Form 27E Appellant's reply
(rule 44.05.5)

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B68 of 2012

BETWEEN: MINISTER FOR IMMIGRATION AND CITIZENSHIP
Appellant

and

XIUJUAN LI
First Respondent
and

MIGRATION REVIEW TRIBUNAL
Second Respondent

APPELLANT'S REPLY

I. Publication

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

II. Reply to Respondent's Submissions

Alleged denial of opportunity to present evidence

2. The first respondent repeatedly submits that the Tribunal's decision denied her the opportunity to "present" a "piece of evidence" which was important to her case, and thereby denied her procedural fairness.[1] That submission misconceives the issue before the MRT.[2]

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1 First Respondent's Submissions at [2(c)], [35], [37], [39], [50], [52], [83], [86], [97].
2 These submissions use the same abbreviations as the Appellant's Submissions in chief.

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3. The first respondent (through her adviser) accepted that the 2007 TRA contained materially false or misleading information[3] and could not be relied upon to meet the criterion in cl 880.230(1) of Schedule 2 to the Regulations. She submitted that that criterion could be met by a "second, fresh assessment from TRA", but she had not obtained such an assessment. Her adviser put the same position to the MRT at the hearing.[4] Such an assessment was required to meet the criterion in 880.230(1).

4. The first respondent suggested that she had the relevant work experience to satisfy the relevant assessing authority.[5] However, as her agent clearly understood, the visa criterion did not require the decision-maker to be satisfied about her work experience. Rather, the criterion required the existence of a positive assessment from the relevant assessing authority (obtained without the use of false or misleading information), which the first respondent did not have at the time of:

   (a) the delegate's decision;

   (b) the making of her application for review to the MRT in reliance on s 347;

   (c) her response to the MRT's request to comment on or respond to information;

   (d) the MRT oral hearing;

   (e) her response to a further MRT request to comment on or respond to information; or

   (f) the MRT's decision under s 349 on the review, to affirm the delegates' decision.

5. The first respondent's case before the MRT was therefore not that she met cl 880.230(1) but needed time to obtain evidence for that proposition (cf, eg, if she did have a successful assessment from TRA but needed to obtain another copy). Rather, she accepted that she did not have the necessary skills assessment (and therefore did not meet the criterion) but contended that, given an undefined period of time, this position might change.

6. It is incorrect, therefore, to describe the first respondent's position as one of awaiting "evidence" to support her case. What she was awaiting was a change in circumstances which might or might not occur so as to allow her to say that she met cl 880.230(1).

7. In refusing to delay its decision any further, the MRT was electing to decide the review on the basis of the uncontested facts as they stood *both* at the date of the delegate's decision under review *and* at all times during the course of the review up to and including the date of the decision under s 349 of the Act. That election does not raise any issue of procedural fairness. If it involved any jurisdictional error, that error must lie in the breach of an asserted obligation to delay its decision so that an applicant, who does not meet a relevant criterion, can attempt to meet it.

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3 Appeal Book (**AB**) at 167, at point 13.
4 AB 8 [24], lines 12-16.
5 AB 166 lines 30-35.

Statutory construction

8. The first respondent submits[6] that s 357A(3) of the Act re-introduces general concepts of fairness as part of the "*natural justice hearing rule*". This fails to have regard to the opening words of s 357A(3): "*In applying this Division*".

9. It is a significant error of construction to detach the obligation ("must act in a way that is fair and just") from its direct subject ("in applying this Division") and instead attach it to a part ("natural justice hearing rule") of a different sub-section within the section. Neither Court below embraced such an error.

10. Further, the first respondent misunderstood the relationship between sub-sections 357A(1) and (3).

11. Sub-section 357A(1) was plainly intended to ensure that Division 5 of Part 5 would exhaustively provide for the MRT's procedural fairness obligations in relation to the matters it deals with: that is, to exclude any further or additional common law requirements in relation to those matters. Sub-section 357A(3) did not seek to re-establish or re-introduce common law requirements, not expressly picked up in Division 5. Neither the words of the Act, read as a whole, nor the second reading speech nor the explanatory memorandum support such a contention.

12. In any event, if ss 353 and 357A(3) of the Act in some fashion serve to maintain or re-assert traditional concepts of procedural fairness, they are irrelevant to the outcome of the present case for reasons outlined above (and in chief).[7] In order to support the judgment of the Full Court, these provisions would have to require the MRT to adjourn or delay its decision so that the first respondent could try to consummate a different process which might or might not enable her to meet the visa criterion which she did not meet at the time of the making of the decision under review or of the review decision itself. The first respondent does not explain how the provisions can be construed to go that far.

Unreasonableness

13. As recognised by Greenwood and Logan JJ, "*Wednesbury* unreasonableness" is only applicable to discretionary decisions.[8] The final decision, affirming the decision of the delegate to refuse the visa, was not discretionary.[9] An analogous ground of review might be available if the MRT's decision were to offend basic notions of rationality in its outcome (or possibly reasoning).[10] However, there has been no suggestion that the MRT's decision is illogical or irrational or was not supported by the evidence before it.

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6 First Respondent's Submissions at [13], [16], [57].

7 Appellant's Submissions at [19]-[21].

8 AB at 274 [33] and see *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [124]-[129]. *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 198 ALR 59 at [73]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [39].

9 Section 65 of the Act.

10 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 198 ALR 59 at [67]-[69]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (in the joint judgment of Crennan and Bell JJ) and *Australia Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [543]-[547].

14. The only discretionary "decision" which is said to be unreasonable is the procedural decision not to adjourn. As Mason CJ said, in the context of the AD(JR) Act,[11] in *Australian Broadcasting v Bond*:[12]

> *If "decision" were to embrace procedural determinations, then there would be little scope for review of "conduct", a concept which appears to be essentially procedural in character. To take an example, the refusal by a decision-maker of an application for an adjournment in the course of an administrative hearing would not constitute a reviewable decision, being a procedural matter not resolving a substantive issue and lacking the quality of finality. ...*

15. Review under s 75(v) of the Constitution does not involve distinct grounds applicable to "conduct". Rather, the constitutional writs are available where some error is identified which vitiates that which purports to be a decision having legal effect. Accordingly, it is only if the first respondent can establish that the refusal of the adjournment infected the MRT's final decision with jurisidictional error, that that final decision will be properly set aside. Even if the refusal of further delay was in some sense unreasonable (and it is submitted, for reasons outlined in chief, that it was not), it has not been shown that that resulted in a breach of any condition of a valid final decision. No breach of any of the requirements of Part 5 of the Act arose from the MRT declining to exercise its discretion to adjourn.

Authorities on adjournments

16. One, perhaps narrower, strand within the first respondent's argument would appear to be that s 357A(3) might be read as a requirement to be observed by the MRT when it comes to exercise its discretion under s 363(1)(b) whether, for the purposes of the review of the delegate's decision, to adjourn the review.[13] This premise leads the first respondent to traverse cases from various contexts where a failure to grant an adjournment was capable of amounting to a denial of procedural fairness.[14]

17. None of the cases cited are remotely similar to the present case. None concerned a situation, like the present, where a person:

    (a) having control over the timing of when to seek a particular entitlement which depended on satisfying a particular criterion, chose to seek the entitlement on a false basis which was duly exposed and left the condition unsatisfied;

    (b) proceeded to assert a right of review of the adverse decision without having established some different and better basis to satisfy the criterion; and

    (c) had at the most a hope that, if the review were adjourned for some undefined period, events might unfold in a different sphere which might, or might not (this could not be controlled or predicted) enable the criterion to be satisfied.

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11 *Administrative Decisions (Judicial Review) Act 1977* (Cth).
12 (1990) 170 CLR 321 at 337.
13 First Respondent's Submissions at [43]-[46].
14 First Respondent's Submissions at [51]-[56].

18. The cases would have more resonance in factual situations like those acknowledged in chief[15] where there was a refusal to adjourn a hearing which an applicant could not attend due to illness or bereavement.

Was TRA approved pursuant to reg 2.26B(1A)?

19. The first respondent has submitted that the 2007 TRA was not valid as the TRA was not approved at that time pursuant to reg 2.26B(1A) of the Regulations.[16]

20. This proposition was not advanced in the Courts below and no evidence was adduced in connection with it (although, in light of the material referred to in other cases, it might not have been controversial).[17] The first respondent and the MRT proceeded on the understanding that TRA was a relevant assessing authority, and this understanding was not questioned in the Federal Magistrates Court or the Full Court.

21. Further, the consequences which the new proposition is said to have in the present case are not developed in the first respondent's submissions, and are not the subject of a notice of contention.[18] In these circumstances, the point will not be addressed further here.

Dated 25 January 2013

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15 Appellant's submissions at [45]

16 First Respondent's submissions at [4].

17 See eg *Singh v Minister for Immigration and Citizenship* [2012] FMCA 145 at [39]-[40].

18 Rule 42.08.5 of the *High Court Rules 2004* (Cth).