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

HIGH COURT OF AUSTRALIA
FILED IN COURT
- 1 MAR 2018
No.
THE REGISTRY CANBERRA

FIRST AND SECOND RESPONDENTS' OUTLINE OF ORAL ARGUMENT

Part I

This outline is in a form suitable for publication on the internet.

Part II

Appeal Ground 1: did the Full Court of the Federal Court (FFC) require that a *House v The King* error be shown?

The reasoning of the Full Court of the FFC

1. The FFC did not require that a *House v The King* error be shown.
2. The FFC decided for itself whether or not the primary Judge had erred in the manner alleged by the Minister to have infected her conclusion as to legal unreasonableness ([28] AB 160-161 & [48] – [57] AB 167-169). The analysis in those passages is inconsistent with the FFC requiring that a *House v The King* error be shown.
3. The FFC correctly directed itself that the appeal turned upon whether the primary judge correctly understood and applied the principles concerning legal unreasonableness ([37] AB 162), that the role of a court on an appeal by way of rehearing is the correction of error ([41] AB 164) and that the primary judge's decision should not be regarded as a discretionary judgment ([46] AB 167).
4. The Minister submitted that the FFC should simply consider the matter of legal unreasonableness "afresh" and come to its own view ([29] AB 161). The FFC made what it described as "general" observations in response and reiterated the need to show error on the part of the primary judge ([42] AB 165 – [47] AB 167).
5. The FFC did not err in having regard to the character of the reasoning below in approaching its task on appeal. Nor did the FFC err in focusing on appeal upon the

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errors alleged to have infected the primary judge's reasoning rather than simply considering the matter afresh and coming to its own view.

6. The primary judge found unreasonableness based upon her evaluation of the relevant factual circumstances having regard to the object and purpose of the relevant provisions of the *Migration Act 1958* (Cth): see in summary [84] AB 130-131). Error in that evaluation had to be shown on appeal.

The nature of a conclusion as to legal unreasonableness

7. A conclusion of legal unreasonableness may reflect analysis that a decision lacks an evident and intelligible justification or an underlying jurisdictional error: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ***(Li)*** at [26] – [28] 350 *per* French CJ; at [68] 364 & [72] 365 *per* Hayne, Kiefel and Bell JJ; at [72] 365 *per* Hayne, Kiefel and Bell JJ. A conclusion of legal unreasonableness will be based upon a process of reasoning – it cannot be a mere assertion.

8. That reasoning will necessarily be informed by a process of statutory construction, but it will also involve an evaluation of factual circumstances: for example, *Li* at [76] 367 *per* Hayne, Kiefel and Bell JJ – an inference of unreasonableness in the exercise of a statutory discretion may be drawn from the facts and from the matters falling for consideration in the exercise of the statutory power.

9. A judgment as to legal unreasonableness is not directly analogous to a finding of fact, an inference of fact or a conclusion on a question of construction of a statute. It is no error for an appeal court to require identification of error in reaching a judgment as to legal unreasonableness.

Error must be shown in an appeal by way of rehearing

10. One issue between the parties in this appeal appears to be whether an appeal against a finding of legal unreasonableness should be determined by looking first to the reasons of the primary judge and seeking to identify error (as the respondents say) or by looking at the question of legal unreasonableness "afresh" and without regard to the reasoning of the primary judge (as the appellant says).

11. There is no inconsistency between an appeal court having to decide a legal issue as to which there is ultimately only one legally correct answer, and an appellant having to show error in the primary judge's reasoning.

12. In an appeal by way of rehearing the conclusions of the primary judge should not be laid to one side and a simple re-argument take place. Respect and weight must

always be given to the decision of the trial judge: *Warren v Coombes* (1978) 142 CLR 531 at 551-2 and having regard to the authority there relied upon at 538-549; *Branir v Owston Nominees (No 2)* (2001) 117 FCR 424 at [21] – [30] 434-438.

Appeal Ground 2 – should the Full Court have concluded that the Tribunal's decision was not legally unreasonable?

13. The FFC did not err in dismissing the appeal on the basis that it rejected the contentions of error relied upon by the appellant. There was no error in the conclusion of the primary judge, upheld by the FFC, that the Tribunal's decision was legally unreasonable.

14. The legislative context for s 426A includes ss 420 and 425: as held by Gageler J in *Li* at [95] – [96] 372 a provision in the terms of s 420 describe the grounds upon which a discretionary judgment must be formed.

15. The purpose of s 425 of the Act is to give an applicant for a protection visa a real and meaningful opportunity to present evidence and argument relating to the issues arising in connection with a decision to refuse applications for protection visas as held by Hayne, Kiefel and Bell JJ in *Li* at [58] – [62] 361-2.

16. The scope of s 426A is that it confers a discretion but does not seek to direct how that discretion is to be exercised – see by analogy Hayne, Kiefel and Bell JJ in *Li* at [78] – [79] 367.

17. The subject matter is an application for review of a refusal of a protection visa. It affords the last opportunity to present the merits of the case for decision.

18. The Tribunal considered that it needed further detail as to some of the key claims for protection– AB 5 at [19] – [21] & FFC [11] at AB 153.

19. There were significant factual matters which militated in favour of the Tribunal taking steps or further action to allow or enable the respondents to appear before it.

20. Those steps could easily and quickly have been taken.

21. The Tribunal gave no reasons for its decision to decide the review without taking further action to enable the applicants to appear before it save that the Tribunal identified that it had power to do so – AB 5 at [17].

22. There was no practical countervailing consideration identified or relied upon by the Tribunal here for not taking further action to allow or enable the applicants to appear before it.

KA Stern **L Andelman**