up an office in Singapore because it could not run an office inside Bangladesh. The Tribunal said, at p 15, that:

> The Applicant told the first Tribunal that AsiaNews Network Overseas supported the BNP and could not run its Bangladesh office from within Bangladesh, which is why it set up an office in Singapore. The material in the Applicant's 1996 migration application does not support that assertion…it provides a very different explanation of the company's role and the Applicant's role within it.

30 Critically, at p 16, the Tribunal said:

> In his 1 February 1999 statement to DIMIA, the Applicant said that due to the change of government in 1996 and the loss of power by the BNP to the AL, the funds for his job "completely stopped." He implied that the international company for which he worked paid his salary out of the coffers over which the government of the day in Bangladesh had control, but only up to about nine months after it lost government. The reference letter, dated 2 July 1995, and submitted with the Applicant's 1996 migration application, said that he was engaged by AsiaNews Network in Singapore "for a year or so on [an] experimental basis.

31 Under the heading "Findings and Reasons", the Tribunal dealt with "Political opinion" at pp 60-68 of its decision record. The Tribunal commenced its treatment of this topic by saying that it "…has serious problems with the Applicant's overall consistency and credibility".

32 At p 65, the Tribunal said it regarded the appellant's claim about being appointed to the Network by BNP as "suspicious". It referred to the lack of evidence of BNP involvement in the Network. The Tribunal went on to say:

> …on the poor quality of the evidence before it, the Tribunal does not accept that the Applicant went to work for [the Network], as an

> extension of his services to the BNP… . The Tribunal does not accept that the Applicant's tenure with [the Network] has any significance as far as his protection prospects in Bangladesh are concerned. It was just a job that he had, until it ended.

33 The Tribunal considered that the appellant's move to Singapore "coincided with his *private* employer's attempt to expand in the Asia region" (original emphasis). It found that:

> …the Applicant left Singapore around the end of the trial period for his tenure there and that the company folded whilst the Applicant was trying to expand its operations in Australia. The Tribunal does not accept that any of these events occurred as a result of a fall in the BNP's fortunes under the AL government in Bangladesh… The Tribunal does not accept that the Applicant avoided returning to Bangladesh at the end of his relationship with [the Network] for the reasons he claims.

34 At p 66, the Tribunal referred to the appellant's "unreliable claims about the BNP being his real employer since 1991".

35 Towards the end of its findings on the political opinion topic, at p 68 the Tribunal rejected the appellant's claims to fear persecution in that regard, "(o)n the grounds of the overwhelming lack of consistency and credibility in his evidence…".

36 The Federal Magistrate considered that the Tribunal did not rely on the reference letter, referred to at [28], as part of its reasons for rejecting the appellant's claims. His Honour said in the reasons for judgment at [80]:

> The Tribunal's reference to that letter in its reasoning indicates no more than an evaluation of its content, in particular, whether it provided support for the applicant's claim that his employment was related to an association with the BNP. The Tribunal found "*no evidence to support*" that claim, including in the reference letter. The Tribunal's actual reasoning does not, in my opinion, show it drawing an adverse inference on the ground that the claim was inconsistent with the reference letter. Although this suggestion appears to have been put to the applicant during the hearing, I do not consider that it ultimately formed a part of the Tribunal's reasons for affirming the delegate's decision. (Original emphasis.)

37 Counsel for the appellant submitted that his Honour erred in his treatment of

this issue. They contended that the Tribunal regarded the reference letter both as a significant piece of evidence and took it into account adversely to the appellant's case. They contended this occurred because the Tribunal failed to ensure, as far as is reasonably practicable, that the appellant knew why the reference letter was relevant to the review, in breach of s 424A(1)(b) of the Act. They referred to the Tribunal's statement about the reference letter "provid(ing) a very different explanation" to that given in the appellant's 1999 statement to the delegate. This statement of the Tribunal, counsel contended, goes beyond a lack of evidence and shows that the Tribunal expressed concern about an inconsistency between the reference letter and the information given in the appellant's 1999 statement to the delegate. Counsel submitted that this, in turn, is relevant to the Tribunal's adverse assessment of the appellant's credibility.

38 As Young J said in *VWFP v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 231 (*VWFP*) at [62]:

> In applying s 424A, it is necessary to focus on matters that, viewed prospectively, would be the reason or a part of the reason for the Tribunal's decision, or viewed retrospectively in the light of the Tribunal's actual decision, can be seen to be the reason, or a part of the reason, for the Tribunal's decision.

39 Justice Young also observed in *VWFP* at [62] that "…s 424A is concerned with information that is adverse to the interests of the visa applicant".

40 The reference letter was not adverse to the appellant's interests. It did not contradict material contained in the appellant's protection visa application. The reference letter was evaluated by the Tribunal for comparison with what the appellant said in his 1999 statement to the delegate. The Tribunal considered the reference letter did not support the appellant's assertion about the connection between the Network and BNP. The Tribunal did not state that the reference letter contradicted the claims made in his 1999 statement to the delegate but, rather, said that it did not support the claims. At this point in its decision-making, the Tribunal was doing no more than evaluating the evidence.

41 Under the heading "Findings and Reasons" in the decision record, the Tribunal

did not rely on the reference letter in rejecting the appellant's claim that the BNP stood behind the Network. I agree with the submission of counsel for the Minister that the Tribunal considered it critical to this aspect of the appellant's claim that he was unable to provide evidence to support his claim. In that sense, the Tribunal relied on a lack of information in dismissing this claim of the appellant, rather than on any particular information. In my view, the Court below correctly determined that the Tribunal did not breach s 424A of the Act in coming to its decision.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 17 August 2007

Counsel for the appellant:	Mr D Patch with Mr I Latham
Solicitors for the appellant:	Allens Arthur Robinson
Counsel for the second respondent:	Mr S Lloyd
Solicitor for the second respondent:	Australian Government Solicitor
Date of Hearing:	24 May 2007
Date of Judgment:	17 August 2007