IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S244 of 2017

BETWEEN:

**MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Appellant

and



**SZVFW**
First respondent

**SZVFX**
Second respondent

**ADMINISTRATIVE APPEALS TRIBUNAL**
Third respondent

## APPELLANT'S SUBMISSIONS

## PART I: CERTIFICATION

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

## PART II: ISSUES

2. This appeal presents the issue whether, on appeal from a decision of a trial court that an administrative decision was legally unreasonable, the appeal court must be satisfied of an error in the nature of that required by *House v The King*.[1]

## PART III: s 78B NOTICE

3. The appellant (**the Minister**) does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

## PART IV: DECISIONS BELOW

4. The medium neutral citation of the decision of the primary judge is *SZVFW v Minister for Immigration* [2016] FCCA 2083. It is reported at (2016) 311 FLR 459.

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[1] (1936) 55 CLR 499

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5. The medium neutral citation of the decision of the Full Court is *Minister for Immigration and Border Protection v SZVFW* [2017] FCAFC 33. It is reported at (2017) 248 FCR 1.

## PART V: FACTS

### (a) Factual background

6. On 3 December 2013, the first and second respondents (**the respondents**),[2] husband and wife respectively, applied for Protection (Class XA) visas. The application gave as their residential and postal address an address at Roselands, New South Wales (**the Roselands address**). The application attached a two page "Personal Statement" by the first respondent briefly setting out the grounds for the application and a copy of the respondents' passports.

7. By letter dated 18 December 2013, the Department acknowledged lodgement of the application, and sought certain further information. The letter was addressed to the Roselands address.

8. By letter dated 3 March 2014, the Department invited the respondents to an interview with a delegate of the Minister on 26 March 2014 and invited them to provide any additional supporting documents. The letter was addressed to the Roselands address. Among other things, it said: "If you do not attend the interview your application may be decided on the information already provided to us".

9. On 25 March 2014, a Mandarin speaking departmental officer contacted the first respondent (it seems by telephone) to tell him that his interview required rescheduling. On 26 March 2014, a Mandarin speaking departmental officer contacted the first respondent (again, it seems, by telephone) to inform him that his interview was now to be held on 9 April 2014 at 11am. Neither of the respondents attended the scheduled interview or provided any further supporting documents.

10. By letter dated 16 April 2014, the Department notified the respondents that their application had been refused. It was addressed to the Roselands address.

11. On 12 May 2014, the respondents lodged an application for review by the then Refugee Review Tribunal (**Tribunal**). The application form specified the Roselands address as that to which correspondence was to be sent, and also gave a mobile phone number and email address for the first respondent.

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[2] The third respondent is the Administrative Appeals Tribunal.

12. By letter dated 12 May 2014, the Tribunal acknowledged receipt of the application for review, and invited the respondents to provide material or written arguments as soon as possible. The letter was addressed to the Roselands address. The respondents provided no further information.

13. By letter dated 15 August 2014, the Tribunal invited the respondents to appear before it on 10 September 2014. The letter was addressed to the Roselands address. Among other things, the letter said: "If you do not attend the scheduled hearing, the Tribunal may make a decision without taking any further action to allow or enable you to appear before it".

14. Neither of the respondents communicated with the Tribunal or attended the hearing. The Tribunal decided to exercise the power, expressly conferred upon it by s 426A(1) of the *Migration Act 1958* (Cth) (**the Act**), as it then stood, to make a decision on the review without taking any further action to allow or enable the respondents to appear before it. Its reasons for so doing are at [15]–[17].

15. The Tribunal decided to affirm the decision under review. By letter dated 15 September 2014, the decision of the Tribunal was communicated to the respondents. The letter was addressed to the Roselands address.

**(b) Decision of the Federal Circuit Court**

16. By application filed 7 October 2014, the respondents sought judicial review of the Tribunal's decision by the Federal Circuit Court.

17. The primary judge said that she had some concern whether she could be satisfied as to whether the invitation dated 15 August 2014 was dispatched within three working days of that date, so as to come within the method prescribed by s 441A(4) of the Act and thus satisfy s 426A(1)(a). However, her Honour did not find it necessary to resolve this point (reasons of the primary judge (**PJ**) [47]–[54]).

18. Rather, her Honour concluded that, assuming that the method prescribed by s 441A(4) was complied with, so that the invitation was given in compliance with ss 425 and 425A and s 426A(1)(a) satisfied, the decision of the Tribunal pursuant to s 426A(1) to make a decision on the review without taking any further action to allow or enable the respondents to appear before it was legally unreasonable, within the meaning explained in *Minister for Immigration and Citizenship v Li*[3] (PJ [55]–[84]).

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[3] (2013) 249 CLR 332.

19. The primary judge's reasons may be summarised as follows:

(a) The Tribunal could easily have identified another avenue of communicating with the respondents, because they included an email address and mobile telephone number in the review application form (PJ [73]–[74], [80], [83]).

(b) The Tribunal could not have been satisfied, in a practical sense, that the respondents were aware of the hearing date and time, as there was no evidence of delivery of the hearing invitation (as it had been sent by ordinary post, not registered post) or attempted subsequent email or telephone communication with the respondents (PJ [75]–[76], [80]–[81]).

10 (c) The matter was before the Tribunal for a relatively short time. There was not a lengthy period in which the respondents did "nothing". While the respondents did not respond to the Tribunal's invitation of 12 May 2014, they were not represented by a migration agent or solicitor. This was the first hearing invitation sent to the respondents. In these circumstances, the absence of a pattern of communication between the respondents and the Tribunal was not determinative (PJ [77]–[78]).

(d) The hearing invitation to the respondents was of great significance. They were applicants for a protection visa and their attendance at the hearing could have made a difference to the outcome of the review (PJ [78]).

20 20. Accordingly, the primary judge quashed the decision of the Tribunal and made an order requiring the Tribunal to determine according to law the application which had been made to it.

**(c) Reasons of the Full Court**

21. The Full Court dismissed the Minister's appeal, with costs. Its reasons may be summarised as follows.

22. ***First***, the Court concluded that, while the decision of the primary judge was ***not*** a discretionary one, it was nevertheless an "evaluative" one, such that it was necessary for the Minister to persuade the Court that the primary judge's reasons involved an error akin to that required to be established in appeals from discretionary judgements
30 (reasons of the Full Court (**FC**) [40]–[46]).

23. ***Secondly***, the Court concluded that such error had not been identified in the primary judge's reasons in any of the respects relied upon by the Minister (FC [48]–[56]).

24. ***Thirdly***, so far as the Minister's submissions had sought to draw attention to similarities and differences between this case and previously decided cases concerning the reasonableness of the Tribunal's exercise of power under s 426A(1) of the Act, the Full Court criticised that approach as inconsistent with a principle, identified by the Full Court, that "[t]he outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles to the relevant circumstances, rather than by way of an analysis of factual similarities or differences between individual cases" (FC [38], [55]–[57]).

## PART VI: ARGUMENT

### (a) Fundamental error in approach by the Full Court

25. While the Full Court made clear that it did not consider the primary judge's decision to be a discretionary one (FC [46]), the Full Court expressly said that the primary judge's decision was "evaluative" and required the primary judge to decide what weight to give to individual circumstances (FC [44]), and that guidance was to be obtained from cases involving appeals from discretionary judgments (FC [45]). The subsequent analysis by the Full Court deferred to the weight attributed by the primary judge to the competing considerations.

26. The reasons and authorities relied upon by the Full Court in support of its view that it was an "evaluative" one in respect of which the Minister was required to identify an error akin to that necessary in appeals from discretionary judgments (ie *House v The King* error) were not raised by counsel for the respondents in written or oral submissions, or by the Court during the hearing. Accordingly, they were not matters on which the Court received any submissions on behalf of the Minister.

27. The approach taken by the Full Court was contrary to previous Full Court authority. In *Minister for Immigration and Citizenship v Stretton*,[4] Allsop CJ said:

> Though the task of assessing legal unreasonableness is partly an evaluative process, it is one rooted in the legal source of the power and the values and considerations drawn from the statute and the common law. There would be in such circumstances no call to treat such evaluation as akin to a discretion such that its review would be concluded by reference to *House v R*. The power was either lawfully exercised by the executive or not. While judicial decision about that question might be contestable, there can only, legally, be one correct answer: cf *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 at 436 [25]. The proper framework of the

[4] (2016) 237 FCR 1 (FC) at [25].

> appeal is not as the review of the exercise of a judicial discretion or of an evaluative judgment of like character.

The other members of the Court agreed with Allsop CJ's reasons. This passage from Allsop CJ's reasons was subsequently approved by a unanimous Full Court in *Minister for Immigration and Border Protection v Eden*.[5] Neither the passage from Allsop CJ's reasons in *Stretton* nor its endorsement in *Eden* was referred to by the Full Court in this case, though other passages from *Stretton* and *Eden* were referred to.

28. The approach of Allsop CJ in *Stretton* is correct as a matter of principle, for the reasons which his Honour gave. It is plain that a conclusion by a court that a tribunal has acted in a manner which is legally unreasonable does not involve the exercise of a discretion. Even if there is a category of "evaluative" decisions which do not involve the exercise of a discretion, but to which the principles in *House v The King* are to be applied by analogy — which, for the reasons set out in paragraphs 39–50 below, it should now be recognised that there is not — for the reasons which Allsop CJ gave, a conclusion of legal unreasonableness is not a decision of that kind.

29. It cannot be right that there is a range of permissible answers which are legally available to the question whether a decision-maker's purported exercise of power was beyond power on the basis that it was legally unrecognisable: either it was valid or it was not. If it were otherwise, the same would apply, for instance, to a challenge on the basis that a decision involved a denial of procedural fairness. Whether procedural fairness has been afforded will, in many cases, be an "evaluative" decision.[6] It cannot be right that an appeal court might reason that, while it considers that the affected person was denied procedural fairness, it was open to the primary judge to take the opposite view, and therefore for the appeal court to refrain from quashing the decision. More generally, it cannot be right than an appeal court might reason that, while it considers an exercise of power to be invalid, it was open to the primary judge to take the opposite view, and therefore for the Full Court to refrain from quashing the decision. The question of the validity of administrative action is not one on which a range of permissible answers is legally available.

30. While the approach of an appeal court in a case involving a conclusion of legal unreasonableness by the primary judge was not in issue before this Court in *Li*,

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5 (2016) 240 FCR 158 (FC) at [94].

6 See further *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 (FC) at [7]–[24] per Allsop CJ.

Allsop CJ's analysis is consistent with that decision. There was no suggestion in the reasons in *Li* that the view of the primary judge was to be given any particular weight. Indeed, the dispositive reasoning of this Court did not mention the view of the primary judge at all. The Court simply considered, for itself, whether the exercise of the Tribunal's power in that case was or was not unreasonable.[7]

31. The Full Court's reliance (FC [41]–[42]) on the reasons of Allsop J in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*[8] was likewise misplaced. The passages quoted by the Full Court about the need for an appeal court to be persuaded of error in the reasons of the primary judge were concerned with findings of fact. It was in that context that Allsop J counselled against asking an appellate court "to survey all the evidence … and to ask it to arrive at its own conclusions, without 'essaying the necessary task of positively demonstrating that the trial judge was wrong'" (quoted at FC [42]).

32. That approach is inapt where what is at issue is a legal conclusion, such as whether the exercise of power by the Tribunal was legally unreasonable, in respect of which there is only one legally correct answer. Allsop J dealt with that circumstance in *Branir*[9] in a passage not quoted by the Full Court in this case, but referred to in the quote from *Stretton* in paragraph 27 above:

> In circumstances where, by the nature of the fact or conclusion, only one view is (at least legally) possible (for example, the proper construction of a statute or a clause in a document, where, although, as often said, minds might differ about such matters of construction, there can be but one correct meaning: see generally *Corp of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151-156) the preference of the appeal court for one view would carry with it the conclusion of error.

33. Allsop J's analysis in *Branir* explains how, where the point on appeal is one where there is only one legally correct answer, even where the appeal is by way of rehearing in which error must be demonstrated, as is the case under s 24 of the *Federal Court of Australia Act 1976* (Cth), it is incumbent upon the appeal court to consider, for itself and without attributing any particular weight to the conclusion of the primary judge, the question at issue (here whether the Tribunal's decision was legally

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7 (2013) 249 CLR 332 at [31] per French CJ, [77]–[85] per Hayne, Kiefel and Bell JJ, [114]–[124] per Gageler J.

8 (2001) 117 FCR 424 (FC).

9 (2001) 117 FCR 424 (FC) at [25]. See also *R v Ford* (2009) 273 ALR 286 (NSWCA) at [75] per Campbell JA.

unreasonable). Error is demonstrated by the different answer given by the appeal court to the question which admits of only one legally correct answer.

34. The position may be tested by considering a case of statutory construction, as instanced by Allsop J in *Branir*. The construction of a statute may involve matters of "evaluation" on which reasonable minds may differ. But there is only one legally correct construction. Where a case of statutory construction is appealed, the appeal court will resolve the question for itself by determining the correct construction. If that differs from the construction preferred by the primary judge, error is thereby identified. That is so even in an appeal by way of rehearing in which error must be demonstrated. Even in that case, it is not necessary for the appeal court to identify some specific error in the reasons of the primary judge, for instance in the weight attached by the primary judge to one or other of the matters bearing on the ultimate question of construction. Thus, it would be an error for the appeal court to approach the matter by way of "broad analogy" to or "guidance" from (cf FC [45]) cases involving discretionary judgments. It would be an error for the appeal court to fail to consider, for itself, what was the correct construction of the statute in question but, instead, to defer to the weight attached by the primary judge to the various matters bearing on that construction. A case involving an allegation of legal unreasonableness is no different, for the reasons explained by Allsop CJ in *Stretton* quoted above.

35. The position is different from that which applies where there is an appeal from a factual finding made by the primary judge. In that case, as explained by this Court in *Fox v Percy*,[10] the primary judge may enjoy advantages over the appeal court which warrant giving particular weight to the view of the primary judge in relation to a factual finding in which such advantages may have played a payed a part. But even in such a case, that does not involve the application, by analogy or otherwise, of the strictures applicable to appeals from discretionary judgments.

36. Accordingly, it was contrary to previous authority of the Full Court of the Federal Court, as well as contrary to principle, for the Full Court in this case to treat the question of legal unreasonableness as an "evaluative" one in which the view of the primary judge was entitled to weight (cf FC [42]–[44]) and, while it was not a discretionary decision, to apply to it the deference to the primary judge's reasons applicable to discretionary decisions (cf FC [45]). It ought not to have been necessary to persuade the Full Court of a specific error made by the primary judge, in

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[10] (2003) 213 CLR 118 at [23]–[31] per Gleeson CJ, Gummow and Kirby JJ.

the manner of *House v The King*, or that the weight given by the primary judge to the various factors on which her Honour relied was not to be disturbed except on very strong grounds. If the Full Court was of the view that the decision of the Tribunal was ***not*** legally unreasonable, that would carry with it the conclusion of error in the reasons of the primary judge.

37. The Full Court's approach infected the whole of its reasoning. Thus, in assessing the Minister's submissions, the Court repeatedly referred to the absence of "appealable error" in the weight attributed to matters by the primary judge (FC [48], [51], [52], [54], [55]). The Full Court referred to the primary judge's analysis as "turn[ing] very much on her evaluation of the relevant circumstances in this particular case" (FC [53]) without considering, for itself, whether the outcome of that analysis was correct. Contrary to what the Full Court said at FC [37], the appeal did not properly turn on "whether the primary judge correctly understood and applied in the particular circumstances of this case the principles concerning judicial review of a statutory discretion for unreasonableness in the legal sense". For the reasons explained, it turned on the Full Court's own view of whether (as the primary judge had held) the decision of the Tribunal was legally unreasonable.

38. Nowhere in its analysis did the Full Court consider, for itself, whether the decision of the Tribunal was or was not legally unreasonable. Simply put, the Full Court did not, in this case, apply the principles in *Li*: rather, it considered, in a manner akin to appeals from discretionary judgments, whether sufficient error had been demonstrated in the primary judge's application of those principles to overturn her Honour's conclusion.

**(b) "Evaluative" decisions which are not "discretions"**

39. The reasons above are sufficient to demonstrate the fundamental error of approach in the reasons of the Full Court, and to require reconsideration of the Full Court's decision without deferring to the primary judge's views. In short, even if there is a category of "evaluative" decisions to which the principles in *House v The King* ought be applied by analogy, a conclusion of legal unreasonableness is not a decision of that character. In any event, the view that there is such a category of decisions ought not be accepted.

40. The origin of the view that there is such a category of case is *Singer v Berghouse*.[11] The context was an appeal from a decision in a claim for family provision. The

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[11] (1994) 181 CLR 201.

statute provided that the Court "may" order such provision only if satisfied that the provision in fact made out of the testator's estate was inadequate for the proper maintenance, education and advancement of the plaintiff. This threshold requirement had come to be known as the "jurisdictional question". Speaking of an appeal from a conclusion of a primary judge in relation to this jurisdictional question, a majority of this Court said:[12]

> Strictly speaking, however, the jurisdictional question, though it involves the making of value judgments, is a question of objective fact to be determined by the judge at the date of hearing. ...
>
> Kirby P, by contrast, has held that the principles that govern appellate review of discretionary decisions should apply ... In our view, this is the correct approach. In this respect we should express our agreement with the following comments of his Honour in *Golosky v Golosky* ((19) Unreported, New South Wales Court of Appeal, 5 October 1993 at 13–14.):
>
> > Unless appellate courts show restraint in disturbing the evaluative determinations of primary decision-makers they will inevitably invite appeals to a different evaluation which, objectively speaking, may be no better than the first. Second opinions in such cases would be bought at the cost of diminishing the finality of litigation in a troublesome area and, sometimes at least, with a burden of costs upon the estate which should not be encouraged.

41. This approach has subsequently been applied to various "evaluative" decisions by intermediate appellate courts, so as to justify the application to such decisions of the principles in *House v The King* or principles similar to them.[13] The correctness of this approach has not been considered subsequently by this Court.

42. The context under consideration in *Singer v Berghouse* is an unpromising foundation upon which to support a general category of case involving "evaluative" determinations, appeals from which are governed by *House v The King*. That is because while, as a matter of statutory drafting, the family provision statute at issue

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[12] (1994) 181 CLR 201 at 211–212 per Mason CJ, Deane and McHugh JJ.

[13] See, eg, *Vines v Australian Securities and Investment Commission* (2007) 63 ACSR 505 (NSWCA) at [8]; *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424 (NSWCA) at [178]; *McCartney v Orica Investments Pty Ltd* [2011] NSWCA 337 at [110]-[128]; *Falkingham v Hoffmans (a firm)* (2014) 46 WAR 510 (CA) at [47]–[49]; *Central Darling Shire Council v Greeney* [2015] NSWCA 51 at [62]–[66]; *Toms v Harbour City Ferries Pty Ltd* (2015) (2015) 229 FCR 537 (FC) at [87]–[88]; *Ghosh v NineMSN Pty Ltd* (2015) 90 NSWLR 595 (CA) at [37]; *Tyne (Trustee) v UBS AG (No 2)* [2017] FCAFC 5 at [54]; *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Bishop Irinej Dobrijevic* [2017] NSWCA 28 at [211]–[212]. See generally *Mobilio v Balliotis* [1998] 3 VR 833 (CA); *R v Ford* (2009) 273 ALR 286 (NSWCA); *Murakami v Wiryadi* (2010) 268 ALR 377 (NSWCA) at [33]; *DAO v The Queen* (2011) 81 NSWLR 568 (CCA) at [83]–[96].

posed first a jurisdictional question and then, if that was answered affirmatively, conferred a discretion on the Court to make further provision, that division was blurred in practice. As Mason J said in *White v Barron*,[14] in a passage quoted by the majority in *Singer v Berghouse*:[15] "There is an element of the artificial in saying that it is only after jurisdiction is established that the exercise of discretion begins, for the twin tasks which face the primary judge are similar." It was the blurring of the jurisdictional question and the discretion which provided the impetus to apply, in an appeal in relation to the former, the strictures on an appeal in relation to the latter. It is a significant extension to generalise that approach to "evaluative" determinations which are not linked to "true" discretions as was the case in *Singer v Berghouse*.

43. Further, to describe the category of determinations to which the principles in *House v The King* applies as "evaluative" provides little, if any, guidance as to what falls within and what falls outside that category.

44. This point was made by Kirby and Callinan JJ in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*.[16] Callinan J rejected the submission that a finding of "unconscionability" was discretionary and thus only open to appellate intervention on the limited grounds in *House v The King*. His Honour said:[17]

> Practically, indeed perhaps every judgment of a trial judge requires an evaluation of facts, but the evaluation is a different and subsequent process from the finding of the facts. An evaluation of facts found is precisely one of the exercises which an appellate court is obliged, when an unrestricted right of appeal is available, to undertake.

Kirby J agreed with these remarks[18] and said:[19]

> The decision of the primary judge in the present case was not strictly a discretionary one, so far at least as it concerned whether the conduct of the respondents was "unconscionable". Yet it undoubtedly involved elements of evaluation and assessment, as the primary judge himself recognised. It involved the application to a mass of evidence of a legal standard expressed in broad statutory language and of decisional law calling forth a judicial response that is partly analytical and partly intuitive. In the nature of things, it is difficult for appellate courts to

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[14] (1980) 144 CLR 431 at 443.

[15] (1994) 181 CLR 201 at 210–211 per Mason CJ, Deane and McHugh JJ.

[16] (2003) 214 CLR 51.

[17] (2003) 214 CLR 51 at [167].

[18] (2003) 214 CLR 51 at [81] fn 114.

[19] (2003) 214 CLR 51 at [82].

> replicate exactly the advantages of the primary judge in making such decisions. These are not reasons for neglecting the appellate function. However, they are reasons for exercising a degree of restraint when asked, on the basis of the written record, to review a conclusion about unconscionable dealing reached at trial.

45. It might credibly be said that the correct construction of a statute or a contract involves an evaluative exercise, weighing various competing factors. Yet it has never been said that the construction of a statute or a contract is an evaluative decision which attracts the principles in *House v The King* by analogy. Any finding of negligence may likewise be characterised as evaluative — yet, again, the principles in *House v The King* are inapplicable.[20] The same has been held about the decision whether a contract is unjust,[21] and whether it is just and reasonable to extend a limitation period.[22]

46. Accordingly, it is insufficient to engage *House v The King* that the decision at issue involves a matter which can be characterised as "evaluative".

47. Conversely, there is authority in this Court accepting the application of *House v The King* beyond the classic circumstance where the primary judge has a largely unfettered power to decide whether or not to do something. Thus, there is longstanding authority in this Court which supports the application of *House v The King* to appeals from decisions as to the quantification of damages for non-economic loss for personal injuries[23] and the just and equitable apportionment of damages between wrongdoers.[24] More recently, in *Batistatos v Roads and Traffic Authority of New South Wales*,[25] four judges of this Court accepted that those principles would apply to an appeal from a decision of a primary judge to stay a proceeding as an abuse of process, or to fail to stay a proceeding as an abuse of process, attracts the strictures of *House v The King*.

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[20] *Warren v Coombes* (1979) 142 CLR 531.

[21] *Antonovic v Volker* (1986) 7 NSWLR 151 (CA) at 154-6 per Samuels JA; *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256 (CA) at 261-3 per Kirby P; *Perpetual Trustee Co Ltd v Khoshaba* (2005) 14 BPR 26,639 (NSWCA) at [100] per Handley JA, [107] per Basten JA.

[22] *Certain Lloyds Underwriters v Giannopoulos* [2009] NSWCA 56 at [107]-[110] per Campbell JA.

[23] *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13 per Dixon J; *Miller v Jennings* (1954) 92 CLR 190 at 194-6 per Dixon CJ and Kitto J; *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 at 124 per *curiam*; *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 369 per Gibbs J.

[24] *AV Jennings Construction Pty Ltd v Maumill* (1956) 30 ALJ 100 at 101 per *curiam*; *Watt v Bretag* (1982) 56 ALJR 760 at 761 per Gibbs CJ, Mason and Brennan JJ.

[25] (2006) 226 CLR 256 at [7] per Gleeson CJ, Gummow, Hayne and Crennan JJ, cf at [223], [236] per Callinan J.

48. The explanation for these cases lies not in the mere fact that the decisions at issue are "evaluative". It lies in the fact that, as explained in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*,[26] the concept of a "discretion" refers not only to the classic case involving a relatively unfettered power to decide whether or not to do something but also:

> to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made.

49. The critical feature is that, as a matter of the proper construction of the statute empowering the decision to be made, [27] or the proper approach to the common law rule pursuant to which the decision is to be made,[28] the decision is not one in which there is, legally, only one correct answer but, rather, one in which there is an element of permissible choice by the decision-maker. It is that feature which provides the foundation for the limited approach on appeal for which *House v The King* provides. As further explained in *Coal and Allied*:[29]

> Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. There errors that might be made in the decision-making process were identified, in relation to judicial discretions, in *House v The King* ...

50. Understood in this light, it is clear that the decision by a primary judge whether or not a tribunal has acted in a manner which is legally unreasonable cannot be regarded as a discretion, to which the principles in *House v The King* apply. There is no permissible element of "choice" on the part of the primary judge: there can be no latitude when it comes to invalidity. Either the action of the tribunal was legally unreasonable or it was not. While considering legal unreasonableness may be

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[26] (2000) 203 CLR 194 at [19] per Gleeson CJ, Gaudron and Hayne JJ, quoted in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [89] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[27] See, eg, *Pennington v Norris* (1956) 96 CLR 10 at 15–16 ("[apportionment legislation] intends to give a very wide discretion to the judge or jury entrusted with the original task of making the apportionment. Much latitude must be allowed to the original tribunal in arriving at a judgment as to what is just and equitable").

[28] See, eg, *Miller v Jennings* (1954) 92 CLR 190 at 194–6 per Dixon CJ and Kitto J ("there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion").

[29] (2000) 203 CLR 194 at [21] per Gleeson CJ, Gaudron and Hayne JJ.

"evaluative", it is not a circumstance where there is "so much room for individual choice"[30] that it is more like the exercise of a (true) discretion.

**(c) The reasonableness of the decision of the Tribunal**

51. In any event, for either (or both) of the reasons explained above, the approach of the Full Court of the Federal Court in this case, based upon at least an analogy with *House v The King*, was fundamentally wrong. In this case, there was no oral evidence heard by the primary judge and the scope of the evidentiary record was very small. There is accordingly no aspect of the primary judge's reasons which therefore requires any particular deference.

52. Approached without deferring to the primary judge's views, for the following reasons, the conclusion in this case ought to have been that the decision of the Tribunal was not legally unreasonable.

53. ***First***, consistently with *Li*,[31] the legal standard of reasonableness and the indicia of legal unreasonableness are found in the scope, subject and purpose of the particular statutory scheme. Yet to place great significance on the proposition that the Tribunal could not have been satisfied that the respondents were aware of the hearing date and time is inconsistent with the deeming effected by s 441C of the Act.[32] That point was not answered by the fact, identified by the Full Court, that the primary judge found that the evidence as to engagement of s 441A(4) was not entirely satisfactory (FC [48]). That is because, as explained in paragraph 17 above, the primary judge proceeded on the basis that s 441A(4) was satisfied. The respondents did not, in the Full Court, file any notice of contention seeking to support the primary judge's decision on the alternative basis that s 441A(4) was not satisfied.

54. ***Secondly***, the primary judge's analysis paid no regard to the respondents' interaction with the delegate of the Minister. As before the Tribunal, they did not respond to the invitation to attend an interview. There was not before the Tribunal, or at any time, any suggestion by the respondents that they did not receive that invitation. Indeed, they were contacted (by phone, it seems) by a Mandarin speaking departmental official about it. Yet they did not attend the interview. These matters were noted by the Tribunal [[15]–[17]]. They provided evidence from which the Tribunal could

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[30] cf *Miller v Jennings* (1954) 92 CLR 190 at 196 per Dixon CJ and Kitto J.

[31] (2013) 249 CLR 332 at [67] per Hayne, Kiefel and Bell JJ. See also *Stretton* (2016) 237 FCR 1 (FC) at [10] per Allsop CJ, [57] per Griffiths J.

[32] *Xie v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 172 at [13]–[14].

reasonably conclude that the respondents were aware of, but chose not to attend, the hearing before the Tribunal. At the least, they denied any basis for a view that the failure to attend the hearing was out of character or unexpected. These matters are not answered by FC [51]. Indeed, the Full Court's reasons leave out any mention of the contact with a Mandarin speaking departmental official.

55. ***Thirdly***, it may be accepted that *prima facie* the hearing invitation was of great significance to the respondents. However, that is tempered by the point made in the previous paragraph: the hearing before the delegate was of equal significance yet the respondents did not attend it. It is not to the point that there was no evidence as to ***why*** they did not (cf FC [52]). The fact that they did not provided a proper basis for the Tribunal, acting reasonably, to proceed as it did.

56. ***Fourthly***, it may be accepted that it was fairly readily open to the Tribunal to seek to communicate with the respondents by email or telephone, given that these details had been provided. However, the Tribunal was under no obligation to use these forms of communication: it was open to the Tribunal to use any method of communication specified in s 441A, including that which it did.[33] To say that, in light of the matters above, it was legally unreasonable for the Tribunal not to seek to contact the respondents by email or telephone once they had failed to appear at the hearing would, in practice, be tantamount to imposing a ***requirement*** for the Tribunal to do so in all or almost all protection visa cases. That is not consistent with the very existence of s 426A or with the choice of methods of communication open to the Tribunal under s 441A. Further, it does not sit well with the absence of any general obligation on the Tribunal to seek to communicate with an applicant further once the invitation required by ss 425 and 425A has been sent.[34] Again, consistently with *Li*, these aspects of the statutory scheme pointed strongly against a conclusion of legal unreasonableness. FC [53] provides no answer to these matters, other than to refer, without explanation and, for the reasons above, incorrectly, to the primary judge's evaluation of the circumstances.

57. The outcome in the Full Court in this case belies the proposition, noted by Gageler J in *Li*,[35] that the approach to unreasonableness remains a "stringent" one. That

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[33] *Minister for Immigration and Border Protection v Kim* (2014) 220 FCR 494; *Radzi v Minister for Immigration and Border Protection* (2014) 143 ALD 124 (FCA); *Pathania v Minister for Immigration and Border Protection* (2015) 240 FCR 254.

[34] *Minister for Immigration and Multicultural and Indigenous Affairs v SZFHC* (2006) 150 FCR 439 (FC) at [38]–[39]. See also *NBBL v Minister for Immigration* (2006) 152 FCR 592 at [21].

[35] (2013) 249 CLR 332 at [105]–[113].

proposition has been emphasised by the New South Wales Court of Appeal[36] and the Queensland Court of Appeal.[37] Notwithstanding the submission to that effect by the Minister in this case (FC [27]), it was notably absent from the Full Court's statement of applicable principles (FC [37]–[39]).

58. The unsoundness of the outcome in this case is underscored by comparison with *Kaur v Minister for Immigration and Border Protection*,[38] on which the primary judge placed considerable reliance (PJ [63]ff). In that case, the hearing invitation concerned a second hearing, after the applicant had already attended a first hearing. There had also been a considerable course of correspondence between the Tribunal and the applicant, during which she was responsive and disclosed a level of anxiety to ensure that she was being kept informed and supplied the information the Tribunal required.[39] In *Kaur*, there were thus facts which suggested that the failure to appear at the hearing was unexpected or out of character. No such facts were present here. To repeat what was recently said in *MZALO v Minister for Immigration and Border Protection*:[40] "This is not a case where there had been a pattern of close contact with the Tribunal such that it was reasonable to expect the Tribunal to take the short and simple step of making a phone call to the appellant to see why she had not attended the hearing." To the contrary, the conduct of the respondents in failing to appear before the Tribunal was consistent with their failure to attend their interview with the delegate of the Minister, which was noted by the Tribunal.

59. Contrary to FC [55]–[57], there is nothing inappropriate about such analysis of and comparison with previously decided cases. Rather, as is apparent, it assists in demonstrating, by way of contrast, why the decision of the Tribunal in this case was ***not*** legally unreasonable.

60. In *Minister for Immigration and Border Protection v Singh*,[41] the Full Court said:

> It would be wrong to see *Li* as creating some kind of factual checklist to be followed and applied in determining whether there has been a legally unreasonable exercise of a discretionary power. Unlike some

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[36] *Arnold v Minister Administering the Water Management Act 2000* [2014] NSWCA 386 at [91]–[92]; *Waterhouse v Independent Commission Against Corruption (No 2)* [2016] NSWCA 133 at [56], [83].

[37] *Francis v Crime and Corruption Commission* [2015] QCA 218 at [33].

[38] (2014) 236 FCR 393.

[39] (2014) 236 FCR 393 at [138]–[141] per Mortimer J.

[40] (2016) 70 AAR 495 (FCA) at [24] per Mortimer J.

[41] (2014) 231 FCR 437 (FC) at [42] per *curiam*.

> grounds of review, legal unreasonableness is invariably fact dependent, so that in any given case determining whether an exercise of power crosses the line into legal unreasonableness will require careful evaluation of the evidence before the court, including any inferences which may be drawn from that evidence. ***Ultimately, however, the outcome will depend on the application of the principles which emerge from Li, and the earlier authorities discussed in it, rather than on mere factual similarities or differences.*** [emphasis added]

61. There is a radical difference between that statement, on one hand, and the approach of the Full Court in this case, on the other. It is one thing to say that a finding of legal unreasonableness is fact dependent and does not ***depend*** on ***mere*** factual similarities or differences between individual cases. It is another to say that analysis of such factual similarities or differences is ***irrelevant*** and ***unhelpful***. That is particularly so where, as here, the individual cases concern precisely the same legal provision and a kind of decision which it may be expected is to be made time and again by the Tribunal.

62. Reference to previously decided cases may often be a helpful guide as to what is within the bounds of reasonable decision-making, and thereby to assist in consistency of decision-making and judicial review of decision-making. As Beazley JA said in *Donnellan v Woodland*:[42]

> Like snowflakes, no two cases are identical. Nonetheless, decided cases play an important role in the jurisprudential framework. Earlier cases that involve the application of principle provide guidance to decision makers as to how principle is to be applied in a particular case. The consistent application of principle in like cases promotes and enhances the predictability of the law, which is itself an important and recognisable strength of the common law. It is also a recognised feature of the common law that there is elasticity in the ultimate fact-finding process in which a court engages. The closer a case is to an earlier decision, the closer is the guidance that it provides.

63. Here, reference to previously decided cases, on precisely the same provision, in particular to *Kaur*, assists to demonstrate, by way of contrast, why the decision of the Tribunal in this case was ***not*** legally unreasonable. The deprecation by the Full Court of this kind of comparison is apt to reduce consistency in decisions of courts called upon to consider questions of legal unreasonableness in cases, such as this, involving the application of the same provision in similar circumstances on many occasions.

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[42] [2012] NSWCA 433 at [197].

## PART VII: LEGISLATIVE PROVISIONS

64. A copy of the relevant legislative provisions is annexed.

## PART VIII: ORDERS SOUGHT

65. The appeal should be allowed.

66. As specified in the Minister's notice of appeal, paragraph 1 of the orders of the Full Court should be set aside and, in its place, it should be ordered that the appeal to the Full Court be allowed, the orders of the Federal Circuit Court be set aside and, in their place, the application to the Federal Circuit Court should be dismissed.

67. The Minister does not seek to disturb the costs orders made in favour of the first and respondents by the Full Court and agrees to pay the costs of the first and second respondents in this Court in any event.

## PART IX: ORAL ARGUMENT

68. The Minister estimates that 1.5 hours will be required for the presentation of the Minster's oral argument.

Dated: 19 October 2017

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(a) is invited under section 424A to comment on or respond to information; and

(b) does not give the comments or the response before the time for giving them has passed;

the Tribunal may make a decision on the review without taking any further action to obtain the applicant's views on the information.

### 425 Tribunal must invite applicant to appear

(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or

(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or

(c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

### 425A Notice of invitation to appear

(1) If the applicant is invited to appear before the Tribunal, the Tribunal must give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear.

(2) The notice must be given to the applicant:

(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(3) The period of notice given must be at least the prescribed period or, if no period is prescribed, a reasonable period.

(4) The notice must contain a statement of the effect of section 426A.

### 426 Applicant may request Refugee Review Tribunal to call witnesses

(1) In the notice under section 425A, the Tribunal must notify the applicant:

(a) that he or she is invited to appear before the Tribunal to give evidence; and

(b) of the effect of subsection (2) of this section.

(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.

(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.

### 426A Failure of applicant to appear before Tribunal

(1) If the applicant:

(a) is invited under section 425 to appear before the Tribunal; and

(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it.

(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled.

### 427 Powers of the Refugee Review Tribunal etc.

(1) For the purpose of the review of a decision, the Tribunal may:

(a) take evidence on oath or affirmation; or

(b) adjourn the review from time to time; or

## Division 7A—Giving and receiving review documents etc.

### 441AA Giving documents by Tribunal where no requirement to do so by section 441A or 441B method

(1) If:

(a) a provision of this Act or the regulations requires or permits the Tribunal to give a document to a person; and

(b) the provision does not state that the document must be given:

(i) by one of the methods specified in section 441A or 441B; or

(ii) by a method prescribed for the purposes of giving documents to a person in immigration detention;

the Tribunal may give the document to the person by any method that it considers appropriate (which may be one of the methods mentioned in subparagraph (b)(i) or (ii) of this section).

Note 1: If 2 or more persons apply for a review of a decision together, a document given to a person is taken to be given to each of them, see section 441EA.

Note 2: Under section 441G an applicant may give the Tribunal the name of an authorised recipient who is to receive documents on the applicant's behalf.

(2) If a person is a minor, the Tribunal may give a document to an individual who is at least 18 years of age if a member, the Registrar or an officer of the Tribunal reasonably believes that:

(a) the individual has day-to-day care and responsibility for the minor; or

(b) the individual works in or for an organisation that has day-to-day care and responsibility for the minor and the individual's duties, whether alone or jointly with another person, involve care and responsibility for the minor.

(2A) However, subsection (2) does not apply if section 441EA (which relates to giving documents in the case of combined applications) applies in relation to the minor.

(3) If the Tribunal gives a document to an individual, as mentioned in subsection (2), the Tribunal is taken to have given the document to the minor. However, this does not prevent the Tribunal giving the minor a copy of the document.

## 441A Methods by which Tribunal gives documents to a person other than the Secretary

*Coverage of section*

(1) For the purposes of provisions of this Part or the regulations that:

(a) require or permit the Tribunal to give a document to a person (the ***recipient***); and

(b) state that the Tribunal must do so by one of the methods specified in this section;

the methods are as follows.

(1A) If a person is a minor, the Tribunal may use the methods mentioned in subsections (4) and (5) to dispatch or transmit, as the case may be, a document to an individual (a ***carer of the minor***):

(a) who is at least 18 years of age; and

(b) who a member, the Registrar or an officer of the Tribunal reasonably believes:

(i) has day-to-day care and responsibility for the minor; or

(ii) works in or for an organisation that has day-to-day care and responsibility for the minor and whose duties, whether alone or jointly with another person, involve care and responsibility for the minor.

Note: If the Tribunal gives an individual a document by the method mentioned in subsection (4) or (5), the individual is taken to have received the document at the time specified in section 441C in respect of that method.

(1B) However, subsection (1A) does not apply if section 441EA (which relates to giving documents in the case of combined applications) applies in relation to the minor.

*Giving by hand*

(2) One method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to the recipient.

*Handing to a person at last residential or business address*

(3) Another method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to another person who:

(a) is at the last residential or business address provided to the Tribunal by the recipient in connection with the review; and

(b) appears to live there (in the case of a residential address) or work there (in the case of a business address); and

(c) appears to be at least 16 years of age.

*Dispatch by prepaid post or by other prepaid means*

(4) Another method consists of a member, the Registrar or an officer of the Tribunal, dating the document, and then dispatching it:

(a) within 3 working days (in the place of dispatch) of the date of the document; and

(b) by prepaid post or by other prepaid means; and

(c) to:

(i) the last address for service provided to the Tribunal by the recipient in connection with the review; or

(ii) the last residential or business address provided to the Tribunal by the recipient in connection with the review; or

(iii) if the recipient is a minor—the last address for a carer of the minor that is known by the member, Registrar or other officer.

*Transmission by fax, email or other electronic means*

(5) Another method consists of a member, the Registrar or an officer of the Tribunal, transmitting the document by:

(a) fax; or

(b) email; or

(c) other electronic means;

to:

(d) the last fax number, email address or other electronic address, as the case may be, provided to the Tribunal by the recipient in connection with the review; or

(e) if the recipient is a minor—the last fax number, email address or other electronic address, as the case may be, for a carer of the minor that is known by the member, Registrar or other officer.

*Documents given to a carer*

(6) If the Tribunal gives a document to a carer of a minor, the Tribunal is taken to have given the document to the minor. However, this does not prevent the Tribunal giving the minor a copy of the document.

## 441B Methods by which Tribunal gives documents to the Secretary

*Coverage of section*

(1) For the purposes of provisions of this Part or the regulations that:

(a) require or permit the Tribunal to give a document to the Secretary; and

(b) state that the Tribunal must do so by one of the methods specified in this section;

the methods are as follows.

*Giving by hand*

(2) One method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to the Secretary or to an authorised officer.

*Dispatch by post or by other means*

(3) Another method consists of a member, the Registrar or an officer of the Tribunal, dating the document, and then dispatching it:

(a) within 3 working days (in the place of dispatch) of the date of the document; and

(b) by post or by other means; and

(c) to an address, notified to the Tribunal in writing by the Secretary, to which such documents can be dispatched.

*Transmission by fax, email or other electronic means*

(4) Another method consists of a member, the Registrar or an officer of the Tribunal, transmitting the document by:

(a) fax; or

(b) email; or

(c) other electronic means;

to the last fax number, email address or other electronic address notified to the Tribunal in writing by the Secretary for the purpose.

## 441C When a person other than the Secretary is taken to have received a document from the Tribunal

(1) This section applies if the Tribunal gives a document to a person other than the Secretary by one of the methods specified in section 441A (including in a case covered by section 441AA).

*Giving by hand*

(2) If the Tribunal gives a document to a person by the method in subsection 441A(2) (which involves handing the document to the person), the person is taken to have received the document when it is handed to the person.

*Handing to a person at last residential or business address*

(3) If the Tribunal gives a document to a person by the method in subsection 441A(3) (which involves handing the document to another person at a residential or business address), the person is taken to have received the document when it is handed to the other person.

*Dispatch by prepaid post or by other prepaid means*

(4) If the Tribunal gives a document to a person by the method in subsection 441A(4) (which involves dispatching the document by prepaid post or by other prepaid means), the person is taken to have received the document:

(a) if the document was dispatched from a place in Australia to an address in Australia—7 working days (in the place of that address) after the date of the document; or

(b) in any other case—21 days after the date of the document.

*Transmission by fax, email or other electronic means*

(5) If the Tribunal gives a document to a person by the method in subsection 441A(5) (which involves transmitting the document by fax, email or other electronic means), the person is taken to have received the document at the end of the day on which the document is transmitted.

(6) Subsection (5) applies despite section 14 of the *Electronic Transactions Act 1999*.

*Document not given effectively*

(7) If:

(a) the Tribunal purports to give a document to a person in accordance with a method specified in section 441A (including in a case covered by section 441AA) but makes an error in doing so; and

(b) the person nonetheless receives the document or a copy of it;

then the person is taken to have received the document at the times mentioned in this section as if the Tribunal had given the document to the person without making an error in doing so, unless the person can show that he or she received it at a later time, in which case, the person is taken to have received it at that time.