FEDERAL COURT OF AUSTRALIA

Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 489

Appeal from:	Application for judicial review from: *Miller and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1623 (8 June 2021)
File number:	NSD 713 of 2021
Judgment of:	**DERRINGTON J**
Date of judgment:	4 May 2022
Catchwords:	**MIGRATION** – application for review of Tribunal's decision – application not made in compliance with s 29(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) – application failed to attach a statement of reasons identifying why the Minister's decision was erroneous – whether failure to include statement invalidated application
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) *Migration Act 1958* (Cth) *Taxation Administration Act 1953* (Cth) *Administrative Appeals Tribunals Tribunal Regulation 2015* (Cth)
Cases cited:	*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 *Beiruti v Commissioner of Taxation* (2013) 138 ALD 380 *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 *Federal Commissioner of Taxation v Consolidated Media Holdings Pty Ltd* (2012) 250 CLR 503 *Luck v the Secretary, Department of Human Services (No. 4)* [2016] FCA 950 *Minister for Home Affairs v Brown* (2020) 376 ALR 133 *Minister for Immigration and Citizenship v Chan* (2008) 172 FCR 193 *Montreal Street Railway Co v Normandin* [1917] AC 170 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 *Regional Express Holdings Ltd v Australian Federation of*

Air Pilots (2017) 262 CLR 456

Division:	General Division
Registry:	New South Wales
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Number of paragraphs:	81
Date of hearing:	31 January 2022
Counsel for the Applicant:	Mr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the Respondents:	Mr N Wood SC
Solicitor for the Respondents:	Sparke Helmore Lawyers

ORDERS

NSD 713 of 2021

BETWEEN:	**JOSEPH MILLER** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**DERRINGTON J**
DATE OF ORDER:	**4 MAY 2022**

THE COURT ORDERS THAT:

1. A writ of certiorari issue quashing the decision of the Administrative Appeals Tribunal of 15 March 2021.
2. The application for review of the decision of the Administrative Appeals Tribunal be otherwise dismissed.
3. The parties file written submissions in respect of the costs of this application by 4.00pm on 11 May 2022, limited to five pages.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

Introduction

1 In this application both parties, being Mr Joseph Miller (the applicant) and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the Minister) agree that the decision of the Administrative Appeals Tribunal of 8 June 2021 ought to be quashed by the issue of a writ of certiorari. However, the Minister says that the Tribunal's decision was made without jurisdiction because the applicant's application to it was invalid by reason of its non-compliance with the requirements of s 29(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the *AAT Act*). He further says that, once the decision is quashed, the matter ought not to be remitted to the Tribunal. Conversely, the applicant says that the Tribunal had jurisdiction but it committed a number of jurisdictional errors in the course of reaching its decision to affirm the decision Minister's delegate (the delegate) under review. He asserts that the Tribunal's decision should be quashed and the matter remitted to the Tribunal for determination according to law. The Minister acknowledges that, if the Tribunal had jurisdiction, its decision on the application was affected by jurisdictional error and it ought to be quashed and, it would follow that the matter would have to be remitted to the Tribunal. There is no reason to doubt the consensus of the parties in this latter respect. It is apparent that the decision contained at least one jurisdictional error consequent upon the manner in which Direction 90 was applied to the circumstances of the application before it.

2 The context in which the issues in this case arise is the Tribunal's review of the delegate's conclusion that the power in s 501CA(4) of the *Migration Act 1958* (Cth) (*Migration Act*), to revoke the cancellation of the applicant's visa which had occurred under s 501(3A) of that Act, had not been enlivened. However, in light of the parties' contentions, the only substantive issue is whether the Tribunal had jurisdiction to hear and determine the application for review.

3 This matter gives rise to a question of some importance because, as appears from the following discussion, there is no existing authority dealing with the consequences of non-compliance with s 29(1) of the *AAT Act* in its current form.

The facts

4 There is little need to identify the circumstances giving rise to the application, but some brief outline is appropriate.

5 The applicant is a Fijian national and citizen. He arrived in Australia in 1991 as a 10 year old with his parents and two siblings.

6 He has three biological minor children from a former relationship with an Australian citizen. He also has five step-children to his current partner who is an Australian citizen.

7 He has an extensive criminal history. Much of it involves assault, violence or physical intimidation. However, most egregiously, he has been convicted of offences relating to domestic violence, including contravening prohibition restrictions or apprehended violence orders.

8 On 27 November 2019 he was sentenced in the Local Court of New South Wales at Orange to a period of two year imprisonment for the offences of assault, stalk/intimidate, intend fear physical harm (domestic), and two counts of contravene prohibition/restriction in AVO (domestic). That sentence was subsequently reduced to a period of 12 months imprisonment with a non-parole period of six months.

9 As a consequence of the imposition of that term of imprisonment his visa was cancelled under s 501(3A) of the *Migration Act* on 4 March 2020.

10 He made representations to the Minister pursuant to s 501CA(4) of the *Migration Act*. However, on 15 March 2021, the delegate determined that he was not satisfied that there was another reason why the original cancellation decision should be revoked and, accordingly, the power under s 501CA(4) to revoke was not enlivened.

11 The applicant was notified of the delegate's decision that same day.

12 It is accepted that the time provided for in s 500(6B) of the *Migration Act* for instituting an application in the Tribunal for the review of the delegate's decision expired on 24 March 2021.

13 On 24 March 2021 the applicant, by his migration agent, filed a document in the Tribunal purportedly seeking a review of the delegate's decision. However, the form used by the migration agent, being document eM2, was not appropriate for instituting a review in respect of the delegate's decision.

14 An alternative form headed, "Application for Review of Decision (Individual)", may well have assisted the applicant. In section 3 of that document, which is entitled "Reasons for the Application", the following appears:

> Why do you claim the decision is wrong?*
>
> Please read the "reasons you are making an application" section in the Guide to applying for a review before answering this question.

15 By using eM2 it is apparent that the migration agent overlooked the requirement in s 29(1)(c) of the *AAT Act* to include a statement of the reasons for making the application.

16 A directions hearing took place on 1 April 2021 at which a Senior Member of the Tribunal requested that the applicant provide the reasons for his application.

17 By an email of 9 April 2021 to the Tribunal, the applicant's solicitors advised that the reasons for the application were as follows:

> Why do you claim the decision is wrong?
>
> The Minister erred in concluding that there is not another reason why the original decision to cancel the applicant's Resident Return (Subclass 155) visa should be revoked.

The Tribunal's decision

18 The Minister submitted to the Tribunal that it lacked jurisdiction on the basis that the applicant's failure to comply with the requirements of s 29(1)(c) of the *AAT Act* because his application did not contain a statement of reasons had the consequence that no valid application had been made.

19 The Tribunal determined that although there was non-compliance with s 29(1)(c), it did not follow that the application was invalid such that it did not regularly invoke the Tribunal's jurisdiction. Before this court Counsel for the applicant disavowed reliance upon the Tribunal's reasons for that conclusion and there is no need to restate them in these reasons.

20 The Tribunal then considered the merits of the application before it and concluded that it was not satisfied that there was another reason why the cancellation decision should be set aside such that the power under s 501CA(4) of the *Migration Act* was not enlivened. As the Minister has not sought to support the Tribunal's decision, there is also no need to assay its reasons in any detail. However, it should be observed that it is clear that the Tribunal failed to take into account, in the sense of giving active intellectual consideration to, the issue of the strength, nature and duration of the applicant's ties to Australia as required by Direction 90 issued under s 499 of the *Migration Act*. After setting out the terms of item 9.4.1 of the Direction, the totality of the Tribunal's reasons in relation to that matter was:

> 134. The Applicant has resided in Australia for 29 years.

> 135. Taking these factors into consideration, the Tribunal considers the strength, nature and duration of the ties to Australia are such as to weigh strongly in favour of the revocation of the original decision.

21 Regardless of the attribution of weight by the Tribunal, the Minister accepted that the Tribunal failed to appropriately address this requirement of Direction 90.

22 That is sufficient to warrant the issue of a writ of certiorari, but that conclusion ought not to be taken as suggesting the absence of other failures by the Tribunal to take into account the requirements of Direction 90.

The legislative scheme

23 Section 29(1) of the *AAT Act* provides:

> (1) An application to the Tribunal for review of a decision:
>
> (a) must be made:
>
> (i) in writing; or
>
> (ii) if the decision is reviewable in the Social Services and Child Support Division – in writing or by making an oral application in person at, or by telephone to, a Registry of the Tribunal; and
>
> (b) must be accompanied by any prescribed fee; and
>
> (c) unless paragraph (ca) or (cb) applies or the application was oral – must contain a statement of the reasons for the application; and
>
> (ca) in respect of an application made under section 54(1) of the *Australian Security Intelligence Organisation Act 1979* for review of a security assessment – must be accompanied by:
>
> (i) a copy of the assessment as given to the applicant; and
>
> (ii) a statement indicating any part or parts of the assessment with which the applicant does not agree and setting out the grounds on which the application is made; and
>
> (cb) in respect of an application under section 54(2) of the *Australian Security Intelligence Organisation Act 1979* – must be accompanied by a statement setting out the grounds on which the application is made;
>
> (d) if the terms of the decision were recorded in writing and set out in a document that was given to the applicant or the decision is deemed to be made by reason of the operation of subsection 25(5) or (5A) – shall be lodged with the Tribunal with the prescribed time. …

24 By s 29AB of the *AAT Act*, the Tribunal may require an applicant to provide clarity in relation to the statement of reasons referred to in s 29(1)(c):

29AB Insufficient statement of reasons for application

> If the Tribunal considers that an applicant's statement under paragraph 29(1)(c) does not clearly identify the respects in which the applicant believes that the decision is not the correct or preferable decision, the Tribunal may, by notice given to the applicant, request the applicant to amend the statement appropriately, within the period specified in the notice.

25 By s 25(3) of the *AAT Act* the operation of s 29 may be modified by enactments conferring jurisdiction on the Tribunal. It provides:

> (3) Where an enactment makes provision in accordance with subsection (1) or (2), that enactment:
>
> (a) shall specify the person or persons to whose decisions the provision applies;
>
> (b) may be expressed to apply to all decisions of a person, or to a class of such decisions; and
>
> (c) may specify conditions subject to which applications may be made.

26 Further, by s 25(6) the conferring enactment may alter or modify the operation of the provisions of the *AAT Act* in relation to an application in respect of which jurisdiction is conferred. It provides:

> (6) If an Act provides for applications to the Tribunal:
>
> (a) that Act may also include provisions adding to, excluding or modifying the operation of any of the provisions of this Act in relation to such applications; and
>
> (b) those provisions have effect subject to any provisions so included.

27 Section 500(6B) of the *Migration Act* has made provision modifying the operation of s 29 of the *AAT Act* in relation to applications for reviews of decisions of delegates under, *inter alia*, s 501CA(4). It provides:

> If a decision under section 501 of this Act, or a decision under subsection 501CA(4) of this Act not to revoke a decision to cancel a visa, relates to a person in the migration zone, an application to the Tribunal for review of the decision must be lodged with the Tribunal within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1). Accordingly, paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the *Administrative Appeals Tribunal Act* 1975 do not apply to the application.

28 In relation to s 29(1)(b) of the *AAT Act*, s 70 permits the making of regulations, specifically (in subs (2)) for the prescribing of fees to be payable in respect of applications to the Tribunal. Presently, the *Administrative Appeals Tribunals Tribunal Regulation 2015* (Cth) (the *AAT Regs*) prescribes standard fees ($920) and concessional fees ($100) for applications for review of relevant decisions (regulation 20).

29 Section 69C(1) of the *AAT Act* provides that the Tribunal may dismiss an application to the Tribunal if: (a) regulations under s 70 prescribe a fee to be payable in respect of the application; and (b) the fee has not been paid by the time worked out under regulations under s 70.

30 Regulation 24 of the *AAT Regs* provides:

> (1) If an application is not accompanied by the prescribed fee, the Tribunal is not required to deal with the application unless, and until, the fee is paid.
>
> (2) For the purposes of section 69C(1)(b) of the Act, the time by which the fee must be paid is the end of the 6 weeks starting on the day the application is lodged.
>
> Note: The Tribunal may dismiss the application under that section if the fee is not paid by that time.

The central issue for determination

31 It is not in dispute in these proceedings that by the operation of the above provisions, the time limited for filing the application for review expired on 24 March 2021, being within nine days after the day on which the applicant was notified of the decision. It is also not in doubt that the form filed by the applicant on 24 March 2021 did not contain or have attached any reasons for the application and none were provided until 9 April 2021. On that basis, the central issue is whether the applicant's failure to file within time an application which complied with the requirement of s 29(1)(c) that it "must contain a statement of the reasons for the application", was effective to invoke the Tribunal's jurisdiction. If not, the Tribunal had no authority to deal with the matter with the result that its decision should be quashed. If that is the case the matter cannot be remitted to the Tribunal, although the delegate's decision, not having been disturbed by any merits or judicial body, remains operative.

Applicable principles

32 The parties did not dispute the relevant principles to be applied to the process of statutory construction although they emphasised different aspects of them. Mr Wood SC specifically relied upon the observations of the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] (*Alcan (NT) Alumina*) to the effect:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

(Footnotes omitted).

33 This passage was taken up by the High Court in *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 by French CJ and Hayne J at 388 [23] (*Certain Lloyds Underwriters*) and later in *Federal Commissioner of Taxation v Consolidated Media Holdings Pty Ltd* (2012) 250 CLR 503, 519 [39] (*Consolidated Media Holdings*) where it was expanded upon:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.
>
> (Footnotes omitted).

34 To the extent to which there may be some difference between *Alcan (NT) Alumina* and *Consolidated Media Holdings*, it maybe that the latter more clearly marries the requirement for emphasis upon the words of the text with the context in which they are used. The importance of that nexus had been the subject of substantial consideration some years earlier in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*). The concept of a "contextual interpretation" has numerous aspects including that provisions are to be construed coherently and congruently with other provisions; they are to be construed by reference to the language of the instrument viewed as a whole; that the purpose of a provision is to be determined in the context of the instrument as a whole; and that the court should strive to give meaning to every word of the provision in question.

35 Mr Donnelly, for the applicant, submitted that when a question arises as to whether non-compliance with a statutory provision renders invalid an act purportedly done pursuant to it, emphasis should be placed on a contextual interpretation. In this respect, he relied upon the majority's decision in *Project Blue Sky* wherein it was said (at 388 – 389 [91]):

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

(Footnotes omitted).

36 In *Project Blue Sky* the majority identified that the real question is whether an act done in breach of a legislative provision is invalid and that the classification of a statutory provision as "mandatory" or "directory" merely records a result which has been reached on other grounds. As their Honours said (at 390 – 391 [93]):

> … A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".
>
> (Footnotes omitted).

37 In *Certain Lloyds Underwriters*, French CJ and Hayne J also considered the manner in which the purpose of legislation was ascertained and held (at 389 - 390 [25] – [26]):

> [25] Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. …
>
> [26] A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some *a priori* assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions. …

The effect of the requirement that an application "must contain a statement of the reasons for the application"

Textual issues arising from s 29(1)

38 The textual aspects of s 29 and, in particular, subparagraph (1)(c), point strongly to the conclusion that an application would be invalid and of no effect if it failed to "contain a statement of the reasons for the application". The requirements in s 29(1) for an application to review a decision are expressed in obviously imperative or obligatory terms. The section specifies that the application "must be made in writing" (s 29(1)(a)); "must be accompanied by any prescribed fee" (s 29(1)(b)); "must contain a statement of the reasons for the application" (s 29(1)(c)); and "shall be lodged with the Tribunal within the prescribed time" (s 29(1)(d)). The use of the imperatives "must" and "shall" naturally indicate that the requirements to which they relate are necessary constituent elements of an application. There was no dispute that, in the ordinary course, the natural meaning of the word, "must", was that the matter to which it related was obligatory. So much was recognised in cognate circumstances in *Fernando v*

Minister for Immigration and Multicultural Affairs (2000) 97 FCR 407, 419 [50] (*Fernando*) where Finkelstein J said:

> Then there is the language of s 412 itself. An application for review "must" be given to the Tribunal within the prescribed period. If one adopts, as it is sometimes necessary to do, the maxim that Parliament says what it means and means what it says, the language adopted by the legislature strongly suggests that an application given to the Tribunal after the relevant period has elapsed is invalid.

39 The conclusion that, generally, s 29(1) imposes conditions of validity is supported by the cumulative effect of the sub-paragraphs. Leaving aside for present purposes the requirement in (1)(b) that the intending applicant is to pay the prescribed fee, each of the other requirements concern a different aspect of the application. Sub-paragraph (1)(a) is concerned with its mode or form; (1)(c) is concerned with its content, and (1)(d) is concerned with the time in which it might be made. It was not disputed by the applicant that the requirements that the application be in writing and that it be lodged within a specific time, were matters which went to its validity. That is, if either were not complied with no valid application would exist. It was also not disputed that this conclusion arises by reason of the use of the word "must" in (1)(a) and "shall" in (1)(d). As was submitted by Mr Wood SC, the manner in which the requirements that the application be in writing and be lodged within the specified time are expressed is relevantly indistinguishable from the manner in which the requirement in 1(c) is expressed. There is no apparent qualitative difference between the requirements of the mode or form of the application and the time of its lodging on the one hand and, on the other, its contents. None were suggested by the applicant. This too rather strongly indicates that the requirement for the application to contain a statement of reasons also went to its validity.

40 That is not to say that an invalid application which does not contain a statement of reasons cannot be perfected by amending it by including a statement of reasons. However, the taking of any remediating step must occur such that, by the time limited by s 29(1) for the filing of the application, a complying application has been lodged. In this case the delivery of a statement of reasons on of 9 April 2021, did not have the effect of validating, *nunc pro tunc*, the original deficient application. Whilst it might be accepted that once the statement of reasons was provided an application in the required form had been made, it was only from that point in time that the requirements as to form were satisfied: *Minister for Immigration and Citizenship v Chan* (2008) 172 FCR 193, 203 – 204 [52] – [54]. In this case that was from 9 April 2021 with the result that no valid application had been lodged within the prescribed time. It would

be entirely inconsistent with the whole scheme of the *AAT Act* (as modified by the *Migration Act*) to hold otherwise.

41 Mr Donnelly also relied on the objectives of the Tribunal as set out in s 2A of the *AAT Act* to advance the case for the applicant. It provides:

> **Tribunal's objective**
>
> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:
>
> (a) is accessible; and
>
> (b) is fair, just, economical, informal and quick; and
>
> (c) is proportionate to the importance and complexity of the matter; and
>
> (d) promotes public trust and confidence in the decision-making of the Tribunal.

It was submitted that the Minister's jurisdictional argument does not sit comfortably with advancing these statutory objectives. This was on the basis that the Minister's construction of s 29(1)(c) undermines accessibility to the Tribunal and that it was neither fair nor just, particularly in circumstances where the applicant's statement of reasons for the application are procedurally accommodated by compliance with directions of the Tribunal under s 33 of the *AAT Act* at a later stage.

42 However, the flaw in this submission is that it fails to appreciate that the objectives only apply to the Tribunal "in carrying out its functions". Clearly, the making of a valid application for review of a decision to the Tribunal is antecedent to the Tribunal carrying out its functions. It can hardly be said the Tribunal has failed to comply with its objectives due to the failure by the applicant to lodge a valid application for review.

The decision in Beiruti v Commissioner of Taxation

43 In the course of submissions Mr Wood SC sought to rely upon the observations of Deputy President Forgie in *Beiruti v Commissioner of Taxation* (2013) 138 ALD 380 (*Beiruti*) as supporting his contention that the word "must" in s 29(1)(c) was mandatory in the sense that a failure to comply with the requirement rendered the application ineffective. That case was concerned with the availability of review in respect of an objection decision under the *Taxation Administration Act 1953* (Cth) (the *TAA Act*) in circumstances where the statement of reasons required by the equivalent of s 29(1)(c) had not been provided within the permitted time. It is to be observed that by s 14ZZC of the *TAA Act*, some of the provisions of s 29 were substituted

with alternatives which regulated the making of applications to the Tribunal. Nevertheless, for present purposes, the cognate provision to s 29(1)(c) in its present form provided that an application for review of a decision to the Tribunal "must set out a statement of the reasons for the application". Importantly, in its unmodified form (being the form prior to the amendments made in 2015) s 29(1)(c) provided that the written application "shall" contain a statement of reasons for the application. Forgie DP found that in the *modified form* the word "must" had the result that if the requirement was not complied with the application for review would be ineffective. At 384 [13] she said:

> [I]n the modified form in which it applies to an application for review of a reviewable taxation objection decision, an application cannot be made to the tribunal unless it sets out a statement of reasons for its being made. That follows from the consistent use of the word "must" in s 29(1)(a), (c) and (d). In its ordinary usage, the word "must" is used to express duty or obligation …

44 Forgie DP also considered (at 396 – 398 [57] – [65]) the operation of s 29 in its unmodified form in which the word "shall" was used in s 29(1)(c) in relation to the provision of a statement of reasons. She concluded that, in that legislative context, Parliament intended it to have a different meaning to the word "must" and was exhortatory rather than mandatory. This is discussed more fully below. Nevertheless, for present purposes the observations of Forgie DP in *Beiruti* are consistent with the text and context of s 29(1) in its current form and lend weight to the conclusion that non-compliance with s 29(1)(c) renders a purported application invalid.

Payment of the prescribed fee – s 29(1)(b), s 69C and s 70

45 Mr Donnelly submitted that the above construction was inconsistent with the existence of s 29(1)(b) which operated together with ss 69C and 70 of the *AAT Act*. As the legislative scheme identified above discloses, s 70 provides that regulations may be made prescribing fees to be paid in respect of applications under the Act and s 69C provides that the Tribunal may dismiss an application if a prescribed fee has not been paid in accordance with the regulations. Regulation 24 of the *AAT Regs* is also relevant and provides that if an application is not accompanied with the prescribed fee, the Tribunal is not required to hear the application until the fee is paid. It also provides that if the applicant does not pay the prescribed fee for a period of six weeks from the date on which the application is lodged, the application may be dismissed under s 69C.

46 It was submitted that these provisions render it clear that failure to comply with s 29(1)(b), which requires that the application for review "must" be accompanied by any prescribed fee, does not impact the application's validity. So the submission went, s 69C recognised that the

application was valid and capable of being dismissed even if the prescribed fee had not been paid and that reg 24 proceeded upon the assumption that an application in respect of which the fee was not paid was nonetheless valid and effective to invoke the Tribunal's jurisdiction. Further, as s 29(1)(b) used the word "must" as the designator of its requirement, it necessarily did not have the consequence that non-compliance with that sub-paragraph resulted in invalidity. It followed that the word "must" should be accorded a common meaning in s 29(1)(c) in relation to the statement of reasons such that the requirement was exhortatory at best.

47 There is some force in these submissions. They are supported by the canon of construction that when the legislature uses the same words in the same legislation it is presumed they are intended to have the same meaning: *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456, 466 – 467 [21]. However, that "rule" of interpretation is far from determinative and it is really no more than a presumption which is always subject to there being a contrary intention.

48 In this case ss 29(1)(a), (b) and (c) all use the word "must" and it is accepted that its use in (a) has the effect that non-compliance with the obligation renders the application invalid. On that basis it might be thought that consistency requires that each subparagraph contains a matter essential to validity. However, the existence of s 69C and reg 24 indicate that such is not the case in relation to payment of the prescribed fee. The resolution of this apparent inconsistency lies in the existence of those other provisions which have the consequence of requiring the word "must" in s 29(1)(b) to have a different meaning to that which it has in the other parts of s 29(1). It is the ameliorating effect of the inclusion of the permissive powers of the Tribunal in s 69C and reg 24 to dismiss an application which is not accompanied by the prescribed fee, which provides context for the interpretation of s 29(1)(b). However, those provisions do not have any operative effect in relation to the subject matter of the other subparagraphs of s 29(1) and there is, therefore, no reason to accord them any interpretive effect.

49 Support for this conclusion can be drawn from s 29(1)(d) which, although it uses the word "shall", is also agreed to have a mandatory effect. Similarly, it would appear that the word "must" as used in s 29(1)(ca) and (cb) was also intended to have the effect that non-compliance with them when relevant would have an invalidating effect. In general terms, s 29(1) can be seen to impose requirements for the validity of an application. Section 29(1)(b) is the singular

exception which is created by the existence of s 69C and reg 24 which do not relevantly affect the other subparagraphs of s 29(1).

50 It should also be kept in mind that the Tribunal is a creature of statute and the extent of its jurisdiction has been carefully considered by Parliament. In that regard, there is a further contextual point relating to the Tribunal's jurisdiction which should be noted, although not raised by either party to support their preferred construction of s 29(1). That is, the operation of ss 29(4) – (6), which sets out what is to occur if there is no prescribed time for making applications. Whilst it is unnecessary to set out those provisions in their entirety, it is apt to mention that where the Tribunal, in forming its opinion as to whether the application was not lodged within a reasonable time after the decision was made, is required to have regard to various factors in determining whether to refuse or entertain the application. Although these provisions have no direct application in the current case, they illustrate that Parliament has carefully turned its mind to all possible permutations in relation to the making an application for review to the Tribunal.

Section 29AB of the AAT Act

51 Section 29AB of the *AAT Act* provides the Tribunal with power to require an applicant to amend their statement of reasons in circumstances where it does not clearly identify, "the respects in which the applicant believes that the decision is not the correct or preferable decision". It was submitted by Mr Donnelly that this section provided a contextual element which supported the conclusion that s 29(1)(c) did not impose any form of mandatory requirement. He submitted that it contemplates circumstances where the applicant has not squarely complied with the requirement to provide a statement of reasons and it affords the Tribunal power to give a notice requiring compliance. This, so the submission went, indicated that non-compliance by the failure to deliver a statement at all did not result in invalidity. It was further submitted that if the Minister's submissions as to the mandatory nature of s 29(1)(c) were correct, s 29AB would be rendered redundant.

52 These submissions should not be accepted. Indeed, the wording of s 29AB supports the contrary conclusion. Its opening words, "If the Tribunal considers that an applicant's statement under paragraph 29(1)(c) does not clearly identify the respects in which the applicant believes that the decision is not the correct or preferable decision", contemplate that the applicant has provided a qualifying statement with their application but that it is insufficiently clear. For s 29AB to assist in Mr Donnelly's submission it would need to operate in circumstances where

no statement was provided. That is, in a way similar to the manner in which s 69C operates with respect to the non-payment of the prescribed fee. That it does not do. If there is no statement of reasons contained in an application, s 29AB has no operative scope because the Tribunal could never reach the conclusion that the applicant's statement of reasons did not clearly identify the applicant's concerns. There would simply be no statement from which the conclusion could be reached.

53 It is also incorrect to suggest that s 29AB would have no work to do. It obviously does in the circumstances expressed in it; being where a complying application is lodged but it fails to "clearly identify" why the applicant is dissatisfied with the initial decision.

54 Mr Donnelly sought to equate the circumstances of the present case with those considered by Forgie DP in *Beiruti* in relation to s 29(1) in its unmodified form together with s 29(1B) (now repealed). The latter section provided:

> If:
>
> (a) an application contains a statement under paragraph (1)(c); and
>
> (b) the Tribunal is of the opinion that the statement is not sufficient to enable the Tribunal to readily identify the respects in which the applicant believes that the decision is not the correct or preferable decision;
>
> the Tribunal may, by notice given to the applicant, request the applicant to amend the statement, within the period specified in the notice, so that the statement is sufficient to enable the Tribunal to readily identify the respects in which the applicant believes that the decision is not the correct or preferable decision.

55 As is apparent, that wording is substantially different from that of s 29AB. In *Beiruti* Forgie DP gave consideration to the contextual impact of s 29(1B) on s 29(1)(c). She noted that it contained two requirements, the first being found in the statement, "If an application contains a statement under paragraph (1)(c)". The second was that the Tribunal was of the opinion that the statement was insufficient to enable the Tribunal to identify the respects in which the applicant believes that the decision is not the correct or preferable one. Forgie DP (at 398 [64]) held that s 29(1B) provided a contextual indicator that non-compliance with the requirement in s 29(1)(c) did not invalidate the application:

> [64] The drafting of s 29(1B) to the AAT Act is important. It begins with two criteria that must be met before the tribunal has the power to request an applicant to amend the statement of reasons in an application. If s 29(1)(c) were intended to be read as imposing a mandatory requirement that an application contain a statement of reasons for the application, there would be no need to specify in the first criterion, found in s 29(1B)(a), that "an application contains a statement under para (1)(c)".

> There would be no need because, if the requirement in s 29(1)(c) is mandatory, there would be no application unless and until it is included.

56 However, the difficulty for Mr Donnelly's submission is that by the amendments in 2015, s 29(1)(c) was amended by the removal of the word "shall" which was replaced with the requirement that the application "must contain a statement of reasons for the application". Additionally, s 29(1B) on which Forgie DP relied, was repealed and replaced with s 29AB. That new section had no equivalent requirement in the erstwhile s 29(1B) that it would operate "if" an application contained a statement under paragraph (1)(c). It follows that the underlying foundation for Forgie DP's reasoning was removed by the amendments. There is nothing in s 29AB which now suggests that an application which did not contain a statement of reasons could have been validly made. For the reasons given above, the contrary position is now true.

57 It can also be added that in *Beiruti*, Forgie DP (at 400 [72] – [73]) recognised that in the modified scheme of s 29(1) as effected by s 14ZZC of the TAA, s 29(1B) was treated as having been omitted and that this supported the conclusion that s 29(1)(c) should be treated as mandatory. In the legislation's current form the substance of s 29(1B), to the extent to which it was relevant in *Beiruti*, has been excised with the result that DP Forgie's reasoning supports the conclusion that non-compliance with the requirements of s 29(1)(c) would render the application ineffective.

58 In the course of his submissions on this issue Mr Donnelly referred to the decision of Bromberg J in *Luck v the Secretary, Department of Human Services (No. 4)* [2016] FCA 950 [81] although it is difficult to see how anything said in that case is of relevance to the present. It merely indicated that where a Tribunal considers that the statement of reasons is unclear it may seek clarification pursuant to s 29AB. That does not address the question of whether an application which does not contain a statement of reasons is valid.

The importance of a statement of reasons

59 Mr Donnelly submitted that the statement of reasons referred to in s 29(1)(c) was not sufficiently important to the administrative decision-making continuum such that its absence should not render an application invalid. He submitted that the lodging of the application was merely part of the process before the Tribunal and other provisions operated to fulfil the task of crystallising the issues before the Court. He referred to s 33 of the *AAT Act* which he submitted provided a suite of provisions that give the Tribunal wide procedural powers relevant to the review application and, in particular, s 33(2A) permitted the Tribunal to "require any

person who is a party to the proceeding to provide a statement of matters or contentions upon which reliance is intended to be placed at the hearing". He added that, in practical terms, the Tribunal undertakes management of the matters which come before it and orders the parties to file statements of facts, issues and contentions as well as relevant evidence. The result, so it was submitted, was that it would be odd for s 29(1)(c) to render an application invalid by reason of the absence of a statement of reasons where the statutory procedures provided the means whereby the applicant's grievances would be fully articulated. Emphasis was also given to the likelihood that the issues for determination would change prior to a matter reaching the hearing stage, and that the statement of reasons was somewhat inconsequential in circumstances where the issue before the Tribunal is not the correctness of the primary decision but the outcome following a hearing *de novo*.

60 Whilst there are no doubt processes which occur in the course of the Tribunal's management of a matter which assist in the crystallisation of the issues for determination, they are somewhat irrelevant to the process by which the jurisdiction of the Tribunal is invoked. The right of review provided by the *AAT Act* is not at large. It is not available to an officious busybody who merely dislikes a government's decision. The right is restricted by s 27 of the *AAT Act* to persons "whose interests are affected by the decision". That requirement distinguishes those with a right to seek review from those who are merely members of the general public or who have a mere belief regarding the matter. Necessarily, a statement of reasons filed pursuant to s 29(1)(c) will or should identify the applicant's grievance in relation to the decision in question in a manner which reveals that their interests have been affected. A reading of ss 28 and 29 of the *AAT Act* together suggests that the import of a statement of reasons is that its purpose is to demonstrate the applicant's legitimate interest in the impugned decision which satisfies their standing to make the application and that their invocation of the Tribunals' jurisdiction to review a decision is justified. It stands as an indicator that the Tribunal is empowered to further the administrative decisional process and undertake an examination of what is the correct and preferable decision to make in relation to the issue raised.

61 It is not, however, necessary to rely on that analysis. In particular, it was not the subject of any detailed submissions in the course of the hearing. However, by a similar submission Mr Wood SC for the Minister submitted that the statement of reasons contained in an application has an important purpose to fulfil, being that it assists the Tribunal and the decision-maker in the non-migration context in ascertaining what, if anything, is being put in issue. In doing so he relied upon the statement of Forgie DP in *Beiruti* at 397 [62] as indicating the relevance and

usefulness of a statement of reasons in the context of merits review. The Deputy President said:

> Consistent with the Tribunal's task, any statement of reasons appearing in the application for review will not be treated as defining the issues. That is not to say that they are not useful for they are. Their preparation concentrates the attention of an application on particular evidentiary or legal issues that he or she considers relevant. On receiving them, a decision-maker has an indication of the aspects of the decision that may be the subject of further evidentiary material and/or legal argument. They are a useful starting point in the Tribunal's alternative dispute resolution mechanisms but are then quickly overtaken as the matter proceeds …

62 Mr Wood SC's submission should be accepted. Although it may be that the applicant's concern as expressed in a statement of reasons may be modified or altered as the merits review process continues, it has importance in highlighting at an early stage the aspects of the challenged decision in respect of which complaint is made. It affords the decision-maker and Tribunal to immediately turn attention to the necessary evidential material which might be required for any hearing. In such circumstances it is not to the point that other subsequent processes may serve to more fully articulate the issues which require determination. Moreover, it is an express requirement imposed by the legislature for the commencement of a review proceedings and, in that light, it was obviously recognised as the initial source of the statement of the applicant's concern.

63 The above is buttressed by the requirement that, in relation to reviews of matters arising under the *Migration Act*, the Tribunal's review of the original decision must take place within a period of 84 days: s 500(6L) of the *Migration Act* and this emphasises the importance placed by the legislature on the expeditious disposition of reviews of migration decisions. In that context the sooner that the applicant identifies the gravamen of their complaint about the decision which they wish to challenge, the more expeditious will be the following process.

64 Mr Donnelly also relied upon the existence and content of s 33 of the *AAT Act* which he submitted diminished the relevance of the statement of reasons in the application for review. That section specifies that in a proceeding before the Tribunal it shall proceed with as little technicality and formality as the Act permits. The difficulty here is that this section is not concerned with the steps taken to commence proceedings, but those within it. Further, the requirements of s 29(1) are not matters of technicality (whatever that expression may mean), they are matters which must be complied with for the purposes of invoking the Tribunal's jurisdiction and thereby extending the administrative decision-making process.

The applicant's construction leads to redundancy

65 The logical consequence of the applicant's submissions is that s 29(1)(c) is completely redundant. On his submission it is not necessary to comply with it because a statement of facts issues or contentions can be ordered later, or by some other method the applicant's complaint can be crystallised. This was made explicit in the course of the hearing where Mr Donnelly submitted that all which was required for the making of a valid application was the filing of a written document within nine days of the Minister's decision stating that the applicant wishes to review a decision. On his submission, no allegation was needed that the decision was incorrect, contained some error, or that some other decision was the correct or preferable one. That submission involves the deficiencies identified in the observations of Dowsett J in *Fernando*, 419 [51]:

> The consequences of a contrary construction must also be taken into account. If an application can be made to the Tribunal after the prescribed period has elapsed then it can be made at any time thereafter. That is to say, if an application made beyond the prescribed period is a valid application, it will be valid if given one day or one year after that period. This result could not have been intended.

66 Neither could a similar result have been intended in relation to the non-compliance with s 29(1)(c). It is a general principle of the construction of statutes that Courts strive to give effect to every word of a provision and every provision of an Act: *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 [97]. On the applicant's preferred construction, the requirement that an application "must" contain a statement of reasons is nothing more than an aspirational guide which may or may not be complied with at the applicant's discretion.

The relevance of s 500

67 Mr Donnelly submitted that the contextual element of s 500 of the *Migration Act* had a profound effect on the construction to be given to s 29(1)(c). He identified that s 500(1)(ba) vested the Tribunal with jurisdiction to review decisions of a delegate of the Minister under s 501CA(4) not to revoke a cancellation decision, but that by s 500(6B) the application for such a review must occur within nine days after that on which the applicant was advised of the decision. He also referred to the requirements of s 500(6C) that a copy of the document notifying the applicant of the decision not to revoke must accompany the application, and of s 500(6H) that the Tribunal must not have regard to any information presented orally in support of an applicant's case unless it was set out in a written statement and given to the Minister at least two business days prior to the Tribunal's hearing concerning the decision under review.

Similarly, by s 500(6J) any document to be relied upon by the applicant must be given to the Minister at least two business days prior to the hearing. From this it was submitted that s 500 provides a scheme which conditions and regulates the Tribunal's jurisdiction to review decisions not to revoke cancellation decisions and that it amounts to an alteration of the manner in which applications can be made to the Tribunal for review within the meaning of s 25(1) and (6) of the *AAT Act*. Those sections relevantly provide:

> **25 Tribunal may review certain decisions**
>
> *Enactment may provide for applications for review of decisions*
>
> (1) An enactment may provide that applications may be made to the Tribunal:
>
> (a) for review of decisions made in the exercise of powers conferred by that enactment; or
>
> (b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.
>
> …
>
> *Enactment may add to, exclude or modify operation of certain provisions*
>
> (6) If an Act provides for applications to the Tribunal:
>
> (a) that Act may also include provisions adding to, excluding or modifying the operation of any of the provisions of this Act in relation to such applications; and
>
> (b) those provisions have effect subject to any provisions so included.

68 Mr Donnelly submitted that the interpretational consequences of the interaction between s 500 of the *Migration Act* and the provisions of the *AAT Act* were that an applicant can provide "a statement of the reasons for the application as late as two business days before the Tribunal conducts the final hearing".

69 That submission should also be rejected. There is a limit to the extent to which the operation of the *Migration Act* can be used to construe the operation of the *AAT Act*, even though an attempt should be made to give them a coherent operation where they intersect. It was open to the Parliament to alter the operation of the *AAT Act* by express provisions in the *Migration Act*, and it did so in relation to s 29(1)(d) by reason of s 500(6B) reducing the time in which an application might be made to review a decision not to revoke a cancellation decision to nine days. However, it is not apparent that it had any intention to do so in relation to s 29(1)(c). There was no express modification of the operation of the section and it is likely that if the

requirements for the making of a valid application were to be modified, the legislature would have used clear and express words to achieve that.

70 More importantly, Mr Donnelly's submissions involve a logical conundrum. On his submission an applicant in the position of Mr Miller might, pursuant to ss 500 (6H) or (6J), provide a statement of reasons as late as two business days prior to the final hearing. However, a precondition to the occurrence of a hearing is that the antecedent step of an application being regularly filed has occurred. If, as appears to be the case, no valid application exists unless the statement of reasons was contained in it, there can be no hearing of the application. Sections 500(6H) and (6J) operate on the assumption that a valid application has been made under the *AAT Act* for the review of the decision and that the necessary steps have been put in place for its hearing. They do not have the effect for which Mr Donnelly contends.

71 In any event, those sections do not conflict with the requirement in s 29(1)(c) for the inclusion of a statement of reasons in an application and, by s 500(6B), that it be lodged within nine days. Even if they had some relevance to the constituent documents of the application, nothing in them extend the time for lodging an application with the Tribunal. It merely identifies a time beyond which documents cannot be provided.

72 Further, the limitations which prevent the applicant from relying on documents which have not been provided to the Minister at least two business days prior to the hearing is obviously concerned with the documentary material on which the applicant seeks to rely in the determination of the application. The sections are patently not concerned with the documents which were necessary to provide to commence the application and regularly invoke the Tribunal's jurisdiction. The submission to the contrary was far-fetched.

Should the construction of s 29(1) be affected be perceived "harshness"?

73 It was suggested that to construe s 29(1)(c) as imposing a requirement which, if not complied with, would render the application for review invalid was harsh on an applicant who has made a simple error of using the incorrect form and that should lend support to a more generous interpretation. In general terms it could be said that the harshness of the operation of the section might have been ameliorated by the operation of s 29(7) which granted to the Tribunal the power to extend time for the filing of an application in an appropriate case. If, therefore, an intending applicant had failed to include a statement of reasons they might seek an extension of time in which to correct the application by filing a complying one or to simply file a statement of reasons and so amend the deficient application. However, by s 500(6B), not only

is the time limited for filing an application reduced, s 29(7) is rendered inapplicable to applications for review of decisions not to revoke the cancellation of a visa pursuant to s 501CA(4). This is indicative of a legislative intention in relation to such applications that there be strict compliance with the requirements for their making. It follows that, to the extent to which s 29(1) applies to applications of the present nature, its operation has been modified to accord with a stricter regime.

74 In *Fernando* consideration was given by Heerey J (with whom Dowsett J agreed) as to the apparent harshness of the operation of s 412 of the *Migration Act* as it then was, which operated such that if an application was not made in accordance with its requirements, it was invalid and thus not one which the Refugee Review Tribunal (RRT) had jurisdiction to consider. His Honour held (at 412 [21]) that where the legislature makes no provision for the extension of time in relation to review it is likely that this was a deliberate choice rather than inadvertence. It was further held that this was consistent with the revealed policy that visa applications be dealt with fairly, efficiently and quickly. His Honour said:

> There are therefore rational reasons why Parliament would want to make a review application period non-extendable, notwithstanding that one can hypothesise that this might cause hardship in individual cases for applicants who are without fault.

75 Similar observations are relevant in the present case. There are rational reasons why the legislature would require that an application in a proper form and indicating the manner in which applicant asserts the primary decision is in error, be made within a particular time. Foremost, it promotes the efficient administration of the *Migration Act* and the myriad applications which are made in relation to s 501CA. By having clear and precise requirements as to what is a valid application for review, the administering department can know which of its decisions have been finalised and which have not.

76 In this context is also appropriate to note that Heerey J considered the application of the decision in *Project Blue Sky* to the circumstances before the Court. His Honour observed that an important element of the High Court's reasoning was derived from the observations in *Montreal Street Railway Co v Normandin* [1917] AC 170, 175 where the Privy Council stated:

> When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only.

77 His Honour concluded that, in *Project Blue Sky*, the members of the High Court recognised that where an act is done in breach of an essential preliminary to the exercise of a statutory power or authority it is more likely to be regarded as ineffective than where the breach occurs in circumstances where the act or omission is in breach of a procedural condition for the exercise of a statutory power or authority. In the case before him he held (at 415 – 416 [31]) that the making of an application within the prescribed time was an essential preliminary to the exercise by the RRT of its function such that the omission was similar to the former category of cases rather than the latter. In addition, the circumstances of the case before him were unlike those in *Project Blue Sky* in that the applicant would not be suffering the consequences of some default in administration by a public authority which was entirely beyond his control. In that case the applicant for a visa was the person who was required to perform the act stipulated as the essential preliminary condition.

78 The same reasoning applies to the present case. The act or conduct in question was the filing of an application which contained a statement of reasons as essential to invoking the Tribunal's jurisdiction to review the delegate's decision. The omission was not the breach of a procedural condition for the exercise of power. In addition the unfulfilled requirement was not something which was to be performed by a public body over which the applicant had no control. To the contrary, it was a matter which was to be undertaken by the applicant himself.

79 Mr Donnelly submitted that in the process of construction it was relevant to undertake a consideration of whether a particular interpretation could result in harsh consequences being visited upon an intending applicant. In particular he referred to the decision of the Full Court in *Minister for Home Affairs v Brown* (2020) 376 ALR 133, 137 [15], 142 [29]. However, neither of those paragraphs assist him. The first, which refers to an interpretation which keeps in mind that need for stability and finality in a decision making process, tends in the opposite direction and the second appears to have nothing to do with the present matter at all, dealing as it does with the complex web of powers in ss 501 – 501CA of the *Migration Act*.

Conclusion

80 It follows that none of the applicant's submissions can be sustained. The requirement in s 29(1)(c) that an application must contain a statement of reasons for the application is essential to the making of valid application. In this case no valid application was made and the Tribunal had no jurisdiction to hear and determine it. It follows that the Tribunal's purported determination was beyond its power and must be quashed.

Costs

81 In the course of the appeal the parties requested that they be accorded an opportunity to be heard on the question of the costs of these proceedings given the several possible outcomes. That is appropriate in the circumstances of this case and the order should be that the parties have a period of time in which to file written submissions on the question of costs.

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 4 May 2022