



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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Important Information

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BETWEEN:

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

and

AAM17 and another
Respondents

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Outline of propositions

The Minister's appeal

2. The Federal Court (FCA) had before it the evidence that was before the Federal Circuit Court (FCCA) and was in as good a position as the FCCA to determine whether any jurisdictional error affected the decision of the Administrative Appeals Tribunal (AAT).
3. The FCA considered the reasons of the AAT and the FCCA and concluded that, subject to two points, there was no *possible* error deserving of close attention on appeal: CAB 62 [43]. It rejected the arguments advanced by the first respondent as to why the AAT was in error (at [44]-[45]). It then considered the two points and, in relation to each, concluded that there was no error vitiating the AAT's decision (and thus no error by the FCCA): CAB 63 [47]-[48] [AS [26]; Reply [22], [23]].
4. The error by the FCCA, said to justify setting aside its judgment, was a denial of procedural fairness arising because the FCCA did not provide its reasons in a form intelligible to the first respondent in a timely way (CAB 60 [37], 61 [41], 64 [51]). That identified error and resultant relief was wrong.
 - a. Provision of reasons – let alone their provision within a certain time or in a certain form – is not an aspect of procedural fairness. The deficiencies in the FCCA's provision of its reasons (after it reached its decision) could not have deprived the first respondent of a possibility of a favourable outcome in that Court. (Provision of

reasons is an essential aspect of the judicial function and failure to do so may be a ground of appeal; but it was not suggested that such a ground arose here.) [AS [16]-[19]]

- b. Even if deficiencies in the provision of reasons had hampered the first respondent in presenting his appeal to the FCA, that would not go to whether the hearing in the FCCA was procedurally fair [AS [20]-[21]]. But there is no basis to conclude that his appeal was materially hampered [AS [22]-[24]].
5. Even if the FCCA had denied the first respondent procedural fairness, it would not follow that its judgment should be set aside on appeal.
- a. The appeal to the FCA was an appeal by way of rehearing [AS [26]].
 - b. The function of the court in such an appeal is to give the judgment that “ought to be given if the case came at that time before the court of first instance” – in other words to arrive at the correct substantive result and thereby correct error [AS [26]].
- *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 FCR 73, 107; *Allesch v Maunz* (2000) 203 CLR 172 at [23].
- c. In seeking the correct substantive result, the procedures of the FCA were apt to ensure that the first respondent was able to advance any arguments that he wished to [AS [27]].
 - d. There are cases where the correct result cannot be ascertained by the appellate court and remitter is therefore the appropriate means of correcting error. This was not one. There was nothing to prevent the FCA deciding whether the AAT decision was affected by jurisdictional error. The FCA in fact addressed that question and decided it negatively. The appeal should have been dismissed [AS [28] – [29]].

The notice of contention

6. **As to ground 3:** The question was not one of “reviewable error” by the FCCA, but rather whether it had fallen into an error that resulted in its final orders being wrong. The FCA *could* decide that question, and did so (but did not give effect to its decision) [AS [26]; Reply [22], [23]]. There was nothing to prevent it considering the evidence and deciding the issues for itself. [AS [40]]
7. **As to grounds 1 and 2:** Neither the notice nor FRS [24]-[29] is very clear as to whether it is being argued that (a) the procedure in the FCCA was procedurally unfair because it had

certain consequences for the appeal, or (b) the procedure in the FCA was procedurally unfair because the FCCA's oral reasons were not available.

8. *If it is (a)*: The contention does not tackle the basic proposition that procedural fairness is concerned with fairness in the procedure leading to the impugned decision. It merely adds another layer to what was said by the FCA at CAB 60-62 [38]-[39], [41].
9. *If it is (b)*: Two problems arise.
 - a. The FCA was not asked to make any order requiring production of a copy of the FCCA's oral reasons. The fact that those reasons were not before the FCA reflects (at most) a gap in the available material and not an unfair procedure in the FCA.
 - b. If the process in the FCA were procedurally unfair, a question would arise for this Court as to what relief if any should be granted. The present appeal is an appeal *stricto sensu*, where the Court gives the judgment "as ought to have been given at the original hearing" (*Dignan* 46 CLR at 107). No relevant error by the AAT has ever been demonstrated (and none is contended for here). The correct judgment is therefore that given by the FCCA. Alternatively, the matter would go back to the FCA.
10. In any case, the contention fails at a factual level.
 - a. It can only be made out if there was a material divergence between the oral reasons of the FCCA and the later written reasons. There is no evidence of such divergence. Absent any such evidence, the Associate's certification that the written reasons are "a true copy of the reasons for judgment of Judge Street" (CAB 41 line 30) should be taken at face value. (An argument to the contrary, if advanced in the FCA, might have been met by evidence.) **[AS [32]-[34], [37]-[38]; Reply [16], [18]]**
 - b. There is no evidence that the oral reasons of the FCCA were "withheld" or "unavailable" (cf FRS [25], [27]) **[Reply [17]]**. Those reasons were given in open court (albeit not interpreted for the first respondent's benefit), and there is nothing to suggest that the first respondent could not have obtained a transcript of them (cf CAB 59 [30]).
11. The grounds of contention do not demonstrate any appealable error by the FCCA and therefore do not support the orders made by the FCA.

Dated: 3 December 2020

Geoffrey Kennett

Cobey Taggart