IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

No. M 174 of 2016

Plaintiff M174/2016

Plaintiff

and

Minister for Immigration and Border Protection

First defendant

Immigration Assessment Authority

Second defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

Filed on behalf of the plaintiff by:
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PART IPUBLICATION

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

PART II REPLY TO FIRST DEFENDANT'S ARGUMENTS

The delegate's failure to comply with s 57 of the *Migration Act 1958* (Cth)

2. The Minister submits that s 57 did not apply to the Reverend Brown information because that information was not "relevant information".[1]

3. ***First***, and contrary to what is suggested by the Minister,[2] s 57 of the Act is expressed in different terms from ss 359A and 424A of the Act, and is directed to a different decision-maker and a different kind of decision. It cannot simply be assumed that the construction of those provisions can be transposed directly to the construction of s 57.

   (a) As the plurality observed in *SZBYR*, s 424A related to a review by the Tribunal,[3] where "its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act". In contrast, s 57 concerns the making of one of those anterior decisions.

   (b) The Tribunal is subject to other statutory obligations directed to giving a review applicant an opportunity to be heard, such as ss 360 and 425. In contrast, no similar provisions accompany or augment s 57.

4. The word "information" in s 57 is not defined in the Act and bears its ordinary meaning. In particular, information is knowledge of facts or circumstances communicated to or received by the Minister or his or her delegate.[4] Plainly the information conveyed to the delegate by Reverend Brown was of that character.

5. ***Second***, contrary to the Minister's submissions at [25], the Reverend Brown information was not information that "would, one might have thought, been a relevant step towards" the grant of a visa. The crux of the information was that the plaintiff had ceased attending the Syndal Baptist Church after 2013, had returned early in 2015 for a few weeks, and then in June 2015 attended the service and sought a letter of support for his visa application. The gap in the plaintiff's church attendance was capable of undermining, and was considered by the delegate to undermine,[5] the plaintiff's claims to be, or be perceived to be, a genuine Christian convert and at risk of harm in Iran for that reason.[6] The delegate not only referred to the Reverend Brown information in her reasons, she concluded that he "only returned to Syndal Baptist Church in June 2015 to seek a letter of support".[7] That conclusion was plainly based on the Reverend Brown information.

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1 The term "Reverend Brown information" is defined in the plaintiff's principal submissions at [10]. Other defined terms used in those submissions are also used in these reply submissions.

2 Cf paragraph 22 of the Minister's submissions filed on 31 July 2017.

3 At the time *SZBYR* was decided, s 424A applied to reviews by the Refugee Review Tribunal; now it applies to reviews by the Administrative Appeals Tribunal.

4 *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 477 [24] (Finn and Stone JJ); *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at 224-225 [18] (Moore J) and 259 [205] (Allsop J).

5 Cf Minister's submissions at [27].

6 See, for example, SCB P296 [45]-[47], P298 [56] and P301 [64]-[65].

7 SCB P323 [148].

6. ***Third***, the information was not about the plaintiff's "credibility". In this regard, the plaintiff notes the slippage in the Minister's submissions at [26] between the credibility of the plaintiff and the credibility of his *claims*. An applicant's claim to have a well-founded fear of persecution, or a claim of harm giving rise to complementary protection obligations, is a central question for the decision-maker, and information that undermined that claim would be relevant information. In contrast, information that undermined an applicant's credibility — whether the applicant is believed or not believed, as discussed in *MZXBQ*[8] — is not "relevant information". In this case, the Reverend Brown information was of the former character, not the latter. It went to whether the plaintiff was a practising Christian with a well-founded fear of persecution.

7. ***Finally***, the Reverend Brown information was not information "given by" the plaintiff and did not come within the terms of s 57(1)(c) of the Act. It was plainly given by Reverend Brown. That is so regardless of the fact that the plaintiff had earlier given the delegate a letter from Reverend Brown stating that the plaintiff had attended the Church in 2012 and 2013. Contrary to the Minister's submissions at [28], it cannot be inferred from that letter that the plaintiff gave information that he *only* attended the Church in those years. It is plain that he in fact attended in 2015, and he had stated in his statutory declaration, made in August 2015, that he "still attended" the Church.[9]

The Authority's lack of jurisdiction or power

8. The Minister submits that, even if there was a jurisdictional error affecting the delegate's decision, the Authority did not lack jurisdiction or power to conduct a review of that decision. For the reasons set out in the plaintiff's earlier submissions, as well as the following reasons, that submission should be rejected.

9. Part 7AA of the Act provides for limited review by the Authority of certain decisions to refuse to grant protection visas. However, that "limited review" is not the same as, or even similar to, the review conducted by the Tribunal under Parts 5 and 7 of the Act. It is not apposite to draw comparisons between the two species of review.

10. ***First***, it is wrong to claim, as the Minister does in his submissions at [14] and [38], that the "core function" of the Authority is the same as that of the Tribunal. The Tribunal's function is to conduct a full merits review of the Minister's or the delegate's decision. The Authority does not, and cannot, perform that function. Its role is much more limited.

    (a) Unlike the Tribunal, the Authority is not permitted to exercise "all the powers and discretions that are conferred by this Act on the person who made the decision" the subject of the review.[10]

    (b) Nor is the Authority permitted, as the Tribunal is, to make the correct or preferable decision on the material before it, or to do "over again" what was done by the Minister or his or her delegate.[11] Among other things, the Authority has no power

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8 *MZXBQ v Minister for Immigration and Citizenship* (2008) 166 FCR 483 at [29] (Heerey J), approved in *Minister for Immigration and Citizenship* v *SZLFX* (2009) 238 CLR 507 at [25] (the Court).

9 SCB P100 [32].

10 Cf ss 349 and 415 of the Act.

11 Cf *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 314-315 [98]-[100] (Hayne and Heydon JJ).

to set aside a decision and substitute its own decision. Under s 473CC its powers are limited to affirming a decision or remitting it for reconsideration.

(c) Unlike the Tribunal, the Authority is not required to give an applicant a hearing. Further, it may only consider new information in exceptional circumstances.

11. ***Second***, and contrary to the Minister's submissions at [35], s 69(1) is not fatal to the plaintiff's argument. Section 69(1) provides as follows:

> Non-compliance by the Minister with Subdivision AA or AB or section 494D in relation to a visa application does not mean that a decision to grant or refuse to grant the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.

12. Section 69(1) was explained by Gaudron J in *Miah* as follows:[12]

> Section 69(1) of the Act simply purports to give validity to a decision notwithstanding non-compliance with, amongst other provisions, those of subdiv AB. The concluding words of the sub-section do not give it any wider operation. To say that non-compliance "only means that the decision might have been the wrong one and might be set aside if reviewed" is not to limit the avenues of review. Certainly, those words are apt to include judicial review pursuant to s 75(v) of the Constitution.
>
> The purpose of s 69 of the Act is to ensure that an applicant's rights are to be ascertained by reference to the Minister's decision unless and until set aside. It says nothing as to an applicant's statutory or constitutional rights to have a decision reviewed. **Still less does it purport to excuse non-compliance with the Act or the rules of natural justice.**

13. In *Palme* Gleeson CJ, Gummow and Heydon JJ said that the majority justices in *Miah* had construed s 69(1) "as providing, **not that the decision in question was valid**, but that it might be set aside on review, so that it did not excuse, in this Court, the denial of procedural fairness which was established on the evidence".[13] These remarks remain apt notwithstanding the insertion of s 51A into the Act.

14. That is, s 69(1) does not mean that, in the event of non-compliance with s 57, a decision to refuse to grant a visa is not an invalid decision. Rather:

(a) s 69(1) means that, in the event of non-compliance with s 57, a decision is deemed valid unless and until set aside; but

(b) section 69(1) does not prevent a court from finding that, as a consequence of non-compliance with s 57, a decision has been invalid *at all times*.

15. In this case the plaintiff seeks, pursuant to s 75(v), a writ of certiorari quashing the delegate's decision. That relief is available notwithstanding s 69(1) (and the Minister does not appear to contend otherwise). Relief under s 75(v) is available because non-compliance with s 57 constitutes a jurisdictional error. If the decision is quashed, it is quashed *ab initio*.

16. The effect of s 69(1) is that a decision that is affected by non-compliance with Subdiv AB will, even if the error was jurisdictional in nature, be sufficient "at least to allow merits review": so much is recognised by the authorities referred to by the Minister at [35].

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12 *Miah* at 87-88 [103]-[104] (Gaudron J) (emphasis added) and 98 [144] (McHugh J agreeing); see also 120-122 [203]-[209] (Kirby J).

13 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 223 [36] (emphasis added).

However, it does not follow from those authorities that s 69(1) preserves validity so as to enable *limited review* under the "fast track" regime.

17. Further, it is significant that the Authority, acting under Part 7AA, lacks power to set aside a decision. Rather, all it may do is affirm a decision under s 65 of the Act or remit the decision. It is the earlier decision that remains the operative decision.[14] Thus review by the Authority under Part 7AA is not one of the avenues of review to which s 69(1) is directed.

18. ***Third***, and contrary to the Minister's submissions at [40], the Authority may well find itself with no power to "cure" procedural irregularities affecting a decision the subject of its review.[15] The Minister suggests that the applicant could seek to give "comments" to the Authority, which it could receive pursuant to s 473DC. That falls far short of a power to cure. The Authority may have no power to consider comments from a review applicant because those comments may not constitute "new information" as defined. Even if the comments do constitute "new information", there may be no "exceptional circumstances" to justify consideration of them consistently with s 473DD. In any event, the mere making of comments is no substitute for provision of evidentiary material in reply.

19. ***Fourth***, the "automatic"[16] referral of decisions to the Authority and the Authority's limited powers on review give rise to what is, in effect, a single decision-making process involving two separate steps.[17] Jurisdictional error affecting one step in that process will infect the whole process.[18] In this regard, extrinsic materials relating to Part 7AA evince Parliament's intention that, by the time of the Authority's review, a referred applicant would have already been afforded a proper opportunity to be heard before the Minister or his or her delegate.[19]

20. ***Fifth***, and accepting for the sake of argument that the functions of the Authority do not include consideration of the delegate's compliance with, say, s 57 of the Act,[20] it does not follow that non-compliance with s 57 cannot affect the Authority's jurisdiction or power.

21. ***Finally***, and contrary to the Minister's submission at [32], the effect of the plaintiff's submission is not to "deny any form of merits review to many applicants". If a primary decision is infected by jurisdictional error and set aside, it will fall to be made again. If and when that occurs *without* jurisdictional error, the applicant in question will then be entitled to the limited merits review for which Part 7AA provides.

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14 *Kim v Minister for Immigration and Citizenship* (2008) 167 FCR 578 at 583 [23] (Tamberlin J). See also the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (**Explanatory Memorandum**) at [883].

15 See paragraph 9 above. See also *Twist* v *Randwick Municipal Council* (1976) 136 CLR 106 at 116 (Mason J).

16 Cf Minister's submissions at fn 5.

17 Cf paragraphs 9 and 11 above. See also: *South Australia v O'Shea* (1987) 163 CLR 378 at 389 (Mason CJ); *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 660-662 (Dawson J).

18 And that may in turn enliven the jurisdiction conferred on the Federal Circuit Court by s 476 of the Act. Cf Minister's submissions at [32].

19 Explanatory Memorandum at [887]-[888], [893], [920] and [926].

20 See Minister's submissions at [38] and [44].

Legal unreasonableness affecting the Authority's decision

22. The Minister submits that the Authority's exercise of power was not affected by any legal unreasonableness. For the reasons set out in the plaintiff's earlier submissions, as well as the following reasons, that submission should also not be accepted.

23. ***First***, no provision in the Act clearly displaces the legislature's intention that a discretionary power, statutorily conferred, will be exercised reasonably. In particular, s 473DA, which provides that the Authority has no duty to get new information "in any circumstances", does not do so. Reasonableness may require, in a particular case, that the Authority act, or refrain from acting, in a particular manner. Contrary to the Minister's submissions at [53], an express statutory provision that excludes a duty to act in a particular manner does not constitute, in every instance, an evident and intelligible justification for a failure to act in that manner.

24. ***Second***, statutory restrictions on natural justice in Part 7AA of the Act give added significance to the implied requirement that the Authority exercise those powers it does have reasonably.[21]

25. ***Third***, the Reverend Brown information was before the delegate when she made her decision. As a consequence, statutory restrictions on natural justice permitted the Authority not to get and consider further information in response to the Reverend Brown information.[22] Those statutory restrictions did not, however, permit the Authority to exercise its powers in a legally unreasonable manner. Having regard to the circumstances in paragraph 70 of the plaintiff's earlier submissions, there was no evident and intelligible justification for the Authority not to exercise its powers under ss 473DC(3) and 473DD to get and consider additional information about the nature and extent of the plaintiff's church attendance in 2014, 2015 and 2016.

Conclusion

26. The Minister contends at [54] that Parliament has declared that a scheme whereby applicants must generally advance all their claims and evidence in the visa application process is sufficiently fair and just. But that proposition serves to underscore the applicant's point: Parliament contemplated a scheme where **fairness was to be accorded at the first level of decision-making**. If there was an absence of procedural fairness at that first level of decision-making, the plaintiff contends that there are two possible consequences:

    (a) either the Authority lacked jurisdiction because of its limited review role, pursuant to which it could not cure that procedural unfairness; or

    (b) if the Authority could have cured that unfairness, it was unreasonable of it not to have done so.

Dated: 14 August 2017

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21 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 373-374 [99]-[102] (Gageler J).

22 See ss 473DA, 473DB, 473DC, 473DD and 473DE of the Act.