IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M77 of 2012

BETWEEN

JAVED HUSSAIN TAHIRI

Plaintiff

MINISTER FOR IMMIGRATION AND CITIZENSHIP

Defendant

10 **PLAINTIFF'S REPLY SUBMISSIONS**

Part I: Internet publication

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

Part II: Reply

2. **Respondent's Submissions (RS) [12]:** The decision of this Court in *Minister for Immigration and Citizenship v SZGUR*[1] does not stand for the principle that, in the absence of a duty to give reasons, an inference cannot be drawn, from absence of discussion of a matter, that the decision-maker did not have regard to that matter. To the contrary, even when a statute does not oblige the decision-maker to give reasons, absence of consideration may well, in the
20 circumstances, support an inference that the decision-maker is applying the wrong test or is not really satisfied of the requisite matters.[2]

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1 (2011) 241 CLR 594, noting there was, in that case, a statutory obligation to give reasons. Nor do the other decisions cited at **RS fn 9** assist the Defendant.

2 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J). See also *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120 (Dixon CJ, Williams, Webb and Fullagar JJ).

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3. The Defendant's submission appears directed at challenging[3] the Plaintiff's submission that the Delegate did not, either than in a rolled-up manner as part of his conclusion, consider who might be the individuals who can lawfully determine where the children are to live.

4. However, in what constitutes (at least in part) reasons for the Decision,[4] there is nothing that shows that the Delegate turned his mind to identification of relevant individuals for the purpose of paragraph (b). Rather, the Delegate proceeded as if paragraph (a) and (b) were equivalent, and plainly excluded all consideration of whether the mother was a person (the only person, the Plaintiff submits) who could lawfully determine where the children are to live.

5. The extraordinarily generous reading by the Defendant of the Delegate's statements, for the purpose of suggesting that the Delegate did not exclude the mother as a person who could lawfully determine where the children are to live,[5] is inconsistent with what the Defendant contends is a correct selection by the Delegate of the applicable law, namely the law of Afghanistan. Plainly, if the Delegate were correct as to the content of that law, it assigns all rights in respect of the children to the father's side of the family to the exclusion of the mother.[6]

6. **RS [17], including footnotes 11 and 12 (also [42]):** It is unclear if, and if so how, the Defendant is seeking to argue, in the interpretative task, for a binding effect of the Hague Convention from the terms of Articles 1 and 2. Whatever the policy documents of the Department might say, the issue remains one of proper construction of a regulation that does not purport to incorporate into Australian law any international treaty obligations. If Articles 1 and 2 of the Hague Convention are relevant to the purpose of PIC 4015, reference should also be made to the Preamble, where it is recognised that the interests of the children are of paramount importance, and to Article 3(b), requiring rights of custody to be actually exercised before a removal can be considered wrongful. In the present case, there is no suggestion of any abduction,[7] and nothing contradicts the conclusion that the best interests of the children would

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3 **RS [13.2(a)].**

4 As the Defendant accepts: **RS [9].**

5 **RS [13.2(a)] and [45].**

6 **SCB [40] :** "*... In both Afghan law and custom, the custody of the minor children would fall to the father's side if there were credible and substantial evidence of the death of the father. ...*"

7 Cf **RS fn 12**, referring to *Nygh's Conflict of Laws in Australia* (8th ed., 2010), 596, fn 121, and the cases there cited for application of the Hague Convention principle that "*abducted children should ordinarily be returned to their place of habitual residence for their futures to be determined by the courts of that place*".

be served by them not continuing to live in Pakistan, but rather living safely and permanently in Australia, reunited with their older brother.

7. **RS [30]-[40] and [45]:** The Defendant's construction requires words to be read into the definition of "*home country*", a strong indication that the proffered construction is erroneous.

8. It may well be that, in a given case, there will be no "*home country*" in respect of a person. That might be what the drafter intended in the particular place in the Regulation where the definition is used, or it might be due to unthinking adoption of the definition in many different places in the Regulations. (It may also be noted that every definition contained in reg 1.03 of the Regulations applies "*unless the contrary intention appears*".)

9. Whatever the case, in respect of "split family" applications for a subclass 202 visa, where cl 202.211(1)(a) does not apply as a time of application criterion nor as a time of decision one,[8] no difficulty is occasioned by the construction advanced by the Plaintiff.

10. A plain misconstruction of the definition of "*home country*" is disclosed, when regard is had to the facts of the case and, further, that on the Defendant's construction the Delegate should have, but clearly did not, with respect to paragraph (b) of the definition, have given consideration to whether each of the children:

    (a) was not usually resident in Afghanistan; and

    (b) was not usually resident in another country,

    before being able to conclude that paragraph (a) of the definition was the applicable one.

11. **RS [41]:** The 6 September letter contains no indication as to what matters had led the Delegate to have already concluded that Afghanistan was the "*home country*" of each of the children, and it is spurious to suggest that such a letter identified the issue of what should be found to be the "*home country*" as one in respect of which an opportunity to comment, or make submissions disputing the conclusion, was being offered to the mother.

12. Further and in any event, the mother's conduct in providing the documents is irrelevant to the question of whether the Delegate misconstrued paragraph (a) of PIC 4015.

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8 *Shahi v Minister for Immigration and Citizenship* (2011) 283 ALR 448.

13. **RS [42]-[45], including footnote 38:** It does not assist the Defendant to seek to rely on the principle in *Wanganui-Rangitikei*,[9] without being able to point to a relevant rule of private international law to which, he asserts, effect should be given by this Court in construing the relevant words of the regulation. To overcome the obstacle, the Defendant wants to have the Hague Convention be given direct effect as if it provided for a choice of law in respect of paragraph (b) of PIC 4015. For the reasons given at [6], such an approach is incorrect.

14. The determination of where the child is to live, which city and/or country, is part of the responsibility of a guardian – at common law, and according to the definition of "*guardian*" in reg 1.03 of the Regulations.

15. Aboriginal and Torres Strait traditional laws and custom are part of Australia's system of law.[10] There is no resultant incongruity arising from the reference to "*custom*" in the definition of "*guardian*" in reg 1.03 of the Regulations.[11]

16. The Defendant's logic, as deployed in the first sentence of **RS [45]**, is but attempt to pull oneself up from one's bootstraps.

17. **RS [52]-[53]:** There is no requirement that the mother prove what she might have said in response to the Delegate putting to her the information regarding "*possible scenarios*".[12] Rather, once information that is credible, relevant and significant is not disclosed to the person affected by the decision,[13] it is for those arguing to sustain validity of the decision to show how the breach of the fair hearing rule could not possibly have made a difference.[14] The information was clearly relevant and it contradicted the mother's evidence that the father had been missing from over 7 years and that she had not heard of him since he had disappeared – accordingly, that he should be presumed to be dead (whether or not the mother said that she believed him to be dead or reminded the Delegate of the presumption of death).

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9 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601 (Dixon J).

10 *Mabo v Queensland (No.2)* (1992) 175 CLR 1, in relation to native title.

11 In fact, an almost identical definition of "*guardian*" is adopted in s 4 of the *Children, Youth and Families Act* 2005 (Vic), an Act whose purposes are the purely domestic ones of: providing for community services to support children and families; providing for the protection of children; and making provision in relation to children who have been charged with, or have been found guilty of, offences.

12 *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541 at 557-558 [91]-[95] (Lee, Goldberg and Weinberg JJ).

13 *Kioa v West* (1985) 159 CLR 550, esp at 628-629 (Brennan J).

14 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

18. The Defendant does no more than assert that the presumption of death is not applicable in the context of administrative decision-making. There is no good reason why it should not, if the issue is one that arises for determination.

19. Nowhere in *Axon v Axon*[15] is it said that there is a requirement to "*make all due inquiries*"[16] before the presumption of death after 7 years can operate.[17] But if there is such a requirement (it would, in any event, be a requirement to make such inquiries as appropriate to the circumstances, meaning they could be nil inquiries), the Delegate should have given the mother an opportunity to address what then would have become the crucial issue, namely, that the Delegate was prepared to depart from application of the presumption of death because the mother had not given evidence about "*due inquiries*".

20. This Court may, under s 144 of the *Evidence Act* 1995 (Cth), take judicial notice of matters that are either common knowledge or capable of verification by reference to authoritative documents. The following matters, at least, fall within those of which judicial notice may be taken: the rise of the Taliban in Afghanistan and their campaign and atrocities against citizens of Hazara ethnicity commencing from 1996; the start of the war in Afghanistan against the Taliban in October 2001, the resurgence of the Taliban from late 2002-2003; the historical fleeing of Hazaras from Afghanistan to neighbouring Pakistan (including to flee their persecution from the Taliban); and the settling of many thousands of displaced Hazaras in Quetta, Pakistan.[18]

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15 (1937) 59 CLR 395.

16 Cf **RS fn 58.**

17 In *Axon v Axon* (1937) 59 CLR 395, Dixon J spoke (at 404-405) of "*reasonable inquiries*" in the context of overturning the presumption of continuance of life, at least in circumstances of danger to the life in question.

18 The Australian Government's "*Country Advice Pakistan*" dated 3 May 2011, used by the Refugee Review Tribunal, states that it is the estimation of Australia's Department of Foreign Affairs and Trade that there are at least 350,000 Hazaras living in Quetta. [Available from www.mrt-rrt.ov.au/Country-Advice/Pakistan/Pakistan/default.aspx]