IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

NO M 75 OF 2018

BETWEEN:

CQZ15
Appellant

HIGH COURT OF AUSTRALIA
FILED
26 JUL 2018
THE REGISTRY SYDNEY

AND:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I PUBLICATION

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

Part II ISSUES

2. The issue in this appeal is:

> Where a decision of the Second Respondent (the **Tribunal**) is challenged on the ground that the Tribunal did not disclose the existence of a certificate purportedly issued under s 438 of the *Migration Act 1958* (Cth) (the **Act**),[1] are the documents the subject of the certificate capable of being relevant and therefore admissible?

3. There are two sub-issues:

   (1) whether the material is capable of being relevant for the purpose of attempting to demonstrate that no denial of procedural fairness (or other error going to jurisdiction) occurred; and further or alternatively

   (2) whether the material is capable of being relevant for the purpose of attempting to satisfy the Court that it should exercise its discretion to withhold relief.

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[1] For ease of reference, the First Respondent (the **Minister**) will refer to both a certificate or notification issued under s 438 of the Act as a "**s 438 certificate**".

Filed on behalf of the First Respondent

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4. If the Minister succeeds with his arguments about either or both sub-issues, it will follow that the Full Court of the Federal Court of Australia (the **Full Court**) was correct to uphold the Minister's appeal.

Part III SECTION 78B NOTICES

5. The Appellant has given notices under s 78B of the *Judiciary Act 1903* (Cth). The Minister has considered whether any additional notices should be given and concluded that no such notices are necessary.

Part IV CONTESTED FACTS

6. The Minister does not contest any facts set out in Part V of the Appellant's submissions or chronology.

Part V ARGUMENT

The proceedings below

7. Before the Federal Circuit Court, the Appellant alleged that the Tribunal had denied him procedural fairness by failing to disclose the existence of two s 438 certificates. In response to that allegation, the Minister sought to adduce evidence of the documents subject to the s 438 certificates. The primary judge refused to admit that evidence on the basis that such evidence could never be relevant in an application for judicial review of the kind brought by the Appellant.[2] The primary judge considered that this followed from the decisions of the Federal Court in *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 (Beach J) (***MZAFZ***) and *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 (Kenny, Perram and Mortimer JJ) (***Singh***).

8. On appeal, the Full Court unanimously held that the primary judge erred in holding that evidence of the documents subject to a certificate issued or notification given under s 438 could never be relevant in an application for judicial review of the kind brought by the Appellant.[3]

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2 See *CQZ15 v Minister for Immigration and Border Protection* (2016) 315 FLR 127 at [27]-[29]. See also *CQZ15 v Minister for Immigration and Border Protection* [2017] FCCA 130 at [9].

3 *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1 (***CQZ15***) at [89].

9. The Full Court held that evidence of such documents could be relevant for at least three purposes:

(1) first, establishing that the Tribunal did not treat the documents as being material to the decision on review (permitting the inference that the Tribunal did not "act on" the certificate or notification);[4]

(2) second, establishing that, in the circumstances of a particular case, the Tribunal's failure to disclose the existence of the certificate or notification did not amount to a denial of procedural fairness;[5] and

(3) third, establishing that, if there was a denial of procedural fairness, the court should nonetheless refuse relief in the exercise of its discretion.[6]

10. The Full Court remitted the matter to the Federal Circuit Court for that Court to determine whether to admit the evidence that the Minister sought to adduce.

11. For the reasons set out below, the Minister submits that the Full Court was correct to conclude that evidence of the documents subject to a certificate or notification issued under s 438 of the Act may be relevant for the purposes referred to above. All of these purposes raise or involve facts "in issue in the proceeding" for the purposes of ss 55 and 56 of the *Evidence Act 1995* (Cth).

12. In summary:

(1) Where a s 438 certificate is invalid, the Tribunal may fall into jurisdictional error if it exercises any of its powers on the assumption that the certificate has legal effect. Whether the Tribunal acted on the invalid certificate in some relevant way is a question of fact for the reviewing court. Evidence of the documents subject to the certificate will be relevant, as it may permit an inference as to whether or not the Tribunal did act on the invalid certificate.

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4 *CQZ15* (2017) 253 FCR 1 at [65], [74]-[76].

5 *CQZ15* (2017) 253 FCR 1 at [67]-[69].

6 *CQZ15* (2017) 253 FCR 1 at [87].

(2) A failure by the Tribunal to disclose to an applicant for review the existence of a s 438 certificate can also amount to a denial of procedural fairness, and therefore jurisdictional error.[7] Whether there was a denial will depend on whether, in the particular circumstances of the case, fairness required that the applicant be given the opportunity to make submissions about issues arising in relation to the certificate. Evidence of the documents or information subject to the s 438 certificate may be relevant to whether fairness required such an opportunity to be given in the particular circumstances. For example, if the documents were not relevant to any issue considered material in the review, it may follow that the applicant did not lose any opportunity to advance his or her case as a result of the non-disclosure of the s 438 certificate.

(3) Where a denial of procedural fairness is established by reason of a failure to disclose to an applicant the existence of a s 438 certificate, evidence of the documents subject to the s 438 certificate may be relevant to the question whether the court should nevertheless refuse relief in the exercise of its discretion.

13. The use of the evidence in these ways does not mean that the documents or information subject to the s 438 certificate "negates" the existence of jurisdictional error.[8] Rather, the evidence is relevant to the determination whether or not there is jurisdictional error, and whether relief should be granted.

Ground 1 — departure from authority

14. Ground 1 does not identify a basis upon which this Court would set aside the Full Court's decision in an appeal. First, this Court is not bound by the authority of *Singh* and must decide for itself whether the decision of the Full Court was correct. Secondly, the principle which called on the Full Court to follow *Singh* was one of comity rather than one of law.

15. In any event, the Full Court did not depart from, let alone purport to overrule, the decision in *Singh*. Rather, the Full Court observed that the decisions in *MZAFZ* and *Singh* did not compel the conclusion that evidence of the documents subject to a s 438 certificate could

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7 See *MZAFZ* (2016) 243 FCR 1 at [65]; *Singh* (2016) 244 FCR 305 at [52].

8 Cf Appellant's submissions at [39] and [48].

never be relevant in an application for judicial review of the kind brought by the Appellant.[9] The Full Court went on to note that *Singh* had expressly left open the possibility that it would be appropriate in some cases for a court to receive evidence of the documents subject to a certificate issued or notification given under s 438.[10]

16. The Full Court was correct to understand *Singh* in this way. Not only did the Full Court in Singh leave open the possibility of a court receiving evidence of the documents subject to a certificate or notification,[11] it also expressly recognised that the content of the obligation to afford procedural fairness will vary from case to case. In particular, in stating its conclusion in *Singh*, the Full Court said:[12]

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> Mr Singh therefore had a sufficient interest to give rise to an obligation to afford him procedural fairness upon the issue of the certificate. **In this case**, that obligation required the Tribunal to disclose to him the certificate which had been issued. (Emphasis added.)

17. The Full Court in *Singh* did not purport to lay down a rule for every case in which a certificate or notification is issued under s 375A or s 438 of the Act. Accordingly, no error is shown in the way that the Full Court here dealt with the decision in *Singh*.

Ground 2 — conflation of issues

18. Ground 2 does not identify a basis upon which this Court would set aside the Full Court's decision in an appeal. It criticises the Court's reasoning process but does not point to the actual decision being wrong.

20 19. In any event, the Full Court did not conflate these two issues, but instead recognised that they were two different purposes for which evidence of the documents subject to a s 438 certificate could be relevant.[13]

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9 *CQZ15* (2017) 253 FCR 1 at [77].

10 *CQZ15* (2017) 253 FCR 1 at [79]. See *Singh* (2016) 244 FCR 305 at [16].

11 (2016) 244 FCR 305 at [16]; see also at [67].

12 *Singh* (2016) 244 FCR 305 at [52].

13 See, in particular, *CQZ15* (2017) 253 FCR 1 at [87]-[88], where the Full Court clearly distinguished between establishing that there was no denial of procedural fairness and establishing that, if there was, relief should nonetheless be withheld in the exercise of the court's discretion.

20. For the reasons given below in relation to the Appellant's third ground, the Minister submits that the Full Court was correct to recognise that evidence of the documents subject to a s 438 certificate could be relevant for both of these purposes.

Ground 3 — finding that the Federal Circuit Court should have admitted the documents

21. The Appellant's third ground is that the Full Court erred in finding that the Federal Circuit Court should have admitted the evidence of the documents subject to the s 438 certificate in this case.

22. The Full Court did not make that finding. It remitted the matter to the Federal Circuit Court to determine whether the evidence that the Minister sought to adduce should be admitted, having regard to the reasons of the Full Court.[14]

23. The Appellant appears to contend that the Full Court should have found that evidence of the documents subject to a s 438 certificate can *never* be relevant for either of the following purposes:

    (1) establishing that, in the circumstances of a particular case, the Tribunal's failure to disclose the existence of the certificate or notification did not amount to a denial of procedural fairness;[15] or

    (2) establishing that, if there was a denial of procedural fairness, the court should nonetheless refuse relief in the exercise of its discretion.[16]

24. The Appellant does not directly take issue with the other purpose identified by the Full Court for which the documents may be relevant — namely, establishing whether (and if so how) the Tribunal "acted on" the certificate or notification).[17] That was an issue raised by the Appellant's case.[18] If it is accepted that evidence of the documents could have been relevant for this purpose, it follows that the Full Court was correct to allow the appeal.

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14 *CQZ15* (2017) 253 FCR 1 at [94].

15 Appellant's submissions at [37]–[48].

16 Appellant's submissions at [49]–[63].

17 *CQZ15* (2017) 253 FCR 1 at [65], [74]–[76].

18 Amended Application, Core Appeal Book (**CAB**) 31, ground 1.

25. Nor does the Appellant directly take issue with the acknowledgement in *Singh* that "confidentiality concerns" in relation to the documents or information the subject of the certificate or notification might be potentially relevant to the scope of the hearing rule in a particular case.[19]

26. In any event, for the reasons given below, the Minister submits that the Full Court was correct to hold that evidence of the documents subject to a s 438 certificate can be relevant for each of the purposes identified above.

Whether the Tribunal acted on an invalid certificate

27. To conclude that a certificate purportedly issued under s 438(1)(a) was invalid does not of itself establish jurisdictional error by the Tribunal. It is necessary to establish, first, that the Tribunal wrongly treated the certificate as valid, and secondly that that error led it to fail to carry out its statutory task.

28. Whether the Tribunal did either of these things is a question of fact for the reviewing court. The Tribunal's reasons may, but often will not, provide the answer. Evidence of the documents subject to the certificate can be relevant in answering that question, as it may support an inference as to whether the Tribunal gave any weight to the documents (as well as a conclusion as to whether anything in the documents was required to be raised with the review applicant under s 424A of the Act). This was implicitly recognised in *MZAFZ* by Beach J who observed that, "[i]n the absence of evidence to the contrary", he could infer that the Tribunal had acted on the invalid certificate.[20]

29. Accordingly, the Full Court was correct to hold that evidence of the documents subject to a certificate issued under s 438 of the Act could be relevant for the purpose of establishing whether the Tribunal relevantly "acted on" an invalid certificate.

Whether there was a denial of procedural fairness

30. The Appellant argues that the Tribunal will *always* commit a breach of procedural fairness if it fails to disclose the existence of a s 438 certificate. Further, (it must follow) there is a duty cast upon the Tribunal to disclose a s 438 certificate, which constitutes an

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19 See *Singh* (2016) 244 FCR 305 at [53]–[54]; cf Appellant's submissions at [42].

20 *MZAFZ* (2016) 243 FCR 1 at [40].

inviolable restraint on the Tribunal's jurisdiction. The Act does not provide, at least expressly, for such an outcome. It is not part of the procedural regimes that s 422B(1) and (2) describe as "exhaustive". Rather, the Full Court held in *Singh* that the Act did not exclude or limit general law obligations of procedural fairness in relation to the issuing of a s 438 certificate.[21]

31. The Full Court also recognised,[22] correctly, that what is required by the common law obligation to afford procedural fairness in a particular case will depend on all the facts and circumstances of the case.[23] The relevant question is "what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made".[24] In this context, the concern of the law is to avoid practical injustice.[25]

32. The Minister's submissions on his first ground of appeal in the Full Court did not question the correctness of *Singh*,[26] and the Full Court accordingly proceeded on the basis that the common law obligation to afford procedural fairness may require the Tribunal to disclose to an applicant the existence of a s 438 certificate.[27] However, it does not follow that procedural fairness will *always* require such disclosure.[28]

33. The Full Court accepted that, if the documents the subject of a certificate were found to be incapable of having any bearing on the decision of the Tribunal, one would likely conclude that the non-disclosure of the certificate could not have deprived the review applicant of an opportunity to advance his or her case.[29] The Appellant appears to argue

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21 *Singh* (2016) 244 FCR 305 at [39]–[40].

22 *CQZ15* (2017) 253 FCR 1 at [67].

23 See *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 (***WZARH***) at [30] (Kiefel, Bell and Keane JJ), [53] (Gageler and Gordon JJ). See also *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [85].

24 *WZARH* (2015) 256 CLR 326 at [30] (Kiefel, Bell and Keane JJ).

25 *Re Minister for Immigration and Ethnic Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ).

26 Ground 2(b) and (c) (CAB 61), however, did put in issue whether any obligation of procedural fairness arose. The Full Court did not deal with that ground (CAB 83 [57], 92 [91]).

27 And see CAB 85 [68].

28 See *CQZ15* (2017) 253 FCR 1 at [68].

29 CAB 86 at [69].

that the Full Court misapplied this Court's judgment in *WZARH*.[30] The Appellant argues that:[31]

(1) failure to disclose a s 438 certificate is always contrary to the demands of procedural fairness (according to the Full Court's judgment in *Singh*)[32];

(2) whenever there is jurisdictional error, because the decision-maker did not do what procedural fairness required, practical injustice is necessarily shown; and

(3) consideration of the effect of the departure from the process required by law is not warranted because any "materiality" considerations arise in determining the process that the law requires be followed.

34. *WZARH* does not stand for such a bald (and circular) series of propositions. What Gageler and Gordon JJ said in *WZARH* was:[33]

> Where ... the procedure adopted by an administrator can be shown itself to have failed to afford a **fair** opportunity to be heard, denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it can be shown that the failure did not **deprive the person of the possibility of a successful outcome**. The practical injustice in such a case lies in the denial of an opportunity **which in fairness ought to have been given**. (Emphasis added. Citations omitted.)

35. Not every denial of an opportunity to make submissions will amount to a denial of procedural fairness. Only the denial of an opportunity "which in fairness ought to have been given" will have that consequence. In other words, there is an anterior question as to what opportunity was required in order to give procedural fairness (including whether any non-disclosure deprived the person of the possibility of a successful outcome). That inquiry takes place in retrospect, including by reference to what the decision-maker actually decided and on what basis. Thus, non-disclosure of material to an applicant does

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30 Appellant's submissions at [45]–[46].

31 Appellant's submissions at [45]–[46].

32 Appellant's submissions at [36]–[44].

33 *WZARH* (2015) 256 CLR 326 at [60].

not amount to a denial of procedural fairness if the decision-maker ultimately decides in his or her favour or if the decision turns on an unconnected issue.[34]

36. Contrary to the Appellant's submissions at [48], the content of the documents or information subject to a s 438 certificate is capable of being relevant in determining whether non-disclosure of the certificate deprived the review applicant of the possibility of a successful outcome. Such evidence may support a finding that the Tribunal did not exercise any power under s 438(3) adversely to the review applicant; or that the exercise of those powers could not have affected the outcome of the review because the information was not material to any issue. In those circumstances, no practical injustice could possibly result from the denial of an opportunity to make submissions about the certificate.

37. It follows that the Full Court was correct to hold that evidence of the documents subject to a certificate or notification may be relevant for the purpose of establishing that, in the circumstances of a particular case, the Tribunal's failure to disclose the existence of the certificate or notification did not amount to a denial of procedural fairness.

Whether relief should be refused in the exercise of the court's discretion

38. It is settled that the constitutional writs (and the writ of certiorari) are discretionary remedies.[35] Thus, where it is found that there has been a denial of procedural fairness, the court may withhold relief on discretionary grounds.[36] Relevantly, this may occur if the grant of relief would be futile. Further, if the submissions above concerning practical injustice and the principles of procedural fairness are incorrect, the cases which accept that an applicant may not succeed if the denial of procedural fairness did not deprive him or her of the possibility of a different outcome[37] are to be understood as standing for a

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34 Cf *Aala v Minister for Immigration* (2000) 204 CLR 82 at [104] per McHugh J.

35 *Aala v Minister for Immigration* (2000) 204 CLR 82 at [5], [42]-[57], [104], [171]; *Re Minister for Immigration; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [90].

36 See *Stead v State Government Insurance Commission* (1986) 161 CLR 141 (***Stead***) at 145-147 (Mason, Wilson, Brennan, Deane and Dawson JJ); *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 (***SZBYR***) at [28] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

37 See eg *House v Defence Force Retirement and Death Benefits Authority* (2011) 193 FCR 112 (***House***) at [31] (Greenwood J), [133-134] (Gilmour J), [168] (Logan J). See also *WZARH* (2015) 256 CLR 326 at [60] (Gageler and Gordon JJ).

discretion to refuse relief on that basis. Thus, the plurality in *SZBYR* would have refused relief in the exercise of discretion if a breach of s 424A had been found, because other findings unaffected by any such breach required the Tribunal to affirm the delegate's decision.[38] Although their Honours described the case as one in which "no useful result could ensue" from the grant of relief, it is (with respect) properly understood as one in which relief would not be justified because the decision under review was necessarily the right one based on findings properly made at the time. In the present case the Minister does not seek to submit that relief would be "futile" in a "forward-looking" sense, but would wish to submit that relief should be refused because provision of an opportunity to comment on the certificate could not have changed any finding of the Tribunal.

39. As explained above, in determining whether the denial of an opportunity to make submissions to obtain the disclosure of documents subject to a s 438 certificate denied the Appellant the possibility of a successful outcome, it may be relevant for the reviewing court to have regard to those documents.

40. The argument of the Appellant at [57]–[63] of his submissions, as to why a "backward-looking" exercise of this kind is inconsistent with the proper role of the Court, should not be accepted.

(1) The Appellant accepts at footnote 35 and [63] of his submissions, there will be "extreme" or "absolutely clear" cases where relief will be refused on any test of futility. Whether a case comes within those descriptions depends on evidence (on established authority such as *Stead* and *DWN042 v The Republic of Nauru* (2017) 92 ALJR 146); and evidence as to whether the material covered by the certificate had any bearing on the issues in the review is clearly relevant for that purpose. The certificate itself may be probative on that issue, but that does not provide a reason to exclude other evidence.

(2) A substantial body of case law (including *WZARH* and *SZBYR*) accepts that the grant of relief may turn on whether an error — including a denial of procedural fairness — denied the applicant the possibility of a successful outcome. Whether that inquiry is understood to arise at the stage of determining whether jurisdictional

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38 (2007) 81 ALJR 1190 at [27]–[29].

error occurred or as part of the exercise of discretion, it involves the "counterfactual" and "speculation" of which the Appellant complains.

(3) The inquiry may involve assessing, on the known facts, whether an administrative decision-maker might have decided an issue differently if a different course had been followed. The courts have repeatedly emphasised the caution that must be exercised in refusing relief on the basis that things could not have turned out differently.[39] Further, the inquiry is undertaken for the purpose of deciding whether there is a reason not to grant constitutional writ relief and not for the purpose of exercising, or purporting to exercise, any power vested in the administrative decision-maker. Any apparent overlap with the issues decided by that decision-maker would not mean that the court was trespassing on the decision-maker's function or exceeding its proper role under Chapter III.[40]

(4) In any event there is no overlap, and no constitutional issue arises. The court is not called on to express its own view about the merits of the administrative decision (especially where, as here, the respondent seeks to demonstrate that particular documents had nothing to do with the merits) and the Minister does not seek to lead evidence of the documents for that purpose. The issue is whether it can be shown that the decision-maker would not have done anything differently, an issue to which clearly it may be relevant for the reviewing court to have regard to the documents.

41. Accordingly, the Full Court was correct to hold that evidence of the documents subject to a s 438 certificate may be relevant for the purpose of establishing that, if there was a denial of procedural fairness, the court should nonetheless refuse relief in the exercise of its discretion.

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39 Eg *Stead* (1986) 161 CLR 141; *House* (2011) 193 FCR 112.

40 As Kirby J stated in *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501 at [230]: "To some extent, the character of the functions performed by a decision-making body may take their colour and their constitutional identity from the body to which those functions are assigned – whether a court or administrative tribunal" citing *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 18; *Pasini v United Mexican States* (2002) 209 CLR 246 at 267 [59]; *Thomas v Mowbray* (2007) 233 CLR 307 at 413 [303]. See also *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at [59] (French CJ, Hayne, Kiefel, Bell and Keane JJ), [64] (Gageler J).

Part VI NOTICE OF CONTENTION/CROSS-APPEAL

42. The Full Court did not consider it appropriate to deal with the Minister's second ground of appeal, which alleged errors in the final judgment of the Federal Circuit Court.[41] If this Court were to find that the Full Court erred in remitting the matter to the Federal Circuit Court, the Minister would wish to be able to agitate paras (a) to (c) of that ground (which in principle remain alive even if the evidence the subject of ground 1 is not admitted). Since this Court does not have the benefit of the Full Court's reasoning on these points (and their disposition may be affected by other matters currently before the Court), in the event that the Appellant succeeds here, it would be appropriate for the matter to be remitted to the Full Court for these issues to be dealt with. The Minister will seek leave to file a cross-appeal to formalise this position.

Part VII TIME ESTIMATE

43. The First Respondent estimates that he will require approximately 1.5 hours for the presentation of his oral argument.

DATED: 26 July 2018

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[41] CAB 61.