IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S65 of 2014

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

and

SZRNY
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

APPELLANT'S REPLY

Part I: Certification

1. The appellant (**Minister**) certifies that these submissions are in a form suitable for publication on the Internet.

Part II: Reply

Paragraph 62 of the Minister's submissions

2. In his submissions dated 14 May 2014, the first respondent (**respondent**) contends (at [4], [11(b)], [15]-[16], [24], [42] and [49]) that the Minister has conceded, at [62] of his submissions, that notification of Tribunal decisions in accordance with s 430A forms part of the "review" of primary decisions under Part 7 of the Act. In so far as the respondent is submitting that the Minister has conceded the very issue that he has taken on appeal (that a visa application is finally determined once a decision on a review has been made), that submission should not be accepted.

3. Paragraph 62 of the Minister's submissions needs to be read in context. The point that the Minister sought to make there was that, under Part 7, the Tribunal has certain obligations in addition to its obligation to make a decision on a review. Those obligations include returning documents to the Secretary (s 430(3)), notifying review applicants and the Secretary in accordance with ss 430A, 441A and 441B, and publishing decisions (s 431). But they come after the Tribunal has reviewed a primary decision and are not concerned with when a *decision* of the Minister's delegate is subject to review. The expression, "Part 7 review", is one that the Majority used at 390 [85] and does not appear in s 5(9). By using that expression in his submissions, the Minister merely intended to illustrate that the time at which a visa application is "finally determined" and the time at which the Tribunal has discharged all of its post-decision duties may be different.

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Other matters in reply

4. Contrary to [17] of the respondent's submissions, Buchanan J accepted (at 381-382 [41]) that once the Tribunal made a valid and final decision to affirm the delegate's decision on 12 March 2012, it could not be said that the delegate's decision remained subject to a form of review. That is consistent with the Minister's position.

5. In relation to [18] of the respondent's submissions, the Minister referred to several authorities (at [40]) that support the proposition that the Tribunal's decision-making power in s 415(2) is spent upon a valid decision being made on a review. Once that power has been validly exercised, it cannot be re-exercised (see [41]). It follows that a decision of a delegate of the Minister cannot continue to be subject to review if the Tribunal has made a valid decision on the review. The respondent's submission (at [11(c)] and [60]) that the Tribunal has the power to change its decision (that is, review the delegate's decision) even after it has made a valid decision on a review is contrary to authority and should not be accepted. The respondent attempts to avoid this by submitting (at [24]) that a delegate's decision may be subject to review without being at risk of alteration and that, for that reason, the "review" (within the meaning of s 5(9)) extends beyond the making of the Tribunal's decision. This is a circular argument, however, and does not explain how the *decision* that is being reviewed is still subject to review at the point of notification.

6. At various points in his submissions, the respondent says that a primary decision will remain subject to review until all of the elements of the review have been completed (see, for example, [11(a)], [14], [22]-[24], [31] and [41]). These submissions beg the question.

7. Contrary to the respondent's submissions at [26], the fact that a visa application will be finally determined once the Tribunal's decision has been made and prior to the review applicant and the Secretary being notified of that decision is not "odd". The Act, as the Minister submitted previously, places particular significance on the recording of decisions. The recording of a decision marks the point in time at which the Tribunal completes its review of a primary decision. Section 430A presupposes that the Tribunal has already made a decision on a review.

8. In response to [32] of the respondent's submissions, although the Tribunal's decision in this case was not an oral decision, s 5(9)(a) operates in the same way such that when the review of the delegate's decision has reached the stage where the Tribunal has made an oral decision and is not able to change it, the Tribunal's power under s 415(2) will be spent and the visa application will be finally determined. It is not necessary to determine, for the purposes of this appeal, whether the power under s 415(2) is spent upon an oral decision being made or only when a statement under s 430(1) has been recorded.

9. Further, contrary to [53] of the respondent's submissions, the obligation to despatch to the review applicant and to the Secretary the Tribunal's s 430 statement in accordance with s 430A may be discharged by a Tribunal officer

at the direction of the Principal Member, having regard to the definition of "Tribunal" in s 410 and ss 420A and 458. It need not be done by the member who constitutes the Tribunal for the particular review. In this connection, the Minister notes that the Full Federal Court has held this view in relation to s 425.[1]

10. In response to [33] of the respondent's submissions, the Minister relies upon [38] of his submissions and further says that the preparation of a s 430 statement marks the *end* of the review of the delegate's decision, and not merely "an element of" the review, as the respondent submits. Indeed, the respondent appears to acknowledge this in the second sentence of [33(c)] of his submissions, where he says that ss 440A(5)(b) and (6)(b) "concern reporting in relation to applications for review for which the Tribunal has **reviewed** the decision under s 414 and prepared its s 430 statement, but not within the period specified in s 414A(1)." [Emphasis added.]

11. Those provisions that concern the reconstitution of the Tribunal for the purposes of a particular review (ss 422 and 422A) are not inconsistent with the Minister's position (cf [33], [47]-[52] and [70] of the respondent's submissions). The respondent contends that, because there is an express limitation on reconstituting the Tribunal under s 422A(1) after it has recorded its decision in writing or pronounced it orally (see s 422A(2)(a)) and there is no similar limitation on the Tribunal's power under s 422(1), it must follow that a decision of a delegate of the Minister can continue to be subject to review by the Tribunal after a decision has been made.

12. This, however, is not the correct approach to statutory interpretation and does not focus upon the words of s 5(9). The starting position is to ask when a decision of a delegate of the Minister will cease to be subject to review by the Tribunal. For reasons given in the Minister's submissions and in this reply, that point is reached when the Tribunal makes a decision on the review. The word "review" "has no settled pre-determined meaning; it takes its meaning from the context in which it appears."[2] In the context of reviews by the Tribunal and the Migration Review Tribunal, "the review each must undertake involves a fresh consideration of the application which led to the decision under review."[3] It strains the meaning of the word "review" in s 5(9) to include within it not only the consideration of a visa application and the making of a decision in respect of that application, but also steps that are taken after the making of that decision, such as notifying the parties of the decision.

13. Further, the respondent's submission that s 422 has a broader ambit than the operation of s 422A because of the absence of the restriction in s 422A(2)(a) in the former leads to a curious result. If one imagines a situation where: a Tribunal member has made a decision and prepared a statement under s 430;

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1 *Liu v Minister for Immigration and Multicultural and Indigenous Affairs* (2001) 113 FCR 541 at 545 [16], 51-552 [37] per Black CJ, Hill and Weinberg JJ.

2 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261 per Mason CJ, Brennan and Toohey JJ, cited by French CJ in *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 at 625 [10].

3 *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 at 625 [10] per French CJ.

then given that statement to the Tribunal registry to be recorded and sent in accordance with s 430A; and where the member then ceases to be a member of the Tribunal prior to notification being dispatched by the registry — then, on the respondent's view of s 422, the Principal Member is bound to reconstitute the Tribunal for the purpose of "finishing the review" (namely, effecting notification). That would be so despite the fact that notification by some methods can be effected by any person authorised by the Registrar (see ss 441A(2), (3)) or an officer of the Tribunal (ss 441A(2)-(5)). The respondent's construction of ss 422 and 422A should not be accepted.

14. Contrary to [34]-[39] of the respondent's submissions, the Majority's construction of s 5(9) will have unintended, undesirable consequences. While the Minister accepts that the Majority did not say, expressly, that the Tribunal was bound to reconsider its decision, that is the effect of their Honours' judgment in circumstances where they appeared to accept, as the primary judge did, that the Tribunal's decision was final and valid as at 12 March 2012. The Minister's concession before the primary judge was that the Tribunal will have made a jurisdictional error by failing to invite the respondent pursuant to s 425 to give evidence and make submissions in respect of the complementary protection criterion in s 36(2)(aa) of the Act if, as at 24 March 2012, the Tribunal was able to alter its decision. It was on the Minister's construction of the expression "finally determined" in s 5(9) that the concession was made (cf [35]-[36], [39] and [56] of the respondent's submissions).

15. The present case did not, as the respondent submits at [36], require the court below to consider the circumstances in which the Tribunal may be bound to consider new claims or fresh evidence prior to notifying the parties of its decision. However, the Majority's decision may have that consequence if, as the respondent submits at [60] and [70], the Tribunal has the power to amend or revoke its decision even after it has validly exercised its decision-making power under s 415(2).

16. Contrary to [37] of the respondent's submissions, [30] of the Minister's submissions does not depend upon the Tribunal "failing to notify an applicant of its decision on a review as the Act requires". The Minister agrees with the respondent's submission that the Act "should be construed on the general assumption of compliance by the Tribunal with its terms".[4] However, the Minister's submissions are premised on the Tribunal complying with its notification obligations to the review applicant and the Secretary, albeit notifying each of them at different times within the 14-day period specified in ss 430A(1) and (2). On the respondent's construction of s 5(9), the Tribunal could change its decision even after the review applicant (but not the Secretary) receives notification of the decision and seeks judicial review in respect of it. The Tribunal might, then, re-notify the review applicant of its decision and notify the Secretary. The status of the decision in respect of which the review applicant has sought judicial review is not at all clear. For this reason (at least), the respondent's construction should not be accepted.

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4 *SZGME v Minister for Immigration and Citizenship* (2008) 168 FCR 487 at 492 [13] per Black CJ and Allsop J.

17. Paragraph 40 of the respondent's submissions is made on the assumption of non-compliance by the Tribunal with its statutory obligations, despite his reliance upon *SZGME* at [37]. That is not the proper approach to statutory construction. In any event, ss 198(2) and (6) require unlawful non-citizens to be removed from Australia "as soon as reasonably practicable". The duty of removal "is ... qualified by considerations of practicality which would have to be determined on a case by case basis."[5] Those considerations would include whether the person has commenced judicial review proceedings.[6]

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18. Subsection 430A(3), contrary to [45], [55]-[56] and [69] of the respondent's submissions, is relevant to the construction of s 5(9) and supports the Minister's case, for reasons given at [37] and [50] of the Minister's submissions. It suggests that the Tribunal's decision will be valid and final even if notification in accordance with ss 430A(1) and (2) is not effected. In circumstances where it is valid and final, it cannot, then, still be subject to a form of review under Part 7, as Buchanan J held. The Tribunal's decision-making power is spent when the Tribunal exercises that power under s 415(2). It is not spent when the Tribunal notifies both the review applicant and the
20 Secretary in accordance with ss 430A(1) and (2), as the respondent submits at [66].

19. The Minister notes that the respondent's summary (at [74]) of the position taken by the Full Federal Court in *SZQOY* is not accurate. In his dissenting judgment below, Buchanan J clarified his remarks in *SZQOY* and considered that notification to either the review applicant or the Secretary would suffice to put the Tribunal's decision beyond recall.

20. As to matters not dealt specifically in this reply, the Minister joins issue with the
30 respondent and relies upon his submissions.

Dated: 28 May 2014

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5 *SZKUO v Minister for Immigration and Citizenship* (2009) 180 FCR 438 at 446 [32] per Moore, Jagot and Foster JJ.

6 *SZKUO v Minister for Immigration and Citizenship* (2009) 180 FCR 438 at 446-447 [32] per Moore, Jagot and Foster JJ.