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

when it proceeded with the matter remitted to be dealt with according to law. They included, it was submitted, a discretion whether or not to allow the reopening of the conduct ground originally found in the applicant's favour and also a discretion to revisit the good conduct issue but without allowing further evidence to be adduced.

The Court said that it was apparent that when the matter was remitted to the Tribunal, it understood the orders made by Sackville J as requiring a "rehearing" of the application for review of the Minister's decision. In treating the terms of remittal by Sackville J as necessitating a rehearing as opposed to a reconsideration, the Tribunal, in the view of the Court, erred in law. The order of Sackville J left to the discretion of the AAT the question whether it should allow a rehearing and to what extent. It did not compel a rehearing. It was open to the Tribunal, if it considered it appropriate in the circumstances, to act on the evidence put before it on the previous occasion and not to permit further evidence to be adduced on that issue. By acting on the basis that this course was not open to the Tribunal at all, the tribunal erred in law.

Khan v Minister for Immigration and Multicultural Affairs (1997) 150 ALR 602

(Federal Court of Australia, 27 November 1997 — Sydney, Wilcox, Foster and Emmett JJ)
Denial of substantial justice for purposes of s 420 (2) of Migration Act 1958 — Whether tribunal was required to indicate to applicant that certain evidence was not considered probative — Whether tribunal was required to hold second oral hearing to consider further evidence and argument which had come to light following first oral hearing — Circumstances in which tribunal should seek additional information

The applicant appealed against the rejection of his application for refugee status. In accordance with s 425 of the Migration Act, an oral hearing was held by the Refugee Review Tribunal. While the Tribunal's decision was pending, the applicant claimed to have converted to Christianity. On request from the Tribunal, the applicant submitted further written material. However, a further oral hearing was not held by the Tribunal, nor did the applicant request one. Upon receiving the further material, the Tribunal informed the applicant's representative that, unless there was an objection, the Tribunal intended to make a decision on the matter as soon as possible. The representative subsequently informed the Tribunal that no further material was to be submitted.

The Tribunal rejected the applicant's application for refugee status.

On appeal, the applicant asserted first, that the Tribunal denied the appellant substantial justice because the Tribunal did not give an intimation to the appellant or his representative that the evidence he had submitted concerning his alleged conversion to Christianity was not considered probative. Second, he argued that substantial justice was denied as the Tribunal did not invite a second oral hearing—the first oral hearing having been devoted exclusively to his claim for refugee status on account of a well-founded fear of persecution on the basis of political opinion. Third, the applicant claimed that no opportunity was given to advance further documentary evidence.