IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M55 of 2013

BETWEEN:

FTZK
Appellant

and

Minister for Immigration and Citizenship
First Respondent

Administrative Appeals Tribunal
Second Respondent

APPELLANT'S REPLY

Part I:

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

Part II:

Chronology and evidence

2. In its submissions the first respondent omits mention of the fact that the appellant's application for a 456 visa was made on the basis of a passport obtained in July 1996 (well before the alleged planning for the crime was said in the materials submitted by the first respondent to have been in contemplation).

3. On 23 December 2011 (after the commencement of the AAT proceedings and after the delegate had made her decision) the appellant was served, for the first time, with copies of the transcripts and other documents relevant to the investigation. The 15 year delay in the provision of these documents and the discrepancies between the two transcripts, were reasons why the appellant took issue before the Tribunal with the provenance, storage, integrity and/or continuity of the exhibits.

4. In paragraphs 4(d) and 7(a) of its submission, the first respondent refers to the "records of the interviews given by Zhong and Wu" and describes them as providing "substantially consistent accounts of the circumstances of the crime." However, the Tribunal accepted that there were "many inconsistencies between the transcripts," although none that caused it to "disregard either or both of them." Apart from the inconsistencies, it should also be noted that the transcript of Zhong's "interview" is a 13 page document which is allegedly the product of an

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interrogation of at least 10 hour duration. This gives weight to the uncontested evidence of Dr. Nesossi and Dr. Sapio relating to the prevalence of torture and coercion in the PRC criminal justice system.

5. The first respondent makes the point that no objection was taken before the Tribunal that the matters referred to in paragraphs [70]-[72] were not relevant to the Tribunal's task. The Tribunal is not a Court and is not a body bound by the rules of evidence (s.33(1)(c)). The alleged failure of the appellant to object to the admission of evidence before the Tribunal, is not to the point. Also, at no time did the appellant concede that the factors relied upon by the Tribunal were capable of supporting its conclusion. Contrary to the first respondents submissions at paragraph [24] the appellant did contend that the circumstances of the appellant's departure from China were not capable, as found by the delegate, of constituting evidence supporting a conclusion that there were serious reasons for concluding that the appellant committed the alleged crimes (see Kerr J at [104], [105]).

New arguments

6. The first respondent objects to the appellant raising the arguments posed by ground 7(b) to (e) inclusive in the Notice of Appeal. The appellant should be permitted to argue these matters for the following reasons:

   (a) As conceded by the first respondent, these grounds do not raise any fresh evidentiary issues[1];
   (b) Grounds 7(b), (c) and (d) were implicitly in issue in the argument before the Full Court as to whether the Tribunal had made the necessary findings of fact or taken the necessary steps in reasoning to make the factors in paragraph [70]-[72] relevant, and whether taking these factors into account evidenced jurisdictional error in that the Tribunal had misconstrued the function it was required to perform (see Kerr J at [124], [125], [135]); and
   (c) Ground 7(e) was not raised before the Full Court either expressly or implicitly but it is expedient and in the interests of justice that ground 7(e) (and grounds 7(c) and 7(d)) should be argued and decided: see Mason J in *O'Brien v Komesaroff.*[2]

Wrong test

7. The fact that the Tribunal has used the correct words to describe the question before it does not necessarily mean that it has asked itself the right question. It is necessary to consider the factors which it has treated as relevant to the determination of the answer: (see Kerr J at [120], [141]). The reliance on those factors may indicate that it has answered (and therefore asked) the wrong question.

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[1] *Minister for Immigration v Singh* [2002] HCA 7; (2002) 209 CLR at 565 [82] (Kirby J).
[2] [1982] HCA 33; (1982) 150 CLR 310 at 319.

8. The first respondent argues at paragraph [19] that the 'appellant does not in truth contend that the Tribunal misconstrued Article 1F." But reliance on irrelevant considerations carrying no probative value in relation to the question to be asked indicates that the Tribunal has not only misapplied, but has in fact misconstrued Article 1F: (see Kerr J at [141]).

9. The first respondent argues that, if the Tribunal did ask itself the correct question but erred in its analysis of the evidence or in its application to the question, it would simply show that the Tribunal reached an incorrect answer to the right question and such error is not capable of amounting to jurisdictional error. But the first respondent concedes at paragraph 21 that "the position would be different if none of the factors relied on by the Tribunal were probative of whether there were 'serious reasons for considering' that the appellant had committed the alleged crimes, "because in that case it would be open to infer that the Tribunal must have misunderstood its task." The Tribunal specifically held that it was only the combination of <u>all</u> of the factors mentioned by it which established "serious reasons for considering" that the applicant had committed the alleged crimes. The fact that the Tribunal reached its conclusion only on the basis that it could rely on irrelevant matters makes it clear (consistently with the first respondent's concession in paragraph 21) that the Tribunal misconstrued its task.

10. Paragraphs 23, 24 and 25 rely upon finding that the falsehoods found by the Tribunal are circumstantial evidence of a weight equivalent to flight or lies giving rise to a consciousness of guilt. Those paragraphs and paragraph [26] repeat the error of the majority of the Full Court, in that they rely upon a finding of fact not made by the Tribunal and advance reasoning not expressed by the Tribunal.

11. Paragraphs 27 and 28 involve a "fresh reconstruction" of the reasoning of the Tribunal and require an inference that the Tribunal held that the matters canvassed in those paragraphs go to the character and credibility of the applicant and justify a rejection of his denials of guilt, even though the Tribunal makes no such finding.

Refoulement

12. There is no dispute that it was conceded before the Tribunal that, in line with existing authority, the consequences of refoulement could not be taken into account.

13. The issue has not decisively been considered by the High Court and the appellant submits that it is appropriate for this Court to consider the argument.

14. First, "as was explained by the Court in *Singh*, there is no conceptual difficulty in conducting the Art 1F(b) inquiry by assuming in a person's favour that his or her claim to refugee status will succeed.[3]"

15. Second, the argument the appellant makes is not that a positive finding in relation to Article 1F needs to be balanced against the consequences of refoulement. Instead, the appellant contends that the consequences of refoulement is a relevant consideration to the test to be applied in Article 1F[4]. In *Applicant NADB of 2001 v Minister for Immigration & Multicultural Affairs*[5] Merkel J stated at [41] that "in determining whether the disqualifying crime is "serious" it is appropriate to have regard to the fact that it must be of such a nature as to result in Australia not having protection obligations to persons who commit such crimes." Similarly, the appellant argues that in determining whether there are "serious reasons" for considering a person has committed such a crime, it is appropriate to have regard to the consequences of refoulement or the consequences of returning a person to a country where they have been found to face a real risk of persecution. In other words, in determining this issue, the Tribunal must take into account the effect of reaching its determination.

16. Article 1F "has an immediate effect upon the existence of protection obligations engaging s36(2) of the Act, and thus upon the grant (and cancellation) of protection visas.[6]" The operation of Article 1F has potentially grave consequences to an appellant. Consistent with the overall humanitarian objective of the 1951 Convention, the extreme consequences that might flow from an affirmative finding should inform the degree of satisfaction required to make such a finding.

Irrelevant considerations

17. The first respondent contends that the appellant's argument reflects an "unduly narrow view of the matters the Tribunal is entitled to consider."

18. The sole issue before the Tribunal was whether there were "serious reasons for considering that the [appellant had] committed the crime or crimes alleged." Therefore, as held by Kerr J the scope, purpose and ambit of the relevant statutory provisions were narrow[7]. The factors the Tribunal was bound to consider were those probative of this question. Conversely, the matters it was bound not to consider were "things lacking any probative value[8]."

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[3] *NADB v Minister for Immigration & Multicultural Affairs* [2002] FCA 200; (2002) 189 ALR 293 at [28].
[4] The line of cases referred to by the respondents can thus be distinguished, as the respondent itself recognises at paragraph [39] of its contentions.
[5] [2002] FCAFC 326, 126 FCR 453.
[6] *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; (2012) 86 ALJR 1372 at [142]
[7] *FTZK v Minister for Immigration and Citizenship* [2013] FCAFC 44; 211 FCR 158 ("Full Court") at [129]; Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40.
[8] Full Court [126]-[129], [138].

19. It is the appellant's contention that the Tribunal had regard to irrelevant considerations and made no findings as to 'consciousness of guilt.' Nearly all the matters relied upon by the Tribunal had no probative weight in respect of the question which the Tribunal was required to determine. The majority in the Full Court held the findings of fact at [70]-[72] relevant only by inferring the additional finding of fact that these matters 'evidenced consciousness of guilt' and by inferring an additional step in the Tribunal's reasoning.

20. This is not a case of failure to give adequate reasons as argued in the alternative by the respondents. It is a case of giving reasons which establish that the wrong question was answered and that irrelevant considerations were taken into account. The cases of *Minister for Immigration and Multicultural Affairs; Ex parte Palme*[9] and *Repatriation Commission v O'Brien*[10] relied upon by the respondents are distinguishable and do not assist the respondents argument.

Dated: 28 January 2014

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[9] [2003] HCA 56; (2003) 216 CLR 212 at [48], [55] and [57].
[10] [1985] HCA 10; (1985) 155 CLR 422 at 445-446.