



Express law fast track information for clients

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Procedural fairness, secret information, disavowals of reliance by decision-makers and public interest immunity

One of the most significant and unresolved issues in administrative law is whether, and to what extent, a decision-maker must afford procedural fairness in respect of information which is potentially adverse, but is given no weight by the decision-maker in reaching the decision.

The High Court has recently revisited this issue in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72 (6 December 2005).

The facts

Applicant VEAL of 2002 (the appellant) and his partner were refused protection visas by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). They each sought review of the refusal by the Refugee Review Tribunal (RRT).

After the RRT's review had commenced, but before it had made a decision, the RRT received (via DIMIA) an unsolicited letter containing allegations against the appellant. The letter contained the author's name and address but asked that the information in the letter be kept 'secret'. The letter contained allegations against the appellant that bore upon whether he had a well-founded fear of persecution for a Convention reason.

During the review, the RRT did not inform the appellant that it had the letter, it did not inform the appellant of the allegations made in the letter, nor did it ask the appellant about the substance of those allegations.

The RRT affirmed DIMIA's decision to refuse the protection visas. At the end of the RRT's reasons for decision, the RRT stated that it gave 'no weight' to the letter because it could not test the claims made in the letter. The RRT further stated that it decided the matter solely for reasons which did not take into account the information contained in the letter.

The decision

The High Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) delivered a joint judgment in this matter, holding that, before reaching its decision, the RRT should have informed the appellant of the substance of the allegations made in the letter and asked him to respond to those allegations.

The obligation to afford procedural fairness

Procedural fairness is directed to the obligation to give a fair hearing

The High Court confirmed that principles of procedural fairness focus on the processes by which a decision will be reached and not the decision that is reached. Principles of procedural fairness govern what a decision-maker must do in the course of deciding how their power is to be exercised.

Before reaching a decision, a decision-maker must determine whether information received is credible, relevant and significant. That determination will affect whether procedural fairness must be afforded.

The High Court adopted and clarified Brennan J's statement in *Kioa v West* (1985) 159 CLR 550 that, in an ordinary case, an opportunity should be given to deal with adverse information that is 'credible, relevant and significant' to the decision to be made.

The High Court held that a decision-maker must determine whether information received is 'credible, relevant and significant' to the decision before that decision is made. That determination will affect whether a decision-maker must give a person an opportunity to deal with the information. 'Credible, relevant and significant' is to be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision.

Whether information is credible, relevant or significant is not to be determined by reference to the characterisation given by the decision-maker to the information in the reasons for decision. In the present case, the RRT's statement in its reasons for decision that it gave no weight to the letter did not demonstrate that there was no obligation to provide an opportunity to respond to those allegations. Nor was the RRT relieved from affording procedural fairness because it could reach its decision on other bases.

The High Court held that the information contained in the letter could not be dismissed from further consideration by the decision-maker and procedural fairness required that the RRT draw the appellant's attention to the information.

How should the RRT have drawn the information to the attention of the appellant?

The High Court held that procedural fairness required that the substance of the allegations made in the letter be provided to the appellant and that the appellant be asked to respond to those allegations.

This case posed the difficult problem in that the letter had been supplied confidentially by a person wishing to remain anonymous but the information in the letter bore on whether the appellant was entitled to a protection visa.

The High Court noted that the fact that the author of the letter asked DIMIA to keep it secret did not mean that equitable principles about confidential information were to be engaged in deciding what course the RRT took. Rather, the nature and extent of the RRT's obligation to disclose the information were regulated by the *Migration Act 1958* (the Act) and the obligation to afford the appellant procedural fairness.

The High Court held that, in this case, the content of the obligation to afford procedural fairness was to be identified by reference not only to the particular provisions of the Act but also by reference to the scope and objects of the Act as a whole. In that latter regard, it was important to keep two propositions at the forefront of consideration. First, the Act required that those persons entitled to a visa be granted the visa, and those not entitled to a visa not

be granted a visa. Secondly, the RRT was exercising executive power (as opposed to judicial power).

As the RRT was exercising executive power, the steps the RRT was bound to take to afford procedural fairness were not necessarily the same as the steps a court should have taken when deciding a matter by adversarial procedures. Notwithstanding this, the High Court recognised that public interest immunity considerations which informed the procedures of courts may also inform the content of the RRT's obligation to afford procedural fairness. However, care must be taken when transposing what is said about public interest immunity and its application to those who inform police about criminal activity, to the wholly different context of inquisitorial decision-making by the Executive.

In identifying what procedural fairness required in the present case, it was necessary to recognise the important public interest in ensuring that information from informers is not denied to the Executive Government when making its decisions. However, the existence of that public interest did not mean there was an absolute rule against a decision-maker disclosing information supplied by an informer or disclosing the identity of an informer. The application of principles of procedural fairness in a particular case must always be moulded to the particular circumstances of that case.

In the present case, the RRT was required to review a decision of the Executive made under the Act and to decide whether the appellant was entitled to the visa he claimed. The information contained in the letter was relevant to that inquiry and could not be ignored. However, giving the letter to the appellant or telling him who wrote it would give no significance to the proper administration of the Act, which required that those entitled to a visa be granted a visa and those not entitled be refused. It was in aid of that important public interest that, so far as possible, there should be no impediment to the giving of information to authorities about claims made for visas. In this case, that public interest could be accommodated with the need to afford the appellant procedural fairness, by telling the appellant the substance of the allegations in the letter. As the appellant would not know the identity of the person making the allegations, any response to the allegations would need to be considered in light of the fact that the credibility of the author could not be attacked.

Implications for clients

Administrative decision-makers will not be able to relieve themselves of the obligation to afford procedural fairness by disavowing reliance on certain information in the reasons for decision, or by making their decision on other bases unrelated to the information.

If a decision-maker receives adverse information, they must determine, before the decision is made, whether the information is credible, relevant and significant to the decision to be made. If so, procedural fairness will likely require that some form of that information (even if it is secret) be provided to a person affected by the decision for comment. The extent to which the information must be given to the person for comment will depend on a number of considerations, including the nature of the information concerned, the circumstances in which the information was received, the relevant Act under which the decision is to be made and the public interest in the proper administration of that Act.

Text of the decision is available at:

http://www.austlii.edu.au/au/cases/cth/high_ct/2005/72.html

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