HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 14 Feb 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S120/2023
File Title:	Miller v. Minister for Immigration, Citizenship and Multicultu
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellant
Date filed:	14 Feb 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

JOSEPH MILLER
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Project Blue Sky and the relevant question

2. The question is whether there can be discerned a legislative purpose to invalidate any application to the Tribunal that fails to comply with the condition in paragraph (c) of s 29(1) that the application contain a statement of the reasons for the application: *Project Blue Sky* (1998) 194 CLR 355 at [91] (**JBA Vol 3 Tab 20**).

3. The focus is on para (c) of s 29(1). As a matter of principle, the answer to the *Project Blue Sky* question may be different for different parts of a single section: *Formosa* (1988) 46 FCR 117 at 123 (**JBA Vol 4 Tab 27**).

Features of s 29(1)(c) which support the conclusion compliance is not essential

4. There are four features of s 29(1)(c) and its context which support the conclusion that compliance is not essential:

   (a) The provision of a statement of reasons in accordance with s 29(1)(c) is a most insignificant step in the scheme of Tribunal review in accordance with the AAT

Act. The Tribunal has held, and that the Minister accepts, that an entirely uninformative statement of reasons — such as "The decision is wrong" — is sufficient to comply with the requirement in s 29(1)(c) (**AS [23]; RS [42]**). The fact that a well-prepared statement of reasons may assist in the early identification of an applicant's standing and the issues in dispute does not provide a rational purpose for the Minister's construction (**Reply [8]**; cf **RS [41]-[42]**).

(b) Section 33 of the AAT Act provides a suite of provisions that allow the Tribunal to identify the issues in the review where those issues are not exposed in the statement of reasons (**AS [26]**). Those provisions are equally available where there is a wholly unhelpful statement of reasons and where there is no statement of reasons at all.

(c) The whole thrust of the purpose of inserting the predecessor to s 29AB into the AAT Act was ***against*** making provision of a clear statement of reasons a hurdle for unrepresented applicants to clear: see Explanatory Memorandum to the Administrative Appeals Tribunal Amendment Bill 2004 (Cth) at 27 (**JBA Vol 5 Tab 40**) (**AS [27]**).

(d) The approach to s 29(1)(c) for which the appellant contends coheres with the object of the Tribunal, which is to provide a mechanism of review that is accessible and informal: see ss 2A, 33(1)(b) of the AAT Act (**AS [32]; Reply [11]**).

English authorities

5. There are a number of English authorities that strongly support the appellant's construction of s 29(1)(c) (**AS [33]-[40]**). In particular, in *Howard v Secretary of State for the Environment* [1975] 1 QB 235 (**JBA Vol 4 Tab 28**), the Court of Appeal of England and Wales held that compliance with a materially similar provision was not essential to the validity of an application. The Minister has not identified any substantive difference between *Howard* and the present case (**Reply [14]**).

Wrong emphasis on the word "must"

6. The Minister's reliance on the word "must" in s 29(1)(c) to support his construction (**RS [21], [23]**), which was accepted by the courts below (**PJ [38] CAB 99, FC [45] CAB 145**), is illogical and indeed circular. The use of imperative or obligatory terms is a necessary premise of the question posed by *Project Blue Sky* (**AS [16]**). Cf the use of the word "must" in careful contradistinction to the word "may": see, eg, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 (**Reply [4]**),

cited in *MZAPC v Minister for immigration and Border Protection* (2021) 273 CLR 506 at [174] (**JBA Vol 3 Tab 19**).

Other paragraphs of s 29(1)

7. Paras (ca), (cb) and (d) of s 29(1) are also not essential to validity (**AS [43], [46]; Reply [6]-[7]**). This provides further contextual support for the appellant's contention that compliance with paragraph (c) is not essential to validity.

The relevance of s 500(6B) of the *Migration Act*

8. Whether one is operating within the context supplied by the *Migration Act* or not, s 29(1)(c) does not state a condition essential to validity. The result for which the Minister contends, which he admits is "harsh" (**RS [6(g)]**), is not compelled by s 500(6B) of the *Migration Act*. In the alternative, at least in the context of the *Migration Act*, s 29(1)(c) of the AAT Act does not state a condition essential to validity.

Dated: 14 February 2024

Perry Herzfeld Jackson Wherrett