HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY **NO P 23 OF 2020**

ON APPEAL FROM
THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**
First Appellant

AND: **AAM17**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The appeal brought by the Appellant (**Minister**) and the notice of contention filed by the First Respondent raise four issues:

   2.1. *first*, did the Federal Court err in finding that the First Respondent had been denied procedural fairness by the Federal Circuit Court providing ex-tempore reasons without ensuring those reasons were translated to the First Respondent and providing written reasons to the First Respondent after he had commenced an appeal in the Federal Court (Minister's grounds 2.1 and 2.2);

   2.2. *second*, where there was no impediment to the Federal Court deciding the substantive issues on appeal, did the Federal Court err in remitting the matter to the Federal Circuit Court (Minister's ground 2.3);

   2.3. *third*, was the First Respondent denied procedural fairness because he was denied the opportunity to present his case on appeal with regard to, or on the basis of, the oral reasons for decision of the Federal Circuit Court (First Respondent's notice of contention at [1] and [2]); and

2.4. *fourth*, if the First Respondent was denied the opportunity to present his case on appeal with regard to, or on the basis of, the oral reasons for decision of the Federal Circuit Court, was the Federal Court required to remit the matter to the Federal Circuit Court (First Respondent's notice of contention at [3]).

PART III SECTION 78B NOTICE

3. The Appellant does not consider that any notice is required under s 78B of the *Judiciary Act 1903* (Cth)

PART IV CITATION OF REASONS FOR JUDGMENT

4. Each of the judgments below are unreported. Their medium neutral citations are:

4.1. First instance: [2019] FCCA 1567 (**CAB 28-41**).

4.2. The Federal Court: [2019] FCA 1951 (**AAM17**) (**CAB 48-65**).

PART V FACTUAL BACKGROUND

5. The First Respondent is a citizen of Pakistan who applied for a protection visa in 2014 (**CAB 51** at [3] and [5]). The visa was refused and that decision was affirmed by the Second Respondent (**Tribunal**) (**CAB 52** at [6]).

6. The Applicant sought judicial review of the decision of the Tribunal. That application was heard and determined on 16 May 2019, with the First Respondent appearing in person with the assistance of an interpreter. At the conclusion of the hearing, ex-tempore reasons were given with orders made dismissing the application with costs (**CAB 52 and 54** at [6], [11] and [17]).

7. On 12 June 2019, the First Respondent appealed to the Federal Court of Australia. After the appeal to the Federal Court had been instituted, the Federal Circuit Court published its reasons for judgment (on 18 July 2019) (**CAB 51** at [2]).

8. The Federal Court relevantly found that the reasons of the Federal Circuit Court that had been given at the hearing on 16 May 2019 were not interpreted to the First Respondent, so that until he received the Federal Circuit Court's written reasons on 18 July 2019, he "had no explanation at all, which was intelligible to him, of how or why" the Federal Circuit Court had decided to dismiss his application for review (**CAB 56** at

[23]). That was after the time for appealing the decision of the Federal Circuit Court (and after the First Respondent had in fact commenced his appeal (**CAB 51** at [2])).

9. Although the First Respondent had commenced his appeal by the time the Federal Circuit Court's written reasons were published, the appeal was not heard until 6 November 2019 (**CAB 49**). That was approximately four or so months after the First Respondent had received the Federal Circuit Court's reasons. The First Respondent did not amend his notice of appeal or otherwise take any step in the proceeding before the Full Court in reliance upon the Federal Circuit Court's written reasons.

10. There was no express finding made as to *why* the Federal Circuit Court's reasons were not provided to the First Respondent during the hearing on 16 May 2019. In particular, there was no finding that the FCC had directed the interpreter not to interpret those reasons (cf *CQX18 v Minister for Home Affairs* [2019] FCAFC 142, as cited in AAM17 at [28] (**CAB 58**)).

11. The Federal Court held, *first*, that the requirement of procedural fairness in its application to a Court "extends to the provision of reasons for the exercise of judicial power" (**CAB 60** at [35]).

12. *Secondly*, the Federal Court reasoned that the failure to ensure that the First Respondent had reasonable and timely access to the Federal Circuit Court's reasons for decision, in a form that was intelligible to him and did not prejudice his statutory right to appeal within a prescribed time, amounted to a denial of procedural fairness because it led to lost opportunities: in particular, opportunities for the First Respondent to understand for himself why he had been unsuccessful, to consider what he might argue on appeal with reference to the Court's reasons and to secure assistance in formulating his grounds of appeal from a person who could read and understand those reasons (**CAB 64** at [50]).

13. Having found that the First Respondent had been denied procedural fairness, the Federal Court proceeded to consider whether there was any relevant error in the Tribunal's or the Federal Circuit Court's decision. Save for the issue of procedural fairness, the Federal Court found no such error (**CAB 62-64** at [43] to [48]).

14. Despite that finding, the Federal Court set aside the Federal Circuit Court's decision and remitted the matter to a differently constituted Federal Circuit Court having found that was the only way in which the identified denial of procedural fairness could be corrected (**CAB 64** at [5]).

PART VI ARGUMENT

First Issue: the Appellant was not denied procedural fairness

15. The Federal Court's finding that the First Respondent was denied procedural fairness was in error for two reasons:

    15.1. *first*, provision of reasons is not of itself a requirement of affording procedural fairness;

    15.2. *second*, a denial of procedural fairness must involve or result in some practical unfairness or injustice that denies an interested party an opportunity to succeed. Even if the provision of reasons was said to be a requirement of procedural fairness, no practical injustice or unfairness to the First Respondent arose;

The requirement of procedural fairness and the provision of reasons

16. Insofar as the Federal Court in *AAM17* identified that a requirement to provide reasons as an incident of the judicial process (**CAB 60** at [35]), that is uncontroversial. However, it is a distinct requirement from the duty to afford procedural fairness that serves different purposes.[1]

17. Although courts are the paradigm case of a decision maker obliged to proceed fairly, no fundamental distinction is drawn by Australian common law between the obligation to provide procedural fairness in the exercise of administrative, and judicial, power. In both contexts, the obligation is imposed because of the capacity of the decision to affect rights and interests; and in both contexts, the obligation goes to ensure that the decision is made fairly. Thus, even though the well known statement of principle in *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 (that "no general rule of the common law, or principle of natural justice, requires reasons to be given") refers only to administrative decisions,[2] it stands squarely against the reasoning of the Federal Court.

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1 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 109 [191]; *Wainhou v New South Wales* (2011) 243 CLR 181, 213 – 215 [54] – [58]; see also *Public Service Board v Osmond* (1985) 159 CLR 656, 666-667, 675-676; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 258-259.

2 At 662 per Gibbs CJ, Wilson, Deane and Dawson JJ agreeing. This was treated as a correct statement of principle in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 497-498 [43]

18. The Federal Court's conclusion that the obligation to provide procedural fairness extended, at least in the case of judicial decisions, to providing reasons (more precisely, timely reasons in a form that a particular party can understand), is inconsistent with principle and with long standing authority.

19. The duty to afford procedural fairness is an obligation to ensure that the process leading to the making of a decision is practically fair[3] and enables an interested party to have a real and meaningful opportunity to put their case (including to an impartial adjudicator), and answer adverse information, before a decision is made.[4] It is directed to the processes undertaken *before* a relevant decision is made, not after.[5] A critical question is whether any failure of procedure deprived an interested party of "the possibility of a successful outcome".[6] A failure to provide reasons (or timely reasons) with respect to the decisional outcome cannot itself produce an affirmative answer to that question.

There was no practical unfairness or injustice

20. Whether or not the requirement to provide reasons is an incident of the requirement to provide procedural fairness, the Federal Court erred in failing to identify any practical unfairness or injustice which deprived the Applicant of an opportunity to succeed. The relevant loss of opportunity is a loss of opportunity to succeed before the decision-maker, not a loss of opportunity to succeed before another body (even on appeal). Plainly, there is no way that the failure by the Federal Circuit Court to have its oral reasons interpreted, or the dilatory provision of its written reasons, could have affected the first respondent's prospects of success in that Court.

21. The Federal Court erred insofar as it failed to consider whether the First Respondent had, in fact, suffered a practical injustice or unfairness in this sense.[7] At its highest, the Federal Court found that the process adopted by the Federal Circuit Court resulted in

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3 *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1, 13 – 14 [37]; *Minister for Immigration v SZMTA* (2019) 264 CLR 421, 443 [38].

4 *Public Service Board v Osmond* (1985) 159 CLR 656, 663, 666; *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 497-498 [43]; *International Finance v Crime Commission* (2009) 240 CLR 319, 354 [54], 379-384, [140]-[151]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 72 [68], 99 [156], 105 [177], 106-107 [184]-[185].

5 *Public Service Board v Osmond* (1985) 159 CLR 656, 670 per Gibbs CJ.

6 *Minister for Immigration v WZARH* (2015) 256 CLR 326, 343 [60].

7 *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1, 13 – 14 [37]; *Minister for Immigration v SZMTA* (2019) 264 CLR 421, 443 [38].

lost opportunities for the First Respondent to: understand why he had not succeeded before the Federal Circuit Court; to consider what he may wish to argue on appeal and to secure assistance in formulating his grounds of appeal from a person who could read and understand the Federal Circuit Court's written reasons (**CAB 64** at [50]).

22. Those matters do not point to practical injustice even if the concept is expanded to encompass the first respondent's prospects of success in the appeal. The First Respondent received the Federal Circuit Court's reasons some months before the hearing of his appeal. Following receipt, he did not seek to amend the grounds of his appeal. There was no evidence of any point that he wished to raise, but could not raise, as a result of not having the reasons before his appeal was commenced. Nor was there any evidence that he was prevented from taking advice on his appeal.

23. Of course, the Federal Court was itself obliged to afford procedural fairness to the First Respondent (and did so). If the First Respondent had been denied an opportunity to file a notice of appeal which articulated all the points he may have wished to make upon reviewing the written reasons, fairness would have required him to be given that opportunity by the Federal Court. That particular circumstance did not arise here; but any unfairness that might be discerned as arising from the Federal Circuit Court's conduct was able to be (and was) cured by the hearing that the First Respondent obtained in the Federal Court.

24. Finally, contrary to the suggestion at **CAB 60-61** [38], the fact that the First Respondent was self-represented does not diminish the relevance of the absence of any attempt to amend the notice of appeal. That would be so only if he was also unaware that amendment of the notice of appeal was possible. Further, the Federal Court's own consideration of whether there was any error in the Tribunal's or Federal Circuit Court's decision (**CAB 62-64** at [43] to [48]) – presumably embarked upon because the First Respondent was not represented – was also relevant to whether there had been practical injustice or unfairness (as to which, see [25] to [27] below).

Second issue: the Federal Court erred in remitting the matter to the Federal Circuit Court

25. Having identified procedural unfairness, the obligation of the Federal Court as an appellate court was to consider whether that unfairness could be cured by the hearing of the appeal and not to remit the matter on the sole basis that there had been unfairness.

26. The obligation of a court hearing an appeal by way of rehearing[8] is to decide the matters in issue for itself,[9] to correct any error in the result and arrive at the correct answer to the substantive issues in the proceeding.[10] Cases may arise in which that cannot safely be done, and remitter is therefore necessary: for example, if necessary facts were not found, or a procedural failing in the court below makes the evidence and the record of the proceeding in that court unsafe as a basis for deciding the substantive issues; but that was not the case here. Here, the Federal Court expressed no unease about deciding for itself whether the Tribunal's decision was affected by jurisdictional error (**CAB 62-64** at [43] to [48]) and no reason for unease is apparent. The Court's conclusion on that point meant that the judgment of the Federal Circuit Court was correct. There was no sound reason not to give effect to that conclusion in deciding the appeal.

27. The Federal Court was in error to conclude that remitter was the *only* way to correct the identified denial of procedural fairness and that in its absence, the error "will remain uncorrected" (**CAB 64** at [51]). The Federal Court as an appellate court was uniquely placed to remedy any denial of procedural fairness through the hearing it provided; and, having done so, its duty was to give the judgment that should have been given below.

28. Relatedly, the Federal Court's observation that remitter may place the First Respondent in a position of having a further opportunity to persuade the Federal Circuit Court that the Tribunal's decision was in error, and that so much "is a similar consequence to other circumstances where a denial of procedural fairness is identified", is further demonstrative of error (**CAB 64** at [51]). Remitter would have no utility at all unless the Federal Circuit Court could be persuaded that it was free to depart from the Federal Court's conclusion that the Tribunal decision was free from error. If that could be done, the effect of remitter would be to grant the Appellant an opportunity to embark on what would otherwise be an abuse of process: to put an entirely new case where the correctness of the Federal Circuit Court's decision (and the lawfulness of the Tribunal's

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8 Such is the nature of an appeal to the Federal Court: *Western Australia v Ward* (2002) 213 CLR 1, 87 [70]-[71]; *Minister for Immigration v SZVFW* (2018) 264 CLR 541, 553 [21] and 555-556, [30] (per Gageler J).

9 *Fox v Percy* (2003) 14 CLR 118, 127 -128 [27] - [29].

10 *Victorian Stevedoring and General Contracting Co Ltd v Dignan* (1931) 46 CLR 73 at 107; *CDJ v VAJ* (1998) 197 CLR 172 at 202 [111].

decision) had been considered and accepted. That could only be justified if the First Respondent had been denied a proper opportunity to put his case, and thus an opportunity to succeed, in the Federal Circuit Court.

29. Remitter to the Federal Circuit Court was not consistent with the principle of finality of litigation. The undesirability of remitting a matter for further consideration, where an appellate court is able to achieve finality, was recently acknowledged by the Federal Court in its appellate jurisdiction.[11]

Third and fourth issues: the First Respondent's notice of contention

30. The First Respondent's first ground of contention (that he was denied procedural fairness by reason of a lost opportunity to present his case on appeal with regard to, or on the basis of, the oral reasons for decision of the Federal Circuit Court) is hypothetical, raised for the first time here and should not be accepted.

31. *First*, as to the issue of whether loss of opportunity as identified is a denial of procedural fairness, the Minister repeats and relies upon [19], to [22] and [24] above and submits that there was no denial of procedural fairness by the Federal Circuit Court as contended (or at all).

32. *Second*, as to the issue of comparison between the unpublished transcript of oral reasons and the Federal Circuit Court's published reasons, the First Respondent has not established as a matter of fact that there was a relevant variation or that he was unfairly prejudiced in the conduct of his appeal. In the absence of those matters, there is no proper basis upon which the First Respondent could establish the alleged unfairness or its materiality.

33. A Court may revise ex-tempore reasons, even extensively, before publication so as to ensure that the judgment conveys what the judge intended, although it has been said that such revision must not alter the substance of those reasons, or the orders which

[11] *SZULE v Minister for Immigration and Border Protection* [2019] FCA 2136.

they sustain.[12] In a civil (non-criminal) context, the relevant test is whether the change is one of substance in fact.[13]

34. As a general principle an appellate court must accept as the authentic record of the judgment below that which has been approved by the judge after consideration of the ex-tempore reasons. [14]

35. Where a party seeks to allege that a judge has impermissibly altered the substance of their ex tempore reasons, the party must produce evidence in support of that contention. Ordinarily, but not exclusively, that evidence will be provided by a person in attendance at the hearing who is able to give direct evidence of that matter.[15] Similarly, a transcript of the ex-tempore reasons not approved by the judge is not ordinarily published or made available to the parties or public.[16] However, leave may be given granting access to that transcript.

36. The grounds of contention appear to acknowledge authority that, in a civil context, the identification of impermissible variation to ex tempore reasons requires an appellate court to consider the judgment below omitting the impermissible variations.[17] If consideration of the original form of the judgment reveals error, it may follow that the appeal should be allowed. The variation *per se* does not provide a ground of appeal. Hence, the First Respondent relies on an alleged lost opportunity to argue his case by reference to the Federal Circuit Court's oral reasons (the first and second grounds) and an alleged inability of the Federal Court to ascertain whether the oral reasons were affected by error (the third ground).

37. It was open to the First Respondent to raise the matters traversed by the first and second grounds below and to seek evidence relevant to those issues including, for example, by seeking to obtain the transcript of the unpublished ex tempore reasons. The First

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12 *Bromley v Bromley* [1965] P. 111, 114; *Bar-Mordecai v Rotman* [2000] NSWCA 123, [193]-[196]; *Todorovic v Moussa* (2001) 53 NSWLR 463, 468 [41]-[47].

13 *Todorovic v Moussa* (2001) 53 NSWLR 463, 468 [45].

14 *Bromley v Bromley* [1965] P. 111, 116; *Lam v Beesley* (1992) 7 WAR 88, 93–94.

15 *Palmer v Clarke* (1989) 19 NSWLR 158, 162-163; *Khondoker v Minister for Immigration and Citizenship* [2012] FCA 654, [84];

16 *Khondoker v Minister for Immigration and Citizenship* [2012] FCA 654, [84].

17 *Spencer v Bamber* [2012] NSWCA 274, [138] – [139].

Respondent did not do so. That is not explicable by the regrettably delayed provision of comprehensible reasons to the First Respondent. As it is, there is no evidentiary basis for this Court to conclude either that there was a material variation between the Federal Circuit Court's oral and written reasons, or that the First Respondent was denied the opportunity to present his appeal by reference to the former.

38. The only material relevant to these issues is the written judgment of the Federal Circuit Court. It acknowledges the matter was heard and judgment was delivered on 16 May 2019 (**CAB 28**). It is stated that the reasons are a copy of the Circuit Court judge's reasons (**CAB 41**). That tends against the existence of any substantial variation. The Federal Court observed that one available inference was that the Federal Circuit Court had elected not to publish written reasons unless and until an appeal was filed (**CAB 58** at [29]).

39. The third ground was also not advanced below, and might have been met by adducing evidence of the contents of the oral reasons (which would have remedied the alleged impossibility). That is sufficient to establish that the ground should not be permitted to be argued.[18] Further, the material before the Federal Court provided no basis for concluding that the Federal Court's oral reasons differed materially from the written reasons.

40. In any event, the Federal Court had before it all of the evidence adduced in the Federal Circuit Court, which was entirely documentary, and was in as good a position as the Federal Circuit Court to make appropriate findings of fact and apply the law to those facts. It was not a case where findings on the credibility of witnesses were needed. The Federal Court in effect carried out its own review of the decision of the Tribunal (not relying on any essential findings of fact by the Federal Circuit Court) and had no difficulty concluding that the decision was free from relevant error. That makes it highly unlikely that consideration of the Federal Circuit Court's oral reasons would have revealed any error requiring that Court's judgment to be set aside.

[18] *Coulton v Holcombe* (1986) 162 CLR 1, 7-8.

PART VII ORDERS SOUGHT

41. The appeal be allowed.

42. Paragraphs 3 to 5 of the orders dated 25 November 2019 in WAD 316 of 2019 be set aside and in lieu thereof, there be an order that the appeal in WAD 316 of 2019 be dismissed.

PART VIII ORAL ADDRESS

It is estimated that 1 hour will be required for the presentation of the oral argument of the Minister.

Dated: 17 July 2020

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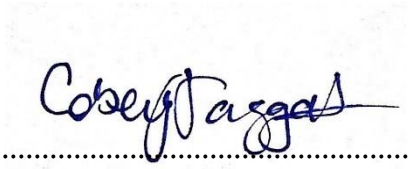

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ANNEXURE OF STATUTORY PROVISIONS

No Constitutional provision, statutes or statutory instruments are referred to in the Appellant's submissions.