THE SCOPE AND MEANING OF 'IN PRIVATE' HEARINGS: THE IMPLICATIONS OF *SZAYW**

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On 5 October 2006 the High Court of Australia handed down its decision in an administrative law (migration) matter which may have far wider ramifications than the operations of Refugee Review Tribunal ('RRT').

The matter concerns the meaning and construction of s 429 of the *Migration Act* 1958 ('Act') which provision requires that oral hearings conducted by the RRT, when reviewing protection visa decisions, 'must be in private'.

The case is also important because it rejects the literal approach to the construction of statutes.

Factual summary and procedural history

Four stateless Palestinians (the appellant and three friends) arrived in Australia in 1998. They applied for protection visas claiming that if they returned to their country of former habitual residence, they would suffer reprisals for deserting Hezbollah. A delegate of the Minister for Immigration refused all four applications for protection visas.

All four applicants, represented by the same advocacy group (Refugee Advice and Casework Service) sought review of the delegate's refusal decision in the RRT. At their request, one RRT tribunal member was assigned to deal with all four applications for review. Also at the request of the applicants, each of them wished to act as witness in the other's case.

The RRT eventually rejected the claims of each of the four applicants.

The appellant (SZAYW) then sought judicial review of the RRT decision in the Federal Magistrates Court. His specific complaints to the court were:

a) the RRT breached s 429 of the Act because the hearing was not conducted in private - the other 3 applicants were present in the RRT hearing room during the period that he gave his evidence;

b) the RRT breached the rules of procedural fairness because, in giving his evidence, he felt inhibited and did not put his case in its best light.

The first complaint was upheld by Federal Magistrate Driver who also held that a breach of s 429 of the Act was a jurisdictional error and consequently, he quashed the RRT's decision[1].

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* *This article was prepared by Zac Chami , a Senior Associate at Clayton Utz and the views expressed are those of the author's alone.*

* *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49.

The second complaint was rejected on the facts by Federal Magistrate Driver and is not relevant to any further issue in this article.

The Minister for Immigration appealed Federal Magistrate Driver's decision. The Full Court of the Federal Court of Australia reversed the Federal Magistrate's decision (Moore and Weinberg JJ, Kiefel J dissenting)[2] and the appellant then sought and was granted leave to appeal to the High Court of Australia.

Decision and reasoning

Five Justices of the High Court unanimously upheld the decision of the Full Court of the Federal Court. In doing so they rejected as 'unduly narrow and inflexible' the appellant's submission that the statutory obligation of privacy required 'only the Tribunal member and necessary officers...and the applicant and his [representative] be present when the [appellant] gave his evidence'.

The High Court, in rejecting the appellant's strict approach to the meaning of the words 'in private', embarked upon an analysis which had as its starting point the principal objective imposed on the RRT that it conduct a review which was fair, economical and informal. This higher objective was considered within the statutory context of other provisions which impact on s 429 of the Act. That context includes obligations imposed on the RRT which deal with the giving of evidence by statutory declaration, obtaining information that the RRT considers relevant from third party sources and the conveyance of adverse information to and obtaining information from the applicant.

Other sections of the Act used to contextualise the meaning of the words 'in private' were:

(a) s 425 which provides that the Tribunal must invite the applicant to appear before the Tribunal to give evidence;

(b) s 426 which entitles the applicant to notify the Tribunal that the applicant wants the Tribunal to obtain evidence from some other person or persons;

(c) s 365 which may be contrasted with s429. In relation to oral evidence taken before the Migration Review Tribunal, such evidence must be taken in public;

(d) s 439 which imposes obligations of confidentiality upon Tribunal members and officers. Notably, the obligation of confidentiality does not apply to the applicants or others.

In considering context, the High Court observed that the concept of privacy is imprecise and is not to be equated with secrecy or isolation[3]. Furthermore, privacy is not necessarily the result of a hearing that does not take place in public. Rather, 'public' and 'private' are words used in contrast, but they do not cover the entire range of possibilities[4]. As a guide, the High Court intimated that a hearing cannot be said to be in private if it is 'open to the general public' but will be private if, by mutual consent, one of the parties to the meeting is accompanied by a friend or supporter - as happened in this case[5]. Similarly, the presence of any person who is reasonably required to perform functions in connection with the RRT hearing does not mean that the hearing ceases to be in private.

In this regard the High Court recognised that persons required to perform functions at or connected to the hearing include interpreters, security officers, necessary administrative staff, witnesses and persons who provide 'moral support' to a person. Finally, the High Court accepted that s 429 does not prevent hearings which are wholly or partly 'concurrent', that is, a joint hearing as occurred in this case.

Implications of decision on other legislation

Section 429 of the Act, as was recognised by the High Court, was enacted for the benefit of refugee applicants. That is, they should feel uninhibited in presenting their case to the RRT and also to protect them against the threat of reprisals, either in Australia or abroad[6] because of the allegations they are likely to have made against persons or the government of their country of origin. These beneficial reasons imply a personal or protective purpose for having a private hearing. In that sense therefore the requirement of a private hearing may be distinguished from regulatory or commercial legislation which may have, as part of its provisions, that certain investigative procedures or examination hearings be held in private. The dichotomy appears to be that there are 'personally protective' private hearings and 'sanctions based/prosecutorial' private hearings (or investigations preparatory to the imposition of a sanction/prosecution). As examples of the latter, the following pieces of legislation serve as a useful starting point.

(1) s 597 of the *Corporations Act 2001* concerns the examination of a person about a corporation's examinable affairs. Such an examination is required to be held in public except if the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private;

(2) s 596F(1)(c) of the *Corporations Act 2001* which operates subject to s 597, empowers the Court to make orders concerning who may be present at an examination while it is being held in private;

(3) ss 913B and 914A of the *Corporations Act 2001* which concern the refusal to grant an applicant a financial services licence and the imposition of conditions on such a licence after the person is given an opportunity to attend a hearing conducted in private;

(4) s 915B of the *Corporations Act 2001 w*hich concerns the suspension or cancellation of a financial services licence after the person is given an opportunity to attend a hearing conducted in private;

(5) s 920A of the *Corporations Act 2001* which concerns the power of the Australian Securities and Investments Commission to impose a 'banning order' on a person providing financial services after the person is given an opportunity to attend a hearing conducted in private;

(6) s 152CZ(1)of the *Trade Practices Act* 1974 which concerns arbitration hearings in connection with telecommunications access disputes which are to be held in private.

A common feature of the provisions above as well as the protection afforded to refugee applicants by virtue of s 429 of the Act is the need to protect confidential information or evidence in the service of a *personally protective* function, a *commercially protective* function or *sanctions/prosecutorial* function. In this way a private hearing serves to guard the interests of the applicant or alternatively the integrity of the information received by the relevant tribunal or decision maker whether it be the RRT, ASIC or the Australian Competition Tribunal. It follows that if there is no real danger that the information given in the course of a (private) hearing will be released to the public, there is no good reason to exclude persons other than the applicant and the tribunal officers from that hearing. Certainly, the general public will not be entitled to attend the hearing but other parties connected with the applicant or who attend at the applicant's request[7] will not change the character of the hearing from being a private one. Many examples can be imagined where an applicant would seek to have a connected third party attend the hearing including, for example, a spouse, a relative, a business partner, a spiritual adviser, a medical assistant and, as in the case of SZAWY, a support person. None of those would, according to the

High Court, turn a private hearing into a public one so as to offend the legislation discussed in this article.

Moreover, there may be situations in which a concurrent private hearing takes place in connection with matters under the *Corporations Act 2001.* Readily imaginable situations may include, for example, the cancellation of a financial services licence held by two partners of a financial advisory house. If the partners in making a case as to why their licences should not be cancelled seek to rely on their 'shared experiences'[8] or the 'consistency of the[ir] claims'[9] this seems a powerful reason why a private hearing can accommodate both of them simultaneously.

Finally, there is one other common feature of significance between the obligation imposed on the RRT under s 429 of the Act and the obligations imposed on ASIC and the Australian Competition Tribunal under the legislation referred to above. Both the RRT, ASIC and the Australian Competition Tribunal in deciding issues as to whether a protection visa ought to be granted, a financial services license ought to be cancelled or whether telecommunications access ought to be given, are exercising inquisitorial powers. Evidence is not adduced, tested and debated as it would, say, in an adversarial trial. The RRT, ASIC or the Australian Competition Tribunal considers the information and claims within the process of administrative merits review. From that standpoint, the High Court's decision in *SZAWY* cannot be dismissed as a mere peculiarity of immigration law and thus of limited application.

Endnotes

1 *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 187 FLR 104
2 *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* (2005) 145 FCR 523.
3 Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ at [23]
4 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 [42]
5 Gleeson, Gummow, Hayne, Callinan and Crennan JJ at [26]
6 Gleeson, Gummow, Hayne, Callinan and Crennan JJ at [25]
7 Assuming that the relevant tribunal permits this course and accedes to the request.
8 SZAYW at [11].
9 ibid.