[2023] HCATrans 107

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Perth

No P2 of 2023

B e t w e e n -

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Applicant

and

JOSEPH LEON McQUEEN

Respondent

Application for special leave to appeal

GORDON J
GLEESON J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA AND BY VIDEO CONNECTION

ON FRIDAY, 11 AUGUST 2023, AT 2.30 PM

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

MR P.D. HERZFELD, SC appears with **MS C.I. TAGGART** for the applicant. (instructed by Australian Government Solicitor)

MS L.G. DE FERRARI, SC appears with **MR J.D. DONNELLY** for the respondent. (instructed by Zarifi Lawyers)

GORDON J: Yes, Mr Herzfeld.

MR HERZFELD: Thank you, your Honour. This matter raises a question which goes to the heart of ministerial decision making, the extent to which a Minister may rely on a departmental summary or synthesis of submissions made to the Minister. The Full Court held that when the Minister makes a decision under section 501CA of the *Migration Act* following the making of representations by a person, the Minister must read the actual pieces of paper submitted by the person, and the Full Court concluded that if the Minister failed to do so, and instead read only a departmental summary or synthesis of those pieces of paper, that was necessarily a jurisdictional error regardless of whether the summary or synthesis was materially complete and accurate. In addition to what we - - -

GLEESON J: Mr Herzfeld, at the outset, your ground of appeal appears to contain two elements. One is about prohibition on relying upon a summary, and then the second aspect is about an obligation to read the actual documents. I am just wondering about that first aspect. Is that really an accurate statement of the Full Court's reasoning?

MR HERZFELD: The Full Court's reasoning was to say, in our submission, that if what the Minister relied upon was the synthesis or summary, that was, of itself, an error in circumstances where factually it was found the Minister did not read anything else. Whether or not relying only on the summary meant that the Minister failed to consider some matter of substance that the Minister was obliged to consider or permitted to ignore. So, that is what we have sought to capture - - -

GORDON J: Can I just deal with that, Mr Herzfeld, head-on. Can we go, please, to application book 329.

MR HERZFELD: Yes, your Honour.

GORDON J: Picking up the question you have been asked by Justice Gleeson, is that right given what is set out at paragraphs 100 through to 103 where they make it apparent that one is actually looking to see whether or not it is accurate. In other words, if it is a complete summary, if

it has both the substance and the content of the representations there, then you are not falling foul of the requirement that the Minister – or the delegate, but here it was the Minister – must read and address the representations that have been made. In 100, we have:

> Complete reliance . . . is an assessment of the worth of the representations by others.

We have the quote from Justice Kiefel, as her Honour then was. We then lead into the requirement:

> to personally read each representation.

But how much so is:

> a question of fact and degree.

Giving rise to 103, that you did not have to:

> read every word or every page of every document –

sitting alongside the need – an assessment and identification by the Court that sometimes a summary is all right.

MR HERZFELD: But that rather, with respect, is our point, and that is what the Full Court did not accept. If your Honours look at page 313 to start with, paragraph 43, your Honours will see there that what the court accepted was that:

> the Minister was required personally to consider Mr McQueen's representations to him, and could not rely only on a summary –

No reference to whether it was accurate or not. Then, if your Honours turn to paragraph 84 of the reasons, in about the middle of the paragraph:

> Summaries provide a useful focus, but they do not relieve the repository of the power from the obligation to directly consider the representations made.

Then, if your Honours look at paragraph 89, their Honours held inapplicable Chief Justice Gibbs' statement that it is:

> permissible for a Minister to rely "entirely on a departmental summary".

And then lower down the page, paragraph 91, agreeing with the primary judge's conclusion:

> It was not possible to discern the full sense . . . without regard to the documents in which the representations were expressed.

GORDON J: Is that last reference not because they had looked at it, rightly or wrongly, and formed the view by reference to omissions, incomplete summaries – they talk about colour and movement in a sense not being addressed by summary – is that not what they are agreeing with in terms of what is set out in paragraph 91?

MR HERZFELD: With respect, no. The Full Court took a much more uncompromising position and that is evident from the passages to which I have directed your Honours' attention. Now, it is true that from paragraph 107 to the end of the reasons, the Full Court gave examples of what it saw as the differences between the summary and the actual documents, almost none of which were the subject of submissions by the parties. But what the Full Court was doing in those paragraphs was to give examples of why, if it concluded as a matter of construction with this power that it was necessary to read the pieces of paper, nowhere in those paragraphs did the Full Court engage with whether the matters that it identified as differences were matters that were mandatory for the Minister to consider.

Nowhere did the Full Court engage with whether it was legally unreasonable for the Minister not to consider those matters. Nowhere did the Full Court ask whether, given the way the Minister had in fact reasoned, the various different impressions the Full Court said could be gained had a realistic prospect of making a difference. None of that is surprising because, as I have said, the Full Court's view was the much more uncompromising one, and that is supported by the respondent in this Court.

If your Honours turn, please, to the respondent's written submissions in this Court at application book page 365, your Honours will see in paragraph 36 that there is a quote there from our submissions where we embrace what your Honour Justice Gordon has really put as the orthodox position; that is, to look at whether there was something missing from the summary and whether the thing that was missing was material. That is, could it realistically have made a difference to the outcome. That is what is said to be the second part, your Honours will see.

Over the page at paragraph 38, the respondent says that that second part is just not a relevant question, and that is because the respondent is seeking to defend what we each really say was the Full Court's approach, which was that in relation to this power one does not get into a question of

whether the summary was materially accurate and complete. It is a much more uncompromising position that the Minister had to read the actual pieces of paper, and that is why there is such a rupture from, for example, the position of Chief Justice Kiefel, to which your Honour Justice Gordon drew attention, which does ask whether the reading or the reliance only on the summary has led to a material deficiency.

That is why there is a difference, for example, between what the Full Court held in this case and what the court held in *Carrascalao*, which was the much more orthodox position than we propound.

GLEESON J: Mr Herzfeld, I did want to clarify with you – in relation to paragraph 77 of the judgment and the quotation from the passage in *M1* – is it any part of your case that the Minister was entitled to adopt a different process from the process that was identified as appropriate for a delegate in *M1*?

MR HERZFELD: No. So, that is really the second point to which we point. Your Honours will see in the passage in *M1* that it was accepted that not every part of the representations is a mandatory relevant consideration. So, it follows that if the Minister relies on the departmental summary of representations – which includes all parts of those representations which are mandatory relevant considerations but leaves out some parts which are not mandatory considerations – the Minister will have considered everything that the statute requires the Minister to consider.

But on the Full Court's approach, the Minister will have still made a jurisdictional error. Apparently, the failure to read the actual pieces of paper and, therefore, to read the parts of the representations which are not mandatory relevant considerations, somehow vitiates the Minister's decision. Similarly, in *M1*, it was accepted that a decision-maker is not required to consider claims that are not clearly articulated. So, likewise, it follows from this that if the Minister relies on the departmental summary that includes all of the parts of the representations which are clearly articulated but leaves out some parts that are not clearly articulated, the Minister will not have acted unreasonably.

But on the Full Court's approach, the Minister has still made a jurisdictional error. That is what is so striking about the Full Court's reasons – that matters which, acting reasonably, a Minister might expect their department to synthesise – for instance, repetitious submissions or transcribing handwritten text into typed text – are matters which, according to the Full Court, are essential for the Minister to read, regardless of whether their content was accurately conveyed. Again, would your Honours take up the respondent's written submissions at page 363 of the application book, please?

GORDON J: Before you get there, Mr Herzfeld, what do we do about this in terms of appropriate vehicle, the criticisms that are made of the summary?

MR HERZFELD: We have addressed why none of those criticisms are in fact sound in our written submissions at page 348 of the application book. So, we do not accept those criticisms, and the respondent in his written submissions has not submitted to - - -

GORDON J: You have four judges passing comment or at least some comments about the quality of the summary.

MR HERZFELD: With respect, Justice Colvin was not invited to. His Honour just said that it had not been attempted to be demonstrated that it was accurate and as I say, almost all of the Full Court's criticisms were not matters raised with the parties or by the parties and so were not matters on which the Full Court had the benefit of submissions.

The respondent in his submissions in this Court has not sought to say that they were correct criticisms. In fact, the respondent eschews any need to for the reason that I have given. And if your Honours look at the respondent's submissions at page 363, please, your Honours will see in paragraph 22, in the last two sentences:

> it may be clear to the Minister, upon reading a one-page document, that it is nothing but a long excursus into a matter which the Minister quickly comes to consider to be of no relevance. The statute does however require him to read that one-page document to form, even quickly, that conclusion.

Now, if, on this example, the document is something which is a long excursus of no relevance, it would follow that it is not a matter the Minister was required to consider either as a mandatory consideration or on grounds of unreasonableness. And if that is so, why is there any problem if the reason the Minister does not consider the long excursus of no relevance is because the Department has excluded it from the summary of the representations made? And that paragraph is, again, another example of how the respondent, consistently with the Full Court, is not approaching this power in the orthodox way that your Honour Justice Gordon raised with me. In fact, it is taking a much more radical approach, which represents a rupture from that orthodox approach.

May we, then, finally add these points. Your Honours will have seen that, given the general importance of the matter – both specifically in relation to the *Migration Act*, but more generally for ministerial

decision-making – we have made it clear that we do not seek to disturb the costs orders below, and will, indeed, pay the respondents costs in this Court, in any event.

The general importance of the point is not really contested by the respondent and it is not suggested by the respondent that this is an inappropriate vehicle in which to consider it. Nor does the respondent, as I have already said to your Honours, say in their written submissions that there was an immaterial inaccuracy in the summary, because they say that is an irrelevant inquiry. What the respondent rather attempts to do is to support the Full Court's conclusion that the particular features of section 501CA are such that an unorthodox approach should be taken, requiring the Minister to read the actual pieces of paper.

We have addressed in writing in the application book at page 346, paragraph 29, why each of the features that the Full Court relied upon as supposedly marking out section 501CA as a special power requiring the Minister to read the pieces of paper are actually fairly common features, not only common to statutory powers, but common to the previous cases, such as *Peko-Wallsend* and *Tickner*, which have considered this issue.

We have then also responded in writing in reply at page 371 of the application book at paragraph 6 to 10 to the other features of the scheme which the respondent has relied upon in an attempt to render this power special in some way so that it stands outside the orthodox approach. We rely on those features, but the more basic point is this: given the general significance of the issue, whether those features justify the Full Court's conclusion that this power should be treated differently and should require the Minister to read the actual pieces of paper regardless of whether they are summarised accurately and completely, that question is not something that should be disposed of on a special leave application. It is something that should be considered by this Court on appeal.

Your Honour, those are the oral submissions we would seek to make in addition to the written submissions.

GORDON J: Thank you, Mr Herzfeld. Ms De Ferrari.

MS DE FERRARI: Thank you, your Honour. Your Honours, may I commence with the important factual finding by the primary judge, first of all, that is at paragraph 85, which your Honours find at application book page 283. That finding was that:

> It was not possible to discern the full sense and content of the representations made without regard to the documents –

the "actual pieces of paper", to put in my learned friend's words:

> without regard to the documents in which the representations were expressed.

So, that is the finding by the primary judge, and the Full Court expressly agreed with that finding. Can I start by going first to paragraph 76 of their Honours' reasons, which is at application book 321. That paragraph summarises the way that the Minister put the submission below, and that was that:

> the Departmental brief was an accurate and fair summary of Mr McQueen's representations and supporting materials.

That submission, that factual submission is rejected. It is rejected at paragraph 91, if your Honours goes to page 325 of the application book, your Honours will see that the Full Court, the unanimous Full Court said:

> We agree with the primary judge's conclusion at [85] –

That is the paragraph that I just took your Honours to, and I think Justice Gordon asked the question about. That is the factual basis upon which this case proceeded. The Minister does not really try and contest that as a factual finding. My learned friend made, twice, the submission that what follows in the Full Court's reasons from paragraphs 107 and following was not really the subject of submissions by either party below, but that is not the point. The point is that is the factual finding at first instance, undisturbed on appeal, against which the Minister simply cannot go. It cannot go in this Court, with respect, if the matter was granted special leave.

That being the crucial finding of fact, the question which the Minister wishes to agitate in this Court is the following: whether, for the purposes of subsection 501CA(4), it is permissible for the Minister, acting personally, to limit his or her consideration to a summary which does not convey the full sense and content of the representations. That is the question.

It is a limited question, and that is whether that is permissible, even though the command of the subsection is for the Minister's personal satisfaction as to whether there is another reason why the original decision should not be revoked. In my respectful submission, references to whether there was legal unreasonableness, whether there was a particular matter that was material that was not considered, whether it was materiality, they just do not grapple with the statutory question, which is that there has to be the

Minister's personal satisfaction as to whether there is another reason. That is the question.

There are two other notable features of this case, in my respectful submission. We do not say that, as a question of statutory construction which has not been considered before – it was not considered in *Carrascalao*; it has never been considered by this Court in this term, that, as a question of statutory construction, we do not wish to be arguing that it does not have some importance.

But here is the other notable feature of this case: the Minister does not contend that either the primary judge or the Full Court misapplied well-established principles of statutory construction to arrive at a wrong construction of this section and what it entails. What the Minister does instead is two things. One is to say that it is inconsistent with what this Court has said in *Plaintiff M1*. We have said that it is not and, with respect, when one reads the entirety of the paragraph from *M1*, that is clear. Your Honour Justice Gleeson went to that paragraph earlier. In particular, the issue is this, that:

> What is necessary to comply with the statutory requirement –

of this section – *Plaintiff M1* did deal with this section:

> What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations.

The Minister has to square up what the Full Court has said – what this Court has said in *Plaintiff M1*, against that factual finding. That is, there was not – factually, there simply was not that level of engagement. Again, I return to the other point, there is not pointed to any error of the statutory construction. Rather, what he said – apart from *Plaintiff M1*, which I have just taken the Court to, and we have made our submissions about that, is to say there is a divergence with the opinions of other courts on other statutes.

With respect, both the primary judge, the Full Court and us, in our response in a special leave application, have gone to those authorities and have shown that there is no divergence at all. Each case will, first and foremost, depend on construction of the particular statute, and that is what the primary judge did in this case and the Full Court upheld, and there is no specific error at all that is pointed in respect of that exercise.

For that reason, we say that it is incorrect to submit, by the Minister, that this case stands in "distinct opposition" – that is the wording that is used at paragraph 21 of the special leave, and the analysis that was done by

the primary judge, which your Honours will find at paragraphs 47 to 63, application book 267 to 274, that analysis, we say, is correct and compelling. We make the same submission about the analysis of those other cases, as was done by the Full Court, and that is at paragraphs 84 to 103 of the Full Court's reasons, which is appeal book 323 to 329.

Unless I can assist the Court further, those are the respondent's submissions.

GORDON J: Thank you, Ms De Ferrari. Anything in reply, Mr Herzfeld?

MR HERZFELD: There are three points. Firstly, the respondent's oral submissions confirm that they, like us, say that the Full Court construed section 501CA differently from previous authorities to require the Minister to read the actual pieces of paper. Secondly, we do point to a fundamental error of statutory construction, and your Honours see that in terms at application book 346 at paragraph 29 that:

> The terms and context of s 501CA(4) do not provide a basis to depart from the long-established principle that a Minister may rely on a Departmental synthesis or summary of documents which they must consider.

That is the second point. The third point is that really the only question is whether what has been described as the factual finding renders this matter an inappropriate vehicle to consider that fundamental issue and it does not for these reasons. Almost none of the matters relied upon by the Full Court to say the summary was inaccurate or incomplete were raised by the respondent or subject of submissions to that court.

It is not a finding based on witness evidence, it is simply a question of comparing the summary to the underlying material. We contest the Full Court's conclusion, we will contest it on appeal to this Court, which will, in fact, be in a better position to resolve it than the Full Court, because this Court, unlike the Full Court, will have submissions from the parties on the question.

If the result is to say that the conclusion that the Full Court reached as a matter of construction was incorrect, but the appeal should be dismissed for the different reason that the summary was inaccurate, the matter will still have served the very valuable purpose of correcting a wrong turning by the Full Court on an important question of executive decision-making in the country, particularly in circumstances where there will be no costs risk to the respondent because we do not seek to disturb the cost orders below, and indeed have agreed to pay their costs in this Court in any event.

GLEESON J: Mr Herzfeld, just coming back to paragraph 43 of the Full Court's reasons, if the correct reading of that is that the Minister could not rely on a summary where it did not convey the full sense of the representations, then that would be perfectly orthodox - - -

MR HERZFELD: Only if the thing not conveyed was a thing which was a mandatory consideration for the Minister to consider, or it was legally unreasonable for the Minister not to consider. So, that gives content to your Honour's use of the words "full sense", and so understanding "full sense" in that way – that is, coherently with *Plaintiff M1* – then there would be no difficulty. But, with respect, both we and the respondents do not approach the Full Court's reasons in that way. Rather, we think the Full Court took the much more uncompromising position that I have explained to your Honours.

GORDON J: The Court will adjourn to consider the course it will take.

AT 2.58 PM SHORT ADJOURNMENT

UPON RESUMING AT 3.04 PM:

GORDON J: In this matter, the application for special leave will be referred in to be heard as if on appeal by the Full Court. Mr Herzfeld, how long do you think it will take?

MR HERZFELD: Unless there is a notice of contention, it could be done in half a day. I raise that possibility because there was, below, a contention that there was a de facto delegation of decision-making which, if it is raised, could extend it over half a day, so it would be half a day to a day, in that case.

GORDON J: Do you agree, Ms De Ferrari?

MS DE FERRARI: I do agree, your Honour.

GORDON J: Thank you. On that basis, as I said, the application for special leave will be referred in to be determined by the Full Court.

Would you please adjourn the Court to 10.00 am on Tuesday 5 September.

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AT 3.05 PM THE MATTER WAS CONCLUDED