[2021] HCATrans 046

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S167 of 2020

B e t w e e n -

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Applicant

and

ALEX VIANE

Respondent

Application for special leave to appeal

KIEFEL CJ
GLEESON J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON FRIDAY, 12 MARCH 2021, AT 2.50 PM

MR G.R. KENNETT, SC: May it please the Court, I appear with my learned friend, **MS R.S. FRANCOIS**, for the applicant. (instructed by Sparke Helmore Lawyers)

MR C.L. LENEHAN, SC: May it please the Court, I appear with my learned friends, **MR J.D. DONNELLY** and **MR K.P. TANG**, for the respondent. (instructed by Scott Calnan Lawyers)

KIEFEL CJ: Mr Lenehan, we would be assisted by submissions from you at the outset, thank you.

MR LENEHAN: Thank you, your Honour. Your Honours, we say special leave should be refused for two reasons: first, because the decision below is not affected by sufficient doubt; and, second, because properly understood, the proposed appeal really turns on the particular facts and circumstances and does not raise the broad questions of admittedly interesting general principle that our friends say it does.

Can I deal first with proposed ground 1. That, in fact, rests on a misapprehension as to the reasoning of the majority. Their Honours' dispositive finding was not, in fact, that the Minister did not have any relevant personal or specialised knowledge, which is what we understand to be said by our friends at paragraphs 18 and 19 of the leave application, it was rather that no such knowledge had been applied by the Minister, and you see that, we say, clearly, in paragraphs 41 and 42 at page 85 of the book.

The four observations that then follow explain that conclusion, that is, that the Minister did not, in fact, apply any specialised knowledge. Only one of those observations, that in paragraph 45, concerns what may be inferred about the state of the Minister's knowledge, and I will come back to that, but can I first say that that approach of the court at paragraphs 41 and 42 necessarily assumes that the authorities on which our friends place reliance in advancing ground 1, that is *Spurling*, *Thomson*, *Muin and Jia*, the majority is necessarily assuming that that line of authority is applicable to the construction of section 501CA.

Now, your Honours know the effect of those authorities is that the statute, properly construed, may indicate that it is, we emphasise this, permissible for a decision-maker to apply accumulated knowledge and expertise, and we say the majority at least appears to have assumed in favour of the Minister that such an approach was authorised by 501CA. So, if that is right, it follows that at least a large aspect of the otherwise, we concede, potentially interesting question of construction raised by our friends does not directly arise on that reasoning.

It is also important to say, as I have just indicated, that the application of those authorities really goes no more than saying that it is permissible for a decision-maker to rely on such knowledge. They do not say, as our friends would have it, that for all purposes and in all circumstances, there is what our friends label a "statutory assumption" of specialised knowledge - that is in paragraph 17 of their leave application.

We say, and this is what the majority applied, whether such knowledge is possessed, and more importantly, here applied are questions of fact, and we say that that was, in fact, the very approach taken by Justice Stephen in *Spurling*, which we take to be the starting point for this whole submission.

In the context of an admittedly different ground, a procedural fairness ground, his Honour scrutinised the reasons of the Tribunal and the transcript, and concluded that the Tribunal there had in fact relied upon expert evidence that was separately placed before it rather than its own experience and accumulated knowledge, on which, it is true - and this is the passage that our friends highlight at paragraph 15 - his Honour said that the statute permitted reliance on that sort of knowledge.

Now, if that is so, that is, whether that sort of knowledge is, in fact, applied, is a question of fact, and the issues raised by our friends regarding the reasoning of the majority at 43 to 46, turns on the particular facts of this case and raises no point of general principle. But can I also say that we say that that reasoning, because it is also criticised by our friends, displays no error.

Your Honours will have seen that the first observation that appears there is that the majority starts with the reasons of the Minister. We say there is nothing remarkable about that. I mentioned before that that is, in fact, how Justice Stephen approached the question in *Spurling*, and laid considerable emphasis, as I say, on the reasons and transcript, and the point that the majority makes in paragraph 43 is that the reasons did not refer to any reliance by the Minister on any specialised knowledge. That, naturally, we say, tended towards a conclusion that no such knowledge had been applied. Of course, that is not conclusive, other material may have suggested otherwise, but there was no other material, we say, pointing the other way here.

Now, we say that the other aspects of the reasoning there also display no error, for example, in paragraph 46 that conclusion is more readily drawn in circumstances where the reasons were prepared by a departmental officer and there was, as their Honours point out, nothing in the evidence to suggest that that officer had any appreciation of the Minister's state of knowledge. There is also, we say, nothing remarkable about examining the

nature of the particular subject matter in issue and its relative obscurity, that is what appears in paragraph 44.

That is because one aspect of the Minister's case below was that, in fact, the Minister had relied on what was referred to as "general knowledge", and plainly, obscurity was pertinent to that aspect. But we also say, if, as *Spurling* indicates, reliance on accumulated specialised knowledge is a question of fact, then obscurity bears on that question also, because one will be considering whether that area of specialised knowledge intersects, in the way of a Venn diagram, with the particular factual subject matter in issue, and it is simply a matter of common sense that the more obscure the particular factual issue is, the less likely it will be inferred that the Minister has relied on that kind of knowledge.

Now, that then leaves the reasoning that I mentioned before that, at 45 regarding what could be inferred about the state of the Minister's knowledge. That is to be read in light of paragraph 44 regarding obscurity, and the point really was that there was no reason one would infer from the Minister's responsibility for the administration of the Act, knowledge of that relatively obscure subject matter.

So, we say, for those reasons, ground 1 first raises no issue of principle, and second, raises no sufficiently arguable ground to warrant leave. That then leaves me with proposed ground 2. Can I immediately accept, in general terms, that it has been said that there is some form of relationship between the rationality and no evidence grounds, but it does not follow, and this is the argument that our friends put, that a no evidence ground will only amount to jurisdictional error in the circumstances identified by Justices Crennan and Bell in *SZMDS* at paragraph 135. That is, as our friends would have it, it is only in a case where the overall conclusion was not open to a rational decision-maker.

Now, we say that was in fact made clear by those two Justices, Justices Crennan and Bell, in *SZMDS* at 124, where, after observing the point that I have made before, that is, rationality and no evidence grounds are related, their Honours said that a decision that is based on no evidence displays jurisdictional error.

We say that notion that a decision based on no evidence displays jurisdictional error aligns with the Federal Court line of authority which was applied here to the effect that a finding made with no evidence will amount to jurisdictional error where the courts use the language "critical step", so the affected finding is a critical step in the ultimate conclusion of the decision-maker.

Your Honours will have seen that the majority refers to one example, one recent example of that line of authority, the decision of *Hands*. They do that at paragraph 48 of their judgment at page 87 of the book, and they went on to apply that approach here.

Now, in such a case where one has that critical step, the decision will be based on a finding lacking evidence in the sense discussed in *SZMDS* in the sense that that finding is of significance to the ultimate conclusion. Can I accept that there has been, and your Honours will be aware of this, there has been some debate in the Federal Court as to whether that is in fact the correct approach or whether no evidence amounting to jurisdictional error is really limited to a case where one is dealing with a jurisdictional fact.

We say that the critical fact approach coheres with the point that was recently made by this Court in *Hossain*, by reference to Professor Jaffe, about jurisdictional error being not only an expression of the existence of error, but also about the gravity of that error. So, stepping through the majority's analysis here, the first point was they discerned, as a matter of construction, an:

> implied condition that the Minister's state of satisfaction –

in 501CA(4):

> be formed on the basis of factual findings that are open to be made on the evidentiary materials -

and that if they are to abide by that condition, we see that at paragraph 47. The question that then arose was whether that non-compliance, to use the language of *Hossain*, was jurisdictional. That, as was pointed out in *Hossain*, is also a question of construction. So, the notion of a decision being based on a finding lacking evidence, or that such a finding is critical to the ultimate outcome, those are, to use again the language of *Hossain*, qualitative statements about the extent of non-compliance with that implied condition. They are simply further examples of what was described as a common law principle of construction in *Hossain*, that the consequences of an error that a legislature will be taken to intend, that is, whether or not it leads to invalidity:

> will usually depend on the gravity of the error.

That is the point made by Justice Edelman in *Hossain* at paragraph 64, also in the joint reasons at paragraphs 27 and 28. So, absent any contrary intention, we say the majority was entirely correct to apply that principle to the construction of section 501CA.

Now, if that is right then, again, ground 2, we say, largely turns on the particular facts of the case, and raises no point of principle warranting leave. Can I make these brief points about why the factual findings in issue here were of sufficient importance to the ultimate conclusion to be regarded as critical in the sense that I have just identified.

First, as Justices Nettle, Gordon, and Edelman noted in *Applicant S270* recently:

> although the s 501CA(4) discretion is wide, it must be exercised by the Minister considering the claims and material put forward by the applicant.

They will be central to that decision. The second point is that those claims here included first the claim that the respondent's daughter would have:

> limited understanding of "her father's native language" -

materially affecting her schooling and advancement in life, and secondly a claim that the prospects of the family would be limited, including because there was no social welfare by the governments in either American Samoa or Western Samoa. The third point, then, regarding criticality, is that the Minister plainly understood the requirement to seek to grapple with that material in the very way recognised in *Applicant S270*.

Then the findings that the Minister in fact made, the impugned findings, involved rejection, we say in significant respects, of the representations that are in fact being made. There was almost complete rejection of a claim that the family would have access to no social welfare, and there was at least partial rejection that the representation that language difficulties would materially affect the respondent's child's schooling and advancement in life.

We say it is therefore obvious in considering, having regard to the material advanced by the respondent, there was another reason why the original decision should be revoked, that those things were important in that decision.

Now, it is true, and our friends make this point that at a general level the Minister accepted first that the respondent's daughter would be significantly affected by any relocation, and also that it was in her best interests that the cancellation be revoked. He also accepted that removal to Samoa or American Samoa would involve what he described as significant adjustments and hardship to the family.

It is also true that he had regard to those broad findings in the weighing process, but that, as the majority observed at paragraphs 57 and also 60 to 61 at pages 89 and also 90 of the book, was really the point. The fact that in that way the interests of the respondent's child were given significant weight in the ultimate evaluative exercise, that really served only to illustrate the importance of factual findings relevant to that issue. It went, we say, to really the heart of decision-making here, and for those reasons we say there is no error in describing those findings as critical in that context, and for those reasons, we say not only does ground 2 not really raise any issue of principle, it is not attended by sufficient prospects of success.

Can I finally say, if your Honours are against me in those submissions and the Court is minded to grant leave, we would ask that it be on the conditions we have identified in our response at page 124, paragraph 25 of the book. Those are the submissions for the respondent, your Honours.

KIEFEL CJ: Mr Kennett, we need only ask you about the question of conditions at page 124.

MR KENNETT: Your Honour, if it is the Court's view that such a condition ought be imposed, then we would accept it.

KIEFEL CJ: Yes, thank you. We need not trouble you otherwise. There will be a grant of special leave in this matter on condition that the costs orders made by the Full Court of the Federal Court of Australia are not disturbed, and that the applicant pays the reasonable costs of the respondent in this Court. Time estimates, gentlemen?

MR KENNETT: Your Honour, likely to be more than half a day. Certainly, our arguments raise some large issues, which need some attention, and my learned friend has indicated that there may be a notice of contention.

KIEFEL CJ: Shall I say then no more than one day?

MR KENNETT: I think that is appropriate, your Honour.

MR LENEHAN: Yes, your Honour, I think that is appropriate.

KIEFEL CJ: Yes, thank you Mr Lenehan.

The Court will now adjourn to reconstitute.

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AT 3.06 PM THE MATTER WAS CONCLUDED