IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S36 of 2018

BETWEEN:

Minister for Immigration and Border Protection

Appellant

and

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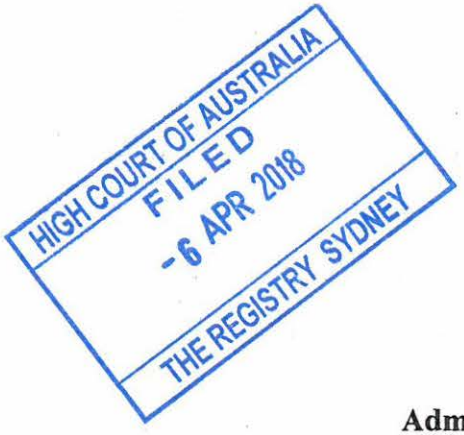
SZMTA

First Respondent

Administrative Appeals Tribunal

Second Respondent



APPELLANT'S SUBMISSIONS

Part I: Internet publication

20 1. The Appellant (**Minister**) certifies that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. Whether, when considering the effect of a notification under section 438(2) of the *Migration Act 1958* (Cth) (**Act**), be it valid or invalid, a Court may speculate about how the Tribunal may have responded to the notification to determine whether the Tribunal has afforded an applicant procedural fairness.

Part III: Section 78B of the Judiciary Act 1903 (Cth)

3. The Minister considers that no notice need be given in compliance with this provision.

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Part IV: Citation of judgments of primary and intermediate court

4. The reasons of the primary judge are reported at *SZMTA v Minister for Immigration and Border Protection & Anor* [2016] FCCA 1329 (**FCCA**). The judgment of the intermediate Court, White J sitting in the appellate jurisdiction of the Federal Court of Australia, is reported at *SZMTA v Minister for Immigration and Border Protection & Anor* [2017] FCA 1055 (**FC**).

Part V: Facts

5. SZMTA is a citizen of Bangladesh who first arrived in Australia on 26 January 2008 on a business short stay visa (FC [1], CAB 57). The visa application the subject of this appeal arises from SZMTA's second unsuccessful application for a Protection (Class XA) visa made on 4 October 2012 (FCCA [3], CAB 33). That second application was lodged in light of the introduction of the complementary protection regime and the decision in *SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235 (FC [2], CAB 57).

6. The second application was refused by a delegate and the delegate's decision was affirmed by the Tribunal on 17 September 2015 (FCCA [1], CAB 5).

7. Relevantly, by a letter dated 17 June 2014, a delegate notified the Tribunal pursuant to section 438(2)(a) of the Act that that section applied to certain documents on the basis that they were given in confidence to the Minister or an officer of the Department (**notification**) (cf section 438(1)(b)) (FC 41, CAB 66).

8. The Tribunal did not inform SZMTA of the notification nor refer to the notification in its reasons. Nonetheless, the evidence before the Federal Court established that SZMTA had previously been provided with copies of all of the documents the subject of the notification in response to an earlier request under the *Freedom of Information Act 1982* (Cth) (FC [42], CAB 66). The notification did not feature in the arguments advanced before the primary Judge or in the grounds of appeal initially advanced in the Federal Court. However, at the hearing, White J granted leave to advance an additional ground (ground 5) which alleged a "deficiency in the legality of the procedure adopted by the Tribunal concerning a certificate issued pursuant to section 438".

Part VI: Argument

(a) Decision of White J

9. The argument in support of ground 5 of the appeal before White J concerned the notification and relied upon the decisions of Beach J in *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 and the Full Court of the Federal Court of Australia (**Full Court**) in *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 (FC [38], [43], CAB 66 – 67).

10. In *MZAFZ*, Beach J had considered a certificate given under section 438(1)(a) of the Act which was similar to the notification under section 438(2)(a). His Honour: found that the certificate was invalid (at [38]); stated that the Court was "entitled to assume that the Tribunal acted in some unspecified way on the invalid certificate" (at [40]); refused to allow the Minister to adduce evidence about the documents the subject of the certificate (at [54] – [55]); and held that it was procedurally unfair for the Tribunal to proceed, whether the certificate was valid or invalid, without notifying the applicant of its existence and allowing the applicant to make submissions (at [60] – [65]).

11. *Singh* concerned a certificate issued under s 375A of the Act. In *Singh*, the Full Court accepted that Beach J had correctly concluded that common law notions of procedural fairness "might" require disclosure of a certificate (or notification) (at [40]). The Full Court then further explained where a certificate was valid, it required the Tribunal to conduct the "review without disclosing the documents or information the subject of the certificate to an applicant" and this was sufficient to enliven the obligation of procedural fairness requiring disclosure of the certificate because that certificate, *prima facie*, diminished an applicant's entitlement to participate fully in the review process (at [42], [52]). The Full Court did not comment upon whether the Court was entitled to make assumptions or speculate that the Tribunal may have "acted in some unspecified way" upon the certificate.

12. Against this background, White J commenced an analysis of the evidence before him by expressing skepticism about whether any (or all) of the documents the subject of the notification were actually provided in confidence and thus whether they fell within section 438(1)(b) of the Act (FC [52] – [53], CAB 69). Despite this, his Honour expressly declined to reach a conclusion as to whether the

notification was "invalid" for that reason (FC [54], CAB 69). Instead, his Honour characterised the notification as "misleading" (although to what effect is unclear) (FC [54], CAB 69).

13. Next, White J observed that there was no indication one way or the other that the Tribunal had any regard to the documents, but it was common ground that the documents were not disclosed to SZMTA under section 438(3)(b) of the Act (FC [55], CAB 69).

14. Then, citing *MZAFZ*, White J stated that the Court was entitled to infer that the Tribunal did act in some unspecified way on the "invalid notification" and this constituted jurisdictional error (FC [56], CAB 70). This statement is, with respect, difficult to reconcile with the earlier abstention from finding that the notification was invalid, and with the remainder of his Honour's reasons which deal with the case on a different basis.

15. His Honour next discussed the Minister's argument with respect to procedural fairness (although slightly mischaracterising the argument by referring to the "defect in the certificate") (FC [57], CAB 70). That argument was in substance that SZMTA already had all of the documents the subject of the notification so no actual prejudice resulted from the Tribunal not hearing from him as to whether the documents should be released to him under section 438(3)(b) of the Act and/or not releasing them to him.

16. White J rejected that argument because "the presence of the invalid certificate may have affected in other ways" the Tribunal's process (FC [58] – [60], CAB 70). His Honour suggested the possibility that the Tribunal may have "chosen not to have regard to the documents" (presumably under section 438(3)(a) of the Act) and may therefore have not had regard to material in them that could have assisted SZMTA (FC [59] – [60], CAB 70). His Honour referred in this connection to a letter of support from a colleague of SZMTA which had been submitted to the Minister as part of an earlier application, and documents containing summaries of SZMTA's claims. His Honour's observations in this regard did not specifically refer to or analyse any part of the Tribunal's decision.

17. Given his Honour's clear statement that it was not necessary to determine whether the notification was invalid (FC [54], CAB 69), the Minister submits that his Honour's reasoning should not be understood to depend on the invalidity of the notification. Rather, the reasoning must be that the Tribunal may have exercised (or purported to exercise) the discretion in section 438(3)(a) of the Act, in a manner potentially adverse to SZMTA's interests, without affording him a hearing, and thereby denied him procedural fairness. However, it is argued below that his Honour's reasoning is erroneous on either understanding.

(b) Errors in the reasoning of White J

10 18. On the understanding that the *ratio* of his Honour's judgment is to be found at [57]-[60] and turns on procedural fairness, the following errors are apparent.

19. *First,* whether or not the documents the subject of the notification were given "in confidence" (a question as to which the notification itself was the only evidence), and whether or not the notification was therefore "invalid", it was not open to White J to speculate, without a basis in the evidence, about the manner in which the Tribunal might have dealt with the documents the subject of the notification.

20. A finding that jurisdictional error has been established must be based on evidence or an inference based on evidence: *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 per at [67] per Gummow J (with whom Heydon and
20 Crennan JJ agreed) and cf [31] to [36] per French CJ and Kiefel J (as the Chief Justice then was) (with whom Heydon and Crennan JJ also agreed).

21. *Second,* the onus is on an applicant to demonstrate that error occurred. It is essential to any claim of denial of procedural fairness that the claimant demonstrate that the impugned procedure deprived him or her of a fair opportunity to be heard: cf *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [60]; *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82 at [104]. At an elementary level that involves demonstrating that there actually was a purported exercise of some statutory power (whose exercise is conditioned by obligations of procedural fairness) that was in some way adverse to the applicant.
30 It was not open to his Honour to find a denial of procedural fairness without finding that such an exercise of power actually occurred. His Honour did not express any such finding, and there was no basis for one.

22. It is well established that a party bearing the onus will not succeed unless the evidence establishes a "reasonable satisfaction" on the preponderance of probabilities such as to sustain the relevant issue: *Axon v Axon* (1937) 59 CLR 395 per Dixon J at 403; cf *Jones v Dunkel* (1959) 101 CLR 298 at 305 per Dixon CJ. And where competing possibilities are of equal likelihood, or the choice between them can only be resolved by conjecture, the allegation is not proved: *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 per Dixon, Williams, Webb, Fullagar and Kitto JJ; cf *SZIGH v Minister for Immigration and Citizenship* [2008] FCA 1885 at [44] per Buchanan J.

23. *Third,* it should not readily be assumed that the Tribunal deliberately ignored relevant material that could have supported the review applicant. Even if section 438(3)(a) of the Act on its proper construction permits that step to be taken, circumstances in which such a step had an evident and intelligible justification would be rare. No such circumstances are apparent here. It should not be inferred that the Tribunal took such an unusual and *prima facie* unjustifiable step in the absence of any evidence that it did so.

24. The same criticisms apply if his Honour's reasons are construed as turning on a finding that the notification was "invalid". Assuming again that such "invalidity" would arise if the author of the notification were wrong as to whether particular documents had been given in confidence, a purported exercise of section 438(3)(a) or (b) of the Act, in circumstances where the power was not enlivened, might well go to the Tribunal's jurisdiction. However, his Honour did not record any finding (and did not have any proper basis to find) that any such purported exercise took place.

25. In this regard, it was not open to White J to infer that the Tribunal acted in "some unspecified way" on the notification and that it therefore fell into error (FC [56], CAB 70; and cf the Notice of Contention, CAB 86). If necessary, the Minister would submit that the conclusion of Beach J in similar terms in *MZAFZ* was also wrong. A conclusion that jurisdictional error occurred requires a finding, based on evidence, that the Tribunal actually did something it was not authorised to do, or failed to do something that the statute required of it.

26. On the material before White J, ground 5 should have been rejected on the basis that:

a) whether the notification was "invalid" did not arise, as there was no evidence that the Tribunal had relied on it in deciding what material it would consider, or what material it would disclose to SZMTA;

b) assuming that obligations of procedural fairness may arise in the Tribunal's consideration of whether to exercise any power under s 438(3) of the Act, no such obligation arose in circumstances where:

i. it was not demonstrated that any of those powers had been exercised adversely to SZMTA's interests (eg, a decision not to take into account material that was otherwise relevant); and

ii. even if the Tribunal had decided under s 438(3)(b) not to disclose documents the subject of the notification to SZMTA, that would not have deprived him of any opportunity to advance his case since he already had the documents (and knew that they were on the departmental file).

Part VII: Orders sought

27. (a) Appeal allowed; (b) The orders of the Federal Court of Australia made on 5 September 2017 be set aside, and in lieu thereof order that: (i) The appeal to the Federal Court of Australia be dismissed; and (ii) SZMTA pay the Minister's costs of the appeal; and (c) SZMTA pay the Minister's costs of the appeal.

Part VIII: Estimated time for oral argument

28. The Minister estimates he will require 45 minutes for oral argument.

Dated: 6 April 2018

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