> At any stage of a proceeding for review of a decision, the Tribunal may remit the decision to the person who made it for reconsideration of the decision by the person.

A considerable part of the applicants' contentions dealt with the respondent's reasons for the decisions which were the subject of the review applications These included that the respondent did not deal or had not dealt adequately with the grounds of objection to assessments made by the Company, that the respondent's reasons were such that the Company was entitled to assert that the respondent did not comprehend or consider certain grounds of objection and that, in general terms, the Company is entitled to assert that the reasons were "a sham".

The Tribunal did not consider it necessary to deal in any detail with the Company's complaints in respect of the respondent's reasons, although he noted that allegations of "sham" or allegations that the respondent did not read or comprehend aspects of the Company's objection, were entirely without foundation. The Tribunal referred to the decision of Deputy President Forgie in *Re Lavery and Registrar, Supreme Court of Queensland and Others (No. 2)* (1996) 23 AAR 52, which outlined the requirements in relation to a statement of reasons noting, in particular, that a decision maker may seek to support the decision on a basis completely different from that upon which it was originally made and that, equally, a person applying for review of a decision may seek to have it set aside on a basis completely different from that which he or she originally put to the decision maker.

On the other hand, the Tribunal noted that it was not clear in what circumstances the Tribunal should exercise its power under subsection 42D(1). The Tribunal observed that

> It may perhaps be correct to say that the power should be exercised where the reasons are so unsatisfactory that it is fair to infer that the decision maker has not applied his or her mind, or where the reasons are indeed aptly categorised as a "sham", but that is very far from being the case in this instance. It may be that the Respondent's reasons could perhaps be refined but this is not an aspect in respect of which this Tribunal need (or indeed should) attempt to be specific.

The Tribunal decided that it did not consider that the reasons furnished were indicative of the fact that the respondent did not understand the relevant objections or that he failed to apply his mind or that they amounted to a "sham" and that no good purpose would be served by remitting the decisions in question to the decision maker for reconsideration.

Streeter and Secretary to the Department of Employment, Education, Training and Youth Affairs (No. Q 97/590; AAT No.12730)

Senior Member Beddoe

Freedom of Information – anonymous telephone information recorded by one agency and passed to another agency – application of exemptions under paragraph 37(1)(b) and subsection 41(1) of the FOI Act.

The applicant sought access under the *Freedom of Information Act 1982* (the FOI Act) to certain documents held on the respondent's files in relation to the applicant's AUSTUDY claims. The documents had come into the possession of the respondent Department from another agency which

had been given the information by an anonymous caller.

The respondent released some documents to the applicant but certain documents were refused on the basis that they were exempt under section 37 of the FOI Act[2]. The reason for that refusal was explained by the delegate as follows:

> material... that I consider exempt under this provision is either statements containing information about sensitive family matters or material that may identify persons who made such statements. In either case I found that the information concerned is not a matter of public knowledge and is inherently confidential in nature.... On the basis of my knowledge of AUSTUDY procedures and advice from the Student Assistance Centre I am satisfied the material was given and received on the explicit understanding that it would be kept strictly confidential to the extent that the Department is legally able to do so...

The delegate's decision was affirmed at internal review on the basis that the material exempted identified a person or persons who gave information to the Department which required that the identity of the person be withheld, that it was information provided by a person which is likely to have come from only one source and that the person's identity could be ascertained from that information.

The applicant sought review of the delegate's decision to refuse access to the documents with submissions made only with respect to paragraph 37(1)(b) and section 41 of the FOI Act.

In relation to paragraph 37(1)(b), the respondent argued that there were three elements to be satisfied:

- whether the documents were confidential – in this regard the respondent relied upon the decision of the Federal Court in *Department of Health & Anor v Jephcott* (1985) 62 ALR 421; 9 ALD 35 to the effect that the existence of confidentiality may be established by reading the document to discover whether the information was provided under an express or implied pledge of confidentiality. The respondent submitted that it could be inferred that there was an implied pledge of confidentiality in relation to both documents and the heading of one of the documents allowed a direct inference to be drawn;

The Tribunal disagreed. Information in the documents was provided by an anonymous caller or callers but this alone was not sufficient to establish a pledge of confidentiality. Further the first agency receiving the information had provided copies to the respondent and in so doing had apparently proceeded on the basis that the information was not confidential as concerned the first agency.

- if documents were confidential, did they relate to the enforcement or administration of law?—in this regard the respondent argued that it was required to administer law in accordance with funds allocated and that it is an agency concerned with administration of the Social Security Act;

The Tribunal agreed that this element was satisfied.

- whether the documents would disclose the source of the

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[2] Section 37 concerns documents affecting the enforcement of law and the protection of public safety.

information – it was submitted that whether the documents would disclose the source of the information was a question of fact.

The Tribunal said:

> In my opinion it cannot be inferred that the documents disclose information that can only point to the identity of one person or a limited few persons, the nature of the information appears to be such that any one of an indeterminate but at least several people may have made such comments which tend to be quite general in nature. Further I do not consider that the release in toto of the documents could reasonably be expected to disclose the identity of the confidential source being the informer.

Accordingly, the Tribunal found that the exemption under paragraph 37(1)(b) was not established.

In relation to the exemption claimed under section 41[3], the respondent submitted that there were two elements to be considered:

- whether the document discloses personal information – in this regard the respondent argued that the document in part refers to individuals other than the applicant and as such falls within the definition of "personal information";
- whether the disclosure is unreasonable – this determination is a matter of fact and degree which must have as its core, public interest considerations. The respondent argued that it would be unreasonable to divulge the information as no public benefit would be achieved.

The applicant then requested access only to the content of the documents and not the identity of the source of the documents.

The Tribunal adopted the view of the full Tribunal in *Scholes and the Australian Federal Police* (1996) 44 ALD 299 at 343 and decided that the applicant should have access to the documents subject to exclusions of exempt portions under section 41 of the FOI Act.

The Tribunal found that there were aspects of information in both documents relating to persons other than the applicant:

> The information as relates to those other persons may of course have some current relevance to those persons and based in some areas on the adverse nature and content of the information provided, I do not consider it appropriate to allow disclosure of that information to the applicant... I do however express concern that information provided to one agency by an anonymous party or parties as concerns a number of persons was passed to another agency for placement on a person's file without apparent considerations of confidentiality as relates to the personal affairs of those other persons by the first agency....
>
> In this instance given the names of the persons mentioned in the documents and the nature of the information I consider it appropriate that if such information were to be fully disclosed to the applicant it should be done only with the consent of those other persons whose affairs are mentioned in the documents.... Otherwise, the s 41(1) exemption to that part of the information in the documents as relates to other persons shall apply...

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[3] Section 41 concerns documents affecting personal privacy.

High Court and Federal Court Decisions of Particular Interest

Morales v Minister for Immigration & Multicultural Affairs

(Federal Court of Australia, 6 April 1998—Black CJ, Burchett and Tamberlin JJ) ***Application of section 501 of the Migration Act—Appeal to the full Federal Court—whether an order by a trial judge remitting a matter to the AAT compels a re-hearing of the matter***

The AAT's decision affirmed a decision of the Minister's delegate refusing to grant an application for an entry visa under s 501 of the *Migration Act 1958* (the Act). The applicant, an Australian permanent resident, objected to the refusal of the visa to Mr Gonzales who had applied for the visa to enable him to migrate to Australia as her de facto spouse.

The decision of the delegate refusing the application for an entry visa was made on the basis that Mr Gonzalez was a person whose entry or presence in Australia would incite discord in a segment of the Australian community within the meaning of s 501 (1) (b) (iii) of the Act.

An appeal was taken from that decision under s 44 of the AAT Act to the Federal Court where it was heard by Sackville J. The Minister had conceded, prior to the hearing, that the AAT erred in law in finding that Mr Gonzalez was a person whose entry or presence would incite discord, so the only issue for determination was whether the matter should be remitted to the AAT to be decided in accordance with law or whether it should be remitted with a direction, as sought for by the applicant, that s 501 did not apply to Mr Gonzalez.

Sackville J ordered:

1. The decision of the AAT made on 19 April 1995 be set aside.

2. The matter be remitted to the AAT to be dealt with according to law.

His Honour refused to give any direction in relation to the application of s 501.

The remitted matter was heard by the AAT as a rehearing, including the introduction of further evidence as to the association of Mr Gonzalez with specified groups, persons, or organisations in Chile. The decision of the Minister's delegate that the application should be refused, was affirmed, but the ground was a different ground to that which was found to be established in the original decision.

On appeal to the Federal Court, the Court rejected the applicant's first and second grounds of appeal which were that the AAT erred in law because it implicitly found that Mr Gonzalez was a person of bad character merely because of an association with organisations involved in criminal conduct.

The Court also rejected the third and fourth grounds of appeal relating to the "failure" of Mr Gonzalez to disassociate himself from the groups of organisations and the finding that the presence of a person in Australia might cause destabilisation of the Australian community.

The applicant submitted that the AAT at rehearing had erred in law by incorrectly construing the orders made by Sackville J as compelling a "re-hearing" of the entire matter whereas, it was said, the Tribunal should have proceeded on the footing that it retained all the discretions that the AAT had