HIGH COURT OF AUSTRALIA

8 August 2018

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZVFW & ORS
[2018] HCA 30

Today the High Court unanimously held that a decision of the Refugee Review Tribunal ("the Tribunal") to proceed in the absence of the first and second respondents ("the respondents") was not unreasonable, and that the Full Court of the Federal Court of Australia should have set aside a decision of the Federal Circuit Court of Australia which had found the Tribunal's decision to be unreasonable.

The respondents sought review by the Tribunal of a decision of a delegate of the appellant ("the Minister") to refuse their application for protection visas. In May 2014, the Tribunal wrote to the respondents, inviting them to provide material or written arguments on the review. In August 2014, the Tribunal invited the respondents to appear before it at a hearing. The respondents did not contact the Tribunal or attend the hearing. Section 426A(1) of the *Migration Act* 1958 (Cth) provided that, if an applicant for review was invited to appear before the Tribunal and failed to so appear, the Tribunal could proceed to make a decision on the review without taking further action to allow or enable the applicant to appear before it. The Tribunal, relying on s 426A(1), proceeded to determine the review application, affirming the delegate's decision to refuse the protection visas.

The respondents sought judicial review of the Tribunal's decision to proceed in their absence. The primary judge held that the Tribunal's decision to proceed to determine the review application was legally unreasonable, because the Tribunal ought to have taken some further action to allow or enable the respondents to appear before proceeding to its decision on the review. On appeal, the Full Court of the Federal Court upheld the primary judge's decision, holding that the Minister was required to demonstrate that the primary judge's evaluation of the legal unreasonableness ground involved appealable error of fact or law akin to that required in appeals from discretionary judgments (which are subject to the principles explained in *House v The King* (1936) 55 CLR 499). Such error not having been demonstrated, the Full Court dismissed the appeal.

By grant of special leave, the Minister appealed to the High Court. The Court unanimously allowed the appeal. Principles analogous to those stated in *House v The King* had no application to an appeal by way of rehearing from a judicial review of an administrative decision on the ground that the decision was legally unreasonable. Rather, the Full Court of the Federal Court was required to examine for itself the administrative decision of the Tribunal to determine whether the primary judge was correct to conclude that the decision was unreasonable. The High Court unanimously held that, in the circumstances of the respondents' failure to respond to the Tribunal's invitations, and having regard to the statutory context of s 426A(1), the Tribunal's decision to proceed in the absence of the respondents was not unreasonable.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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