IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M141/2017

B E T W E E N: **CHETAN SHRESTHA**
Applicant

-and-

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR
Respondents

No. M142/2017

B E T W E E N: **BISHAL GHIMIRE**
Applicant

-and-

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR
Respondents

HIGH COURT OF AUSTRALIA
FILED
19 OCT 2017
THE REGISTRY MELBOURNE

No. M143/2017

B E T W E E N: **SHIVA PRASAD ACHARYA**
Applicant

-and-

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOR
Respondents

APPELLANTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Each appeal raises the question: what are the principles that govern whether a Court should decline to make an order for a writ of certiorari, when the Court has found that the decision under review is affected by a jurisdictional error, and when the decision under review involved exercise of a general discretion?

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3. The Appellants submit futility can rarely, if ever, be a basis for refusing relief, when the discretion under review is a general one and its application is affected by a misapprehension of the relevant provisions. This is because:

   a. The correct test to determine whether certiorari would be futile is forward-looking, such that it can rarely, if ever, be said that remittal to the decision-maker would invariably result in the same exercise of discretion.

   b. Alternatively, if the test is backward-looking, asking whether the error made any difference calls for the court to guess whether the Tribunal would have thought about its exercise of discretion differently if the Tribunal had hypothetically applied the law correctly in exercising discretionary power. In such circumstances there would rarely, if ever, be a case where it would be open to a court to find that a different and unidentified line of thinking could not possibly have led to the same exercise of an unfettered discretion.

   c. Further, the broader and more fundamental principle that decisions affected by jurisdictional error are not decisions at all,[1] warrants that relief should be granted in all but exceptional cases. Judicial discretion to restrict relief when a public body has acted unlawfully should be strictly limited.

Part III: *Judiciary Act 1903*, section 78B

4. No notice under s 78B of the *Judiciary Act 1903* is required.

Part IV: Judgment below

5. The appeals are from the orders made by the Full Court of the Federal Court of Australia in *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69.

6. The Full Court heard together the appeals from *Shrestha v Minister for Immigration and Anor* [2016] FCCA 828, *Ghimire v Minister for Immigration and*

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1 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [51]-[53] (Gummow and Gaudron JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

Anor [2016] FCCA 1440 and *Acharya v Minister for Immigration and Anor* [2016] FCCA 1240.

Part V: Background

7. The facts of each of the three appeals are relevantly indistinguishable. Each of the three Appellants applied for subclass 573 student visas. At the time the Minister decided whether to grant their visas, the Appellants were each enrolled in two courses: a diploma and a bachelor degree.[2] Their enrolment meant they met the definition of 'eligible higher degree student' in cl 573.111 of Schedule 2 to the *Migration Regulations 2004*.[3] By reason of meeting this definition, the Appellants were assessed against the 'less stringent' criterion in cl 573.223(1A).[4] It was the satisfaction of this 'less stringent' criterion which led to the grant of the visas. Had the Appellants not met the criterion in cl 573.223(1A), their student visa applications would have fallen to be assessed against the 'more stringent' criterion in cl 573.223(2).[5]

8. Each Appellant subsequently ceased to be enrolled in his respective diploma, but remained enrolled in a bachelor course for some time afterwards.[6]

9. Then, on 5 September 2014, the Appellants were each sent a 'Notice of Intention to Consider Cancellation' (**NOICC**). The NOICC referred to s 116(1)(a) of the *Migration Act 1958* (Cth) (***Migration Act***) and said:

> It appears that the circumstance which permitted the grant of the visa no longer exist. The circumstance which permitted the grant of the visa was that you were an eligible higher degree student as defined by 573.111 of the *Migration Regulations 1994* and satisfied the primary criteria set out in subclause 573.223(1A) of Schedule 2 of the Regulations. It appears that you are no longer an eligible higher degree student, and that therefore, a circumstance which permitted the grant of the visa no longer exists.[7]

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2 *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [59].
3 *Ibid* at [59].
4 *Ibid* at [56].
5 *Ibid* at [56].
6 *Ibid* at [61].
7 *Ibid* at [65].

10. Each Appellant's visa was subsequently cancelled by a delegate of the Minister.[8]

11. Each Appellant sought review in the then-Migration Review Tribunal. The Tribunal, in each case constituted by the same member, affirmed the cancellations.[9] The Tribunal found that when the Appellants ceased to be enrolled in their respective diplomas, they ceased to satisfy the definition of 'eligible higher degree student' (**the EHDS definition**), and that there was no evidence to show that they otherwise met the EHDS definition.[10] That, according to the Tribunal, enlivened the discretion in s 116(1)(a) of the Act to cancel the visas.[11]

12. The discretion in s 116(1)(a) of the Act to cancel the visas was unfettered.

13. The Tribunal purported to exercise the discretion in each case and affirmed the delegate's decision to cancel the Appellants' visas.[12]

14. The Appellants each sought review in the Federal Circuit Courts, where their applications were dismissed.

15. On appeal in the Full Federal Court, Charlesworth J found that the Tribunal erred when it considered whether the cancellation discretion was enlivened, by asking the wrong question. Her Honour considered that it was incorrect for the Tribunal to have focussed on whether the Appellants still met the EHDS definition. Rather, her Honour considered that the correct question was whether the Appellants remained enrolled in the courses that they were enrolled in at the time of their visa grant.[13] As a result, the Tribunal's decision was affected by jurisdictional error.[14] Justice Bromberg agreed.[15]

16. However, despite finding that there was a jurisdictional error, their Honours separately concluded that relief should be refused as a matter of discretion. Charlesworth J said at [126]:

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8 *Ibid* at [66].
9 *Ibid* at [69].
10 *Ibid* at [72], [75].
11 *Ibid* at [72], [75].
12 *Ibid* at [72], [77].
13 *Ibid* at [108]-[110].
14 *Ibid* at [121].
15 *Ibid* at [2]-[6].

> It cannot be said that there is any possibility that the Tribunal would have exercised its discretion any differently than it did, had it not erred in the manner I have identified.

17. Bromberg J said at [16]:

> on the facts at hand and with the requisite degree of clarity, I am satisfied that no different outcome could have eventuated had the right question been posed and answered by the Tribunal in each of the cases at hand. Insofar as it may be necessary that a forward looking assessment must be taken as to the outcome of any reconsideration, I would come to the same view.

18. Bromwich J was in dissent as to whether there was jurisdictional error, but concluded at [21] that if he was wrong, relief should be refused in any event.

Part VI: Argument

The high bar for denying discretionary remedies

19. Discretionary remedies can be refused if their grant would be futile. However, in order for a court to conclude that there would be futility, a high bar must be met. In *Stead v State Government Insurance Commission* (1986) 161 CLR 141 (***Stead***) at 145, the High Court stated discretionary relief would not be granted only if "it would inevitably result" in the same outcome.

20. There have been variations in language used to describe the bar, although there is little, if any, practical difference in the leading judicial postulations of the bar. In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (***Aala***), Gleeson CJ concluded that refusal of a discretionary remedy should occur only if the denial of procedural fairness "made no difference to the outcome".[16] Gaudron and Gummow JJ concluded that refusal should only occur if the same result would "inevitably" be reached; otherwise, it was sufficient to demonstrate the "possibility" of a different outcome.[17] McHugh J concluded that relief should be refused "only when it is confident that the breach could not have affected the outcome".[18]

21. The learned authors in Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th edition, Law Book Co at

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16 (2000) 204 CLR 82 at [4].
17 (2000) 204 CLR 82 at [80]. See also [57]-[58].
18 (2000) 204 CLR 82 at [104]. See also (2000) 204 CLR 82 at [145]-[148] (Kirby J), [172] (Hayne J), [211] (Callinan J).

[17.150] state the threshold for refusing mandamus to be understood in similarly high terms:

> There is in all of these instances a real danger in saying that the ultimate outcome is obvious. Unless the eventual outcome is crystal clear, a consideration of a likely outcome might shade into a consideration of the desirable outcome, which is something that must be left to the primary decision-maker.

22. In *R v Chief Constable of the Thames Valley Police Forces, ex p Cotton* [1990] IRLR 344, Bingham LJ also set out six reasons for expecting that refusal of discretionary remedies would be rare:

> (i) Unless the subject of the decision has had an opportunity to put his case, it may not be easy to know what case he could or would have put if he had had the chance.
>
> (ii) As memorably pointed out by Megarry J in *John v Rees,* experience shows that that which is confidently expected is by no means always that which happens.
>
> (iii) It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
>
> (iv) In considering whether the complainant's representations would have made any difference to the outcome, the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
>
> (v) This is a field in which appearances are generally thought to matter.
>
> (vi) Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied.[19]

23. A common thread through several of Lord Justice Bingham's propositions is that for a court to conclude that relief would be futile would be for the court to engage in merits review.

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19 Lord Justice Bingham, 'Should Public Law Remedies Be Discretionary?' (1991) *Public Law* 64 at 72-3.

The Court should have granted relief, whether it took a forward- or backward-looking approach

24. Although the settled understanding is that the bar for refusing relief is high, existing case law is unsettled as to whether the correct test in determining whether the bar is met, is a forward- or backward-looking one.

25. The differences between forward- and backward-looking tests were discussed in *Giretti v Deputy Commissioner of Taxation* (1996) 70 FCR 151 (***Giretti***), and arise because of differing interpretations of *Stead*. In *Giretti*, Justice Lindgren explained at [36] that often, the two tests would lead to the same result. On the facts of *Giretti*, Lindgren J considered that on either test, the discretion to make a sequestration order against Mr Giretti would still have been exercised in the same way.

26. Justice Merkel also considered at [53] that "in most cases", the result would be the same. However, his Honour considered at [56] that a backward-looking test was inconsistent with *Stead*. In any event, Merkel J concluded that neither the forward- and backward-looking tests removed the possibility of a different result.

27. Justice Merkel explained at [71]-[72] that it was open to Mr Giretti to take an entirely different approach at any rehearing that would occur upon granting of relief, and thereby present a different factual matrix to the decision-maker. So understood, a forward-looking approach (contrary to Lindgren J's reasoning at [39]) does not require the Court to engage in any "speculation or guesswork" at all; the fact of a possibility that the evidence may unfold differently upon rehearing is self-evident, and it is unnecessary and undesirable for the Court to predict what might happen upon rehearing.

28. In *Lee v Minister for Immigration and Citizenship* [2007] FCAFC 62 (***Lee***) at [51], Besanko J applied Merkel J's approach, favouring a forward-looking test in the sense that Merkel J described (as opposed to Lindgren J's narrower formulation of a forward-looking test).

29. In *Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492 (***Ucar***) at [72]-[74], Redlich JA discussed the risks of the backward-looking test, and also referred to Merkel J's analysis in *Giretti*. Redlich JA observed:

> Amongst the arguments advanced by Merkel J in favour of the "forward-looking" test was the notion, inherent in administrative or common law remedies of remitting a matter for rehearing where procedural fairness had been denied, that the rehearing may proceed quite differently and more advantageously to one of the parties than the original hearing.

30. Although Redlich JA did not arrive at a conclusion in *Ucar* couched in terms of the correctness of the forward-looking test over the backward-looking test, it is clear that his Honour also had doubts about whether a backward-looking test was consistent with the principle identified in *Stead*. Redlich JA observed at [79]:

> **[79]** The degree of *causal* connection between the alleged breach and the reasons for decision is not a relevant inquiry. The first way in which relief may be refused calls for an assessment of whether the matter to which the procedural fairness relates could possibly have affected the decision. It will have done so where the procedural unfairness went to an issue that was in controversy that was material to the decision. If such a connection is identified, it is immaterial what, if any, actual effect the procedural unfairness had upon the decision-maker. Cases that have analysed the material before the decision maker and asked whether the decision may have changed had the appellant been afforded a proper opportunity to respond are difficult to reconcile with the principle as stated in *Stead* and as applied in *Kioa, Aala, SAAP* and *Veal*. (footnotes omitted)

31. Chief Justice Warren and Chernov JA agreed with Redlich JA: [1] and [33].

32. Justice Merkel's reasoning that the correct test is a forward-looking test, and that on such a test the Court should not engage in speculation as to how a rehearing might unfold, is the preferable approach. This is because it is the approach most consistent with principle.

33. First, as is apparent from the observations of both Merkel J and Bingham LJ (cited by Merkel J at [60]-[61] of *Giretti* and Redlich JA at [74] of *Ucar*), the backward-looking test requires sailing close to, if not, into the territory of merits review. This is particularly the case when the decision that was made was one that involved the exercise of a general and unfettered discretion. Merkel J's forward-looking test avoids this problem.

34. Second, the possibility of a different outcome is intrinsic to the very nature of the exercise of a discretion. This is especially so when the discretion is a

general and unfettered one; the same set of facts may result in different decision-makers arriving at different decisions because of differing evaluative judgments. Further, as Beaumont J observed in *Santa Sabina College v Minister for Education* (1985) 58 ALR 527 at 540, "it is enough that it is possible that the Minister may change her mind".

35. On the other hand, a backward-looking test presupposes that a discretion can only be exercised in a particular way. That would be inconsistent with the nature of the discretion being general and unfettered.

36. Third, the forward-looking test is implicit in the line of cases that have established that where there has been a denial of procedural fairness, relief will typically be ordered on the basis that the possibility of a successful outcome cannot be discounted.[20] This is because the rehearing "may proceed quite differently and more advantageously to one of the parties than the original hearing".[21] As Bingham LJ explained, "it may not be easy to know what case he could or would have put if he had had the chance".[22]

37. As Besanko J described it more directly in *Lee* at [53], there was every possibility that the appellants there would introduce fresh evidence upon a rehearing such that the fresh decision would have to be in their favour.[23]

38. The forward-looking test maintains consistency with the jurisprudential underpinnings in the cases concerning relief where courts find procedural unfairness; there is no sound principled reason to treat the jurisdictional error of the kind identified by Bromberg and Charlesworth JJ in the present appeals any differently.

Continuing legal effect of a decision affected by jurisdictional error

39. Aside from the forward- and backward-looking question, the appeals should be resolved in favour of the Appellants for a more fundamental reason.

40. The fact of there being a discretion to refuse relief is apparent from *Stead*.

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20 See eg *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Gill v Minister for Immigration and Border Protection* [2017] FCAFC 51,

21 *Giretti v Deputy Commissioner of Taxation* (1996) 70 FCR 151 at [68].

22 *R v Chief Constable of the Thames Valley Police Forces, ex p Cotton* [1990] IRLR 344.

23 See also *Giretti v Deputy Commissioner of Taxation* (1996) 70 FCR 151 at [79].

41. But as Gaudron and Gummow JJ observed in *Aala* at [55], the discretion to refuse relief is to be "exercised lightly" because of, ultimately, considerations of the rule of law:

> No doubt the discretion with respect to all remedies in s 75(v) is not to be exercised lightly against the grant of a final remedy .... The discretion is to be exercised against the background of the animating principle described by Gaudron J in *Enfield City Corporation v Development Assessment Commission*. Her Honour said:
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> "Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less."
>
> (footnotes omitted)

42. It is also well-understood from *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 that a decision affected by jurisdictional error is "no decision at all".[24]

43. Together, *Aala* and *Bhardwaj* reveal a dilemma: refusal of discretionary relief means that an unlawful decision is nonetheless given a continuing practical effect, even though that was not what was intended by Parliament (such intention being the very thing that gives rise to the jurisdictional error: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93]). As Perram J observed extra-curially:

> By refusing to set aside the decision one is giving effect to the very thing which one has just concluded Parliament has said

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[24] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [51]-[53] (Gummow and Gaudron JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

> must not be given effect. This makes no sense; it is internally inconsistent.[25]

44. In cases of purported futility, resolution of the dilemma can only occur if the granting of relief is not subjected to a discretion.

45. There is a principled consistency between that proposition and the empirical observation that remedies almost always flow in cases of denial of procedural fairness; the notion of futility is subordinated by the broader concern for "procedures rather than outcomes"[26] (cases such as *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 where an independent basis exists being a cogent principled exception).

46. As Lord Justice Bingham observed extra-curially, where unlawful conduct in the public sphere is shown to have occurred or to be threatened, judicial discretion to refuse relief "should be strictly limited and the rules for its exercise clearly understood".[27]

Errors in the Full Federal Court

47. Justices Bromberg and Charlesworth were each wrong to refuse relief as a matter of discretion.

48. In doing so, their Honours gave practical effect to Tribunal decisions that were unlawful, by reason of the decisions being affected by jurisdictional error. Parliament did not intend that a cancellation should be lawful if the statutory precondition for cancellation was not identified.[28] After all, Bromberg and Charlesworth JJ concluded that the Tribunal in each case did not correctly identify the precondition for cancellation, and that amounted to a jurisdictional error.

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25 Justice Nye Perram, 'Project Blue Sky: Invalidity and the evolution of consequences for unlawful administrative action' (2014) 21 AJ Admin L 62 at 69. As Perram J indicates, there is also an unresolved question as to whether decisions affected by jurisdictional error are 'void' or 'voidable': see eg "rival theories of invalidity": *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [68]-[75], [101]-[123] (Kirby J). Compare with [51]-[53] (Gummow and Gaudron JJ, McHugh J agreeing). See also [12]-[15] (Gleeson CJ), [144]-[157] (Hayne J), [163] (Callinan J).

26 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [54]-[55] (Gageler and Gordon JJ).

27 Lord Justice Bingham, 'Should public law remedies be discretionary?' (1991) *Public Law* 64.

28 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389.

49. Further, in concluding that the grant of relief would not have made any difference to the outcome, their Honours applied a backward-looking test,[29] which, for the reasons set out above, was the incorrect approach in this case, where jurisdictional error affected the exercise of discretionary power to cancel visas.

50. Although Bromberg J also stated that he would have reached the same conclusion on the application of a forward-looking test, his Honour merely asserted that to be the case.

51. The discretion in s 116(1)(a) to cancel the Appellants' visas was a general and unfettered one. It cannot be said that the same result would be arrived at if relief were granted; the general and unfettered nature of the discretion means that the decision-maker in each case might make a different decision—even on the same evidence. More significantly however, because the test is a forward-looking one, it is open for the Appellants to put forward different factual matrices upon remittal that might have the effect of persuading the Tribunal to exercise the discretion differently when the Appellants have a fresh opportunity to impress the decision maker to exercise discretion in their favour.

52. It otherwise cannot be suggested that relief would be futile, in the sense of there being an independent basis for the cancellation discretion having to be exercised in the same way.

53. On an application of the rule of law as explained in *Enfield City Corporation v Development Assessment Commission*, this is sufficient to compel relief.[30] But the considerations of principle set out at paragraphs 39 to 46 above also demand the same result.

Part VII: Applicable provisions

54. Paragraph 116(1)(a) of the Act was, at the relevant time:

> (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

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29 *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [16] (Bromberg J), [126] (Charlesworth J).

30 *Enfield City Corporation v Development Assessment Commission* (2000) 99 CLR 135 at [56].

(a) any circumstance which permitted the grant of the visa no longer exists;

...

55. Paragraph 116(1)(a) was amended by Item 3 of Sch 2 to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (**Amending Act**) such that it became:

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

(a) the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists;

...

56. The relevant transitional provisions, set out in Item 22 of Sch 2 to the Amending Act, were:

(1) The amendments made by items 1 to 17 of this Schedule apply in relation to a visa held on or after the commencement of those items (even if the visa was granted before that commencement).

(2) If a notification was given under section 119 of the *Migration Act 1958* before the commencement of the amendments made by items 3 and 4 of this Schedule, that Act continues to apply in relation to that notification as if those amendments had not been made.

57. The old version of s 116(1)(a) is the version relevant to the determination of these appeals.[31]

Part VIII: Orders sought

58. In each appeal, as set out in the notices of appeal, the orders sought are that:

1. The appeal is allowed.

2. Set aside the orders of the Full Court of the Federal Court of Australia made on 27 April 2017 in respect of each appellant and in their place order:

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31 *Shrestha v Minister for Immigration and Border Protection* [2017] FCAFC 69 at [96].

a. The appeal is allowed with costs.

b. Set aside the orders of the Federal Circuit Court of Australia and in their place order that:

i. there be an order in the nature of certiorari to quash the decision of the Administrative Appeals Tribunal (**the Tribunal**);

ii. there be an order in the nature of mandamus requiring the Tribunal to review according to law the decision made by a delegate of the Minister to cancel the appellant's visa.

3. The First Respondent pay the appellant's costs of this proceeding and any costs of the proceedings in the Federal Court and Federal Circuit Court.

Part IX: Oral argument

59. The Appellants estimate they will need 2 hours to present oral argument.

60. These written submissions are 14 pages (rather than 20) and the Appellants seek leave to file an 11 page reply in light of the Minister's pending submissions regarding his notice of contention.

Dated: 19 October 2017

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