HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **JOSEPH MILLER**
Appellant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

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

PART II: REPLY

2. ***Overall.*** It is striking that nowhere in the Minister's submissions is there any attempt to explain why it would be a purpose of s 29(1)(c) of the AAT Act, the AAT Act as a whole or the AAT Act read with the *Migration Act* to render invalid an application to the Tribunal simply because it fails to include a statement that the applicant believes the primary decision to be wrong. There is no rational purpose.

3. ***The word "must".*** It is clear that the Minister relies on the use of the word "must" in s 29(1)(c) of the AAT Act in support of his submission that the provision imposes a condition essential to the validity of the application. In this regard, while the Minister submits that the use of the word "does not, ***in and of itself***, and irrespective of the context, dictate the answer" (**RS [21]**), he also submits that the use of "mandatory rather than permissive language … ***naturally tends*** to the conclusion that" non-compliance leads to invalidity (**RS [21], [23]**, emphasis added). That amounts to the radical submission that, in all cases where a *Project Blue Sky* analysis is required, the scales are tipped in favour of a conclusion that compliance with an obligation is a condition of validity.

4. The Minister relies upon the separate reasons of Edelman J in *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [174] "and the cases there cited" in support of his submission that the use of the word "must" "may be relevant" (**RS fn 19**). The only relevant case cited by his Honour is *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [77], [166] and [206]. In that case, it was the relevant context, namely that other provisions of the *Migration Act* governing the procedure of the Refugee Review Tribunal used the word "may", that supported the Court's conclusion that a breach of s 424A constituted

jurisdictional error. For example, Hayne J said that the "imperative language [of s 424A] stands in sharp contrast with the permissive terms of, for example, s 424 which says that 'the Tribunal ***may***' take various steps" (at [206], emphasis in original), and Kirby J referred to the "juxtaposition of language in Pt 7, Div 4" (at [166]).

5. ***The Full Court's decision in BXS20.*** The Minister asserts without explanation that the reasoning of the Full Court of the Federal Court in *BXS20 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 296 FCR 63 "resonates here" (**RS [20]**). It is clear that *BXS20* is distinguishable. *First*, in light of the fact that the chapeau in s 347(1) of the *Migration Act* uses the single word "must" to introduce the following paragraphs, the Full Court held that s 347 imposed one statutory requirement, compliance with which was either essential or not essential to the validity of an application (at [31]). By contrast, s 29 of the AAT Act uses the word "must" in each of paragraphs (a), (b), (c), (ca) and (cd), and the word "shall" in paragraph (d). Accordingly, as Davies and Gummow JJ recognised in *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117 at 123, those requirements may be "mandatory as to some of the integers therein and directory as to others". Indeed, as the parties agree and in direct contrast to the decision in *BXS20*, compliance with the requirement to pay the prescribed fee is ***not*** essential to the validity of an application under s 29 of the AAT Act. *Secondly*, each of the requirements in s 347(1) of the *Migration Act* considered in *BXS20* is of substance: approved form, prescribed period and prescribed fee. None is equivalent to s 29(1)(c) AAT Act, compliance with which will often produce an entirely uninformative statement of reasons.

6. ***Section 29(1)(d).*** The time limit in s 29(1)(d) would not be "meaningless", and the associated provisions with respect to an extension of time in s 29(7)-(10) would not be "otiose", if that requirement were not essential to a valid application (contra **RS [28]**). Rather, compliance with the time limit avoids the need for the applicant to apply for an extension of time, which may of course be refused. The significant point, however, is that the Tribunal is not deprived of the capacity to determine the application for review by non-compliance with s 29(1)(d). Yet on the approach of the courts below, that is the consequence of non-compliance with s 29(1)(c).

7. ***Section 29(1)(ca) and (cb).*** The Minister's construction of s 29(1)(ca) and (cb) is irrational. The Minister submits that "[t]here is a single ground upon which a review of this kind can be brought and an application will thus either state that ground (and be valid) or will not state that ground (and be invalid)" (**RS [33]**). The Minister also submits that, if the application does not set out the available ground, the applicant can simply submit a further application setting out the ground (**RS [34]**). The reason why an application must set out the ground upon which the review can be brought in order for

the application to be valid, in circumstances where there could only be one ground upon which the application is brought, is not clear.

8. ***Purpose of s 29(1)(c).*** The Minister's focus on the appellant's "concession" that a well-prepared statement of reasons may assist in the early identification of an applicant's standing and the issues in dispute (**RS [41]**) reflects the Minister's failure to grapple with the real question. It is not whether a statement of reasons may be useful. It is whether, given that such a statement of reasons may often be useless, it was a legislative purpose to render valid an application containing a useless statement of reasons but to render invalid an application which does not contain one at all. In this regard, the Minister does not explain why the purpose of s 29(1)(c) he identifies – namely the "system-level" benefits of statements of reasons being provided – is not equally achieved by requiring a statement of reasons to be provided, but the Tribunal having jurisdiction where a statement of reasons is absent and power to make directions under s 33 (cf **RS [42]**).

9. ***Section 29AB.*** The appellant's purposive reading of s 29AB does not "presuppose[] a purpose in order to support the appellant's desired construction" (contra **RS [44]**). The parties are agreed that the purpose of s 29AB is to enable the Tribunal to inform itself of the issues in the review application or the standing of the applicant where those matters are not sufficiently identified in the statement of reasons. That the purpose is best achieved by reading the power in s 29AB as applying both to a statement of reasons that is entirely meaningless in relation to those matters and statement of reasons that is absent. In relation to the appellant's construction "contradict[ing] the statutory text" (**RS [44]**), the appellant accepted in his submissions in chief that "read literally, s 29AB assumes the existence of an inadequate statement of reasons for an application at the time of application" (**AS [29]**). However, the purpose of the provision, as well as the principles of statutory construction relied upon in that paragraph of his submissions in chief, support a broader reading of s 29AB.

10. ***Section 33.*** It unclear how s 33 of the AAT Act "underscores the importance of a person setting out their reasons for review in s 29(1)(c)" (contra **RS [47]**). As **AS [26]** points out, s 33 provides a suite of provisions that allows the Tribunal to ensure that the applicant's grievances are fully articulated. Those provisions are equally available in cases where there is a wholly unhelpful statement of reasons and where there is no statement of reasons at all, and the end result will be entirely the same.

11. ***Section 2A.*** The Minister's submission that s 2A of the AAT Act is not relevant to the construction of s 29(1)(c) should be rejected (**RS [48]**). Parliament did not intend that a hearing in the Tribunal would be "accessible" and "fair, just, economical, informal and quick", but that ***obtaining*** a hearing would be none of those things.

12. ***The Migration Act***. The Minister, while accepting that the result for which he contends is harsh, adopts the Full Court's reasons at FC [57] (**CAB 148**) that the harshness arises by reason of modifications to s 29(1)(d) made by the *Migration Act* (**RS [6(g)], [49]**). The Minister overlooks the two points made in direct response to this aspect of the Full Court's reasons in **AS [51]-[52]**. In particular, for the reasons set out in **AS [52]**, while it may be accepted that "Parliament's unmistakeably clear intention [was] that a valid application to the Tribunal must be validly made within 9 days", Parliament should be taken to have proceeded on the basis that a statement of reasons was not essential to the making of a valid application. There is nothing "strained" in the appellant's construction of s 29(1)(c) of the AAT Act (contra **RS [51]**). A *Project Blue Sky* analysis is always required where there is non-compliance with a statutory requirement and the answer to that analysis for which the appellant contends requires no strained construction of any provision. The harsh result, which the Minister accepts would be the case if his construction were accepted, is readily avoided.

13. In answer to **RS [13]-[15]**, the appellant's case is that the "default scheme" is that compliance with s 29(1)(c) is never essential to the validity of an application. **AS [54]-[55]** advance a narrower submission in the alternative, which is that – at least in relation to reviews provided for by s 500 of the *Migration Act* – a statement of reasons is not essential to validity. In making this argument, contrary to **RS [13]**, it is no part of the appellant's case that s 500(6B) implicitly "disapplies" s 29(1)(c) of the AAT Act. Indeed, **AS [55]** accepts that it is implicit that s 29(1)(c) still ***applies***. The question, rather, is whether non-compliance with s 29(1)(c) leads to invalidity of an application. In answering that question, as the Minister submits (**RS [11]**), s 25(6) of the AAT Act "ensures that the other enactment [here, the *Migration Act*] is given priority so that the provisions of both statutes can be read together". Reading the statutes together, for reviews to which it applies, it is s 500(6B) of the *Migration Act* that prescribes the mandatory requirements for a valid application for review of a decision under s 501CA(4) not to revoke a decision to cancel a visa. In this regard, it is true that s 500(6B) does not refer "in terms" to making an application in writing (**RS [14(a)]**). However, it does so implicitly by referring to an application being "lodged" with the Tribunal. Accordingly, it is the lodgement of a written application, within nine days, that is essential to validity.

14. ***English authorities.*** The Minister does not identify any substantive difference between *Howard* and the present case (**RS [54]**). *First*, s 29(1)(c) ***is*** "prescriptive" – it prescribes that an application must contain a statement of reasons. The fact that it is "readily capable of being complied with" does not mean that s 29(1)(c) is not "prescriptive". If the Minister intended to submit that *Howard* is distinguishable because the statutory requirement considered in that case was more onerous, that submission should be

rejected. In *Howard*, the Court placed no reliance on the fact that the requirement was onerous. Indeed, as the quote set out in **AS [34]** makes clear, it was partly because the requirement to state the grounds of the application could be complied with in a meaningless or unhelpful way that led the Court to conclude that the requirement was "directory". *Secondly*, the "consequences of holding such a prescriptive requirement to be 'mandatory'" are the same in both cases. The notice of appeal in *Howard*, and the application here, would be invalid. *Finally*, the fact that the legislation in *Howard* did not have a provision equivalent to s 29AB is not a material difference since, as Lord Denning MR recognised, "[t]he defects [with a notice] can be remedied later, either before or at the hearing of the appeal" (at 243).

15. As a matter of substance, there is no difference between the decisions in *R v Croydon Justices, ex parte Lefore Holdings Ltd* and *Robinson v Whittle*.[1] It is accepted that, in *Croydon Justices*, the Court held that there had been "substantial compliance" with the relevant rule. However, as **AS [38]** made clear, there was only "substantial compliance" because there was enough information in the application to work out what the relevant question of law was. Such *de minimis* compliance was functionally equivalent to no compliance at all. The Court held that such *de minimis* compliance with the rule was sufficient given "all sorts and manner of persons" should not be kept "away from the seat of justice". Similarly, if *de minimis* compliance with s 29(1)(c) does not deprive the Tribunal of jurisdiction (that is, by the inclusion of a meaningless statement of grounds), neither should non-compliance.

16. In relation to *Robinson v Whittle*, the pejorative characterisation of the decision as containing "little to no reasoning" should be rejected (**RS [57]**). The Divisional Court made the simple but compelling point that – given there is a mechanism for the question of law to be identified at a later time – compliance with the rule should not be construed as essential to the validity of an application. Similarly, given the power in s 29AB, and the other provisions in the Act that allow the issues in the case to be identified (eg s 33), compliance with s 29(1)(c) should also not be construed as being essential to validity.

Dated 18 December 2023

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[1] Nothing turns on this, but for completeness, contrary to **RS [57]** the decision in *Robinson v Whittle* is the "later decision" – it was delivered on 2 May 1980, while *Croydon Justices* was delivered on 19 March 1980.