HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **LPDT**
Appellant

and

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
First Respondent

Administrative Appeals Tribunal
Second Respondent

APPELLANT'S REPLY

I. SUITABLE FOR PUBLICATION

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

II. REPLY

Principles and the counterfactual inquiry

2. It is and has always been accepted that the appellant had the onus of proving historical facts relevant to the materiality of the errors alleged, on the balance of probabilities. However, as the appellant has previously explained (AS [27]), that onus was discharged here by adducing the Tribunal's reasons into evidence.

3. At times, the Minister appears to submit that the appellant has the onus of proving something *additional* (see, e.g., RS [52]-[53]). That is wrong. The historical fact of the Tribunal's actual reasoning having been proven by adducing the reasons given under s 43 of the AAT Act, the question then arises whether (but for any one or more of the errors made by the Tribunal) its decision might realistically have been different. The historical facts having been proven, the answer to that question is simply a matter for submissions: the appellant need "prove" nothing more.

4. The appellant has not contended that there is a "structural or other impediment" to a court conducting the counterfactual inquiry when the error (or errors) by the administrative decision-making concern reasoning on an evaluative matter (cf. RS [11]). Nor has the appellant contended, or does he need to contend, that "every error in the making of an evaluative decision will necessarily be found to have deprived an application of the possibility of a successful outcome" (cf. RS [14]).

5. The Minister's suggested analogy with *Mackie*[1] is unpersuasive. In *Mackie*, it was argued that the Minister had erred in finding that the involvement of the applicants in unifying outlaw motorcycle gangs against anti-biker legislation was "a further example of [their] willingness to disobey Australian laws."[2] It was also argued that the Minister could not have regarded "the exercise of non-violent political speech as relevant to the assessment of the national interest".[3] At trial, and on appeal, the Federal Court held that no errors were made by the Minister. But, in case they were wrong, both the primary judge (Besanko J) and the Full Court dealt with materiality.

6. Besanko J held: "the other evidence and findings of the Minister that the applicant had an unwillingness to obey Australian laws was so strong that there is no realistic possibility of a different result absent the finding of a further example" (emphasis added).[4] The Full Court identified no error with that conclusion.[5]

7. It is readily understandable why a conclusion of immateriality may be made when error only applies to the identification a "further example" given by the decision-maker in support of its conclusion. But, here, the errors in the Tribunal's reasoning were not as to a surplus example. Rather, the Tribunal's errors here in its compliance with paragraph 8.1.1(1) of the Direction went to the gradation of the seriousness of the appellant's conduct. These was not merely errors in the evaluation of weight to be given to evidence,[6] but non-compliances with a direction imposed by the Minister.

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1 *Mackie v Minister for Home Affairs* [2022] FCAFC 120 (***Mackie***).

2 *Mackie v Minister for Home Affairs* [2021] FCA 1326 at [6] (emphasis added).

3 *Mackie v Minister for Home Affairs* [2021] FCA 1326 at [7].

4 *Mackie v Minister for Home Affairs* [2021] FCA 1326 at [55] (emphasis added) regarding the first ground. As to the second, related ground, Besanko J held at [82]: "Grounds 1 and 2 are linked, and for the same reasons I gave in relation to Ground 1, I do not consider that if there was an error in relation to Ground 2, it was material in the relevant sense."

5 [2022] FCAFC 120 at [62].

6 Cf. RS [15].

Subparagraphs 8.1.1(1)(a) and (b) of Direction 90

8. The Minister's first argument for why errors in respect of subparagraphs 8.1.(1)(a) and (b) were immaterial[7] fails to appreciate that the remaining considerations would not inevitably have weighed the same had the Tribunal not made the first or second errors: see AS [43]-[44]. It is no answer to say that the Full Court was aware of the need for care in undertaking the counterfactual inquiry,[8] where the appellant contends that the Court's reasons demonstrate error. This Court would not defer or give latitude to the Full Court's assessment: there can only be one right answer to the question of whether the Tribunal's errors were material, which this Court can give.[9]

10 9. The Minister's second argument[10] relies on a misreading of the Tribunal's reasons, because it relies on reading the various considerations as having been weighed separately from one other. The Direction 90 considerations "are not integers in a mathematical formula",[11] and without such a formula prescribing the weight to be given to particular considerations, the Full Court could not have known what weight the Tribunal would have given to paragraph 8.1.1 had the Tribunal not placed weight on one or more irrelevant sub-paragraphs, and whether that weight was such that the decision would not have been any different.

10. The Minister's third argument[12] seeks to compartmentalise different aspects of the Tribunal's reasons, despite in the same paragraph urging that the reasons must be
20 read as a whole.[13] The Tribunal's conclusion on the weight to be given to the fourth primary consideration, relying on its assessment that the appellant's convictions for "multiple serious offences on separate occasions over an extended period of time",[14] draws upon its earlier erroneous finding about the seriousness of the appellant's offending (or there is at least a "realistic possibility" that the findings are so linked).

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7 RS [24]-[29], [45].

8 RS [29].

9 See, by analogy, *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [18] (Kiefel CJ), [20]-[60] (Gageler J), [76], [78]-[87] (Nettle and Gordon JJ); [127]-[129], [142]-[155] (Edelman J).

10 RS [30]-[39], [45].

11 CAB 136 [99].

12 RS [40]-[41], [45].

13 RS [40].

14 CAB 36 [112].

Subparagraph 8.1.1(1)(g) of Direction 90

11. RS [50] does not grapple with the appellant's argument that while the Tribunal was not prohibited from considering the appellant's awareness that his criminal offending could jeopardise his migration status, nor was it required to consider that matter. And nothing in the historical facts of the reasoning in the decision indicates that the Tribunal would inevitably have considered that matter as a non-mandatory consideration, had it appreciated that subparagraph 8.1.1(1)(g) did not apply. The Full Court's reasoning involves impermissible conjecture: see AS [56]-[57].

Cumulative assessment

10 12. RS [54] seeks to read into Kiefel CJ, Gageler and Keane JJ's explanation of materiality in *Hossain*[15] emphasis on the reference to the singularity of the gravity of "an error". But *Hossain* was not concerned with a case of multiple errors and the Court's remarks should not be construed as addressing an issue that did not arise.

13. The Minister asserts at RS [56] "as a matter of logic" that there can be no connection between the existence of multiple errors that go to different issues or aspects of a decision, and an assessment that would see those errors considered on a "compounded" basis.[16] That is wrong, and the appellant's submissions do not invite the Court to depart from any "longstanding jurisprudence" on jurisdictional error as the Minister suggests (RS [57]).

20 14. As both parties agree, the materiality of an error is to be assessed on the basis of counterfactual inquiry by reference to the "historical facts". At least in a circumstance of the present kind, where the decision-maker has erred in multiple respects *in its reasoning*, it makes no sense to conduct the materiality analysis in an atomised way by reference to each error, rather than in a cumulative way.

a) It would be absurd to assess the materiality of Error A in reasoning A by reference to the "historical facts" of the balance of the Tribunal's reasoning, where the balance of the reasons incorporate Errors B and C.

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15 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***).

16 RS [56].

b) The only logical course is to identify the multiple errors that the Tribunal made, and then to ask: but for all of those errors, is there a realistic possibility that the Tribunal's decision would have been different?

15. Furthermore, contrary to RS [59], the Full Court's reasons at CAB 136 [100] did not express a cumulative assessment of error for three reasons.

a) First, the location of that paragraph in context of the reasons as a whole indicates that the Full Court was considering the materiality of only the error concerning paragraph 8.1.1(1)(a).

b) Second, the finding of the Tribunal that the Full Court referred to was not one that the Tribunal gave weight to only the matters stated in sub-paragraphs (c) to (e). It remained necessary for the Court to consider whether the Tribunal's finding of overall weight could, as a realistic possibility, have been different if it had also disregarded (b) and (g) and there is no indication in CAB 136 [100] that the Court engaged in that exercise.

c) Third, the reasoning at CAB 136 [100] involved impermissible reconstruction and is not a valid counterfactual assessment: see AS [39]. If the reasoning is not a sound counterfactual assessment of a single error, it cannot be a sound counterfactual assessment of cumulative errors.

16. Contrary to RS [62], there was a realistic possibility that the Tribunal could have weighed the considerations differently had it not made the three errors, and that the overall decision could have been different: see AS [43] and [60].

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