HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

SDCV
Appellant

and

DIRECTOR-GENERAL OF SECURITY
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

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APPELLANT'S REPLY

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PART I — CERTIFICATION

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

PART II — REPLY

ISSUE 1: CONSTITUTIONAL PRINCIPLE

2 ***Procedural fairness cannot be excluded.*** The Respondents accept that it is an "essential characteristic" of the Federal Court that it must comply with the requirements of procedural fairness: **2RS [17]**. Yet, they also maintain that a law of the Commonwealth Parliament may "exclude" those requirements in relation to the Federal Court: **2RS [21]**. Those two propositions cannot be reconciled. If a characteristic is "essential", a "court" within the meaning of Ch III must possess, and must maintain, that characteristic for it to have "institutional integrity".[1] If a law purports to deprive a "court" of such a characteristic, the law will "distort" or "substantially impair" the institutional integrity of that court,[2] and thereby infringe the *Kable* principle (in the case of a State or Territory court) or the *Lim* principle (in the case of a federal court): **AS [17]-[18]**; cf **SA [22]**. Thus, by definition, essential characteristics cannot be excluded — even if there exists a "competing public interest": cf **2RS [19]**; **SA [26]-[27]**. If it were otherwise, the concept of an essential characteristic would be reduced to a mere label, contrary to the substance-based approach demanded by Ch III: **AS [14]-[15]**.

3 The reasoning in *Graham* does not support any different conclusion: cf **2RS [21], [31], [44]**; **Qld [13]**. Contrary to basic principle, the Respondents gloss over what was in issue, and therefore what was decided, in that case: see **AS [51]-[52]**, **[60]**. The focus of the "institutional integrity" challenge was that fact-finding was an essential function of courts.[3] No broader challenge was decided. And, in that context, it was explained that no constitutional principle requires a court to be the arbiter as to how competing interests should be balanced in determining whether otherwise admissible evidence is to be withheld from judicial proceedings. But as *HT* demonstrates, questions of that nature are fundamentally different from questions of procedural fairness: **AS [41], [56]**.

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1 The Appellant's primary submission is that the essential characteristics of all Ch III courts are the same: cf **Qld [6] n 5**. However, the Appellant accepts that the approach suggested by Queensland (**Qld [9]**), which focuses on the content of judicial power and distinguishes between the content of Commonwealth and State judicial power, is one way in which the existing authorities can be explained: **AS [51] n 96**; see also **SA [31]**.

2 See *Forge* (2006) 228 CLR 45 at [63]-[64] (Gummow, Hayne and Crennan JJ); *Wainohu* (2011) 243 CLR 181 at [44], [47] (French CJ and Kiefel JJ); *TCL* (2013) 251 CLR 533 at [100]-[102] (Hayne, Crennan, Kiefel and Bell JJ); *NAAJA* (2015) 256 CLR 569 at [39(2)-(3)] (French CJ, Kiefel and Bell J), [121] (Gageler J). See also *Kirk* (2010) 239 CLR 531 at [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ): cf **SA [22] n 48**.

3 *Graham* (2017) 263 CLR 1 at [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

4 ***Mischaracterisation of the minimum requirement.*** The Appellant's submissions have been mischaracterised in two respects. *First*, the Appellant does not contend that the minimum requirement requires that a person be provided "all of the material on which the Court is being asked to make its decision": cf **2RS [23], [29]**; **WA [19]**. The Appellant accepts that the minimum requirement can be satisfied in a variety of ways, which need not involve provision of all of the material to him and his representatives: **AS [29]-[35]**; **SA [4] n 4**. *Second*, the Appellant does not contend that a "balancing" approach must be applied to satisfy the minimum requirement, or that the Court is required to determine that balance: cf **2RS [21]**; **Qld [14]**. Balancing is one of several ways in which the minimum requirement may be satisfied, as illustrated by various common law (**AS [31]-[32]**, **[39]**) and statutory (**AS [49], [58]**) examples.

10 5 ***No example is inconsistent with the minimum requirement.*** The Respondents place significant weight on the power of courts to inspect documents in connection with a privilege or immunity claim: **2RS [20]**; see also **SA [13.3]**. Inspection of a document is a mechanism for scrutinising such a claim. It is not a substitute for admissible evidence in support of a claim. A party's ability to test that evidence ensures that procedural fairness is maintained: **AS [33]**. That said, it can be accepted that there may be circumstances, such as that identified at **2RS [34]**, where not even the basis for the claim can be disclosed to the party themselves. However, it is not clear that there could ever be a circumstance where the basis cannot be disclosed to a legal representative of the party (and the example in **2RS [34]** does not suggest otherwise).[4] If such a circumstance ever arose, the solution may
20 lie in the appointment of a special counsel.[5]

6 Similarly, the Respondents invoke the "trade secrets" and "confidential information" cases (**2RS [19]**) but ignore the discussion of those cases at **AS [31]-[32]**. The Respondents assume that there are cases in those categories that allow information to be withheld from a party's representatives. Lord Dyson JSC was not aware of such a case, nor is the Appellant.[6] It appears that the Respondents and the Interveners are in the same position.[7]

[4] Somewhat curiously, s 39A(9)(b) of the AAT Act allows for a representative of the applicant before the Tribunal to be present when certificated evidence is adduced before the Tribunal (if the ASIO Minister consents), but that cannot occur in the Federal Court by reason of s 46(4): see **2RS [10], [47] n 72**.

30 [5] *Public Transport Ticketing Corporation (No 3)* (2011) 81 NSWLR 394 at [10], [20] (Allsop P).

[6] Fagan J can be added to the list: see *Renshaw v New South Wales Lotteries* [2020] NSWSC 360 at [68].

[7] In the only "trade secrets and patents" case to which the Respondents refer (**2RS [19] n 14**), the issue was whether the information could be disclosed to the defendant himself in circumstances where it had already been disclosed to his legal representative: see *Portal Software* [2005] NSWSC 1115 at [46], [56] (Brereton J).

7 Next, it is necessary to address the additional examples proffered by South Australia. The cases in which confidential counsel opinions may be provided to the court (**SA [13.1]**) are not "adversarial" in the relevant sense. They are akin to the cases concerning children discussed at **AS [34]** (and referred to at **SA [13.4]**).

7.1 Judicial advice proceedings are an ancient[8] "exception to the Court's ordinary function of deciding disputes between competing litigants".[9] Such proceedings are about protecting the interests of the trustee and the trust.[10] Further, "[o]rders in the nature of judicial advice do not determine rights".[11]

7.2 The jurisdiction and power to approve settlement of a claim by a person under legal incapacity is "protective in nature".[12] Likewise, a court "assumes a protective role" when deciding an application to approve settlement of a class action.[13] The role of the court in such an application "is akin to that of a guardian".[14]

8 As to circumstances where a confidential affidavit is filed in support of an application by a liquidator for an examination summons (**SA [13.2]**), the court retains a discretion to allow a proposed examinee to inspect the affidavit.[15] Further, at any examination, "the court will regulate the examination so that the examinee suffers no injustice".[16]

9 As to cases where gender-restricted evidence is involved (**SA [13.5]**), the court may make orders ensuring that evidence is disclosed to legal representatives of the relevant gender.[17]

10 Finally, it is necessary to address two examples from foreign jurisdictions. *First*, critical to the reasoning of the Supreme Court of Canada in *Harkat* was the fact that the statutory scheme required the appointment of a special advocate to protect the interests of the person and that he or she be provided with a summary that enabled them to be reasonably informed of the case made by the Minister.[18] The quote extracted in **Qld [14]** must be read having

8 The origins of the jurisdiction date back to at least the early 14th century: Chief Justice Kiefel, "Judicial Advice to Trustees: Its Origins, Purposes and Nature" (2019) 42 *Melbourne University Law Review* 993 at 994.

9 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [64] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

10 *Macedonian Orthodox Church* (2008) 237 CLR 66 at [72] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

11 Chief Justice Kiefel, "Judicial Advice to Trustees" (2019) 42 *Melbourne University Law Review* 993 at 1004.

12 *Fisher v Marin* [2008] NSWSC 1357 at [29] (Rothman J).

13 *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439 at [62] (Murphy J).

14 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8] (the Court).

15 *Corporations Act 2001* (Cth), s 596B(2).

16 *Simionato & Farrugia v Macks & Macks* (1996) 19 ACSR 34 at 63 (Lander J). See also *Palmer v Ayres* (2017) 259 CLR 478 at [35] (Kiefel, Keane, Nettle and Gordon JJ).

17 See the orders considered in *Western Australia v Ward* (1997) 76 FCR 492 at 495 (Hill and Sundberg JJ).

18 See [2014] 2 SCR 33 at [33]-[37], [47], [51]-[60], [67]-[73] (McLachlin CJ).

regard to that context. *Second*, the decision of the UK Supreme Court in *Haralambous* does not support the proposition that a mechanism that operates in a blanket fashion, such as s 46(2) of the AAT Act, is the only "sensible" solution where a similar procedure applied in the court or tribunal below: cf **2RS [41]**; **NSW [34]**. The Court expressly affirmed that a closed material procedure "should only ever be contemplated or permitted by a court if satisfied, after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case".[19]

11 Both cases reinforce what is otherwise demonstrated by the Australian examples: that the minimum requirement of procedural fairness may be satisfied by different common law and statutory mechanisms: **AS [35]**. Indeed, the Respondents ultimately accept that s 46(2) of the AAT Act could be construed to incorporate one of those mechanisms, namely the appointment of a special counsel: **2RS [47]**.

ISSUE 2: UNFAIR PROCEDURE MANDATED BY SECTION 46(2)

12 ***"Additional" rights.*** The Respondents repeatedly refer to the fact that the right to seek merits review of an ASA before the Tribunal, and the right to appeal from the decision of the Tribunal to the Federal Court pursuant to s 44 of the AAT Act, are "additional" to the right to seek judicial review of an ASA under s 75(v) of the Constitution: **2RS [8], [13], [16]**. What may or may not occur before the Tribunal (as to which, see paragraph 14 below), or in a hypothetical judicial review proceeding, does not bear upon the question whether the procedure authorised or required by s 46(2) in a s 44 appeal contravenes Ch III: cf **2RS [45]**. That question concerns the court's procedures for resolving the dispute between the parties in that proceeding.[20]

13 ***The validity of the certificate.*** The Respondents' submissions seek to focus attention on the validity of the certificate and the Appellant's capacity to challenge it: **2RS [36]**; see also **NSW [26]-[29]**, **WA [30(a)]**. That submission is a distraction for the same reason identified in paragraph 12 above. The Respondents now also advance a new argument, namely that the Federal Court can assess the validity of a certificate on its own motion: **2RS [37]**; cf **CAB 47 [72]**. It is very difficult to reconcile that proposition with *Hussain*,[21] which the Respondents simultaneously seek to defend. In any event, the new argument

[19] *Haralambous* [2018] AC 236 at [61] (Lord Mance DPSC) (emphasis added), quoting *Tariq* [2012] 1 AC 452 at [67] (Lord Mance JSC).

[20] See *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ), [193] (Gageler J).

[21] The conclusion turned on the scope of the Court's jurisdiction in s 44 appeals: (2008) 169 FCR 241 at [35], [41], [50] (the Court). See also *FCT v Raptis* (1989) 20 ATR 1262 at 1267 (Gummow J).

does not assist the Respondents. The power in s 39B(2)(a) of the AAT Act is conditioned on the ASIO Minister's opinion, not objective facts. Therefore, it is not the role of the Court to determine upon evidence provided to it whether the disclosure of the information would be contrary to the public interest because it would prejudice security. That sets the scheme apart from those considered in *Gypsy Jokers*, *K-Generation* and *Pompano*: see **AS [47]**.

14 ***Gist of an ASA.*** The Respondents' submission that an appellant under s 44 of the AAT Act is likely to be aware of at least the "gist" of an ASA suffers from two fundamental problems: see **2RS [39]**. *First*, it focusses, incorrectly, on the "gist" of the ASA. But what is relevant is whether the "gist" of the undisclosed material is provided.[22] *Second*, the Respondents fail to recognise that, by reason of s 36 of the ASIO Act, in circumstances where an ASA is made in relation to an exercise of power, or the performance of a function under the Migration Act, the requirement to provide a statement of grounds under s 37(2) of the ASIO Act does not apply "in cases where the person who is the subject of the security assessment is not an Australian citizen, permanent resident or holder of a special category or purpose visa".[23] Further, even if a statement of grounds is provided (as it was to the Appellant), it cannot include any matter that the ASIO Minister has certified would be prejudicial to the interests of security if disclosed: **2RS [6]**.[24] It can be expected that there will be substantial, if not complete, overlap between the material excluded from any statement and the material subject to a certificate. It is therefore entirely speculative to assert that an appellant will know the "gist" of the material against them. In all likelihood, the combined effect of a certificate and the restriction on material contained in a statement of grounds will be that the gist of the material will not be disclosed at any point prior to, or during, a Tribunal hearing.

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[22] *Haralambous* [2018] AC 236 at [61] (Lord Mance DPSC).
[23] *Leghaei* [2005] FCA 1576 at [20] (Madgwick J). See ASIO Act, ss 35 (para (b) of definition of "prescribed administrative action"). The only exception is in relation to an assessment made for the purpose of s 202(1) of the Migration Act: ASIO Act, s 36(1)(b). See also *Leghaei* (2007) 241 ALR 141 at [19]-[20] (the Court).
[24] ASIO Act, ss 38(2)(b) and (5).