HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY **NO P 23 OF 2020**

ON APPEAL FROM
THE FEDERAL COURT OF AUSTRALIA

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

AND: **AAM17**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S REPLY

PART I FORM OF REPLY

1. This reply is in a form suitable for publication on the Internet.

PART II SUBMISSIONS IN REPLY

The first ground of the Minister's appeal

2. The Minister's notice of appeal does not raise any issue concerning the obligation of the Federal Court to provide procedural fairness to the First Respondent (cf First Respondent's submissions (**FRS**), [2.1]). No finding was made by the Federal Court that it was unable to afford procedural fairness to the First Respondent. Rather, the Federal Court found that the obligation of the Federal Circuit Court to provide procedural fairness extended to the manner and circumstances of providing reasons and that the Federal Circuit Court had failed to provide procedural fairness to the First Respondent (AAM17, [41] **CAB 61-62**). The Minister's first ground is directed to that finding (**CAB 74**, [2.1]; Minister's submissions, [2.1]).

3. The First Respondent does not confront the first ground as it is actually contended or the Minister's submissions relevant to it (Minister's submissions, [15] – [24]).

4. In particular, the First Respondent does not contend that there is either a fundamental distinction to be drawn between the obligation to provide procedural fairness in the

exercise of administrative, and judicial, power or that *Public Service Board (NSW) v* ***Osmond*** (1986) 159 CLR 656 was incorrectly decided or should not be followed.

5. The First Respondent appears to contend that the obligation to afford procedural fairness does extend to the giving of reasons because procedural fairness is concerned to avoid practical injustice (FRS [6]). That submission is not a complete statement of the applicable principles and does not provide a persuasive answer against the Minister (as to which see Minister's submissions, [16] – [19]).

6. Further, the First Respondent's submission (FRS, [7]) that in determining what is required to ensure procedural fairness from *the appellate court*, there is no reason in principle that precludes an appellate court from considering whether reasons were provided or made available by the court below is not to the point. As submitted above, the Federal Court did not find it could not afford procedural fairness to the First Respondent.

7. Contrary to the First Respondent's submissions (FRS, [9]), the Federal Court's findings concerning opportunities lost to the First Respondent as a result of the delay in receiving the Federal Circuit Court's reasons do not establish a correct application of applicable principles. Rather, that submission assumes but does not establish the correctness of the Federal Court's conclusion that the duty of procedural fairness extends to the giving of reasons. Further, even if it be assumed that the Federal Court correctly found the First Respondent had been denied procedural fairness, there was no practical unfairness or injustice to the First Respondent so as to establish a relevant error by the Federal Circuit Court (as to which, Minister's submissions [20] – [24]).

The second ground of the Minister's appeal

8. The First Respondent describes the issue raised by the Minister's second ground of appeal as whether the Federal Court erred in finding that the First Respondent had been denied procedural fairness because the Federal Circuit Court did not ensure its ex tempore reasons "were translated (interpreted) to the First Respondent after he had commenced an appeal…" (FRS, [2.2]).

9. It is unclear what the First Respondent contends by that explanation. One reading, which appears to be generally consistent with the First Respondent's submissions relevant to his notice of contention, is that the Minister's second ground proceeds upon the basis that the First Respondent did not ever have the Federal Circuit Court's reasons

as they were pronounced at the conclusion of the hearing. If that is what the First Respondent contends, it is not correct (as to which, see Minister's submissions [22], [32], [34], [37] and [38]).

10. The First Respondent submits, in answer to ground 2, that the Federal Court's conclusion as to the Federal Circuit Court's denial of procedural fairness "did not depend upon the provision to the First Respondent of written reasons for decision" (FRS, [10]). That is not an answer to the Minister's second ground.

11. It is apparent that the Federal Court did not consider that the *only* way for procedural fairness to be afforded was to provide written reasons to the First Respondent (AAM17, [41] **CAB 61-62**). The Minister does not contend otherwise.

12. The difficulty for the First Respondent is that even if it is accepted there was a denial of procedural fairness by the Federal Circuit Court arising from a failure to provide the First Respondent with a means of comprehending the reasons for decision until after the appeal had commenced, that had been cured before the Federal Court heard the appeal. In the circumstances, there was no practical unfairness or injustice to the First Respondent in the Federal Circuit Court's (alleged) failure to afford procedural fairness (as to which, Minister's submissions [20] – [24]).

Third ground

13. In respect of his reply concerning ground three of the appeal, the Minister relies on his submissions from [14] below.

The First Respondent's notice of contention

The First Respondent was not denied access to the Federal Circuit Court's reasons

14. The First Respondent's notice of contention, and answer to the Minister's third ground, proceeds upon a contention that, as a matter of fact, he has not had an opportunity to understand the Circuit Court's "operative" reasons for dismissing the application (FRS, [15]-[19], [26] and [27]).

15. That is so, the First Respondent contends, because there is no basis upon which it may be found or accepted that the Federal Circuit Court's written reasons are the ex-tempore reasons in published form.

16. In this regard, it is necessary for the First Respondent to establish that there was some material or operative difference between the ex-tempore and published reasons (cf FRS, [27]). If there was no difference (or error in the ex-tempore reasons) then the identified failure could not have been material and no relief could have flowed (Minister's submissions, [32], [36]). It is the First Respondent who was required to show materiality.

17. The First Respondent's submission (FRS [28]) that because he was unrepresented before the Federal Circuit Court and required the assistance of interpreter, it may be inferred he was unaware that a record of the hearing before the Circuit Court was available should not be accepted. Those facts do not establish the inference contended for. Further, despite being unrepresented at, and after, the hearing before the Federal Circuit Court, the First Respondent was able to commence, appear at and argue his appeal. So much stands against the inference contended for. Finally, even if the fact of his self-representation and use of an interpreter was seen as sufficient to establish the identified inference, then the identified denial of procedural fairness by the Federal Circuit Court was not the cause or source of the First Respondent's failure to articulate such a ground.

18. As it concerns the reasons of the Federal Circuit Court, the Federal Court had the written reasons which were certified to be the reasons of the Federal Circuit Court. There was no allegation before the Federal Court that those reasons were not, in fact, the reasons of the Federal Circuit Court (and had there been such an allegation, evidence might have been led). There was otherwise no basis upon which the Federal Court could have declined to treat those reasons as the authentic record of the Federal Circuit Court (Minister's submissions, [34], [38] and [39]).[1]

19. If Mortimer J had found that the written reasons of the Federal Circuit Court were not the authentic or "operative" reasons for its decision, the proper response would have been to adjourn the appeal until those reasons could be obtained. It was not a case where no reasons had been given. It was uncontroversial that oral reasons had been given, in open court, and highly likely that those reasons had been recorded.

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[1] cf *Quant v Bonde* (2018) 25 Fam LR 379 (cited at FRS, [17]) where the primary judge provided brief ex-tempore reasons and sought to reserve an opportunity to provide expansive written reasons in the event a party so requested.

20. In the circumstances, the First Respondent's contention (FRS, [29]) that he was denied the opportunity to "present his case on appeal with regard to, or on the basis of, the operative reasons for decision of the Federal Circuit Court" is not established.

21. Finally, contrary to the First Respondent's submission, the Federal Court did not form an "impressionistic" assessment of the Federal Circuit Court's, or Tribunal's, reasons for decision (FRS, [33]).

10 22. The Federal Court was tasked with reviewing the decision of the Federal Circuit Court for error. It did so and found no such error (AAM17, [45] – [48], **CAB 62-63**). The Federal Court did not give a conditional or tentative opinion that fell short of undertaking a proper review of the Federal Circuit Court's decision. If the Federal Court had considered that it did not have sufficient bases upon which to undertake its review function then it was obliged to remit the matter. However, that is not what the Federal Court found.

20 23. The Federal Court found, subject to two matters, having looked at the Federal Circuit Court's decision, and that of the Tribunal, it did "not consider the approach taken by the Federal Circuit Court to the judicial review of the Tribunal's decision discloses *any possible error* deserving of close consideration by this Court on appeal" (AAM17, [44] **CAB 62**). Further, the Federal Court proceeded to consider whether the Tribunal's decision was affected by jurisdictional error (see Minister's submissions, [26] and 30 [27]). The Federal Court found it was not (AAM17, [45] – [48], **CAB 62-63**). The First Respondent does not engage with that finding.

Dated: 3 September 2020

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