[2023] HCATrans 67

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S152 of 2022

B e t w e e n -

RGKY

Applicant

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

Application for special leave to appeal

GORDON J
EDELMAN J
GLEESON J

TRANSCRIPT OF PROCEEDINGS

FROM CANBERRA BY VIDEO CONNECTION

ON FRIDAY, 19 MAY 2023, AT 11.28 AM

GORDON J: In accordance with the protocol for remote hearings, I will announce the appearances of the parties.

MR D.J. HOOKE, SC appears with **MR J.D. DONNELLY** for the applicant. (instructed by Zarifi Lawyers)

MR G.T. JOHNSON, SC appears with **MR T. REILLY** for the first respondent. (instructed by MinterEllison)

There is a submitting appearance for the second respondent.

GORDON J: Mr Hooke.

MR HOOKE: May it please the Court. Your Honours, the two proposed grounds of appeal your Honours have seen. Each of them stands alone and success on either is sufficient for the applicant to succeed on appeal.

GORDON J: Do you accept, Mr Hooke, that both of these grounds do not raise questions of general principle, but it is a visitation case?

MR HOOKE: Your Honour, there is certainly a strong visitation element to the case. However, we say that the reasoning approach that we criticise in relation to the deployment of the "untested in the community" aspect of the risk of recidivism is an error at a level of principle, in that we say that it involves a question of logical fallacy which, in our submission, amounts to a failure to properly consider in the relevant legal sense. But certainly, we accept that there is a strong visitation element involving, as it does, a man whose entire family is here and who has lived here since he was five months of age.

We certainly would not resile from the proposition that the Court would exercise its visitorial jurisdiction in the case if not convinced that there was a question of general principle involved. Having said that, your Honours, could I deal firstly with the first proposed ground, which involves the "change of character" evidence as we have called it.

Your Honours will have seen in the reasons of the Tribunal and the courts below that there were, including the applicant, four change of character witnesses who were identified in the reasons. There were, in fact, no fewer than seven. However, only four even rated a passing mention in the reasons of the Tribunal. The Minister accepted before the primary judge and in the Full Court that the Tribunal had made no express findings about the evidence of any of those witnesses, despite the fact that the change of character since July 2019 was a clearly advanced and significant plank of his representations to the Minister and to the Tribunal.

The Full Court, as did Justice Rares, accepted that there was no express treatment of that body of evidence. However, the majority concluded that the bare reference to some of it at a high level of generality at paragraphs 34 to 36 of the Tribunal's reasons amounted to the entire body of evidence having been considered in the *Carrascalao* sense. Justice Collier had a different view about it, as did Justice Rares and, in our submission, each of their Honours was correct for the reasons they gave.

The highest that the majority in the Full Court were able to put the matter was as the Minister submitted in that court, and that was that the Tribunal had impliedly considered the matter because it had been mentioned in paragraphs 34 to 36 and because the Tribunal, when making findings on the risk of recidivism, had referred to other facts from that section of its reasons, albeit not to that significant body of evidence. That finding of the majority is at paragraph 129 at application book 122, which we say is the nub of the error. As we have submitted, the change of character evidence was - - -

EDELMAN J: Mr Hooke, ultimately the point comes down to whether or not the references in paragraphs 34 onwards by the Tribunal to the applicant having changed and the birth of his son and so on, were sufficient to demonstrate, I think what was described as, an "active intellectual process". Is that right?

MR HOOKE: That is right, your Honour. And we say that even if one were to treat what appears at paragraphs 34 to 36 as having been imported into the dispositive reasoning, it, at face value, does not amount to an active intellectual engagement with the evidence.

EDELMAN J: How do you deal with what the joint judgment in *Plaintiff M1/2021* said about the dangers of using phrases like "active intellectual process" as a hook for jurisdictional error itself, which could shade into, really, a merits-based assessment?

MR HOOKE: Well, your Honour, there is undoubtedly that risk at a general level, however we would embrace what the majority in *M1* said at paragraph 27, that nothing in the passage of the reasoning to which your Honour has referred:

> detracts from, or is inconsistent with, established principle –

This is set out at application book 116 – that:

> if review of a decision-maker's reasons discloses that the decision-maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument –

et cetera:

> that may give rise to jurisdictional error.

We say that that is this case.

EDELMAN J: Thank you.

GORDON J: Mr Hooke, can I just ask you about that? Does that mean that I am not permitted, when I undertake that exercise which you have just identified, to read paragraphs 34 to 36 with what then is undertaken, really, from paragraph 68 onwards?

MR HOOKE: No, it does not, your Honour. But we say that there is - - -

GORDON J: So, could you identify for me what is absent from those paragraphs where you have an identification of, again, some aspects of the evidence and then, in effect, the analysis undertaken at 70?

MR HOOKE: Yes. The only evidence that is referred to in that passage is the applicant's evidence, himself, of his aspirations. There is no reference in that passage, or indeed in 34 to 36, of the other three witnesses who gave evidence of change of character, who are not addressed at all. The only other oblique reference is at 71, which is to the:

> support of a strong network of friends and family led no doubt by his grandfather and grandmother.

But that does not address – as the last sentence of paragraph 71 makes clear – the position from July 2019 through to the present, which is, of course, the relevant period for the change of character representation.

As it makes clear, that network did not assist much in the past – which is, of course, in our submission, to divorce the relevance of the change of character evidence from the material consideration which is where he is now and what the risk to the community is now.

There is no mention directly of any of the other evidence – of any of the other witnesses other than the applicant. And, indeed, in paragraph 73, where the Tribunal summarises that the material to which it has had regard in reaching its conclusion to the risk of the community, it identifies the matters that the Tribunal set out in detail in the preceding paragraphs. But what your Honours will notice is that there is no reference to any of the evidence or the witnesses who have given evidence about the position between May 2019 and the time of the decision. We say that is an

underscoring of the absence from the reasoning that precedes it of an active consideration of that evidence – that important body of evidence.

GORDON J: I notice the time, Mr Hooke. Do you wish to deal with ground 2?

MR HOOKE: I will, your Honour. The treatment of ground 2 commences with the majority's observation at paragraph – it was an observation your Honours will have seen, that the Tribunal's conclusion at paragraph 82, page 26 of the application book, that it was:

> unable to make any assessment at all as to the magnitude of that impact –

of non-revocation on the applicant's son, was a "jarring" one. That, with respect, was an apt description. There was an acceptance by the Tribunal, in relation to the secondary consideration of ties to the community, that the applicant had strong ties to his son, and early in the Tribunal's reasons, the recounting that the child goes to sleep each night with a phone by his head, listening to his father's voice. Furthermore, the change of character evidence spoke in terms of the relationship between the applicant and his son, and the fact that that relationship was a cornerstone of the applicant's rehabilitation.

Contrary to paragraph 82 of the Tribunal's reasons, there was not, in our submission, a "dearth of evidence". There was an entire body of it that the Tribunal, in our submission, failed to engage with. And, as the Tribunal recorded and the Federal Court recorded, the witnesses who could speak to the relationship of the applicant with his son were called to give evidence in the two-day Tribunal hearing. So, to the extent that the Tribunal had any reservations about the adequacy of the information that had been provided, the witnesses were there and able to be asked.

In addition to the failure to engage at that level, in our submission, the Tribunal at paragraph 81, where it deployed its finding on the risk of recidivism, to find that the applicant would not:

> be likely to play a positive parental role in his son's life –

meant that the primary consideration of the interests of the young child was infected by the error of which we complain in relation to ground 1. It is in that sense that we say that ground 1 feeds into ground 2.

And again, in our submission, Justice Rares and Justice Collier were correct in the way that they concluded, for the reasons that their Honours respectively gave, the diminution of the value of the applicant's role in the

future of the young child, at application book 26. If your Honours would turn up paragraph 81, your Honours see, from the third line down:

> I am unable to find that RGKY would, on balance, be likely to play a positive parental role in his son's life in the future given those matters –

being the previous offending:

> and my assessment concerning the likelihood of him re-offending.

That recidivism question feeds directly into the stint of that second primary consideration as well. In our respectful submission, one has two of three primary considerations affected by the error reflected in ground 1, and the additional error in ground 2 of failing to engage with the task required by the ministerial direction - - -

GORDON J: Can I ask you about paragraph 85?

MR HOOKE: Yes, your Honour.

GORDON J: Because in 85 it is actually in favour of your client – it is just a question of weight - - -

MR HOOKE: It is.

GORDON J: - - - to do with that.

MR HOOKE: That goes to the question of materiality, your Honour, because we say that had the Tribunal not wrongly considered the primary consideration in relation to the interests of the child, the likely outcome would have been a far greater positive attribution of weight to that primary consideration. So we say that is a question that goes to materiality. It does not detract in any way, in our submission, from the proposition that we put and indeed it supports us.

GORDON J: Thank you. Anything else you wish to say?

MR HOOKE: Unless there is anything further I can assist with, those are our submissions.

May it please the Court.

GORDON J: Thank you, Mr Hooke. Mr Johnson. Mr Johnson, you are on mute, and we cannot hear you. I apologise.

MR JOHNSON: I am the one who should be doing the apologising.

GORDON J: That is all right. We can hear you now. Thank you.

MR JOHNSON: Thank you, your Honours. Firstly, and broadly following my friend's structure, this is not a case which raises any general question of principle or point of public importance for which it is a good vehicle. There is no question of principle or point of public importance raised. And even in a case where one is raised, there is then a consideration of what might be a good vehicle and what might not.

Nor is there anything so special about this case as to warrant the exercise of the Court's visitation jurisdiction. The only matter which is suggested to the Court as possibly warranting the exercise of the visitation jurisdiction is the conflict which the applicant alleges between the approach of the Full Court in the present case and a particular paragraph of *CKL21 v Minister for Home Affairs* [2022] FCAFC 70 which was specifically referred to in the special leave question which was formulated in the application.

Now, with respect, this is simply not a case where the majority of the Full Court was offending anything said in that paragraph. The only point which was made in that paragraph – it was a case where the Full Court had already found – I am talking now about *CKL21* – the Full Court had already found there was:

> no error in the finding that the appellant's conduct had not been tested in the general community.

And then, at paragraph 79, which was the one that the special leave application refers to, the Court said well, the fact that it has not been "ruled out":

> does not, of itself, logically establish the existence of a risk.

With respect, the Full Court in this case did not say anything different. To the extent that the Tribunal accepted that there was a risk of the applicant re-offending, it cannot possibly be said to be a finding which was based entirely on some logical fallacy that because something had not been tested, well, therefore there is a risk. So, we would say that there is not a conflict between the two. Certainly, the case is not a good vehicle to test even the point formulated by the applicant in the special leave question, even if, contrary to our submission, that is something which would otherwise warrant a grant of special leave.

Moving to my friend's submissions on the first ground, it was accepted below – and this is noted at various stages through the judgment – that there was no express reference to the particular evidence that was set out by the Tribunal at paragraphs 34 to 36 on pages 14 to 15 later in the decision when the Tribunal came to consider a risk to the community. However, it was also submitted that that evidence, and in particular the claim that is referred to in 34 to 36 to the effect that "having a child has changed him" and that he intends to be "drug free upon his release from detention" and that he "has changed", and, so the argument went, will not offend again, rather than being ignored, the Minister said that was considered and rejected.

The Minister's case was that when one looks at paragraph 63 through to 73 of the Tribunal's decision – those are on pages 22 through to 24, and particularly from 67 through to 70 and 73 – it is apparent that the claim was in fact considered and rejected. The Tribunal was not doubting the honesty of the intention in those paragraphs, but rather it was making the point, particularly at 70, that:

> The difficulty with relying on any of his stated intentions singularly or together as indicating some lower likelihood of re-offending than what was assessed in the pre-sentence report, is that only about six weeks after his son was born he was re-offending both in terms of property offences and an offence of personal violence against his mother.

Then the paragraph continues. We say that the Full Court was entitled, as the majority said at paragraph 129, to form the view that, in their words at paragraph 129:

> the Tribunal did not fail to consider the claim that RGKY's character changed after he went into custody following his last offending on 22 July 2019 which occurred after the birth of his son or the change of character evidence supporting that claim.

Then, my friend referred to *M1* in answer to your Honour Justice Gordon's question. My friend particularly referred in his answer to *M1* at paragraph 27. But what paragraph 27 did was to affirm that if there is a substantial and clearly articulated argument which is misunderstood – so the case is not understood – that may give rise to jurisdictional error. That is not so here. It was understood that he was claiming to have changed his character. It was since the last incarceration in relation to the offences that he committed against his own mother.

I might add that the chronology of facts, which the Tribunal itself sets out – they are too lengthy to go through today – does express clear

appreciation that the offences in relation to which the 12-month sentence was imposed – the one which led to the failure to meet the character test, it was back on 15 November 2017, and that is at paragraphs 12 and 17 – that there were then further offences against Ms MQ, the child's mother, which led to a pre-sentence report. That is referred to by the Tribunal between paragraphs 21 and 27.

There was then an intensive corrections order, which was revoked and replaced with a term of imprisonment. The Tribunal notes in paragraph 30 that the subsequent offending – that is, subsequent to the pre-sentence report – against the applicant's own mother, occurred on 22 July 2019 – that is in paragraph 30. That was the subject of conviction on the 10 October 2019 - - -

GORDON J: Mr Johnson, I think we understand the point that is being made. This is an application for leave. Do you wish to say anything else in relation to the second ground?

MR JOHNSON: In relation to the second ground – I think I can be particularly brief in relation to the second ground. The majority's decision in relation to ground 2 is - - -

GORDON J: This is dealing with whether or not the best interests of the son were given proper, genuine consideration. It really arises out of what appears at application book 25 to 27, between 79 and 85, I think.

MR JOHNSON: Yes, thank you, your Honour for that. And at paragraph 181 – and I will come back to the Tribunal's reasons just in a moment, but in paragraph 181 the plurality accepted that the Tribunal had accepted that it was in the best interests of RGKY that the cancellation decision be revoked. I am sorry, the best interests of RGKY's son, that the Tribunal – sorry, the cancellation decision be revoked and that otherwise there would have been nothing for the Tribunal to moderate the weight of it in the way that it described in paragraphs 81 and 85.

The idea that there was no finding made by the Tribunal – pardon me – identifying what the best interests of the son were, that is, what decisions they favoured, and that the Tribunal did not lawfully go about weighing that, with respect, must be rejected. Having regard to what the Tribunal said – pardon me – in its reasons, particularly between paragraphs 79 and 82, 85 and 96, and 106. And I will just briefly indicate the gist of that.

If your Honours go to paragraph 79 of the Tribunal's reasons, the Tribunal accepts there – used the adjective, "meaningful" – four lines from the bottom – it was "meaningful" contact between the applicant and his son.

At paragraph 80, the Tribunal accepted that the applicant had some "devotion to his son" and that that would continue into the future as a matter of "likelihood", and it accepted his desire to be a part of the son's life and says:

> that would be positive in a child's upbringing and therefore in the best interests of the child.

In paragraph 82, it accepted there would be "something of a negative impact on RGKY's son" if they were separated. In 86, the Tribunal indicated that:

> the best interests of RGKY's child weighs moderately in favour of revocation.

Critically, in paragraph 81, the Tribunal said that those things which it identified positively above:

> need to be measure very carefully given RGKY's criminal history and, in particular, the fact that that history involves offending against his son's mother and his own mother when his son was present and in her care. I am unable to find that RGKY would, on balance, be likely to play a positive parental role in his son's life in the future given those matters and my assessment concerning the likelihood of him re-offending. Moreover, should the kinds of offending in the past be repeated in the future I consider that will invariably have a negative impact on RGKY's son because of its likely psychological impact upon the child. It is to be remembered that RGKY's most recent offending against his mother was in the presence of his child. These are matters that cause me to moderate the weight that I give to this consideration.

So, plainly, the interests of the child were seen to be served by revocation, but the weight to be given to that factor which operated in favour of the applicant was moderated because of the risk that offending of the type that had happened before, which could be quite damaging to the child, might happen again.

The other paragraphs that I have mentioned only need the briefest of reference. At paragraph 96 of the Tribunal's reasons, the last sentence indicates that acceptance of the ties of the son "are obviously strong". Paragraph 106 concludes that the:

> interests of RGKY's child weigh moderately in favour of revocation –

But it is apparent from the balance of what is set out under the conclusion that the other considerations, in particular, those relating to the severity of the offences and risk to the community carried the day.

GORDON J: Anything else, Mr Johnson, in relation to either ground 1 or ground 2?

MR JOHNSON: No, your Honours. Those are our submissions.

GORDON J: Thank you, Mr Johnson. Mr Hooke, anything in reply?

MR HOOKE: Just four matters, your Honour. Our learned friend referred to the alleged conflict between the approach of the majority in the Full Court at paragraphs 137 and 197(c) in relation to the untested rehabilitation findings and the Full Court in *CKL21*. We have given your Honours in the special leave application the reference to paragraph 79, which your Honours will have observed was a joint judgment of the Full Court in that case in which their Honours started off by observing that it was a logical fallacy to take that path of reasoning and that it could not be probative of being a positive predictor of future behaviour.

Their Honours in that paragraph also refer to another decision of the Full Court in *Assistant Minister for Immigration and Border Protection v Splendido* 271 FCR 595, which we did send to your Honours and our learned friends this morning. We gave your Honours reference to the late judgment of Justice Mortimer, as the Chief Justice then was, with whom the other members of the court agreed, in which her Honour at paragraphs 91 through to 95, in a scenario strikingly similar to this one, expounded at some greater length to the same effect as the passage that we have cited from *CKL21*. So, there are, in our submission, two decisions of the Full Court, each unanimous, which are inconsistent with the approach taken by the majority to that issue in the present case.

The Minister says that the passage at paragraphs 63 to 70, where the Tribunal does not doubt the honesty of intentions in relation to rehabilitation, shows that all of the change of character evidence was given active consideration by the Tribunal. What is striking about that passage, and your Honours will have noticed it on the way through, is that it only addresses the applicant's evidence, and it only addresses his intention. The majority in the Full Court said as much at paragraph 129 when they couched their finding in terms that "notwithstanding" that the evidence was not addressed to – "was not expressly referred to" – they were satisfied it was taken into account.

Paragraph 27 of *M1*, our learned friend took your Honours to it, he, with respect, left out an important part of paragraph 27 of *M1*, which was

the reference to, if the "decision-maker ignored, overlooked", et cetera, "relevant facts or materials". It is not limited to a base misunderstanding per se. It is far broader than that, consistent with – as the majority said – "established principle".

In relation to ground 2, there is one point – our learned friend read to your Honours from paragraph 82 of the Tribunal's reasons. However, he stopped before the finding that the Full Court described as "jarring", having read to your Honours, the passage about:

> will necessarily have something of a negative impact –

whatever that might mean. That was the passage where the Tribunal then went on to say, somewhat surprisingly:

> I am unable to make any assessment at all as to the magnitude of that impact because of the dearth of information that was presented.

And that, your Honours, in our respectful submission, is a clear failure to discharge the jurisdiction committed under the direction.

May it please the Court.

GORDON J: The Court will adjourn to consider the position it will take. Adjourn the Court, please.

AT 12.07 PM SHORT ADJOURNMENT

UPON RESUMING AT 12.10 PM:

GORDON J: The Court is of the view that the application does not identify a point of principle of general importance appropriate for the grant of special leave to appeal and that there would otherwise be insufficient prospects of success if leave were granted. Special leave to appeal is refused.

Do you seek your costs, Mr Johnson?

MR JOHNSON: Yes, your Honours.

GORDON J: With costs.

MR HOOKE: May it please the Court.

GORDON J: Would you adjourn the Court please until 12.30.

AT 12.10 PM THE MATTER WAS CONCLUDED