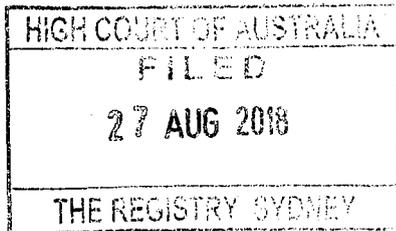


**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. M75 of 2018

BETWEEN:

CQZ15
Appellant



and

**MINISTER FOR IMMIGRATION AND
BORDER PROTECTION**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

**FIRST RESPONDENT'S SUBMISSIONS IN REPLY ON HIS NOTICE OF CROSS-
APPEAL**

Part I PUBLICATION

1. This document is in a form suitable for publication on the Internet.

Part II REPLY

- 10 2. These submissions are made in reply to those of the appellant responding to the Minister's proposed cross-appeal. By his proposed cross-appeal, the Minister contends that the Full Court erred in remitting the matter to the primary judge and that it should have determined ground 2 in the notice of appeal below and ordered that the application to the Federal Circuit Court be dismissed.
3. To be clear, the Minister seeks to press the cross-appeal only in the event that the order of the Full Court remitting the matter to the Federal Circuit Court is set aside in the appeal. If it be the case that the Full Court erred in upholding ground 1 of the Minister's appeal and remitting the matter to the Federal Circuit Court, it must also follow that the Full Court erred in considering it unnecessary to determine the issues
20 raised by ground 2 of that appeal. On the other hand, if the order remitting the matter to

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and Border Protection

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the Federal Circuit Court is not set aside, the Minister is content with that result and would not press for any different order.

4. It will also have been noted that the proposed cross-appeal seeks only to have the matter remitted to the Full Court for determination of the outstanding issues.

5. Of course, the extent to which elements of ground 2 are viable may depend on reasoning of this Court in determining the present matter and *BEG15 v Minister for Immigration and Border Protection* (S135/2018). However, at least *prima facie*, paras (a) to (c) are arguable even if the evidence rejected by the Federal Circuit Court as irrelevant was properly rejected.

10 6. Although the proposed cross-appeal envisages that such argument would occur in the Full Court rather than here, the following points may be noted:

(1) Paragraph (a) of ground 2 raised a question as to whether, on the material before it, the Federal Circuit Court had a proper basis for a finding that the Tribunal “acted on” the certificate. Its acceptance may require the overruling of *MZAFZ v Minister for Immigration and Border Protection*.¹ The argument for the Minister in the Full Court made it clear that the correctness of that decision was challenged.² Although the Minister’s submissions were predicated on the evidence of Mr Murano being received by the Full Court, the point (which really goes to the *absence* of necessary evidence at first instance) logically does not depend on that evidence being before the Court.

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(2) Paragraphs (b) and (c) raised questions as to the extent of any procedural fairness obligations arising in relation to the certificate. The argument put in support of those grounds in the Full Court was predicated on Mr Murano’s evidence being received by the Court, and sought to distinguish *MZAFZ* and *Minister for Immigration and Border Protection v Singh*.³ No formal submission was made that *Singh* was wrongly decided.

¹ (2016) 243 FCR 1.

² Appellant’s Book of Materials in Reply 78, lines 33-41.

³ (2016) 244 FCR 305.

(3) In these circumstances, it is accepted that a submission that *Singh* was wrongly decided would be a new argument. Just as the Minister would need leave to advance it in an appeal, it is accepted that, on remitter, the Minister would need to persuade the Full Court that he should be permitted to raise it. Consistently with the limited nature of the relief sought in the proposed cross-appeal, the Minister does not seek to effect that change of position in this Court as part of the proposed cross-appeal.⁴

7. Contrary to what appears to be the appellant's argument at [15]-[20] of his submissions, the Minister's proposed cross-appeal does not depend on any argument about the content of the Murano affidavit; rather, it is conditioned by the hypothetical circumstance of the Full Court having been in error when it remitted the matter to the primary judge. Further, contrary to what appears to be suggested at [20] of the appellant's submissions, the fact that the appellant might raise arguments before the Full Court, and seek to adduce further evidence, does not stand in the way of the Minister's argument that, if the Full Court erred in remitting the matter to the primary judge, it should determine the Minister's appeal to that court by resolving ground 2.
8. The appellant also appears to be saying, in effect, that any arguments that the Minister might be permitted to make if the matter were remitted to the Full Court are restricted to arguments available on the state of the law as at the date the appeal was first heard.⁵ There is no reason why the Minister should be so restricted. If the law (in particular, the correctness of *MZAFZ* and *Singh*) is altered as a consequence of the present appeals, the Minister should be entitled to make submissions about, and the Full Court should apply, the law as pronounced by this Court.

Section 35A of the Judiciary Act 1903 (Cth)

9. The Minister submits that the administration of justice and the public importance of the issues under consideration support the grant of special leave in relation to the proposed cross-appeal.

⁴ *cf* Appellant's Reply at [6]-[7], [10], [14].

⁵ Appellant's Reply at [10.4].

- (1) *First*, if this Court alters the law (particularly in relation to *MZAFZ* and *Singh*) but finds that the Full Court erred in remitting the matter, the judgment of the primary judge will (potentially) stand uncorrected unless the Minister has the opportunity to argue ground 2 of his notice of appeal in the Full Court.
- (2) *Secondly*, it is apparent from the three appeals before this Court that there are difficulties in the application of the law in relation to s 438 of the Act. The effect of the Minister's cross-appeal will be to require the Full Court to consider, and determine, the matters adverted to in ground 2 of the notice of appeal below, thereby assisting in the process of clarifying the law.

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Dated: 27 August 2018



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Counsel for the Minister