A further erosion of natural justice?

By John Gibson

SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs[1] concerned the nature and extent of the obligations imposed on the Refugee and Migration Review Tribunals to provide information to an applicant that it considers would form part of its reasons for affirming the decision under review.[2] The combined effect of *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*,[3] which held that s424A (and its equivalents s359A and s57) is a mandatory provision requiring compliance in writing, and *SZEEU* has been to create a situation in which the Minister has remitted matters by consent, or where magistrates and judges quash tribunal decisions in many cases (more than 50). Approximately 600 cases have apparently been remitted for re-hearing heard before the tribunals over the past year. A number of cases have turned on what Weinberg J in *SZEEU* described as:

> '[d]istinctions … which are highly refined, and which require the tribunal to engage in extraordinarily sophisticated reasoning [and which] do not seem to me to serve any worthwhile purpose.'[4]

The Minister introduced the Migration Amendment (Review Provisions) Bill 2006 in late 2006. The purpose of the proposed amendment is twofold: (i) it would enable the tribunals to put matters orally during the hearing to satisfy their s424A/s359A obligations, and would give them a discretion to permit an adjournment if it is reasonably required so that an applicant can respond; and (ii) it would bring written material provided at the application stage within the ambit of the sub-section, providing exemption from disclosure.

The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs. A wide range of both oral and written submissions opposed the Bill on the grounds of unfairness, lack of rigour, added complexity, and unevenness and likely inconsistent application of processes.

In *SZEEU* Weinberg J made a similar criticism – although regarding the current law – while commenting on the incidence of appeals and applications (which prompted the government to introduce the Bill in its present form):

> '[174] … these appeals … seem to me to illustrate, and not for the first time, the problems that can arise when the legislature embarks upon the course of establishing a highly prescriptive code of procedure for dealing with visa applications, and with subsequent applications for review, instead of simply allowing for such matters to be dealt with in accordance with the well-developed principles of the common law.
>
> [175] One of the reasons for the difficulty is that the legislature has chosen to use the term "information" when searching for a global expression designed to trigger the obligations imposed under s424A. The term "information" is not defined in the Act, and if it were, it would not necessarily conduce to clarity. "Information" is inapt, as a word, to encompass at least some of the circumstances that would normally give rise to a duty, as a matter of natural justice, to invite comment from an applicant. Its use in s424A can lead to unsatisfactory results.'

The reservation regarding the use of the term 'information' was echoed by Young J in *NBKT v Minister of Immigration and Multicultural Affairs* [5]

> '[40] … the potential difficulty I have identified is, as Weinberg J observed in *SZEEU* … the product of the legislature's choice of the term "information" when searching for a global expression to trigger the operation of s424A. I doubt that the legislature intended that s424A should apply to information that is as basic to the whole review process as the dates upon which the applicant arrived in Australia and applied for a protection visa.'

In *SZEEU*, Weinberg J concluded:

> '[181] Were it not for *SAAP*, it would matter little whether any notice, in compliance with a duty to act fairly, was given orally or in writing. Indeed, in some cases it might not matter whether such notice was given at all. The tribunal's duty would be simply to ensure that it acted fairly…
>
> [182] However, since *SAAP*, fairness is no longer the touchstone. Indeed, it may be regarded as being only

marginally relevant... It is sufficient simply to show that the "information" contributed in some way, which renders it an operative causal link to the decision itself.

[183] With great respect, I doubt that the legislature ever contemplated that s424A would give rise to the difficulties that it has, or lead to the results that it does. The problems that have arisen stem directly from the attempt to codify, and prescribe exhaustively, the requirements of natural justice, without having given adequate attention to the need to maintain some flexibility [in applying those requirements]... As is demonstrated by the outcome of at least some of these appeals, codification in this area can lead to complexity, and a degree of confusion, resulting in unnecessary and unwarranted delay and expense.'

Against this background, the Bill clearly has some major flaws.

First, in relation to the amendment allowing the tribunal to comply with its obligations orally, the proposed scheme would lack the precision of the present system. Framing questions with the rigour and discipline that the written process requires is indispensable.

The amendments additionally involve a requirement to orally explain the consequences of why something is part of the reason for a decision but, more controversially, add an additional layer of discretion as to whether to grant additional time for response and 'to adjourn the review'. This discretion may well be judicially reviewable. In the Senate Committee hearings, the submissions consistently noted the difficulties of unrepresented, vulnerable people in understanding the current process. The submissions argued that the proposed scheme will simply compound these difficulties – particularly the new discretion to adjourn.

As regards judicial review consequences, it is unlikely that the amendments will reduce the recourse to litigation. The changes will require parties to engage in a complex and time-consuming process of checking transcripts of orally submitted information to see whether it has been properly described and communicated. There is no substitute for rational, considered responses in writing to information that is also provided in writing.

The amendment proposes to remove the distinction between information provided at first instance to the department and that provided to the tribunal. Eliminating that distinction will interfere with the rules of natural justice as properly recognised by the courts and practised in the tribunals. Under the current scheme, natural justice requires the tribunal to bring any inconsistencies – including anything that is said earlier but not later, or something that is added to – to the attention of applicants. Applicants often have no record or do not recall what they said two or three years ago, or are simply unaware of the significance of certain documents. Cases often turn on adverse inferences drawn from such inconsistencies. Abolishing the distinction will therefore lead to unfairness for applicants.

Finally, the proposed amendments will produce a confusing and uncertain scheme, with inconsistent applications of the rules between individual members of tribunals who will inevitably adopt their own practices.

The best outcome would be, as Weinberg J has suggested so persuasively, a return to the rules of natural justice. If the common-law rules of procedural fairness were reinstated and s424A, s359A and s57 removed altogether, fairness would be the touchstone – as it should be. ■

Notes: **1** [2006] FCAFC 2 (24 February 2006). **2** See *Precedent* 78, pp48-9. **3** [2005] HCA 24 (18 May 2005). **4** At [180]; see also [176]-[179]. **5** [2006] FCAFC 195 (20 December 2006).

John A Gibson *is a member of the Victorian Bar. He is the editor of a CD Rom legal service published quarterly with fortnightly updates and of a weekly email case note service for migration practitioners.*
PHONE *(03) 9642 2110* **EMAIL** *irc@rubix.net.au*
WEBSITE *www.ircon.com.au*