IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S244 of 2017

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

and

SZVFW and others
Respondents

APPELLANT'S OUTLINE OF ORAL ARGUMENT

PART I PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The Full Court's approach

2. Despite the Full Court's observation that the primary judge's decision was not a discretionary judgment, the Full Court nonetheless required the Minister to establish an error akin to that in *House v The King* (1936) 55 CLR 499 (**AB 167 [46], [45], [40]–[44], [48]–[55]; AS [25], [36]–[38]; Reply [8]–[11]**).

The applicable principle

3. Where the legislature has given a decision-maker latitude or choice as to the decision to be made, the correctness of a decision can only be impugned by identifying error in the decision-making process: **AS [48]–[50].** Where, as here, there can only be one legally correct decision, regardless of whether reasonable minds may differ as to the outcome or whether the decision involves elements of evaluation, error can be shown by demonstrating that the court below has not reached the correct decision.

Error in approach: Legal unreasonableness

4. The approach taken by the Full Court was contrary to previous Full Court authority (**AS [27]; Reply [4]**).

   - *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [25]
   - *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158 at [94]

Sparke Helmore Lawyers
Level 29, MLC Centre
19 Martin Place
SYDNEY NSW 2000
DX 282 SYDNEY

Contact: Andrew Keevers
Ref: DEP993-00984
Telephone: 02 9260 2427
Facsimile: 02 9373 3599
Email: andrew.keevers@sparke.com.au

5. The approach taken by the Full Court was contrary to principle. As conceded by the respondents, the question whether a decision-maker has exercised a power in a manner that is legally unreasonable has only one legally correct answer and is not to be approached by analogy with cases involving discretions (**AS [28]–[29]; Reply [4]**).

6. The approach taken by the Full Court was inconsistent with this Court's approach in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [31], [77]–[85], [114]–[124] (**AS [30]**).

7. The approach taken by the Full Court was not justified by reason that the appeal was by way of rehearing in which error must be demonstrated. The Full Court was required to consider, for itself, whether the primary judge's conclusion of unreasonableness was correct. A different conclusion on this point would carry with it the conclusion of error. As conceded by the respondents, the Full Court did not undertake this task (**AS [31]–[34]; Reply [5]–[6], [12]–[15]**).

   - *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [25]
   - *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 at [32], [86]–[87]
   - *Austin, Nichols & Co Ltd v Stichting Lodestar* [2008] 2 NZLR 141 at [13], [16]–[17]
   - *Kacem v Bashir* [2010] 2 NZLR 1 at [31]–[33]

8. This was not a case in which the primary judge enjoyed any advantage over the Full Court, as might be so in the case of a factual finding made by the primary judge (**AS [35]**).

   - *Fox v Percy* (2003) 214 CLR 118 at [23]–[31]

Error in approach: "Evaluative" decisions

9. The approach taken by the Full Court was not justified by previous cases referring to "evaluative" decisions by a primary judge which are not "discretions". Those previous cases should be understood as confined to decisions in which there is an element of permissible choice by the primary judge (**AS [39]–[49]**).

   - *Singer v Berghouse* (1994) 181 CLR 201 at 211–212
   - *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [81]–[82], [167]
   - *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (200) 203 CLR 194 at [19], [21]

10. Whether or not a decision-maker has exercised power in a manner that is legally unreasonable is not a question involving any element of permissible choice by a primary judge (**AS [50]**).

The Tribunal's decision was not legally unreasonable

11. The Court is required to assess the Tribunal's decision against the standard of reasonableness indicated by the true construction of the statute (**AS [53]**).

    - *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [66]–[67]

12. The primary judge's doubt as to whether s 441A was satisfied is irrelevant, given the primary judge resolved the matter on the assumption that it was, and no notice of contention was filed in the Full Court, nor in this Court (**AS [53]; Reply [19]**). In any event, the postal dispatch register clearly showed dispatch on 15 August 2014 at **AB 98** was clear.

13. The Full Court's analysis paid insufficient regard to the respondents' previous interactions with the delegate of the Minister (**AS [54]–[55]**). The respondents knew of that hearing (**AB 73.8**) but did not to appear, did not explain their non-appearance and did not provide more information (**AB 74.1** and **AB 4–5 [15]–[17]**).

14. It is insufficient that it was open to the Tribunal to seek to communicate with the respondents by email or telephone. That would in substance impose a requirement that the Tribunal do so in all or almost all protection visa cases, which would be inconsistent with the statutory scheme (**AS [56]**).

15. The outcome in the Full Court in this case belies the proposition, conceded by the respondents, that the approach to unreasonableness remains a stringent one. The Full Court's statement of legal principles omits any reference to this point (**AS [57]; Reply [7]**).

    - *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [108]

16. The proposition that legal unreasonableness is invariably fact dependent does not preclude a Court from having regard to previous decisions in similar cases (**AS [58]–[63]; Reply [20]**).

    - *Donnellan v Woodland* [2012] NSWCA 433 at [197]

    - *Kaur v Minister for Immigration and Border Protection* (2014) 236 FCR 393 at [138]–[141]

Dated: 13 March 2018

Neil Williams **Perry Herzfeld** **Matt Sherman**