IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S244 of 2017

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

and

10 **SZVFW**
First respondent

SZVFX
Second respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Third respondent

APPELLANT'S ANNOTATED REPLY

20 ## PART I: CERTIFICATION

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

PART II: ARGUMENT IN REPLY

2. These submissions are in reply to the first and second respondents' submissions filed 13 November 2017 (**RS**). Abbreviations adopted in the appellant's principal submissions filed 19 October 2017 (**AS**) are adopted below.

(a) Fatal concessions by the respondents

3. The respondents' submissions contain a number of concessions, which, for the reasons in the Minister's principal submissions and the further submissions below, are fatal to the respondents' position in this appeal.

30 4. ***First***, the respondents concede that, legally, there can only be one correct answer on the issue of legal unreasonableness (RS [3(a)], [31])[1] and that the determination whether a decision is legally unreasonable is not an exercise of discretion (RS [3(b)]). The consequence of these concessions is that, for the reasons in AS [25]–[50], an appeal in a case involving legal unreasonableness is not to be approached by

[1] RS [34] appears to run somewhat counter to this concession. To the extent that RS [34] suggests that there can, legally, be more than one permissible view as to whether a decision was legally unreasonable, it is wrong for the reasons in AS [27]–[29] and [50].

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reference to, or by analogy with, the principles applicable to cases involving true discretions or other evaluative decisions in which more than one answer is legally permissible. So much is indeed conceded by the respondents (RS [45]). Yet that is how the Full Court approached the case.

5. ***Secondly***, the respondents concede that, on an appeal against a conclusion as to legal unreasonableness, the question is not only whether there was error in the ***reasoning*** of the primary judge but also in the ***conclusion*** of the primary judge (RS [37]). That must follow from the first concession, and the submissions at AS [25]–[50]. The same is so in, for instance, a statutory construction case. As Allsop J explained in *Branir* in the passage quoted in AS [32], the appeal court's preference for a different conclusion to that of the primary judge carries with it the identification of error in that conclusion sufficient to support an appeal.

6. ***Thirdly***, the respondents concede that the Full Court at no time independently assessed for itself whether or not the Tribunal's decision was legally unreasonable (RS [60]). Yet, having regard to the concessions noted above, that was an essential element of the Full Court's task.

7. ***Fourthly***, the respondents concede that the test for legal unreasonableness remains "stringent" (RS [65]). As noted in AS [57], that was a significant omission from the reasons of the Full Court.

(b) The respondents' mischaracterisation of the Full Court's approach

8. In the face of these concessions, the respondents are driven to mischaracterising the Full Court's approach in order to defend it. The respondents submissions repeatedly attempt to deny the extent to which the Full Court relied on principles applicable to appeals from discretionary decisions (eg RS [23], [26], [27], [56]).

9. Yet the respondents simply cannot escape the reasons of the Full Court at FC [45] [**AB 166**]. In that passage, in which the Full Court explained how it approached the appeal, the Full Court said that it took guidance from cases involving appeals from discretionary decisions. For the reasons in the appellant's principal submissions, to do so was — and, it seems from the respondents' submissions, must be conceded by the respondents to be — fundamentally wrong. Contrary to RS [23], the fact that the Full Court did not in terms refer to *House v The King* does not weaken this point. The passage from the reasons of Latham CJ in *Lovell v Lovell*[2] quoted at FC [45]

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[2] (1950) 81 CLR 513.

[**AB 166**] makes essentially the same point, and indeed Latham CJ quoted *House v The King* immediately before that passage.

10. The Full Court's subsequent references to the absence of "appealable error" must be understood in light of its reasons at FC [45] [**AB 166**]. In this light, it is evident that the Full Court was not using that language to describe the conclusion of its process of reasoning, ie that it had considered the point for itself and agreed with the primary judge's reasoning ***and conclusion*** that the Tribunal's decision was legally unreasonable. Rather, it was using that language to mark the absence of the kind of error which the Full Court perceived had to be demonstrated, ie the kind necessary to disturb a discretionary decision (cf RS [25]–[28], [41]–[44]). It is for this reason that it can rightly be said that the Full Court's approach infected the whole of its reasoning. The Full Court's reasons at FC [45] [**AB 166**] demonstrate far more than the Full Court simply giving "respect and weight to the conclusion of the trial judge" as to be expected in any appeal from a reasoned judicial decision (cf RS [46]–[47]).

11. For these reasons, the respondents' characterisation of the issue in this appeal in RS [2] as being only whether the Full Court was correct to require the Minister to identify error in the reasoning of the primary judge is wrong. So too is the submission at RS [4] that the Full Court did not proceed on the basis that it must be satisfied of an error in the nature of that required by *House v The King*.

(c) The approach to appeals requiring identification of error

12. Contrary to RS [31], for the reasons in AS [32]–[34], in terms of the approach of an appeal court, no distinction can be drawn as a matter of principle between decisions as to legal unreasonableness and statutory construction. It may be accepted that the question of legal unreasonableness will ordinarily involve greater attention to the individual factual circumstances than a statutory construction case. But that is beside the point for present purposes. In neither is more than one answer legally permissible and, accordingly, in neither is reference to cases involving appeals from discretionary decisions appropriate.

13. More generally, in such cases, contrary to RS [41]–[42], it is ***not*** sufficient for the appeal court simply to consider the steps in the reasoning of the primary judge to identify whether there is error in any of those steps. To do so risks the appeal court omitting to do what it is required to do: determine whether the ultimate conclusion reached by the primary judge on a question of law with only one legally correct answer is correct.

14. Indeed, in such cases, for the reasons explained in AS [32], and contrary to RS [45], it is not in principle ***necessary*** that the appeal court identify error in the steps in the primary judge's reasoning, as disagreement as to the ultimate conclusion is sufficient. No doubt it may often be helpful for the appeal court to consider the primary judge's analysis, as that may assist in identifying whether or not the conclusion reached is correct or erroneous. But the appeal court may reach a different ultimate conclusion without identifying "specific error" of the kind necessary in an appeal from a discretion. That was the point made by counsel for the Minister during oral argument before the Full Court in this case in the passage quoted at FC [29] [**AB 161**][3] (cf RS [42]). Accordingly, in cases involving legal questions such as that at issue here, it is unhelpful to deprecate the appeal court "approach[ing] its role as if it were a court of first instance" (cf RS [48]).

15. For the reasons in AS [35], there ***is*** a distinction in terms of the approach of an appeal court to a finding of fact in which the primary judge enjoyed advantages to the appeal court. It was in that context that the passages quoted at RS [38]–[40] were stated. Be that as it may, as explained at AS [35], even those passages do not justify the approach of the Full Court in this case. At most, they justify appellate restraint of the kind discussed in *Fox v Percy*. No such restraint was called for in this case, for the reasons in AS [51].

(d) "Evaluative" decisions

16. Having regard to the respondents' concessions noted at paragraph 3 above, the relevance of the respondents' submissions concerning cases involving "evaluative" decisions is opaque (RS [49]–[54]). Be that as it may, for the reasons in AS [25]–[50] that line of cases is inapplicable to the present case.

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[3] That is even clearer from the full submission made by counsel for the Minister, not quoted by the Full Court (see the annexed transcript extracts). At transcript p 18.7–14, counsel for the Minister said: "*it's obviously not a discretion which her Honour was exercising, so I don't have to demonstrate House v The King error. […] if your Honour has formed the view that […] it was wrong, then it was just wrong.*" At transcript p 21.42–46, counsel for the Minister said: "*the primary judge concluded, looking at the circumstances, that it was unreasonable. Really, the question for your Honours is effectively the same one. Although, your Honours, it's an appeal and an error has to be identified, if your Honours form the view that actually, on all of the material —*" Kerr J then said (transcript p 22.1–7): "*Well, that's a House v The King approach, and I'm not minded to approach it that way. … I'm minded to find an error and, if no error is discernible, to say, 'Well, sorry.'*" It was in that context that counsel for the Minister responded (transcript p 22.9–13): "*Well, with respect, your Honour, given that the question is a legal one of whether the tribunal acted in a Wednesbury unreasonableness way or a legally unreasonable way, it's as much a matter for your Honours to answer that question as it was for the primary judge, and it's not necessary for your Honours to say the primary judge made a legal error in the course of her Honour's analysis.*"

(e) The reasonableness of the Tribunal's decision

17. Most of the matters identified by the respondents at RS [61]–[72] in support of the primary judge's conclusion are addressed at AS [51]–[63]. The Minister makes the following points by way of reply.

18. ***First***, for the reasons in AS [53], the respondents' focus on whether the Tribunal could have been satisfied as to whether the respondents in fact received the hearing invitation (RS [66], [68], see also RS [12]) is inconsistent with the statutory scheme, and in particular s 441C. The fact that the respondents gave evidence before the primary judge, which was not challenged, that they were absent from Sydney at the time and were unaware of the contents of the invitation to attend the Tribunal hearing (RS [13]) was, and is, irrelevant to the reasonableness of the Tribunal's decision, given that that information was not before the Tribunal.

19. ***Secondly***, for the reasons in AS [53], the primary judge's doubt as to whether s 441A was satisfied is likewise irrelevant, given that the primary judge resolved the matter on the assumption that it was, and the respondents did not in the Full Court, and do not in this Court, contest that assumption (cf RS [67], see also RS [17]).[4] That being so, the question of unreasonableness must be resolved on the basis that s 441A was satisfied.

20. ***Thirdly***, contrary to RS [70], that a conclusion on the facts of this case does not, as a matter of law, impose any mandatory requirements on the Tribunal in the future does not undermine the point at AS [56]. For the reasons explained in AS [59]–[63], the facts, reasoning and outcome of this case will inevitably provide guidance to the Tribunal in future cases involving similar circumstances.

Dated: 27 November 2017

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[4] To be clear, the Minister made written submissions to the Full Court as to why the primary judge's doubts were unfounded, and that remains the Minister's position. But as the point was not raised by the respondents by notice of contention, the Full Court did not consider this issue.

KERR J: Because there was no means of tracking it. It was sent by ordinary post, not by registered post.

MR HERZFELD: That's - - -

KERR J: So let's work on the reality of what we know. The tribunal could not have known - - -

MR HERZFELD: But importantly for present purposes, addressing your Honour's point, well, we know – or that was proceeded on the common assumption that the applicants, in fact, did not receive it, that's not really a relevant matter to be assessing the reasonableness of the tribunal's exercise of discretion, because that has to be assessed against the basis of what the tribunal knew at the time. That's the first answer. The second answer is that the mere existence of 441C and the deeming provision operates – rather, 441C operates even if an applicant says, "Look, in fact, I didn't receive this," and that's an indication in the statutory context that the factual question of whether an applicant did receive a notice is not a matter which the scheme suggests should be of great moment. And that's the constructional argument which, in my submission, consistently with Stretton, particularly, is relevant to assessing what matters go into the mix when assessing unreasonableness.

KERR J: But doesn't it operate – and – look, excuse me. I shouldn't take your time to lengths, but doesn't it operate somewhat differently in the sense that when the judge of the Federal Circuit Court was considering the question of unreasonableness, had it been the case established that, in fact, this had come to notice, relief should not have been granted because whatever way in which the tribunal – however curt it had been in terms of its consideration, however faulty the materials before it, no real injustice has been done?

MR HERZFELD: That's so.

KERR J: So that is an affirmative reason not to grant the relief.

MR HERZFELD: That's so, and that would be, in a sense, an additional or quite separate reason. Quite apart from anything else, it would have meant that there was an additional reason not to grant relief.

KERR J: But having otherwise the simple fact that you have a statutory provision that deems that the letter was delivered to the address that the applicant had provided, and that the applicant hadn't turned up, I still struggle to see how the provisions of 441C really say anything about how the exercise of the discretion in relation to what you do in those circumstances should be exercised. Surely it's a matter of the context of all the events, the circumstances, all of those other situations, whether it's easy to make an inquiry, all of the factual matrix, and don't you have to persuade us in the particular circumstances of this case that the reviewing judge is in error in some way; that he or she – she - - -

MR HERZFELD: She.

KERR J: - - - misunderstood or misapplied the principles of the High Court as established in Li and had been given an effect to in various different ways or nuanced ways by the judges of this court?

MR HERZFELD: Just working backwards, it's obviously not a discretion which her Honour was exercising, so I don't have to demonstrate House v The King error.

KERR J: That's true.

MR HERZFELD: In a sense, if your Honour has formed the view that - - -

KERR J: It was wrong.

MR HERZFELD: - - - it was wrong, then it was just wrong. That's a quibble. But in relation to the significance of 441C, test it this way. Suppose the 441C provided that a notice is not effective unless an applicant, in fact, received notice of it. That would be a strong indication that something highly relevant to the tribunal's consideration is, well, has the applicant, in fact, received the notice? That's a clue that that's something that the scheme says is very important and is a factor which should weigh heavily in the exercise of the tribunal's discretion, and therefore is a factor which equally can weigh heavily in deciding whether the tribunal's discretion was exercised unreasonably.

KERR J: That would be a jurisdictional fact, and the absence of a finding – necessary requisite to do that would invalidate the decision. I mean, let's - - -

MR HERZFELD: No, but the point that I'm seeking to make is the fact that this scheme expressly de-emphasises whether, in fact, an applicant has received a notice is rather inconsistent with placing emphasis on that matter in deciding whether the tribunal's exercise of - - -

KERR J: Doesn't it just provide a convenient method to avoid the inherent difficulty and the absurdity that would be required if you had to prove actual receipt? You have a deemed receipt. The question is, well, in some circumstances you will adjourn; in some cases you won't. There must be some principles that apply to that.

MR HERZFELD: Well, your Honour, I mean, it's a bit more than that, because otherwise it could just be a rebuttable presumption. It's not - - -

KERR J: Well, it's – no, no, no. No, no, it's a deemed receipt.

MR HERZFELD: I accept that, and if all it was getting at was inconvenience, it could be a rebuttable presumption. It goes further than that, and the fact that it goes further than that is, in my submission, an indicator that whether actually, as a matter of fact, an applicant has received a notice is not properly a matter which should be

Now, the respondent's submissions at paragraph 22, really criticise the written submissions for focusing on the absence of any analysis for these matters by the primary judge. It's not really apparent why that criticism would be made – the history before the delegate formed part of the context which had to be considered, and was considered by the tribunal. And then ought to have been considered but was not by the primary judge.

KERR J: Could I ask you – you would ask us to read not only paragraph 4 of the reasons, but also 15, 16 and 17.

MR HERZFELD: These are the tribunal's reasons?

KERR J: Yes.

MR HERZFELD: Yes, yes.

KERR J: As – perhaps unhelpfully bifurcated, but nonetheless revealing that in relation to the decision to proceed, that the tribunal was both aware of and took into account its previous – the applicant's previous non-attendance.

MR HERZFELD: That's so. And it's plain in terms, your Honour, that paragraphs 1 to 4 are really an introductory set of paragraphs, and that paragraphs 15 to 17 provide the reasoning – brief, but, in my submission, entirely adequate – for the tribunal's conclusion that it should proceed with the review. And the first thing that's mentioned is the delegate's decision – the course of conduct for the delegate. And that course of conduct was really not analysed by her Honour at all. The third point is this: her Honour placed emphasis upon the fact that the interview with the – the hearing invitation to the tribunal and the attendance at the tribunal was of great significance to the applicants. And that may be accepted as a prima facie matter, but the importance of that invitation is really tempered by the fact that the interview with the delegate, one would have thought, was also a matter of great importance, and yet they didn't attend that. So, again, in the factual mix here, to place emphasis on the apparent importance of the interview at the tribunal doesn't pay sufficient regard to the previous history.

KERR J: And if we were reviewing the tribunal's decisions directly, that would be persuasive, but I would be very grateful if you could identify the error we can attach, because let's assume that the tribunal did give regard to those matters. The error you assert is that the learned Federal Circuit Court judge did not give regard to relevant material. I don't want to put words in your mouth, but - - -

MR HERZFELD: No, but in a sense, the primary judge concluded, looking at the circumstances, that it was unreasonable. Really, the question for your Honours is effectively the same one. Although, your Honours, it's an appeal and an error has to be identified, if your Honours form the view that actually, on all of the material, the - - -

KERR J: Well, that's a House v The King approach, and I'm not minded to approach it that way.

MR HERZFELD: No.

KERR J: I'm minded to find an error and, if no error is discernible, to say, "Well, sorry."

MR HERZFELD: Well, with respect, your Honour, given that the question is a legal one of whether the tribunal acted in a Wednesbury unreasonableness way or a legally unreasonable way, it's as much a matter for your Honours to answer that question as it was for the primary judge, and it's not necessary for your Honours to say the primary judge made a legal error in the course of her Honour's analysis. However - - -

KERR J: But it must have done something wrong.

MR HERZFELD: That's so. And that's - - -

KERR J: So all I'm asking you to crystallise so I can make a note of it - - -

MR HERZFELD: Yes.

KERR J: - - - is – you've drawn our attention to matters that - - -

MR HERZFELD: Yes.

KERR J: - - - the learned judge - - -

MR HERZFELD: I understand.

KERR J: - - - did not refer to - - -

MR HERZFELD: I understand.

KERR J: - - - and I'm asking you to crystallise the proposition you say was wrong, if I can put it that way.

MR HERZFELD: Yes. So the first one was that her Honour placed great emphasis on whether the applicants were, in fact – whether the tribunal could be satisfied that the applicants were, in fact, aware of the hearing. And, in my submission, that was wrong for the two reasons I've given. It's inconsistent with 441C, in particular. So for her Honour to place great weight on that was legally in error, because it failed to have regard to the statutory scheme. It was giving inappropriate weight to that matter. The next matter I referred to was her Honour's failure to pay any regard to the course of conduct before the delegate. So that's the primary judge failing to have