

# Meaning of hearing 'in private'

## *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49

Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ, 5 October 2006

### Issue

The issue in this case was what the expression 'in private' meant, in the context of holding a hearing 'in private'?

### Relevance to NTA

The question raised in this appeal to the High Court was the interpretation of s. 429 of the *Migration Act 1958* (Cwlth) (Migration Act), which provides that: 'The hearing of an application for review by the Tribunal must be in private'. Although the statutory context is somewhat different, the findings in this case may be of relevance to the interpretation of:

- section 136E of the *Native Title Act 1993* (Cwlth) (NTA), which provides that mediation conferences held by the National Native Title Tribunal pursuant to s. 136(1) must be held 'in private, unless the presiding member directs otherwise and no party objects';
- section 154 of the NTA, which provides that the presiding Tribunal member may direct that a hearing (or part of it) for the purposes of an inquiry conducted under s. 139 is to be held 'in private' in certain circumstances;
- section 91 of the NTA, which provides that an assessor presiding over a conference held pursuant to s. 88 may, in appropriate circumstances, direct that the conference, or part of it, be held 'in private'.

### Background

In this case, 'people with whom the appellant was making common cause' were present while the appellant gave evidence before the Refugee Review Tribunal (RRT). The argument put on behalf of the appellant was that privacy demanded that only the presiding RRT member, necessary officers of the RRT, the applicant and the applicant's agent or agents should be present when the applicant is giving evidence.

The Full Court of the High Court rejected this submission, finding that:

- this was 'an unduly narrow and inflexible interpretation of s. 429' of the Migration Act;
- the concept of privacy 'is imprecise, and is not to be equated either with secrecy or isolation';
- 'public' and 'private' are words that are used in contrast but they do not cover the entire range of possibilities;
- since the requirement of privacy is for the benefit of an applicant, the RRT may not allow 'anyone' to be present but people required for the functioning of the RRT (including interpreters, security officers, necessary administrative staff and

witnesses) are clearly contemplated by the statute, 'although privacy may require the exclusion of witnesses when they are not giving evidence' —at [21], [23] and [25].

It was noted that:

A hearing would not be in private if, for example, a Tribunal member decided to invite a group of his or her acquaintances to be present. In such a case the hearing would not be open to the general public, but the applicant's entitlement to privacy would be disregarded. ...The group of onlookers ... would, vis-à-vis an applicant, properly be regarded as members of the public, but the hearing would not be open to the public because ordinary members of the public, other than members of the group of onlookers specially invited to be present, would be excluded —at [23].

### **Friend or supporter allowed**

Subject to any powers of the RRT, their Honours said:

- it was consistent with the statutory purpose, and with common use of language, to treat the concept of privacy as embracing not only agents of an applicant but also the people that an applicant wanted to be present (e.g. an applicant's girlfriend or boyfriend) since: 'A meeting between A and B does not cease to be private if, by mutual consent, one is accompanied by a friend or supporter';
- there may be cases where the RRT would feel a need to impose some requirement of confidentiality upon an applicant's friend or supporter but that issue did not arise in this case —at [26] and [26].

### **Concurrent hearings**

It was noted that s. 429 of the Migration Act does not necessarily prevent hearings of applications wholly or partly concurrently if that course was:

- dictated by the objectives stated in s. 420 of the Migration Act, which concerns the RRT's way of operating and is expressed similarly to s. 109 of the NTA;
- consistent with procedural fairness —at [27].

Their Honours said it was not difficult to think of cases, such as those involving separate applications by members of the one family where that could be appropriate. In some circumstances, s. 429 may present an obstacle to that course but not in the circumstances of this case —at [27].

### **Decision**

The appeal was dismissed with costs, with the court finding that, in the circumstances, the presence of the other applicants while the appellant was giving evidence did not mean the hearing was not 'in private' for the purposes of s. 429 as:

- this was consistent with the purpose of the provision and the proceedings were not open to the public;
- the other applicants present were witnesses upon whose evidence the appellant intended to rely and their presence at the hearing of his application was necessary at least for the purpose of enabling them to give evidence in his support;
- the appellant also knew that his evidence was to be used in support of their claims —at [29] and [31].