IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S85 of 2014

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

and

WZARH
First Respondent

ADOLFO GENTILE
IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

APPELLANT'S REPLY

Part I: Certification

1. The Minister certifies that these submissions in reply are in a form suitable for publication on the Internet.

Part II: Reply

2. These submissions reply to the respondent's submissions filed on 15 June 2015 (**RS**). Abbreviations employed in the Minister's submissions filed on 22 May 2015 (**MS**) are employed in these submissions in reply.

3. Contrary to RS [2(a)], at [25] of the their reasons the plurality said that procedural unfairness resulted in this case *because* the respondent received a review that was different from, and inferior to, his expectation. The issue identified at MS [3], therefore, arises on the reasons of the court below.

4. It is true, as the respondent asserts at RS [32] and as the Minister accepted at MS [37], that, in making a recommendation to him, the Reviewer was required to comply with the rules of procedural fairness. But to state this proposition does not progress the debate. The respondent has failed to show that procedural fairness was denied in this case, and, in particular, that he was entitled to any oral hearing – much less two hearings.

5. It is not correct to say, as the respondent says at RS [2(b)], that the Minister takes no issue with the Full Federal Court's understanding and application of *Lam*. The Minister has submitted that the court below misunderstood and misapplied *Lam*. That was the Minister's position during the special leave application, and in his submissions on this appeal (see MS [55]-[62]).

Sparke Helmore Lawyers
Level 16, 321 Kent Street
Sydney NSW 2000

Telephone: (02) 9260 2424
Fax: (02) 9260 2486
Ref: Liam Dennis

6. The submission made at RS [2(c)(3)] is inaccurate. The plurality did not "rejec[t]" the Reviewer's statement at [34] of his reasons that he was "assigned to continue with th[e] review"; rather, their Honours said that that language "reveal[ed] a lack of appreciation that the [respondent] had by then suffered a defeat of his legitimate expectation." That is a different point. In any event, the respondent is not asserting that the Reviewer was obliged to conduct a fresh review, in the sense that he was prohibited from having regard to his evidence and submissions before the Previous Reviewer. If, however, the respondent is making this assertion, he has not explained why the Reviewer was obliged to offer to him an oral hearing.

7. In relation to RS [4], the Minister does not dispute that the central issue in this appeal is whether the respondent was denied procedural fairness. However, RS [4] fails to note (and the respondent's submissions do not justify) the Full Federal Court's reasoning, in particular, its reliance on "legitimate expectation".

8. As to footnote 4 (at RS [9]), the Minister notes that a part of the document referred to therein—a Request for Independent Merits Review Information Leaflet (**Leaflet**)[1]—was not before the court below and cannot now be relied upon by the respondent, given that the appeal to this Court is a strict appeal as described in cases such as *Mickelberg v The Queen* (1989) 167 CLR 259, *Eastman v The Queen* (2000) 203 CLR 1 and *Allesch v Maunz* (2000) 203 CLR 172. In any event, nothing in the Leaflet assists the respondent's case.

9. RS [20] only recites the first sentence of AS [19] and ignores the Minister's summary of the plurality's reasoning in the balance of that paragraph and at MS [20]-[22].

10. As to RS [21], the judgment below did not depend upon what the plurality said, at [9]-[16], about there being no universal right to an oral hearing (a proposition which the Minister does not dispute). The Minister has not made any submission, contrary to RS [36], [47] and [50], that there is a common law rule that an administrative decision-maker is not required to invite a person to an oral hearing or that a person is never entitled to one. The Court did not make a finding as to whether, absent the Previous Reviewer's opening and closing statements, the respondent would have been entitled to an oral hearing before the Reviewer. Rather, the Full Federal Court sidestepped the question whether the respondent ever had a right to an oral hearing before a reviewer. The respondent has also avoided this question, there being no response in his submissions to MS [63].

11. It is not correct to say, as the respondent does at RS [22], that the Minister does not criticise those cases on which the plurality relied in relation to the question whether there was "'a legitimate expectation as to the procedure to be followed' on the facts of the case". Some cases on which the Full Federal Court relied, such as *Ng Yuen Shiu*, *Haoucher* and *Applicant NAFF*, are distinguishable (and were distinguished at MS [30]-[31] and [49]). Others, such as *FAI Insurances*, are not relevant. Most importantly, contrary to RS [29] and [45], and as noted above, the Minister has submitted (at MS [55]-[62]) that the Full Federal Court misapplied *Lam*.

---

[1] A completed Request for Independent Merits Review Form appears elsewhere in the Appeal Book (**AB**): see AB 127-131.

12. As to RS [23]-[24], the Minister refers to MS [20] and would add that the label, "statements of principle", is apt with respect to the second, third and final sentences in [24] of the plurality's reasons.

13. The submission at RS [27] (and Nicholas J's reasons at [49]) overlook that it was necessary for the respondent to show unfairness and what steps he took, or did not take, in reliance upon the Previous Reviewer's representations to cause him unfairness. It is not enough to say, as Nicholas J did, that, had the Reviewer invited the respondent to an oral interview (which, the Minister notes, begs the question), he would have accepted the invitation.

14. Contrary to RS [36], it is not correct to say that "it is plain from what the [Previous] [R]eviewer said that she believed that the particular circumstances of the [respondent]'s case meant that it would be procedurally fair to provide him with an oral hearing." All that the Previous Reviewer relevantly said was that the purpose of the interview was "to take a new look at [the respondent's] claims".[2] She made no comment as to why a face-to-face interview was being conducted. In any event, the Previous Reviewer's belief—whatever it may have been—is immaterial. What procedural fairness required in the circumstances of this case is an objective question to be determined by a supervising court.

15. The respondent's submission, at RS [38], that "[t]here was evidence below that [he] ha[d] been misled by the [P]revious [R]eviewer's statements" is not correct. No such finding was made by the plurality, Nicholas J, or the primary judge. At [11] of his affidavit affirmed on 27 March 2013, to which the respondent has made reference at RS [38], the respondent relevantly said that he "expected the author of [his] IMR report would be [the Previous Reviewer]". The Previous Reviewer said that she would consider the respondent's claims and make a recommendation as to whether the Minister should recognise him as a refugee. Contrary to RS [39], these are not misleading statements. The respondent was not misled in the sense that he did, or failed to do, something in reliance upon the Previous Reviewer's statements, as was the case in *Aala* and *Muin*, and no such finding was made below.

16. The submissions in the first three sentences in RS [40] and in [41] beg the question. They assume, without demonstrating, that the respondent was entitled, as a matter of procedural fairness, to an oral hearing at the outset.

17. The respondent's submissions, including in RS [42], do not explain why a review that is "different" from, and "inferior" to, that which the respondent expects is procedurally unfair. If, as the Minister submits, the respondent was given a reasonable opportunity to present his case on the review, he was accorded procedural fairness.

18. Contrary to RS [43], the Minister never submitted that the Reviewer's adverse credibility findings, which were made on the basis of inconsistencies in the respondent's evidence and submissions, "defeat[ed] the legitimate expectation held out to the [respondent] as to the procedure to be followed". The first sentence in [27] of the plurality's reasons deals with an argument not put by the Minister in either court below. Indeed, it could

---

2 Affidavit of Susan Archer affirmed on 14 March 2013, Annexure A (**Transcript**) at 2.33.

not have been put: neither party employed the language of "legitimate expectation" in argument before the Full Federal Court or the Federal Circuit Court.

19. As to RS [46], the Minister does not dispute that, in *Applicant NAFF*, Kirby J said that nothing in *Lam* "obliges abandonment of reference to 'legitimate expectations' as a tool of judicial reasoning" (at 20 [68]), but his Honour tempered that observation by saying, in the very next sentence: "[h]owever, given the expanded notion of procedural fairness in Australia I accept that the utility of this particular fiction is now somewhat limited." For the reasons given in MS [33]-[36], the doctrine lacks utility and, following this Court's decision in *Plaintiff S10/2011*, should be discarded.

10 20. Contrary to RS [48] (which appears mistakenly to refer to MS [54]), the Minister made no submission below that the respondent was required to show that an oral hearing before the Reviewer would have made a difference to the outcome of his case. The Minister refers to, and repeats, MS [52]-[53].

21. In answer to RS [49], the Minister submits as follows. At [52]-[53] of the judgment below, Nicholas J attempted to explain why he did not agree with what his Honour considered was the Minister's submission by reference to [80]-[81] of the Reviewer's findings, which concerned the respondent's claim that he supported a particular politician in the 2004 election in Jaffna. There are a number of difficulties with those parts of his Honour's reasons. In particular, the respondent's evidence upon the issue
20 under discussion was, in fact, internally inconsistent,[3] and the Reviewer did not accept his suggestion that the inconsistencies in his evidence were "due to memory lapse or confusion … as he has claimed from the beginning that he was supporting [the politician] in the 2004 election in Jaffna".[4] Justice Nicholas appears to have overlooked this evidence.

Dated: 26 June 2015

30

Geoffrey Johnson SC
11th Floor St James' Hall
T: (02) 8226 2344
E: geoffrey.johnson@stjames.net.au

Bora Kaplan
Sixth Floor Selborne/Wentworth Chambers
T: (02) 8067 6912
E: bdkaplan@sixthfloor.com.au

Counsel for the appellant

3 See Transcript, 14.15-17, 19-24, 26-28, 30-50, 16.14-15, 20-22, 31-46, 17.1-2, 4-13.
4 Independent Merits Review Statement of Reasons dated 25 July 2012 at [81].