RULING

BRAR and MINISTER FOR IMMIGRATION, CITIZENSHIP, and MULTICULTURAL AFFAIRS (2024/1282)

1. I indicated to the parties that I would provide short written reasons in due course in respect of my oral ruling not to accept the tender of a decision record and reasons in the matter of **Brar (Migration) [2021] AATA 2154 (30 March 2021)** ('the earlier Brar decision').

2. I note that the substantive application before me was subject to the 84-day rule imposed by s 500(6L)(c) of the *Migration Act, 1958*. The matter was listed for a two-day hearing commencing on Wednesday, 8 May 2024, continuing on Monday 13 May 2024, and with a final decision due no later than the 84th day; namely, 22 May 2024. I determined the substantive application on 22 May 2024 and written reasons were delivered on that day. What follows is my statement of reasons for rejecting the tender of the decision record and reasons for the earlier Brar decision.

3. The Applicant gave his oral evidence on 8 May 2024, the first day of the hearing. During the course of that day, the respondent's counsel, Ms Letcher-Boldt, received information from a witness, Ms Seibel. Ms Seibel had apparently conducted some internet searches and had discovered that the Applicant had had certain adverse findings made against him in 2021 by this Tribunal in the earlier Brar decision. Ms Seibel forwarded a copy of the earlier Brar decision to Ms Letcher-Boldt on 8 May 2024.

4. The earlier Brar decision had not been drawn to Ms Letcher-Boldt's attention by her client, the respondent, and she was otherwise unaware of the decision until she received Ms Seibel's communication. The findings of fact in the decision had not been drawn to the attention of the Applicant. Directions were made by this Tribunal on 8 March 2024. These required the Respondent to file and serve any witness statements and other evidence on which the Respondent intended to rely, together with its Statement of Facts, Issues and Contentions, by 24 April 2024. These directions also imposed obligations on the Applicant in respect of evidence he wished to adduce. The directions were intended to facilitate a hearing that was fair to both parties.

5. Ms Letcher-Boldt promptly sought instructions from her client when she received the earlier Brar decision from Ms Seibel. She verified with her client that the person who was the subject of the earlier Brar decision was the Applicant in these proceedings. Ms Letcher-Boldt received her instructions in relation to the decision late in the afternoon on Friday, 10 May 2024.

6. On Sunday 12 May 2024, at 2.16 pm, Ms Letcher-Boldt sent an email to the Adelaide Registry of the Tribunal and copied the email to Dr Donnelly. She attached the earlier Brar decision to her email. She had not drawn Dr Donnelly's notice to the decision before this time.

7. When the matter resumed on the morning of Monday, 13 May 2024, Ms Letcher-Boldt tendered the earlier Brar decision. I heard argument as to whether I should receive the decision in evidence and take into account the findings in the decision as part of my own review. Ms Letcher-Boldt submitted that I ought to do so, and her formal position, as

advised in her email, was that the earlier Brar decision should be received by the Tribunal, the Applicant could be recalled as a witness to answer questions in relation to it, and that he should have an opportunity to put on further written submissions in relation to any issues arising from the decision.

8. Dr Donnelly opposed tender of the earlier Brar decision. He pointed out that the Respondent had had ample time in the lead-up to the hearing to put forward all relevant material. He pointed to the difficulties he might face in trying to obtain instructions during the course of the week and in gathering together evidence in response. He pointed out that my decision had to be delivered at the latest some seven working days later, namely, on 22 May 2024.

9. I read the earlier Brar decision in order to understand the Respondent's application to tender the document. I decided on Monday 13 May 2024 that I would not accept the tender of the document, and that I would exclude it from my consideration. I formally ruled in that way on 13 May 2024 and indicated that I would provide written reasons for my ruling.

10. First, it was not, in my opinion, helpful for the earlier Brar decision to be tendered as evidence of facts that were the subject of findings. If it had been relevant to the proceeding before me that the Tribunal had considered an application by Mr Brar in 2021, the earlier Brar decision would have been directly relevant to prove that bare fact.

11. That was not the case, however. The earlier Brar decision was not tendered to prove the bare fact that the Applicant had been before the Tribunal in the past: it was tendered to prove certain findings of fact, or more exactly, to prove certain facts by seeking to have me rely on the findings recorded in the reasons as strong evidence of those facts. The earlier Brar decision, however, whilst it is a record of the deliberations of the Tribunal and of findings that the Tribunal made in that case, does not constitute original and direct evidence of any facts. It would have been more appropriate for the Respondent to have put forward a clear set of allegations against the Applicant and to have sought to prove them by reference to original material. Instead, Ms Letcher-Boldt sought to prove those facts by reference solely to findings that appear in the Tribunal's reasons. That way of proceeding did not provide the Applicant with the source information he would need if he were minded to contradict any facts put against him.

12. Secondly, I was not persuaded that the Respondent had acted reasonably in the circumstances. The Respondent did not offer any explanation through Ms Letcher-Boldt as to why the factual matters the Respondent wished to put forward were not referred to earlier by the Respondent in conformity with directions made by this Tribunal on 8 March 2024. I am concerned also that the Respondent took some two days to provide instructions to Ms Letcher-Boldt when it was clearly a matter of urgency. Ms Letcher-Boldt should have had available to her at all times an instructor from the Department who would be able to provide or obtain instructions urgently. That was apparently not the case.

13. I have come to the conclusion also that Ms Letcher Boldt, on appreciating the potential significance of the decision was provided to her by Ms Seibel, ought to have immediately provided the earlier Brar decision to Dr Donnelly after the end of the day's hearing on 8

May 2024. She could have provided it on the basis that she was seeking instructions as to its potential significance and that she may wish to cross-examine Mr Brar about the finding contained in the document. In that event, Dr Donnelly would have been in a position to discuss the decision with his client in the course of Thursday, Friday, and over the weekend. Dr Donnelly was not able to discuss the decision with his client since it was only forwarded to him on the afternoon of Sunday, 12 May, 2024, the day before the resumption of the hearing. It came to him, therefore, as a surprise.

14. I gave consideration to the possibility of granting an adjournment to allow Dr Donnelly to discuss the matter with his client and to obtain instructions; but I decided that that course ought not to be followed because of the very tight timeframe for the final decision in this matter. It would have required Dr Donnelly to arrange for any countervailing evidence to be brought forward in too short a timeframe. I decided that I could not fairly require Dr Donnelly, who was no doubt expecting the hearing to conclude on 13 May 2024, to attend to further aspects of the hearing after 13 May, but, say, by Friday, 17 May, to permit the Tribunal time to give its decision by Wednesday, 22 May.

15. I gave consideration to the desirability of the Tribunal having before it all relevant evidence. That is no doubt true as a general proposition; but the Tribunal is also under an obligation to be procedurally fair to both parties. Procedural fairness is an overriding consideration, arising both under section 2A(b) of the *Administrative Appeals Tribunal Act, 1975* (Cth) and at common law. The decisions of tribunals are often given in a context of limited information. The Tribunal depends, at least partly, upon the parties to bring all relevant information to its attention. When information is overlooked, it may mean the result in a case is imperfect in the sense that the result might well have been different had that information been before the Tribunal; but the proceedings are not automatically unfair on that account.

16. The Tribunal is, of course, not strictly adversarial but can always adopt a suitably flexible approach to its proceedings where it is appropriate to do so. But this approach was not available to me given the time pressures involved. Proceedings in 'section 501 matters', as they are referred to in the Tribunal, are often conducted under quite some pressure as the Tribunal is, as I have said, under a strict legal obligation to render a decision by the 84th day where section 500(6L)(c) applies; otherwise, it loses jurisdiction to the detriment of the Applicant before it.

17. Having weighed these matters, I decided I should accept Dr Donnelly's submission and reject the tender of the decision record and reasons in **Brar (Migration) [2021] AATA 2154**. I ruled accordingly on 13 May 2024. I proceeded to hear and determine the Applicant's substantive application without reference to the record or reasons in that case.

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Senior Member Dr N A Manetta

27 May 2024