Procedural Fairness: Tips and Traps for Advising Government Clients

Juliet Lucy

The rules of procedural fairness are now reasonably well settled. Over the last thirty or so years, since *Kia v West* (1985) 159 CLR 550, procedural fairness has grown in stature and importance to the point where there is a presumption that there is an obligation to comply with the principles of procedural fairness whenever a statutory power to destroy or prejudice a person’s rights or interests is exercised. There are some areas, however, in which the rules of procedural fairness continue to evolve.

This paper addresses some issues in the application of the principles of procedural fairness recently considered by courts, namely: how to reconcile tensions between those principles and obligations of confidentiality or privacy; whether administrators are entitled to adopt a uniform approach when dealing with similar material from different members of the public; and what needs to be done when a person affected by a decision is from a non-English speaking background.

Tensions between procedural fairness obligations and obligations of confidentiality and privacy

A question often arises as to what an agency is permitted or required to do when it is making a decision affecting a person and is presented with confidential information adverse to that person’s interests.

The first point to note is that procedural fairness only requires the disclosure of adverse information that is “credible, relevant and significant”. Accordingly, if the information does not meet these criteria it does not need to be disclosed.

The second point is that it is generally only necessary to disclose the nature and substance of adverse material, rather than the actual text or the precise details of all matters upon which the decision-maker intends to rely. This may mean, in some cases, that a decision maker may maintain confidentiality while also complying with procedural fairness.

Thirdly, the consideration that information is confidential may reduce the content of the duty. For example, where questions of national security collide with obligations of procedural fairness,

---

1 Juliet Lucy is a barrister at 13th Floor St James Hall Chambers.
3 *Kia v West* (1985) 159 CLR 550 at 615.
the content of the duty may be reduced to nothingness.\textsuperscript{5} Similarly, where information is confidential, the content of the duty may be reduced, sometimes to nothing.\textsuperscript{6} More often, however, the decision-maker is required to disclose the substance or gist of that information, notwithstanding its confidentiality.

There are unfortunately no hard and fast rules as to what needs to be disclosed, because the rules of procedural fairness are flexible, and require the decision-maker to act fairly in the particular circumstances of the case.\textsuperscript{7}

The High Court considered the relationship between confidentiality and the obligation to comply with the rules of procedural fairness in Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72. In that case, the Department provided to the Refugee Review Tribunal an unsolicited letter in which the author made certain allegations against an applicant for a protection visa, but also asked that his or her identity be kept secret. Without providing the applicant with an opportunity to comment on the letter, the Tribunal affirmed the delegate’s decision to refuse to grant a protection visa, saying it had given the letter no weight.

In a unanimous judgment, the High Court held that the information in the letter was credible, relevant and significant to the decision to be made and that the Tribunal was therefore required to give the applicant an opportunity to respond to it. The Court held that the content of the Tribunal’s obligation to accord the appellant procedural fairness may be informed by the considerations courts taken into account where claims of public interest immunity are involved.\textsuperscript{8} Bearing in mind the different context, it was nonetheless “necessary to recognise that there is a public interest in ensuring that information that has been or may later be supplied by an informer is not denied to the Executive government when making its decisions”.\textsuperscript{9} However, the Court observed that there was no “absolute rule” against disclosing information supplied by an informer, or the identity of an informer, as “the application of principles of procedural fairness in a particular case must always be moulded to the particular circumstances of that case”.\textsuperscript{10}

In weighing the public interest in the proper administration of the Migration Act 1958 against the need to provide procedural fairness, the Court held that it was not necessary to provide the applicant with the identity of the informer or the text of the letter. All that was required was that the Tribunal put to the applicant the substance of the adverse allegations.\textsuperscript{11} This was consistent

\textsuperscript{5} Minister for Immigration and Citizenship v Maman (2012) 200 FCR 30, Flick and Foster JJ at 40 [33]; Leghaei v Director-General of Security [2005] FCA 1576, Madgwick J at [88].
\textsuperscript{7} Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72, the Court at 98-99 [25].
\textsuperscript{8} Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72, the Court at 98 [24].
\textsuperscript{9} Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72, the Court at 98 [24].
\textsuperscript{10} Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72, the Court at 98-99 [25].
\textsuperscript{11} Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72, the Court at 100 [29].
with the public interest in there being no impediment to the provision of information about visa claims to authorities.

A similar situation to that in Applicant VEAL arose more recently in Minister for Immigration and Citizenship v Maman (2012) 200 FCR 30. The Full Federal Court placed more focus upon the need for transparency than the High Court had seven years earlier, suggesting that, in some cases, it would be necessary to provide the text of adverse information and not just the substance of it.

In that case, an applicant for a Partner (Residence) Subclass 801 Visa was rejected on the basis that the applicant did not satisfy the claimed “domestic violence” qualification. The decision maker had regard to an expert report which considered an undisclosed, unfavourable letter written by the applicant’s former wife/sponsor. The Full Federal Court held that the failure to provide the substance of this letter to the applicant was a breach of procedural fairness.

Flick and Foster JJ discussed the need to reveal the identity of a person providing or authoring information (at 43 [40]) and expressed the view that, where “the ‘confidentiality’ arises by reason of a personal relationship between two persons — and where no question of any ‘confidentiality’ to any third party arises — the very fact of the relationship may dictate the disclosure of information which is otherwise properly characterised as truly ‘personal’ or ‘confidential’”. Their Honours went so far as to suggest that, in these circumstances, “the more intensely personal a relationship is, the more necessary it may be to disclose to the other party to that relationship the entirety of the information in question if that party is to be treated in a procedurally fair manner” (at 43 [40]). This is because, “[s]tripped of the context or the manner or the terms in which purely personal information is communicated, an opposing party may be denied a proper opportunity to respond” (at 43 [40]). In their Honours’ view, personal information in a letter “may well take its colour from the terms in which the author of the letter communicates the information; the surrounding context of the letter itself; and the circumstances in which the letter was written” (at 43 [40]), thus necessitating disclosure of the entirety of the communication.

Their Honours held that procedural fairness most probably required disclosure of the entirety of that letter to the applicant (at 45 [46]) but certainly required disclosure of the gist of the letter. Another consideration was that, while the letter may have been confidential in 2006, it no longer had the same degree of confidentiality in 2010 when an expert interviewed the applicant (at 48 [60]-[61]). By this time, the whole of the letter could be disclosed.

Katzmann J generally adopted the reasoning of Flick and Foster JJ but added (at 56 [97]) that she “would not be quite as emphatic about the duty to disclose ‘purely personal’ information,” leaving “open the question whether the duty arises where disclosure would pose an imminent threat to the safety of the source”.

In another case in the same year (Minister for Immigration and Citizenship v SZQHH (2012) 200 FCR 223 at 244 [70]), Flick J expressed the view that the nature of a source may need to be disclosed, even if the gist of the information in a document had already been disclosed. This is because it might be necessary to allow an opportunity to comment upon the particular document:
Common information may be found in a number of different sources. But the reliability, for example, of each of those different sources may be open to question. A breach of the requirements of procedural fairness may arise where a claimant is denied an opportunity to make submissions regarding information contained within (for example) a more reliable source even though the very same information has been disclosed elsewhere in a less credible source.

McColl JA considered the suggestion in Maman’s case that procedural fairness may require disclosure of the entirety of a communication in Director-General, Dept of Trade and Investment, Regional Infrastructure and Services v Lewis (2012) 301 ALR 420; [2012] NSWCA 436, at 439 [73]-[74]. Her Honour pointed out that, in Maman, it was unnecessary to decide whether the entire letter or the gist of it should have been disclosed, because by the time of the appeal, the entire letter had been made available to the applicant. While she did not expressly disagree with their Honours’ reasoning, McColl JA did seek to limit the application of the principle that procedural fairness may require the whole of a document to be disclosed.

A case which illustrates the application of the presumption that the rules of procedural fairness will apply, notwithstanding national security issues, is Plaintiff M47/2012 v Director-General of Security [2012] HCA 46; (2012) 292 ALR 243. In that case, a Sri Lankan applicant for a protection visa was refused the visa, notwithstanding that he had a well-founded fear of persecution, on the ground that the Australian Security Intelligence Organisation (“ASIO”) had issued an adverse security assessment of him. The security assessment process included an interview of the plaintiff (in the company of his legal adviser and a translator) by three ASIO officers.

Public interest criterion 4002 required that an applicant for a protection visa not be assessed by ASIO to be directly or indirectly a risk to security. The plaintiff challenged the decision to refuse the protection visa, on the ground, among others, that he had been denied procedural fairness in the conduct of the security assessment.

ASIO conceded that it owed the plaintiff a duty of procedural fairness. The High Court found that, as a matter of fact, this duty had not been breached because the ASIO officers had put to the plaintiff the important matters in respect of which they made findings against him.12 Heydon J noted that there had been “copious questioning” on certain subjects.13

Bell J observed that the likelihood that the subject of the security assessment would remain in detention for some period if the visa was refused was a consideration which tended “to increase the content of the obligation of procedural fairness in the conduct of the assessment”.14 However, the case was not an appropriate one for consideration of the extent of any curtailment of the obligation of procedural fairness in the conduct of security assessments by reason of

---

12 Plaintiff M47/2012 v Director-General of Security [2012] HCA 46; (2012) 292 ALR 243, Gummow J at [139]-[144], Heydon J at [244]-[253], Crennan J at [378]-[380], Kiefel J at [413]-[415] and Bell J at [491]-[505].
ASIO’s statute and the nature of its intelligence work, since the plaintiff’s case was without substance.\(^\text{15}\)

Finally, agencies are understandably cautious about disclosing personal information, in light of their obligations under the State or federal privacy legislation. However, privacy legislation is unlikely to restrict the disclosure of personal information where this is done in compliance with the rules of procedural fairness.

There is an exception to the prohibition against disclosure of personal or health information in New South Wales where this is “permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law”.\(^\text{16}\) Similarly, the Commonwealth privacy legislation does not prohibit the disclosure of personal information where this is “required or authorised by or under law”.\(^\text{17}\) The former Administrative Decisions Tribunal has held that the principles of procedural fairness are a “law” for the purposes of the State legislation,\(^\text{18}\) and it is likely that disclosure would also be “authorised” by the rules of procedural fairness, where procedural fairness required this, for the purposes of the Privacy Act 1988 (Cth).

**How to avoid a reasonable apprehension of bias when dealing with similar matters or similar applications**

Often decision makers are faced with a large amount of material, from different individuals, which is very similar in nature or raises similar issues. Consistency in decision-making is, at least to some extent, an administrative virtue. However, there is a question as to the extent to which decision makers are entitled to repeat themselves verbatim in relation to different decisions, or to “cut and paste” from one decision to another.

This issue was raised for the consideration of the Full Federal Court in *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223; [2012] FCAFC 45. In that case, an independent merits reviewer considered ten visa applications made by Hazara Shia asylum seekers. Each asylum seeker claimed to fear persecution in Afghanistan because of his or her ethnicity and religion. The reviewer found that Hazara Shias did not face a situation in Afghanistan that gave rise to a well founded fear of persecution. He used a template to record his assessment of the common claims put by all the asylum seekers, repeating verbatim the materials relied on to reject the generic claims in each case. One of the asylum seekers claimed that the decision was void on the ground of apprehended bias.

Rares and Jagot JJ rejected this argument. Their Honours held that the use of a template to express the reasons for rejecting the generic claims did not give rise to an apprehension of bias. In their view, a fair-minded observer would be aware that the reviewer had arrived at his conclusion based on country information and would expect that the reviewer would evaluate each of the generic claims and country information for all those persons, and decide those generic claims generically; that is to say, consistently and fairly (at 238 [46]-[47]).

---

\(^{15}\) *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; (2012) 292 ALR 243, Bell J at [498].

\(^{16}\) Privacy and Personal Information Protection Act 1998 (NSW), s 25(b); Health Records and Information Privacy Act 2002 (NSW), Sch 1, cl 11(2)(b).

\(^{17}\) Privacy Act 1988 (Cth), s 14, Principle 11(1)(d) and Sch 3, cl 2.1(g).

\(^{18}\) *KD v Medical Board (NSW)* [2004] NSWADT 5.
Flick J dissented. His Honour observed (at [79]):

Whatever the ground of review relied upon, a common question in need of resolution is whether a decision-maker has discharged the responsibilities entrusted to him in accordance with law. He may fail to do so if independent consideration has not been given to the particular case before him. The repetition of previously expressed reasons or findings may be an indicator that independent consideration has not been given to a particular case; but the repetition of reasons and findings does not, of itself, dictate such a conclusion.

His Honour also noted (at [89]), that “the verbatim repetition of findings and reasons previously expressed should serve as a reason for caution when a court is called upon to review the decision-making process.” In Fick J’s view, the informed bystander “would be more likely to conclude that the Independent Reviewer has simply ‘copied’ his earlier findings — probably without even re-reading them — let alone considering whether the same findings should again be made” (at 250 [97]).

Although Flick J was in the minority, this case points to the need to take care when repeating previously expressed reasons, as this may, in some circumstances, indicate that the decision maker has not independently considered each person’s application.

There is more likely to be a reasonable apprehension of bias when a decision maker adopts, word for word, the opinion of another person. In one case, it was held that this indicated that the second decision-maker did not apply an independent mind to the decision-making process.19

What to do when the person whose interests are affected by a decision has a limited understanding of English

Many decision-makers are required to deal with members of the public whose first language is not English, and the question may arise as to what the rules of procedural fairness require in terms of ensuring that such persons are given an opportunity to be heard. There are a number of judicial decisions to the effect that, for procedural fairness to be complied with, the opportunity to be heard must be meaningful.20

The issue of whether a person has had a real or meaningful opportunity to be heard in Tribunal proceedings often arises in cases where the person has an inadequate understanding of English and needs an interpreter.21

---

20 Minister for Immigration and Multicultural and Indigenous Affairs v SCAR [2003] FCAFC 126 at [37]; 128 FCR 553 at 561 per Gray, Cooper and Selway JJ (in relation to the requirements of the invitation to be heard under s 425 of the Migration Act 1958 (Cth)); Lowe v Australian Chinese Community Assn of NSW (No 2) [2010] NSWSC 1375, Slattery J at [58]; Towk v Medical Practitioners Board Of Victoria [2008] VSCA 157, the Court at [35]; Minister for Immigration and Citizenship v SZQHH (2012) 287 ALR 523 at [71]; SZRMQ v Minister for Immigration and Border Protection [2013] FCAFC 142 at [44].
provided at all). In the context of the statutory requirement that the Refugee Review Tribunal invite an applicant to attend a hearing under s 425(1) of the Migration Act 1958 (Cth), it has been held that the interpretive standard must be such that it is not “a hollow shell or an empty gesture”.

The Full Federal Court recently considered the standard of interpretation which is required by the rules of procedural fairness in **SZRMQ v Minister for Immigration and Border Protection [2013] FCAFC 142**. An applicant for a protection visa claimed that he had been denied procedural fairness because, during the course of an interview between the applicant and an Independent Merits Reviewer, there were some errors in translation and a failure to translate what was being said. Because this was a non-statutory process, the common law rules of procedural fairness applied.

A previous case had indicated that procedural fairness would be denied, only if it could be shown:

(a) that the standard of interpretation was so inadequate that the applicant was effectively prevented from giving evidence at the hearing; or

(b) that errors were made by the interpreter, which were material to the conclusions which the reviewer made adversely to the applicant (see Robertson J’s judgment at [75]).

The Full Federal Court took a more expansive approach to the duty, relating it to the more flexible concept of fairness. Allsop CJ, with whom Robertson J generally agreed, observed that the “informing norm and root of the principle [of procedural fairness] is fairness” (at [6]). The Chief Justice explained that “fairness” is a normative concept but is nevertheless “an inhering requirement of the exercise of state power” (at [7]). As the purpose of a hearing is to give the person affected by the exercise of power “a real opportunity to place before the repository of the power such information as is relevant,” any necessary interpretation or translation “must be adequate to convey the substance of what is said, to a degree that the hearing can be described both as real and fair” (at [9]).

The question is “whether the applicant has had a real and fair opportunity to put what she or he wanted to put, to understand what was being said to her or him, and to participate in the hearing in a way from which it can be concluded that the hearing was fair, and thus that administrative justice was done” (at [24]). If a misinterpretation prevented material and substantive information being communicated to the decision-maker, there will be a breach of procedural fairness, even if the applicant cannot demonstrate that there was an error in the reasoning process caused by the misinterpretation (at [24]).

As the errors of interpretation did not lead to unfairness in the circumstances of the case, the appeal was dismissed by majority.

There appears to be little authority as to how the obligation to provide procedural fairness applies where a non-English speaking person is affected by a decision, but there is no

---


23 **SZQLS v Minister for Immigration and Citizenship** [2012] FCA 1274; (2012) 134 ALD 267 at [33].
requirement to provide an oral hearing. The same principles would, however, apply. The decision-maker would need to ensure that there was “a substantially effective mechanism of communicating ... written information” to and from the person affected.\textsuperscript{24}

**Conclusion**

The cases considered above provide a useful guide to the application of the principles of procedural fairness in particular situations. However, the flexibility of the rules of procedural fairness, and their chameleon like quality of adapting to the circumstances of a particular case, can make it hard for decision makers to anticipate what the courts would hold to be required of them in any given situation. Allsop CJ’s acknowledgement that the assessment of fairness “is sometimes imprecise in articulation and open to debate” is welcome,\textsuperscript{25} but it does not make the task of a decision maker any easier. It is helpful to remember that the concern of the law is to avoid practical injustice,\textsuperscript{26} and the decision maker should therefore focus upon ensuring, as far as possible, that this occurs. However, once again, practical injustice, like fairness, is a normative concept about which reasonable minds may differ. Taking a cautious approach (for example, by avoiding the verbatim repetition of reasons, or by disclosing as much as may reasonably be disclosed of an adverse document) may be the best way of avoiding successful challenges to administrative decision making.

\textsuperscript{24} SZRMQ v Minister for Immigration and Border Protection [2013] FCAFC 142, Allsop CJ at [9].

\textsuperscript{25} SZRMQ v Minister for Immigration and Border Protection [2013] FCAFC 142, Allsop CJ at [7].

\textsuperscript{26} Re Minister for Immigration & Multicultural & Indigenous Affairs Ex parte Lam (2003) 214 CLR 1; [2003] HCA 6, Gleeson CJ at [37]; Assistant Commissioner Contin v Pampao Pty Ltd (ACN 010 634 689) (2013) 295 ALR 638, Hayne, Crennan, Kiefel and Bell J at 682 [157]