IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B68 of 2012

BETWEEN:

MINISTER FOR IMMIGRATION AND CITIZENSHIP
Appellant

and

XIUJUAN LI
First Respondent

and

MIGRATION REVIEW TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

I. Publication

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

II. Statement of the issues

2. The issues are:

   (a) Whether s 353 and/or s 357A(3) of the *Migration Act 1958* (Cth) (**the Act**):

      (i) imposes statutory requirements capable of supporting substantive grounds of review for jurisdictional error; or

      (ii) defines the 'core functions' of the Migration Review Tribunal (**MRT**) in such a way as to include procedural or substantive requirements additional to those imposed by Division 5 of Part 5 of the Act; or

      (iii) re-introduces principles of procedural fairness arising under the general law, in addition to the express statutory requirements imposed on the MRT by Division 5 of Part 5 of the Act, contrary to s357A(1) of the Act.

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(b) Whether there was a denial of procedural fairness (as required under the Act) in circumstances where there was no deficiency (actual or claimed) in the opportunity afforded to the visa applicant to present and/or advance her case on the facts and criteria as they stood, but the MRT refused a request to delay its decision made in the expectation that the factual position would change.

(c) What is the proper test for unreasonableness in relation to the consideration of adjournment requests by the MRT if (as the majority below considered) the unreasonable refusal of such a request is an error which in itself goes to jurisdiction.

III. Judiciary Act s 78B

3. The appellant certifies that he has considered whether any notice should be given to the Attorneys-General in compliance with s78B of the *Judiciary Act* 1903 (Cth) and has concluded that no such notice need be given.

IV. Reports of decisions below

4. The decision of the Federal Magistrates Court is unreported. Its medium-neutral citation is [2011] FMCA 625.

5. The decision of the Full Court of the Federal Court is reported at (2012) 202 FCR 387 (medium-neutral citation [2012] FCAFC 74)[1].

V. Factual background

6. The first respondent applied for a Skilled – Independent Overseas Student (Residence) (Class DD) Visa, in subclass 880, on 10 February 2007.[2] A criterion for the grant of that visa was cl 880.230,[3] which required the first respondent to have a skills assessment issued by a relevant assessing authority (here being Trades Recognition Australia (**TRA**)). That criterion also required that there be no evidence that the information given or used as part of the assessment was false or misleading in a material particular.

7. The first respondent provided with her visa application a skills assessment from TRA dated 8 January 2007, which assessed her skills as suitable for the nominated occupation "*Cook [4513-11]*" (**2007 TRA**).[4]

8. From Departmental interviews and site visits, it emerged that some information supplied for the purposes of obtaining the 2007 TRA, relating to work claimed to have been done to accumulate the necessary directly related work experience, was false. This was acknowledged by the first respondent's new adviser on 19 December 2008.[5] The delegate refused the visa on 13 January 2009, on the basis that the first respondent did not satisfy cl 880.230.[6]

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1 Herein referred to as the 'Full Court Reasons'.

2 [Full Court AB 190.]

3 Schedule 2, Subclass 880, of the *Migration Regulations 1994* (Cth).

4 [Full Court AB 218.]

5 [Full Court AB 173.]

6 [Full Court AB 171.]

9. On 30 January 2009 the first respondent applied to the MRT.[7] On 21 September 2009 the MRT wrote to the first respondent inviting her comment on the adverse information that had led to the delegate's decision.[8] In response, on 19 October 2009, her adviser informed the MRT that further work experience had been accumulated and a second skills assessment application was being finalised. It was submitted that the provision of a new, favourable, skills assessment would allow cl 880.230 to be satisfied. The adviser asked the MRT to hold the first respondent's matter in abeyance.[9]

10. On 21 October 2009 the MRT invited the first respondent to an oral hearing, scheduled for 11 December 2009[10] (later rescheduled to 18 December 2009).[11] On 4 November 2009, the first respondent submitted her second skills assessment application to TRA.[12]

11. The oral hearing took place on 18 December 2009, at which time the first respondent had not received a second skills assessment.[13] The MRT sent a further invitation to comment to the first respondent dated 21 December 2009.[14] On 18 January 2010 the adviser responded, informing the MRT that after the hearing the first respondent had received an unfavourable TRA assessment dated 15 December 2009 (**2009 TRA**). The adviser submitted that the 2009 TRA contained errors and advised that an application for review had been made to TRA. The adviser asked the MRT to forbear from making a final decision until the outcome of the first respondent's skills assessment was finalised.[15] (The 2009 TRA itself and the review application do not appear to have been provided to the MRT.)

12. The MRT did not accede to that request, and on 25 January 2010 made its decision. It affirmed the decision of the delegate, on the basis that the first respondent could not satisfy criterion 880.230: the only skills assessment before the MRT was the 2007 TRA, which (as the first respondent accepted) was affected by fraud and could not be relied upon.[16]

13. The MRT noted that it had had regard to the 2009 TRA and the submission that it was the subject of review, but stated in its reasons for decision that the first respondent had "*been provided with enough opportunities to present her case and is not prepared to delay any further...*".[17]

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7 [Full Court AB 159.]

8 [Full Court AB 151.]

9 [Full Court AB 138-140.]

10 [Full Court AB 134.]

11 [Full Court AB 122.]

12 [Full Court AB 97.3.]

13 [Full Court AB 97.3.]

14 [Full Court AB 106.]

15 [Full Court AB 97-98.]

16 MRT Reasons at [33].

17 MRT Reasons at [35].

VI. Argument

Summary

14. Argument in the Full Court, and the reasons of the Court, focused upon the MRT's refusal to delay its decision in response to the request made to it, following the hearing, to await the outcome of the review of the 2009 TRA. Greenwood and Logan JJ held that for the MRT to refuse this request was 'to deny [the first respondent] a reasonable opportunity to present her case' and that consequently the MRT had 'failed to discharge its statutory function of review'.[18] In reaching that conclusion, reliance was placed on ss 353 and 357A(1) of the Act, although the exact nature of that reliance is, with respect, not entirely clear.[19]

15. The Minister's submissions may be summarised as follows:

(a) Properly analysed, the circumstances of the case did not raise any question of procedural fairness. There was no arguable or asserted deficiency in the opportunity given to the first respondent to establish, and make submissions about, the existing facts.

(b) The judgment below can therefore only be supported on the basis that there is, arising from ss 353 and 357A(3) of the Act, an obligation on the MRT to tailor its procedures so as to help a review applicant to succeed.

(c) Sections 353 and 357A(3) are facultative and exhortatory in nature and give rise to no such requirement. (Nor, if it be relevant, do they impose additional obligations of procedural fairness on the MRT.)

(d) In any event, even if ss 353 and 357A(3) give rise to an additional requirement to act "fairly", the conduct of the MRT was consistent with that requirement.

Procedural Fairness and ss 353 and 357A(3) of the Act

16. The decision in relation to which relief was sought in the Federal Magistrates Court was, of course, the MRT's final decision under s 349(2)(a) of the Act to affirm the decision of the delegate. For that decision to be set aside in the exercise of the jurisdiction of the Court under s 476 of the Act (which is based on the jurisdiction of this Court under s 75(v) of the Constitution), it was necessary for some error to be identified which went to the jurisdiction of the Tribunal to make that decision. It would not be enough to establish that the exercise of a procedural discretion by the Tribunal had in some sense miscarried, without also explaining how that error resulted in the Tribunal lacking power to make the final decision which it made.

17. Greenwood and Logan JJ appear to have conceived the error which they identified in terms of procedural fairness.[20] That characterisation faces an obvious difficulty in that s 357A(1) of the Act makes the provisions of Division 5 of Part 5 an 'exhaustive statement' of the requirements of the 'natural justice hearing rule' in relation to the matters they deal with. That issue will be addressed below. More fundamentally, however, the conduct of the MRT which was said to involve error did not constitute, or result in, any denial of procedural fairness to the first respondent (whether that

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18 Full Court Reasons at [38].

19 Full Court Reasons at [28].

20 Full Court Reasons at [27]-[29], [38].

concept is understood as involving general law principles or as being limited to compliance with the provisions of Division 5).

18. Circumstances can of course be envisaged in which a refusal by the MRT to delay or adjourn its processes may result in a failure to provide procedural fairness. Hely J identified one such situation, involving a refusal by the Refugee Review Tribunal (**RRT**) to adjourn a hearing when the applicant was ill, in *NAHF v Minister for Immigration and Multicultural and Indigenous Affairs.*[21] Similar facts arose in *Minister for Immigration and Multicultural Affairs v Bhardwaj.*[22] These decisions, of course, predated the enactment of s 357A(1) and its analogue s 422B(1). However, what is important is that in any such examples the refusal to adjourn results in – rather than constituting in itself – the failure to provide a fair hearing as required by the Act. Refusal to delay cannot amount to a denial of procedural fairness, at least as that concept is understood in Australian law,[23] unless its consequence is that the applicant does not have a proper opportunity to present his or her case.

19. It cannot be said that there was any such denial of opportunity in the present case. The first respondent was invited to comment on adverse information under s 359A of the Act and invited to a hearing under s 360. No complaint has ever been made about the conduct of those processes. Her adviser made further submissions on the circumstances following the hearing, which were considered. She lacked no opportunity to persuade the MRT that she met the criteria for grant of the visa. Rather, she effectively conceded through her adviser that she did not meet the relevant criteria. The MRT made a decision consistent with that concession.

20. The first respondent asked the MRT to delay its decision, not so that she could gather evidence in support of her case or prepare further submissions, but in the hope that the passage of further time would see her meet the criterion which presently she did not meet. Refusal of her request put an end to that hope; it did not deny her a proper hearing.

21. The result in the Full Court therefore cannot be supported on the basis that the first respondent was denied procedural fairness. For the same reason ss 353 and 357A(3) of the Act, upon which Greenwood and Logan JJ placed considerable reliance, did not support the judgment of the Full Court if, as was suggested at one point,[24] they were merely declaratory of underlying principles of procedural fairness. Those provisions could only assist the first respondent if they had some further, substantive operation requiring the Tribunal to direct its procedures towards a favourable *outcome* for the first respondent.

Sections 353 and 357A(3) of the Act – substantive requirements?

22. Similarly, the suggestion that the Tribunal failed to discharge its '*core statutory requirement* of *reviewing the decision*' of the delegate[25] is unsustainable in the absence of some substantive addition to that 'core requirement' arising from s 353 or s 357A(1). The Tribunal considered and affirmed the decision of the delegate. Its decision was not only free from legal error, in so far as the application of the relevant

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21 (2003) 128 FCR 359, 365-366.

22 (2002) 209 CLR 597.

23 *SZBEL v Minister for Immigration, Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160 [25].

24 Full Court Reasons at [28].

25 Full Court Reasons at [27].

criteria was concerned, but manifestly correct on the existing material and effectively conceded to be correct by the first respondent. On any ordinary understanding of the concept, that represented the unexceptionable conduct of a 'review'.

23. For reasons outlined above, to sustain the conclusion of Greenwood and Logan JJ it is necessary to find in the Act an obligation, in certain circumstances, to use the Tribunal's powers so as to assist the review applicant in meeting the relevant criteria and thus obtaining a favourable outcome. That conclusion therefore depends on the proposition that ss 353 and 357A(3) of the Act contain substantive *requirements* in respect of the conduct of the review by the MRT,[26] breach of which constitutes an error going to jurisdiction. Reliance on that proposition is misconceived, however, for two reasons. First, the proposition is wrong. Secondly, there was no unfairness or unreasonableness in the Tribunal's conduct.

The correct interpretation of ss 353 and 357A(3) of the Act

***Section 353 and the decision in* Eshstu**

24. Sections 353 and 357A are contained within Part 5 of the Act, relating to the '*Review of decisions*'. Section 353 is contained within Division 4, which deals with the '*Exercise of Tribunal's powers*', and s 357A is in Division 5, which is headed '*Conduct of review*'.

25. Section 353, according to its heading, provides for the '*Tribunal's way of operating*'. Subsection (1) provides that the Tribunal shall, in carrying out its *functions* under this Act, *pursue* the *objective* of providing a *mechanism* of review that is fair, just, economical, informal and quick. Subsection (2) frees the MRT from compliance with technicalities, legal forms and rules of evidence, and provides that it is to act according to '*substantial justice and the merits of the case*'.

26. The section commences with the mandatory expression '*shall*', but then directs the MRT to *pursue* an *objective* rather than taking any identified action. The stated objective is to provide a 'mechanism of review' of a particular kind (presumably in compliance with, and within the constraints of, the detailed provisions of Part 5). The mechanism, which the MRT must strive for is one which is 'fair, just, economical, informal and quick'.

27. Two points emerge immediately from that brief analysis of s 353(1). First, a requirement framed in terms of pursuing an 'objective' is not suggestive of an intention to create a duty enforceable in proceedings for the constitutional writs. It could rarely if ever be proved that the MRT had not attempted to achieve the objective at all, or had pursued some contrary goal. It might be said that the objective had not been pursued with sufficient zeal; but the provision provides no standard by which such arguments could be tested.

28. The second point is that the adjectives '*fair, just, economical, informal and quick*' are necessarily identified as objectives and not as mandatory requirements because each pulls the MRT in a different direction.[27] It would be incongruous if the MRT, in ensuring that its process was 'fair' failed to be 'quick' and thereby fell into error. Further, none of these aspirations is given primacy over any of the others; so that,

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26 *Full Court Reasons* at [20]-[22].

27 *Telstra Corporation Limited v Australian Competition and Consumer Commission* (2008) 171 FCR 174 at [160]-[164]; *Ogawa v Minister for Immigration and Citizenship* (2011) 199 FCR 51 at [13]-[16].

even if it was their pursuit rather than their achievement that was regarded as mandatory, placing more weight on one goal than another would lead to error.

29. This Court considered the analogous provisions of s 420 of the Act, which applies to the RRT, in *Minister for Immigration and Multicultural Affairs v Eshetu*[28] (***Eshetu***). Gleeson CJ and McHugh J (with whom Hayne J agreed), Gummow and Callinan JJ all endorsed the reasoning of Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs*[29] and described the provisions of s 420 as 'facultative' and 'exhortatory'.[30]

30. In the present case Greenwood and Logan JJ observed[31] that these observations needed to be viewed through the prism of the Act as it stood at the time. Their Honours appeared to regard the amendments which have occurred since the decision in *Eshetu* as depriving the majority's characterisation of s 420 of authoritative force. Those amendments consist, relevantly, of the replacement of the regime of statutory judicial review in Part 8 by a conferral of jurisdiction analogous with that conferred by s 75(v).

31. It is correct that the particular focus of the Court in *Eshetu* (and that of Lindgren J in *Sun*) was the relationship between s 420 and the statutory grounds of judicial review which were then provided for in s 476. However, the nature of the requirements imposed by s 420 as identified by their Honours was the basis for, not the consequence of, their conclusion that breach of those requirements did not engage any of the grounds in s 476. The nature of any such requirements (which, if they exist, are part of the substantive obligations of the RRT under the Act) is not logically affected by the availability of particular statutory avenues of review (by which compliance with such substantive obligations is tested). To hold otherwise is to invert the reasoning in *Eshetu*.

32. The point that their Honours' understanding of the purpose and effect of s 420 was not dependent on the terms of s 476 is emphasised by the reference[32] to *Qantas Airways Ltd v Gubbins*,[33] where the history of provisions similar to s 420(2) was considered and it was held that such a provision did not relieve a tribunal of the duty to apply the general law. It was in the light of that background that Gleeson CJ and McHugh J described provisions of this kind as 'intended to be facultative, not restrictive'. Such provisions do not detract from, but nor do they add to, such obligations and limits on power as arise from the empowering legislation and the general law.

33. The reasoning of Lindgren J in *Sun*, which was set out at length and endorsed by Gummow and Callinan JJ in *Eshetu*, noted four considerations relevant to the construction of ss 420 and 353. The first consideration recognised the internal tension between the objectives in subsection (1) (noted above), which is not affected by any subsequent amendment. The second consideration, relating to the practicalities of establishing whether the RRT had 'pursued' a relevant objective, also remains pertinent. The third and fourth considerations mentioned by his Honour related to the terms of s 476 as it then stood, and specifically to reasons why a failure

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28 (1999) 197 CLR 611.

29 Unreported Federal Court of Australia 6 May 1997; rev (1997) 81 FCR 71.

30 *Eshetu* at 628 [49], 642-644 [106]-[109], 659 [158], 664-668 [176]-[179].

31 Full Court Reasons at [14]-[18].

32 Eshetu at 628 [49].

33 (1992) 28 NSWLR 26.

to comply with s 420 should not be seen as giving rise to a ground of review under that provision. These do not bear upon the construction of ss 420 and 353 *per se*. The fact that these considerations are now matters of history does not detract from the force of the points made above.

34. Nor does a different understanding of the construction of s 420 or s 353 emerge from the reasoning of the minority Justices in *Eshetu*.[34] Gaudron and Kirby JJ described s 420 as 'describing the general nature of the procedures the Tribunal is to adopt'. Their Honours considered that s 420 could have some effect by informing consideration of, for example, what constituted an error of law or a procedural irregularity, but rejected the proposition that it mandated 'specific procedures to be observed by the Tribunal'.[35] This amounts to no more than that the 'general' statement in s 420 is relevant to the construction of the provisions governing the RRT's powers and duties. Their Honours certainly did not go so far (as Greenwood and Logan JJ suggest)[36] as to hold that s 420 contained 'substantive requirements'.

***Section 357A(3) and* SZMOK**

35. Section 357A, together with the analogous provisions of s 51A and s 422B, was introduced by the *Migration Legislation Amendment (Procedural Fairness) Act* 2002. Its introduction was a response to, and an attempt to overcome, the decision of this Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*.[37]

36. Section 357A(1) provides that the specific requirements of Division 5 of Part 5 constitute an "exhaustive statement" of those obligations "in relation to the matters it deals with". In doing so, it excludes the general law principles of procedural fairness in relation to those "matters".

37. Subsection (3) was inserted into section 357A by the *Migration Legislation Amendment (Procedural Fairness) Act* 2002. In describing its purpose, the Explanatory Memorandum to the Bill for that Act said:

> Division 5 relates to the MRT's conduct of its review. Subsection 357A(1) provides that Division 5 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with. New subsection 357A(3) ensures that **in carrying out the procedures and requirements set out in Division 5, which continue to be an exhaustive statement of the natural justice hearing rule**, the MRT must do so in a way which is fair and just. This complements subsection 353(1) of the Act, which provides that in carrying out its functions under the Act, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.[38]

38. The description of s 420 and similar provisions in *Eshetu* as facultative rather than restrictive, and as exhortatory, was relied on by the Full Court of the Federal Court in *Minister for Immigration and Citizenship v SZMOK*[39] (**SZMOK**). The Court in that case also held that s 422B(3), which is the direct analogue of s 357A(3), was to be

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34 Cf Full Court Reasons at [19].

35 *Eshetu* at 635 [75]-[77]

36 Full Court Reasons at [20]

37 (2001) 206 CLR 57; See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 263-265 [26]-[34].

38 Explanatory Memorandum to the *Migration Amendment (Review Provisions) Bill 2006*, Notes on Clauses, Schedule 1 at [3] (emphasis added) (and see Outline at [2]).

39 (2009) 259 ALR 427 at 431-432 [13]-[18] (Emmett, Kenny and Jacobson JJ).

understood in the same way and therefore 'should not be understood as creating a procedural requirement over and above what is expressly provided for'.[40]

39. That conclusion, with respect, was clearly correct. Section 422B(3) sits alongside s 422B(1), which is in the same terms as s 357A(1), and was (as the Explanatory Memorandum confirms)[41] plainly not intended to effect a repeal of the latter provision. It describes how the RRT is to act 'in applying this Division', thereby presupposing the operation of all of the provisions of Division 4 of Part 7 (analogous to Division 5 of Part 5) and purporting to apply only when the RRT, consistently with those provisions, has some scope to determine what action it will take. Because those provisions, by force of s 422B(1), are to be taken as an exhaustive statement of the requirements of procedural fairness, subsection (3) cannot properly be read as cutting down the RRT's procedural discretions or requiring them to be exercised in particular ways. The way in which the RRT is to act is cast in similarly broad and aspirational terms ('fair and just') to provisions such as s 420.

40. The significance of s 422B(3), as identified by the Court in *SZMOK* (again, it is submitted, correctly), is to guide the exercise of the Tribunal's procedural powers by 'restoring fairness and justice as a procedural concept'.[42] Thus, the exercise of one of the powers in s 427(1) or s 363(1) might be called into question if undertaken with a view to denying rather than promoting the fairness of the procedure in a review. Fairness and justice in this context are, as the Court emphasised, a procedural rather than substantive concept. Further, even if the particular exercise of a procedural power were open to challenge, a question would remain as to whether the ultimate decision on the review was therefore vitiated.[43]

41. The basis upon which Greenwood and Logan JJ considered it proper to depart from the understanding of the relevant provisions expressed by an earlier Full Court appears to have been a remark by French CJ and Kiefel J (with whom Heydon and Crennan JJ agreed) in *Minister for Immigration and Citizenship v SZGUR*[44] (***SZGUR***). Having noted that the error alleged in that case was a failure to consider whether to exercise the power conferred by s 427(1)(d), their Honours said:

> [19] The power conferred by s 427(1)(d) is to be exercised having regard to the requirement imposed on the Tribunal, in the discharge of it core function of reviewing Tribunal decisions, "to pursue the objective of providing a mechanism or review that is fair, just, economical, informal and quick" and to act "according to substantial justice and the merits of the case". ...

42. Three things should be said about this passage. First, the 'requirement' referred to (and linked by footnote references to s 420) was merely noted as something to which 'regard' must be had in exercising the relevant procedural discretion; it was not suggested as determinative in itself of the lawfulness of an exercise of that discretion, let alone of the decision on a review. Secondly, no reference was made to *Eshetu* in argument or in the judgments. Thirdly, nothing was said to turn on this 'requirement'; it was not mentioned further by their Honours or referred to in the concurring reasons of Gummow J. The reference to this 'requirement' was, properly understood, simply

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40 SZMOK at 432 [15].

41 Section 422B(3) was inserted by the same amending Act as s 357A(3) and is described in identical terms in the Explanatory Memorandum (notes to clauses, Schedule 1 at [46]).

42 SZMOK at 432 [18].

43 Cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93].

44 (2011) 241 CLR 594, 601-602 [19] (citations omitted).

part of their Honours' introductory description of the statutory context in which the issue arose. It cannot be regarded as authority for the proposition that s 420 (or s 353) imposes requirements, in addition to those arising under other provisions, the breach of which in itself goes to jurisdiction. The decision in *SZGUR* itself – that the RRT was not under an obligation to consider exercising its power to obtain a medical report[45] – is to the contrary of any such enforceable requirement.

43. Nothing that was said in *SZGUR* provided any reason to question the correctness of the conclusions expressed in *SZMOK* as to the significance of ss 420 and 422B(3) (which apply equally to ss 353 and 357A(3)). Those conclusions were based on a correct appreciation of what had been decided about the role of s 420 in *Eshetu* (which, for reasons explained above, remains relevant to the construction of that provision). These provisions do not impose obligations on the Tribunal, except to the extent that they provide goals that the Tribunal *shall pursue*, in the exercise of procedural discretions or shed light on the construction of provisions that confer such powers or impose obligations. Further, to the extent that they have such an effect, their concern is with procedures, not outcomes.

44. For the same reasons, if (contrary to the argument above) the conduct of the MRT is seen as having denied the first respondent a hearing, and thereby infringed general law principles of procedural fairness, s 357A(3) cannot properly be seen as restoring the operation of such principles to the extent that they are excluded by s 357A(1). Subsection (3) was inserted into a section containing subsection (1) and must be construed as operating alongside it. As noted above, the relevant Explanatory Memorandum serves to confirm that the object of the amendment was not to dilute the exhaustiveness of Division 5 as established by s 357A(1). Thus, if it be true that ss 353 and 357A(3) 'add nothing to the general law ground of a denial of procedural fairness',[46] it also follows that they add nothing to the procedural rights of a review applicant as ascertained pursuant to s 357A(1).

45. As noted earlier, s 357A(1) excludes the operation of general law principles only in relation to 'matters' that Division 5 'deals with'.[47] Division 5 deals, in s 360, with the provision of an opportunity to attend an oral hearing (and it may be accepted that that section would not be complied with if a request to adjourn the hearing, eg because of illness or bereavement, was unreasonably denied). Division 5 also deals, in ss 359AA-359A, with the opportunity that is to be given to respond to adverse information. There are express provisions in s 359B(2)-(4) for that opportunity to be subject to a time limit, and for that limit to be extended by the MRT. No complaint has been made about the MRT's compliance with these provisions in the present case. Finally, Division 5 deals with the possible adjournment of a review in s 363(1)(b), by placing that matter in the discretion of the MRT. Thus, to the extent that general law principles of procedural fairness might call for a review to be delayed (and it is not conceded that they did, in the present case), s 357A(1) leaves no room for those principles to operate. Rather, the issues in such a case would be whether s 360 had been complied with and, possibly, whether the discretions in ss 359B and 363(1)(b) had been exercised according to law.

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45 *SZGUR* at [22], [41] and [76]

46 Full Court Reasons at [28].

47 The significance of that language in s 51A, which is in similar terms, was considered in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

No failure to act fairly or reasonably

46. The procedural history of the matter has been summarised above. Relevantly, when the issue was first raised with her by the Department, the first respondent did not deny that the 2007 TRA had been obtained on the basis of information which was false (albeit that she blamed this on her former adviser).[48] When she applied for review of the delegate's decision in January 2009, therefore, it was plain to the first respondent and her adviser that she did not meet one of the criteria for grant of the visa. It is difficult to see why, at that stage, she should (or would) have expected the Tribunal to do anything other than affirm the delegate's decision.

47. It was not until October 2009 that the First Respondent, through her adviser, indicated that she planned to apply for a new skills assessment. (This application was to be based on further work experience since 2007[49] – thereby at least implicitly accepting that, when she applied for the 2007 TRA, she had not been in a position properly to obtain the necessary document for compliance with cl 880.230.) The application for a new skills assessment was apparently made on 4 November 2009, after the MRT had signalled its intention to advance matters by scheduling a hearing. At the time of the hearing, with no response from TRA having been received, the first respondent was thus pursuing a review application which could not succeed (and which her adviser, at least, understood could not succeed) almost 11 months after it had been filed.

48. A further month later, on 18 January 2010, her adviser reported that her application for a new skills assessment had been unsuccessful and she had sought review of the adverse assessment. The first respondent therefore still did not have the document that she needed in order to meet cl 880.230. It was in these circumstances that the adviser asked the MRT to forbear from making a final decision 'until the outcome of her skills assessment application is finalised'. And it was in these circumstances that the MRT made its decision, almost exactly a year after the application for review, to affirm the decision of the delegate. It is not in doubt that, at that time, this was the only substantive decision that could have been made.

49. Greenwood and Logan JJ appear to have accepted the learned Federal Magistrate's description of the refusal of an adjournment in these circumstances as 'unreasonable',[50] although the precise content of that description was not explored. (Their Honours also described it as denying the First Respondent an opportunity to present her case, although for reasons explained above that is clearly incorrect.)

50. Plainly, the conduct of the Tribunal was not 'unreasonable' in the *Wednesbury* sense ('a decision on a competent matter ... so unreasonable that no reasonable authority could ever have come to it').[51] It can be accepted that the grounds for seeking review of the 2009 TRA, as outlined by the first respondent's adviser, were coherent on their face and might well have justified an expectation that a favourable skills assessment would be obtained. However, that was scarcely a compelling case. Neither the review application, the unfavourable TRA assessment nor the material given to TRA was put before the Tribunal. Nor was any information provided about how long TRA might take to decide on the review. Meanwhile, it was at least open to a reasonable person in the position of the Tribunal to consider that there had already

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48 [Full Court AB 173.]

49 [Full Court AB 139.]

50 Full Court Reasons at [34], [38].

51 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.

been too long a delay in resolving the matter and that the first respondent should not be granted any further indulgence. In reaching their conclusion that the conduct of the Tribunal was unreasonable, Greenwood and Logan JJ in substance concluded that an adjournment should have been granted because the application for review of the 2009 TRA was likely to succeed.[52] Their Honours strayed impermissibility into the merits of the issue, giving effect to their own assessment of how the relevant considerations should have been weighed.

51. As has been explained above, the question before the MRT was not whether to give the first respondent a further opportunity to show that she met the criteria, but whether to give her more time to bring herself within the criteria. If, contrary to the submissions above, the MRT was required (by some principle derived from ss 353 and 357A) to determine that question in a way that was "fair and just", it is submitted that that requirement should be understood as being infringed only when the MRT's actions are unreasonable in the *Wednesbury* sense. To apply a less stringent standard would have the result that any procedural decision which might affect the outcome of a review would be merely provisional, because a court might consider that the power should have been exercised differently and could on that basis set aside the MRT's decision. That is unlikely to have been the intention of Parliament in enacting s 353 or s 357A(3).

52. Alternatively, if the Tribunal was under an enforceable obligation to meet some more general standard of fairness and justice when deciding whether to delay its decision, that standard was met. The first respondent had maintained her review application for almost a year in circumstances where she and her advisers accepted that the decision of the delegate was correct. If she could bring herself within the criteria before a decision was made, she was entitled to a favourable decision; but there was no reason to consider that she was entitled to be given any especially favourable treatment in this respect. To put it another way, she was entitled to expect a decision according to law, but not further indulgence in putting off the day of reckoning. Certainly there is no general obligation on the Tribunal to delay a decision because the review applicant considers that the passage of time will allow a visa criterion to be met.[53]

53. For all of these reasons, even if the Tribunal was subject to enforceable obligations arising from ss 353 and 357A(3) (which is not accepted), it did not err in refusing to delay its decision further.

Separate reasoning of Collier J

54. Collier J, unlike Greenwood and Logan JJ, appeared to accept the characterisation of s 357A(3) in *SZMOK*, and held that the Tribunal's refusal to delay its decision could not be regarded as a denial of procedural fairness for reasons based on s 357A(3).[54] Her Honour held that a failure by the Tribunal to give 'proper consideration' to a request for an adjournment amounted to a failure to provide a reasonable opportunity

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52 Full Court Reasons at [37].

53 *Huo v Minister for Immigration* [2002] FCA 617 at [31], upheld on appeal *Huo v Minister for Immigration* [2002] FCAFC 383 at [10]

54 Full Court Reasons at [83].

to present evidence and argument within the meaning of s 360 of the Act,[55] and that there had been such a failure in the present case.[56]

55. The first respondent has not filed a notice of contention and it is therefore assumed that she does not seek to uphold the decision below on this basis.

VII. Relevant provisions

56. The relevant provisions of Part 5 of the Act and Subclass 880 in Schedule 2 to the Regulations, as in force at relevant times, are set out in Annexure A to these submissions.

57. Sections 353 and 357A are still in force and in the same terms as set out in the Annexure.

58. Subclass 880 was repealed by *Migration Amendment Regulation 2012 (No. 2)* (No 82 of 2012).

VIII. Orders

59. The Minister seeks the following orders:

1. The Appeal be allowed.

2. The judgment of the Full Court of the Federal Court be set aside save as to costs and in lieu thereof it be ordered that:

   (a) The appeal from the judgment of the Federal Magistrates Court dated 31 August 2011 be allowed;

   (b) The judgment of the Federal Magistrates Court be set aside save as to costs and in lieu thereof it be ordered that the Application filed on 22 February 2010 be dismissed.

3. The Court notes the undertaking of the Minister to pay the first respondent's reasonable costs of the appeal.

IX. Estimate of time

60. The appellant estimates that he will require 2-3 hours to present his oral argument.

Dated: 21 December 2012

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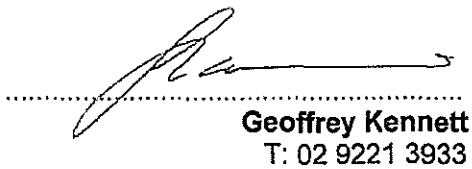
55 Full Court Reasons at [102].

56 Full Court Reasons at [107].



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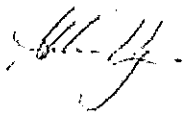

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