HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

LPDT
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

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

Part II: Propositions to be advanced in oral argument

Legal framework

1. There are three elements of the legal framework that are important to appreciate in conducting the requisite counterfactual inquiry for the purposes of materiality:
   (a) *first*, the highly evaluative nature of the Tribunal's task under s 501CA(4)(b), whereby it is impossible "to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation": *Viane* (2021) 96 ALJR 13 at [15]; **AS [26]**
   (b) *second*, the complex tree-structure of mandatory considerations that the Minister has directed the Tribunal to have regard to when conducting its evaluation, whereby "Primary Consideration 1" (Direction, s 8(1)) is informed by consideration of sub-factors (including in s 8.1(2)(a)), which in turn are informed by consideration of sub-sub-factors (including in s 8.1.1(1)(a)-(g)): **AS [16]**.
   (c) *third*, the terms and structure of the Direction (including s 7), which requires the Tribunal "bring together the considerations as part of a single evaluation of their relative significance thereby weighing them all together"; and which preclude the Tribunal "attributing some form of 'weight' to [any one] consideration viewed in isolation": *CRNL* at [28]; see also [25]-[27], [34]-[35]; **AS [45]-[46].**

The requisite counterfactual inquiry

2. In multiple ways, the Tribunal failed to comply with the Direction as required by s 499(2A) of the Act: **AS [25]**. Assessing materiality requires a counterfactual inquiry that hypothesises compliance with Direction 90: **AS [27]-[28].**

3. The Tribunal's errors must be assessed cumulatively because the counterfactual inquiry must hypothesise that the Tribunal wholly complied with Direction 90. Were it otherwise, incoherence would result: **AS [59]**; **Reply [14]**.

4. The statutory framework entails that, when conducting the counterfactual inquiry, the Court cannot take – as the Full Court did and the Minister invites this Court to do – certain evaluative conclusions *as they stand* in the Tribunal's reasons in order to conclude that the Tribunal's multiple non-compliances with the Direction could not realistically have made a difference to its decision: *Chamoun* at [70]; **AS[31]-[32]**.

The correct application of the counterfactual inquiry

5. Step 1: compliance with Direction 90 by the Tribunal *could* realistically have resulted in the Tribunal assessing the appellant's conduct as "serious" (rather than "very serious"): **AS [37]-[39], [51]**. That is so especially, but not only, because on the Full Court's interpretation of s 8.1.1(1)(b) (see *J* [118]), the Tribunal might realistically have found that that paragraph positively militated in favour of an assessment of the conduct as "serious" as distinct from "very serious".

6. Step 2: if the Tribunal had complied with s 8.1.1 and found the appellant's conduct to be "serious", but not "very serious", that *could* realistically have affected the relative weight that it gave to both to Primary Consideration 1 and other considerations (including considerations that tended to weigh in favour of revocation): **AS [43]-[44].**

7. The Full Court's analysis is affected by numerous errors.

   (a) The counterfactual inquiry does not "challenge the conventional distinction between judicial review and merits review". This vital distinction is clear, and it must be adhered to: cf. *J* [77]; **AS [56]**.

   (b) The adjective "realistic" does not authorise guesswork as to how the Tribunal might evaluate a matter to deny reasonable conjecture. The word does capture the notion that the counterfactual inquiry is constrained by the parameters set by the historical facts: *MZAPC* at [38]; cf. *Hossain* at [36], [78]. But, as explained, the historical fact of evaluative conclusions affected by non-compliance with the Direction cannot be taken *as they stand* in order to deprecate reasonable conjecture as the possibility of a different decision as "unrealistic".

   (c) *J* [78] is right: the Tribunal's errors regarding s 8.1.1(1)(a), (b) an (g) "cannot be neatly excised, leaving the balance of its reasons intact". But the Full Court failed to adhere to that in its reasons: *J* [98]-[104], [124]; **AS [38]-[39], [43]-[44]**.

Deprecation of "formalism" (*J* [79]-[83]) adds nothing, and is apt to distort: **AS [34]-[35]**.

(d) As to s 8.1.1(1)(g) bearing on step 1, the Full Court's speculation that the Tribunal "would" have "had regard to the same substantive matters as a relevant non-mandatory consideration" misstates the applicable test, and is unsustainable. The Court cannot dismiss as "unrealistic" the possibility that the Tribunal might take the very same approach that it took here in fact to its decision-making: confining itself to the list of mandatory considerations: **AS [56]-[57]**.

8. The key historical fact is that the Tribunal considered that the "*totality* of the weight attributable to the relevant Other Considerations" did not outweigh "the strong, combined and determinative weight that it has attributed to Primary Considerations 1 and 4" ([164(e)]) and that "a *complete* view of the considerations in the Direction therefore favours … non-revocation" ([164(f)]). In light of the legal framework, and the principles correctly stated in *Chamoun* and *CRNL*, the Court cannot conclude that the balance would have inevitably stayed the same if (hypothetically) the Tribunal had complied with the Direction: **AS [50]**; *Thornton* at [78].

Dated: 6 February 2024

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