Recent developments in procedure and case law

By John Gibson

Photo © Jeremy Scheerlinck

PROCEDURE

The Federal Magistrates Court (the FMC) became the court of original jurisdiction in all but a handful of migration matters in 2006 after the *Migration Litigation Reform Act* 2005 (the Reform Act) came into force on 1 December 2005.[1] The Reform Act also imposed restrictive procedural steps, including arbitrary time limits for anyone challenging refugee and migration decisions (up to 84 days from the date of actual notification where an extension is granted by the court);[2] and mandatory certification by a legal practitioner (if on the record) that there are reasonable grounds for believing that the application has reasonable prospects of success.[3] There are now adverse costs implications for those encouraging the bringing of unmeritorious applications,[4] and amendments to the Magistrates Court Rules have introduced a 'show cause' process, leading to a number of cases being struck out at an early stage of the proceedings.

Over the past year, the FMC in Sydney has handed down judgment in as many as four times the number of cases as that of the Melbourne registry,[5] although having a far higher percentage of unrepresented litigants than elsewhere. A significant minority of judgments have set aside the administrative decision that was the subject of the proceedings. Some of these cases are probably the result of a large number of individual actions still in the pipeline in which the applicant was formerly part of one of several class actions. Nonetheless, the number of judicial review applications has decreased since the Reform Act came into force, especially in the refugee jurisdiction. The number of cases heard by the Refugee Review Tribunal (RRT) has fallen dramatically, in line with fewer on-shore applications being lodged in the first place. Conversely, the number of Migration Review Tribunal decisions (MRT) being challenged has risen proportionate to the overall number of new cases. Despite concerns about the impact of the new costs provisions, provided that due consideration is given (by seeking counsel's advice or otherwise) to the existence of jurisdictional error in the decision of the delegate or the minister, the fear of a personal costs order should not inhibit the commencement of proceedings.

SIGNIFICANT JUDGMENTS

Following the shift to the FMC as the court of first instance, the number of full Federal Court judgments has dwindled markedly and, invariably, with some notable exceptions, appeals from the FMC are heard by a single judge.[6]

A judgment that has affected the available grounds of jurisdictional error is that of the full court in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs*.[7] This concerned the obligation of the RRT and MRT to give an applicant information that it considers would be the reason or part of the reason for affirming the decision under review. 'Information' refers to 'knowledge of relevant facts or circumstances communicated to or received by the Tribunal'.[8] The use of that term was rightly criticised in *SZEEU* by Weinberg J: '"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.'[9]

It was decided in *SZEEU* that, so long as information played a part in the ultimate decision by the tribunal to affirm the decision under review, the s424A/s359A(1) obligation was engaged. Information (which the court confirmed extended to omissions or inconsistencies – that is, what was not said prior to the review stage but was raised at the tribunal) included all information put to the delegate at the time of the initial application. The issue of whether unfairness was occasioned by the breach does not play any role in determining whether non-compliance has occurred. To fall within the exception to the obligation contained in s359A(4)(b)/s424A(3)(b), the applicant should actively give specific information for the purposes of the review (in chief or in response to questioning).[10] The combined effect of *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*,[11] which held that s424A was a mandatory provision requiring compliance in writing, and *SZEEU*, has been to create a situation in which the minister has either remitted matters by consent, or magistrates and judges have quashed tribunal decisions[12] in a large number of cases. Legislation was put before Parliament at the end of 2006 to enable tribunals to put matters orally to satisfy their s424A/s359A obligations and to remove written material provided at the application stage from the ambit of the sections. Given that the scope of the provisions attempting to confine the 'natural justice hearing rule' to the procedural code contained in the Act[13] has not been clarified,[14] the strong public policy rationale for having broad grounds of natural justice available,[15] and the highly technical nature of the inquiry that the courts had to undertake in relation to s424A and s359A, it would be far preferable for the executive to reinstate the common-law rules of procedural fairness and remove s424A altogether.

In terms of substantive law affecting refugee and migration decisions, the courts have clarified and interpreted the criteria of various migration visa classes. In *Huynh v Minister*

for Immigration & Multicultural & Indigenous Affairs,[16] for example – the case of a child who turned 18 and had to fulfil the requirements of reg 1.05A(1)(a)(i) for the grant of a Partner (Provisional) (Class UF) Visa – it was held that the child did not have to have a lack of choice before s/he can be said to be wholly or substantially dependent or reliant on the parent for the relevant financial support. The question that the regulations ask is merely whether the child is relying on the parent for support, not whether the child *needs* to rely on the support.

In overturning the judgment of the court at first instance, the full court in *Minister for Immigration & Multicultural & Indigenous Affairs v Zhou*[17] rejected the existence of any legal nexus between the cancellation provisions under the s116 process and the notice provisions of s20 of the *Education Services for Overseas Students Act* 2000 (Cth). While the respondent in that case was unable to raise issues of exceptional circumstances to excuse her breach of a visa condition, changes that came into effect for visas in force on 7 October 2005 meant that such considerations can now be invoked in order to stave off cancellation of a student visa.[18]

In the area of refugee law, a critical issue has been whether holders of temporary protection visas who have already been granted protection, but who must apply for a further visa, must again satisfy the test of Article 1A(2) of the *Refugees Convention*[19] rather than be assessed against the cessation provisions of Article 1C(5). In *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[20] it was held that this is indeed the case: in interpreting s36(2) in the context of a fresh visa application, there is no room for the *Refugees Convention*, which must give way to the Act. In its reasoning, the court overruled by a side wind the clear statement of 6 members of the court made barely 18 months ago in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[21] that the 'the adjectival phrase ... in s36(2) "to whom Australia has protection obligations under [the Convention]" describes no more than a person who is a refugee within the meaning of Art 1 of the Convention'.

One subsection of s36 that has not been the subject of judicial interpretation is subsection (6). Its interpretation may affect the evidentiary standard regarding proof of the nationality of an applicant for the purposes of Article 1A(2) of the *Refugees Convention*.

In immigration law generally, the role of the courts in scrutinising decisions of tribunals, and of the minister and his delegates, remains a crucial one both in terms of identifying any errors and clarifying the law in this area. This is clear from the number of judicial review applications that have been decided in favour of the applicant on the grounds of:

- failure to deal with an element or integer of a claim;[22]
- a misunderstanding or misconstruction of visa criteria (including the Article 1A(2) definition in the *Refugees Convention*);[23] and
- the presence of a fact critical to the decision for which there is no supporting evidence.[24]

Future columns will be devoted to those cases that are of significant interest to migration practitioners. ■

Notes: **1** Sections 476(b) and (c) *Migration Act* 1958 (the Act) deprive the FMC of jurisdiction in AAT matters and character decisions made by the minister personally under s501 and following. **2** There is currently a challenge to the related provision (s486A) affecting the jurisdiction of the High Court in the matter of *Bodruddaza – No S241 of 2006* (High Court). A special case was referred to the full court: *Bodruddaza v MIMA* [2006] HCATrans 518 (21 September 2006). A majority of judges seemed to be favourably disposed, during argument, to the appellant's constitutional submissions. **3** The Act, s486I. **4** The Act, s486E. **5** The other capital city registries have had a relatively minimal migration and refugee case-load. **6** *Federal Court of Australia Act* 1976 (Cth), s25(1A). **7** [2006] FCAFC 2. **8** See *Win v Minister for Immigration and Multicultural Affairs* (2001) 105 FCR 212 at [20]. **9** At [175]. **10** *NBKT v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 195 (20 December 2006). **11** [2005] HCA 24. **12** In excess of 40 judgments. **13** Sections 51A, 357A and 422B. **14** Compare *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* [2006] FCAFC 61 (obiter) and a line of single judge authority taking a restrictive view, and *Antipova v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 584; note that French J in *WAJR v MIMIA* [2004] FCA 106 held that a failure to invite comment on an adverse conclusion not implicitly or explicitly an issue in the hearing and not therefore dealt with by s425 was a breach of procedural fairness the requirements of which were not excluded by s422B. **15** See the principles set out in *Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576. Note that special leave will be sought in *Minister for Immigration & Multicultural Affairs v SZFDE* [2006] FCAFC 142, partly on the basis of unresolved authority as to the meaning and scope of these sections. Note *SZBEL v Minister for Immigration & Multicultural Affairs* [2006] HCA 63 (concerning a common law breach of the rules of natural justice) in which the court indicated an expanded role for s425 of the Act and the court's continued unwillingness to allow the duty of procedural fairness to be unduly circumscribed. **16** [2006] FCAFC 122. **17** [2006] FCAFC 96. **18** The *Migration Amendment Regulations* 2005 (No. 8) have amended the provisions in sch 5 relating to student (Temporary) (Class TU) visas in reg 2.43(2)(b), importing an additional element which the minister must consider before cancelling a visa for breach of a condition 8202. That element is that 'the non-compliance was not due to exceptional circumstances beyond the visa holder's control'. The effect is therefore to place the procedure under s20 of the *Overseas Students Act* and s116 of the *Migration Act* on a similar footing with respect to consideration of exceptional circumstances as the automatic cancellation provisions under s137J. **19** 'The 1951 Convention Relating to the Status of Refugees as amended by the 1967 protocol'. **20** [2006] HCA 53 at [38] per Gummow ACJ, Callinan, Heydon and Crennan JJ (Kirby J dissenting). **21** [2005] HCA 6 at [42]. **22** For example, *Feng v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 846; *SZGVO v Minister for Immigration & Anor* [2006] FMCA 1005; *SBBC v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 925; *SVRB v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 123; *SZGXY v Minister for Immigration & Anor* [2006] FMCA 1035. **23** For example, *SZDAI v Minister for Immigration* [2006] FMCA 988; *SZDAD v Minister for Immigration* [2006] FMCA 987; *VINH QUANG HAN v Minister for Immigration* [2006] FMCA 297; *MZWTX v Minister for Immigration* [2006] FMCA 297; *Wolseley v Minister for Immigration* [2006] FMCA 1149. **24** For example, *NBMF v Minister for Immigration* [2006] FMCA 1265; *SZFWJ v Minister for Immigration* [2006] FMCA 1231; *SXJB & Ors v Minister for Immigration* [2006] FMCA 1536; *SZDCH v Minister for Immigration* [2006] FMCA 78.

John A Gibson *is a member of the Victorian Bar who specialises in migration law. He is the publisher of a quarterly CD Rom on migration and refugee law and procedure and a weekly email Migration Case-Law Newsfeed Service.* **PHONE** *(03) 9642 2110*
EMAIL *irc@rubix.net.au* **WEBSITE** *www.ircon.com.au*