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Lawyers acting for government potentially liable for misfeasance in public office

This *Express Law* examines uncertainty as to the application of the legal professional immunity in relation to the tort of misfeasance in public office and abuse of process committed during an administrative review, and the dangers of failing to provide procedural fairness or comply with a tribunal's orders when conducting litigation on behalf of the Commonwealth.

In an interlocutory judgment in *Noori v Leerdam and 3 Ors* [2008] NSWSC 515 in the New South Wales Supreme Court, Smart AJ has found that the plaintiff, an Afghan refugee, has advanced a reasonably arguable case of misfeasance in public office and abuse of process against the lawyer from a private law firm representing the then Minister for Immigration, Mr Philip Ruddock (the Minister) during proceedings in the Administrative Appeals Tribunal (AAT).

The case raises a number of issues which will be relevant to Australian Government departments and agencies involved in administrative review proceedings, and in-house and external lawyers who act in such proceedings.

Background

The plaintiff had applied for a protection visa under s 195 of the *Migration Act 1958* (Cth), but his application was denied. He was informed that his application was denied because there were serious reasons for considering that he had engaged in disentitling conduct within the meaning of Article 1F of the 1951 *Convention Relating to the Status of Refugees*. The 'serious reasons', which were not divulged to the plaintiff, were based on allegations forwarded to the Minister by a member of the Afghan community that the plaintiff had engaged in war crimes and crimes against humanity. The plaintiff alleged that the member of the Afghan community was motivated by malice and a belief that anyone sympathetic to the Soviet regime that was in power in Afghanistan between 1979 and 1989 ought to be denied a protection visa.

The plaintiff applied to the AAT to have the decision reviewed. In the course of the proceedings the AAT made an order that the Minister provide full particulars of the precise crimes relied upon as disentitling conduct. These particulars were not provided prior to the hearing. Further, when the issue of the particulars was addressed at the hearing, the plaintiff and his lawyer were asked to remain outside the hearing room without, the plaintiff alleged, the steps set out in s 35 of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) for a

hearing at which neither the plaintiff nor his solicitor were present being taken. The order requiring the provision of full particulars of the alleged disentitling conduct was not vacated or varied but the plaintiff was not provided any further details of the alleged disentitling conduct, nor a summary of what had occurred whilst he was excluded from the hearing. The plaintiff claimed this prevented him from being able to answer the case against him. The AAT affirmed the decision of the Minister to refuse the protection visa. The plaintiff appealed.

The Federal Court quashed the decision of the AAT, on the basis that the plaintiff had been denied procedural fairness, and remitted the matter to the AAT for rehearing. During the rehearing, adequate particulars were provided to the plaintiff and he was able to respond to these allegations. On 14 October 2005 the AAT concluded that there were no serious reasons for considering that the plaintiff had engaged in any disentitling conduct. The plaintiff was released, six years after initially being detained, on 31 January 2006.

The plaintiff's claim

The plaintiff then commenced proceedings in the Supreme Court of New South Wales alleging misfeasance in public office and abuse of process against the Minister, the Commonwealth and the Minister's legal representatives in the AAT proceedings (the Minister's previous lawyers). In framing his claim the plaintiff relied primarily on the failure to provide adequate particulars of the plaintiff's alleged disentitling conduct and otherwise afford him procedural fairness.

Smart AJ's decision

The Minister's previous lawyers sought orders that the proceedings be dismissed as against them or, alternatively, that the further amended statement of claim be struck out as against them (the strike-out application).

Misfeasance in public office

The central issue relating to the misfeasance in public office claim raised by the strike-out application was whether or not the Minister's previous lawyers could be deemed to be a public officer.

The Minister's previous lawyers argued that the solicitor was only discharging his duty as a legal representative of the Minister and that simply receiving instructions from a public officer does not make the recipient of such instructions a public officer.

However, Smart AJ emphasised that the solicitor for the Minister was required to perform an important function in which the public had an interest. He reiterated that heavy responsibilities attached to the solicitor's position, including organising to have the particulars provided to the plaintiff. He relied on the judgments of Best CJ in *Henly v Mayor & Burgesses of Lyme* (1828) 130 ER 995 at 1001 and Brennan J in *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 to support his view that it is reasonably arguable that the solicitor was a public officer.

He stated:

> Where it is established that in an administrative review there has been a denial of procedural fairness by the deliberate failure by the Minister and his agent/solicitor to supply the particulars ordered of disentitling conduct with the consequence that an applicant for a Protection Visa has

> remained in detention for an extended period (4 years) there is a reasonably arguable case that the person responsible for the failure to supply the particulars has committed the tort where, as here, it was reckless for that person not to appreciate that the probable result of the failure to supply the particulars ordered would be that the plaintiff would not be able to meet the serious allegations made against him and would spend a lengthy period in detention.

Smart AJ appeared to conclude that a legal representative of a Minister arguably occupies a public office simply because he or she is able to bring a measure of independence to bear in the performance of the representation. However, in our view, the source of the required independence must inhere in or derive from the public nature of the office. The independence which a legal representative is able to exert has nothing to do with performance of any public office. It is an aspect of every solicitor–client relationship. It will therefore be interesting to see if the plaintiff's claim based on misfeasance in public office is ultimately successful.

Abuse of process

The second cause of action relied upon by the plaintiff was abuse of process. This claim was framed on the basis that the Minister and/or his previous lawyers acted to give effect to allegations made against the plaintiff by the member of the Afghan community in their non-compliance with the order to provide particulars in the AAT proceedings. The plaintiff claimed that the Minister and/or his lawyers were aware or were recklessly indifferent as to the malicious motivations for the allegations.

The cause of action of abuse of process is concerned with the use of the process of the court for a dominant purpose which is illegitimate. The criterion is whether the improper purpose is the predominant purpose of the moving party (*William v Spautz* (1991–1992) 174 CLR 509, 529).

The Minister's previous lawyers submitted that they could not be liable for an abuse of process because the tort only applied to parties to a litigation. However, Smart AJ held that it is possible for an action for abuse of process to be available against a non-party to proceedings, but acknowledged that these instances will be rare.

Smart AJ also rejected submissions put forward by the Minister's previous lawyers that there was no case against them because the plaintiff had failed to identify any advantage they would gain as a result of the solicitor's alleged conduct. His Honour suggested that it was sufficient that they were advantaged by preventing the applicant from mounting an effective defence to the Minister's case.

Legal professional immunity in administrative processes

The Minister's previous lawyers argued that they were immune from suit. Section 60(2) of the AAT Act provides:

> A barrister, solicitor or other person appearing before the Tribunal on behalf of a party has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

In *D'Orta-Ekenaike v Victoria Legal Aid (VLA)* (2005) 223 CLR 1, the High Court declined to reconsider its opinion in *Giannarelli v Wraith* (1988) 165 CLR 543 that 'an advocate is immune from suit whether for negligence or otherwise in the conduct of a case in court'.

Smart AJ distinguished these cases on the basis that in the present case the plaintiff was not complaining about the conduct of his own solicitor.

Smart AJ considered that the underlying justification for the immunity lies in the importance of achieving finality in the quelling of disputes by the exercise of judicial power (at 121; *Giannarelli v Wraith*). His Honour queried the applicability of such justifications to administrative processes which do not have the same degree of finality as court processes.

Smart AJ (at 143) attached considerable weight to the judgment of Lord Hoffman in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, 215 where it was observed in obiter that the immunity does not apply to malicious prosecution. His Honour concluded that it 'has not been authoritatively resolved whether the immunity applies in the case of the tort of misfeasance in public office or that of collateral abuse of process committed during an administrative review' (at 144) and refused to strike out the plaintiff's claim on the basis of legal professional immunity.

Implications

The decision places considerable emphasis on the responsibility of an administrative decision maker and his or her lawyers to accord procedural fairness to an applicant. To our knowledge it raises for the first time the possibility of a claim for misfeasance in public office and/or abuse of process against both the decision maker and his or her lawyers if this does not occur.

Even where sensitive information is involved in an administrative decision, departments and agencies should be very careful to reveal as much about their concerns about an applicant as they possibly can without compromising the sensitive information. Careful, restrained and precise redacting of sensitive information and summarising sensitive information in a non-sensitive way are two ways this can be done.

The decision is also a timely reminder of the importance of abiding by courts' or tribunals' orders or directions and seeking a vacation or variation of an order or direction if there is a good reason why it cannot be complied with.

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