



HIGH COURT OF AUSTRALIA

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

No. P23 of 2020

BETWEEN:

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

and

AAM17
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I Form of Submissions

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

Part II Issues

2.

- 2.1. Whether, as a matter of principle, the obligation of the Federal Court to afford procedural fairness in the exercise of a right of appeal from the decision of the Federal Circuit Court extends to the circumstances in which the Federal Circuit Court provided the First Respondent with access to its reasons for decision (Minister's ground 2.1).
- 2.2. Whether the Federal Court erred 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 (interpreted) to the First

Respondent after he had commenced an appeal in the Federal Court (Minister's ground 2.2).

- 2.3. Whether the Federal Court erred in remitting the matter to the Federal Circuit Court (Minister's ground 2.3).
- 2.4. Whether the First Respondent was denied procedural fairness because he was denied the opportunity to present his case on appeal with regard to, or on the basis of, the reasons for decision of the Federal Circuit Court (Notice of Contention Grounds 1 and 2).
- 2.5. On the basis of the Federal Court's factual findings concerning the delivery of the oral and written reasons of the Federal Circuit Court, whether the matter should have been remitted to the Federal Circuit Court for rehearing because it was not possible to ascertain whether there was any reviewable error in the oral reasons for decision of the Federal Circuit Court (Notice of Contention Ground 3).

Part III Section 78B Notice

3. The First Respondent does not consider that any notice is required under s78B of the *Judiciary Act 1903 (Cth)*.

Part IV Contested Facts

4. The First Respondent does not contest the material facts set out in the Appellant's narrative of facts set out in the Factual Background section of Part V of the Appellant's Submissions ("AS"), save that, in respect of paragraph 13 of that document:
 - 4.1. The Federal Court's assessment of whether there was any relevant error in the Tribunal's decision was limited to the question of whether there was any 'obvious' jurisdictional error: [9], CAB 52;
 - 4.2. The Federal Court's assessment of whether there was any relevant error in the Federal Circuit Court's decision was limited to whether the approach taken by the Federal Circuit Court disclosed 'any possible error deserving of close consideration' by the Federal Court: [43], CAB 62;

- 4.3. That assessment was based on reasons published more than a month after the notice of appeal was filed: [49], CAB 64;
- 4.4. There was no way that the Federal Court could compare what was said by the Federal Circuit Court in its contemporaneous reasons with what were the published reasons of the Federal Circuit Court for its orders, including the extent of any similarity between the two sets of reasons: [20(h)], CAB 55 and [49], CAB 64.

Part V Statement of Argument

Ground 2.1

5. The application of procedural fairness is an indispensable requirement of courts established under Ch III of the Constitution.¹
6. Procedural fairness manifested, relevantly, in the requirement that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances.² The concern of the law, in terms of procedural fairness or natural justice, is to avoid ‘practical injustice’.³
7. There is no reason of principle that precludes the consideration of the circumstances in which reasons for judgment are (or are not) made available by a court below as relevant to a determination of what is required to ensure that a decision on appeal from that court is made fairly.⁴
8. It is an essential aspect of procedural fairness that a party has the opportunity to advance their case and respond to the case put against them.⁵ Where there exists a right of appeal and reasons for decision have been prepared by the court below, sufficient access to those reasons is integral to a determination (in the case of the appellant) of whether to appeal, a determination (in the case of the respondent) whether to respond to an appeal, and in

¹ *Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38 at [67] (Gageler J).

² *Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38 at [68] (Gageler J).

³ *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at 14 [37] (Gleeson CJ).

⁴ *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at 335 [30] (Kiefel, Bell and Keane JJ).

⁵ *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 570 (Gibbs CJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at 10 [29], 14 [38] (Gleeson CJ).

either case, a fair opportunity to advance their case and to respond to the case put against them by the opposing party. That is because the fundamental issue on any appeal is error in the judgment that is on appeal.

9. It is apparent that Mortimer J considered whether the circumstances in which the Federal Circuit Court provided access to the First Respondent to its reasons for decision denied the First Respondent procedural fairness in terms of the exercise of his appeal rights: [38], [39], CAB 60-61; [50], CAB 64. For the reasons explained, it was not incorrect, as a matter of principle, for her Honour to do so.

Ground 2.2

10. Justice Mortimer's conclusions as to a denial of procedural fairness did not depend upon the provision to the First Respondent of written reasons for decision: [41], CAB 61-62; cf. Minister's ground 2.2.
11. The First Respondent does not seek to uphold the decision below to the extent that it imposes as a general requirement of procedural fairness that reasons for decision are to be delivered as soon as practicable after judgment or prior to the expiration of the time for appeal: see [37], CAB 60; [41], CAB 61-2. Whether or not procedural fairness has been afforded in the exercise of appeal rights will depend upon the circumstances of a particular case, such as when operative reasons for decision are delivered, whether leave to appeal out of time is granted and, if so, on what terms.

Ground 2.3

12. Remittal is an appropriate disposition of an appeal from the Federal Circuit Court, at least where it is unsafe for the Federal Court to decide the matter itself⁶ or it would be inconsistent with the processes of review as prescribed by the legislature for the Federal Court to 'fill the gap' where there is found to be an inadequacy in the approach pursued by the court below.⁷

⁶ AS, [26].

⁷ *SZKLO v Minister for Immigration and Citizenship* [2008] FCA 735; (2008) 102 ALD 115 at [41]; (2008) 247 ALR 582, 590 (Flick J). In *SZULE v Minister for Immigration and Border Protection* [2019] FCA 2136, Flick J stated at [53] that he adhered to this view. This view was also approved by the Full Federal Court in *BVG17 v BVH17* [2019] FCAFC 17; (2019) 268 FCR 448 at [60]-[61] (Collier & Rangiah JJ).

13. Justice Mortimer found that the Federal Circuit Court gave contemporaneous oral reasons for decision and that those reasons were not intelligible to AAM17 because they were not interpreted for him into a language that he could understand: [23], CAB 56.
14. Those oral reasons were not before the Federal Court: [17], CAB 54.
15. Her Honour also found that the Federal Circuit Court's reasons for judgment were not published until 18 July 2019: [20(g)], CAB 55. Further, that there was no way that the Federal Court could compare what was said by the Federal Circuit Court in its contemporaneous reasons with what were the published reasons of the Federal Circuit Court for its orders, including the extent of any similarity between the two sets of reasons: [20(h)], CAB 55 and [49], CAB 64.
16. Against this background, it is apparent that Mortimer J concluded at [49], CAB 64 that she had no alternative but to remit the matter back to the Federal Circuit Court for rehearing. For the reasons explained below, that conclusion was correct.
17. The contemporaneous reasons of the Federal Circuit Court delivered at the hearing on 16 May 2019 supported the final order made on that date that gave rise to AAM17's right to lodge an appeal to the Federal Court under r. 36.03(a)(i) of the *Federal Court Rules 2011*. The provision of the contemporaneous reasons was the articulation of the Federal Circuit Court's process in arriving at its judgment for the benefit of the parties and the public administration of justice.⁸ Those reasons were the operative reasons for the purposes of the appeal to the Federal Court.
18. The Federal Circuit Court's written reasons⁹ published in Sydney (CAB 31) on 18 July 2019 (CAB 41) contained no statement that they were the reasons delivered orally in Perth on 16 May 2019, nor that they were a settled version of those oral reasons. The Associate's certification dated 18 July 2019 on the final page of the reasons (CAB 41) says no more than the preceding 44 paragraphs are a true copy of the reasons for

⁸ *Quant & Bonde* [2018] FamCAFC 150; (2018) 58 Fam LR 379 at [19] (Murphy, Aldridge & Kent JJ) where their Honours quoted Forrest J in *Kyriakos v Kyriakos* [2013] FamCAFC 22; (2013) 48 Fam LR 618 at [72].

⁹ CAB 31-41. Described as "Reasons for Judgment" in the document title on page 1 of the document (CAB 31); and at the bottom right hand corner of each of the 11 pages of the document.

judgment of Judge Street. The certification does not link those paragraphs to the reasons delivered orally on 16 May 2019.

19. Further, the 'Cover sheet and Orders',¹⁰ consisting of 3 pages (CAB 28-30), which accompanied the written reasons for judgment, stated that the judgment was delivered on 16 May 2019 at Sydney (CAB 28) – however, judgment was actually given in Perth on 16 May 2019: CAB 42.
20. The inability to conclude that the written reasons were the operative reasons for the decision made on 16 May 2019 meant that Mortimer J was deprived of the means to herself review those operative reasons for error.
21. Her Honour's statement at [51] (CAB 64) to the effect that remittal was the 'only one way' to address the deficiencies in the manner in which the reasons in the court below had been delivered, was made in the context of those factual circumstances, and not as a statement of general legal principle.
22. Similarly, Mortimer J's consideration of whether the written reasons for decision disclosed any possible error at [43]-[48] (CAB 62-3) did not resolve the question of whether the operative reasons disclosed error. In any event, her Honour did not find in some absolute sense that the decision of the Tribunal was not affected by jurisdictional error. Rather, she reviewed the materials only to ensure that there was no 'obvious' jurisdictional error: at [9] (CAB 52). It remained the position that Mortimer J was unable to reach a concluded view as to the correctness of the Federal Circuit Court's approach to the exercise of its supervisory jurisdiction in relation to the Tribunal's decision-making: [49] (CAB 64).
23. In these circumstances, the rehearing effected by the remittal of the matter is not inutile and does not offend the principles of finality of litigation.

¹⁰ As this document is described at the bottom right hand corner of the page (CAB 28-30).

Part VI First Respondent's Notice of Contention

First Respondent's Ground 1

24. The factual circumstances described in paragraph 13 above were important context for her Honour's consideration of whether the First Respondent had been afforded procedural fairness in the context of the exercise of his appeal rights.
25. For the reasons articulated above in respect of the Minister's ground 2.1, if a court from which an appeal lies has prepared reasons for decision, the withholding of access to those reasons may well deprive a party of the opportunity to advance their case on appeal and the possibility of a successful outcome there. That is a proposition of general application or principle. Her Honour should have so found.

Ground 2

26. In addition to the fact that the First Respondent was not given access to the operative reasons for decision, as referred to at paragraphs 15-19 above, the Federal Court could not conclude whether and to what extent the written reasons published subsequently conformed to the operative reasons given at the time judgment was delivered.
27. The unavailability to the First Respondent of the operative reasons in these circumstances deprived him of an opportunity to investigate and, if available, make submissions about any disparity between the operative and written reasons and that the operative reasons contained relevant error. That amounts to a practical injustice in the form of the denial of an opportunity which in fairness ought to have been given. It is not necessary for the First Respondent to demonstrate that there was in fact a disparity between the two sets of reasons and error in the operative reasons.¹¹ (cf. AS, [32])
28. As to AS [37], it was also a relevant circumstance in terms of a consideration of whether the First Respondent was afforded procedural fairness to advance his case on appeal that he was unrepresented before the Federal Circuit Court and relied on an interpreter to participate in that hearing: [20(a)], CAB 55. The reasonable inference is that because of these disadvantages, when before the Federal Court, the First Respondent was not aware

¹¹ *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at 343 [59]-[60] (Gageler & Gordon JJ).

of the possible existence of a record of the contemporaneous oral reasons: [21], CAB 55-6.

29. Against that background, Mortimer J ought to have concluded that the First Respondent had been denied procedural fairness because he was denied the opportunity to present his case on appeal with regard to, or on the basis of, the operative reasons for decision of the Federal Circuit Court.

Ground 3

30. This ground of contention is advanced in the alternative, to the extent that the First Respondent's submission is not accepted as to the content of Mortimer J's reasoning in respect of the Minister's ground 2.3.
31. Justice Mortimer relevantly concluded that there was no way to know whether the two sets of reasons were the same: [20(h)], CAB 55; [49], CAB 64. Her Honour also confirmed that the oral reasons were not before the Federal Court: [17], CAB 54. The latter point is uncontroversial and renders the former the same. In those circumstances, the principles that preclude the raising of new arguments on appeal which likely involve evidence or controversial facts do not apply: cf. AS [39].
32. Having regard to those uncontroversial facts, it was not possible for the Federal Court to ascertain whether there was any error in the operative reasons of the Federal Circuit Court. The only appropriate remedy in those circumstances was for the Federal Court to remit the matter to the Federal Circuit Court for rehearing because the review exercise could not be undertaken.
33. It is not the case that the Federal Court had 'no difficulty' concluding that the Federal Circuit Court decision was free from relevant error: AS, [40]. Justice Mortimer considered the written reasons of the Tribunal to the extent to ensure there was 'no obvious' jurisdictional error attending the Tribunal's decision, and which the Federal Circuit Court failed to identify: [9], CAB 52. Her Honour's approach to the question was impressionistic. The conclusion she reached that the Federal Circuit Court decision was not attended by relevant error was limited to that impressionist assessment, and not intended to be definitive or exhaustive.

Part VII Oral Argument

34. It is estimated that one hour will be required for the presentation of the oral argument of the First Respondent.

Dated 13 August 2020

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