HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN: **MZAPC**

Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST RESPONDENT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Issues that are not in dispute

2. The appellant has not challenged the proposition that materiality is essential to the existence of jurisdictional error, and not something that goes only to a court's discretion to refuse relief once jurisdictional error is established: RS [3]. That is, it is not in dispute:

   (a) that the breach of a condition on the exercise of a statutory power under the *Migration Act 1958* (Cth) will constitute jurisdictional error only if the breach is material, in the sense that there could realistically have been a different decision; or

   (b) that the appellant, as the party alleging jurisdictional error, bears the onus of proving that the breach was material.

The appellant needed to prove that the notified information was in fact taken into account

3. The question whether a breach of a condition on the exercise of a statutory power is material is a question of fact, which requires findings to be made about the decision-making that actually occurred: RS [24]-[25].

   - *SZMTA* (2019) 264 CLR 421 at [46]-[47], [50], [68]-[69], [71] (Bell, Gageler and Keane JJ) **(JBA 2, tab 17)**
   - *Minister for Immigration v CQZ15* [2021] FCAFC 24 at [85] (the Court)

4. In contrast to the decision-making process that the Tribunal would ordinarily follow, where the Tribunal receives a notification under s 438 of the Act, it is required to leave the information subject to the notification out of account in making its decision unless it positively exercises its discretion to consider the information: RS [28].

   - *SZMTA* (2019) 264 CLR 421 at [23], [30]-[31] (Bell, Gageler and Keane JJ), [115] (Nettle and Gordon JJ) **(JBA 2, tab 17)**

5. This feature of the statutory scheme has the consequence that, in the absence of evidence that the Tribunal positively exercised its discretion to consider the information, a court on judicial review should infer, by reference to what can be expected to occur in the course of the regular administration of the Act, that the Tribunal paid no regard to information subject to a s 438 notification in making its decision: RS [38]-[40].

- *SZMTA* (2019) 264 CLR 421 at [46]-[47], [70] (Bell, Gageler and Keane JJ) **(JBA 2, tab 17)**
- *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at [35] (Gaudron J), [69] (McHugh, Gummow and Hayne JJ) **(JBA 2, tab 10)**
- Heydon, *Cross on Evidence* (12th ed, 2020) at [1175]

6. The inference that the Tribunal did not have regard to the information subject to a s 438 notification is strengthened where the information in question is adverse to the interests of an applicant, but was not disclosed to the applicant, because a fair-minded Tribunal would not take that course without good reason.

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- *MZAOL v Minister for Immigration* [2019] FCAFC 68 at [74]-[76] (the Court) (**JBA 3, tab 19**)
- *Minister for Immigration v CQZ15* [2021] FCAFC 24 at [82] (the Court)

7. Where the information subject to a s 438 notification is adverse to the claims made by the visa applicant, in order to show that disclosure of the existence of the notification could possibly have made a difference to the outcome, the applicant must prove on the balance of probabilities that the Tribunal in fact took the information subject to the notification into account: RS [30], [32].

8. There is no basis for the Court to grant leave to re-open *SZMTA*: RS [42]-[46].

20 9. There is no inconsistency between the majority's reasoning in *SZMTA* and other decisions of this Court. Any differences in result arise from the different statutory contexts: RS [33]-[35].

- *Balenzuela* (1959) 101 CLR 226 at 232, 236-237 (Dixon CJ, Windeyer J agreeing) **(JBA 2, tab 5)**
- *Stead* (1986) 161 CLR 141 at 147 (the Court) **(JBA 2, tab 8)**
- *Kioa v West* (1985) 159 CLR 550 at 588 (Mason J), 602 (Wilson J), 628 (Brennan J), 634 (Deane J) **(JBA 2, tab 7)**
- *Applicant VEAL* (2005) 225 CLR 88 at [8], [10], [13], [27] (the Court) **(JBA 2, tab 11)**

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The primary judge correctly found that the information was not taken into account

10. Mortimer J correctly held that the appellant was required to prove: first, that the Tribunal in fact took the s 438 information into account; and second, that the outcome of the review could realistically have been different if the appellant had the opportunity to make submissions to the Tribunal about the information: CAB 66 [50].

11. Mortimer J correctly held that there was no basis on which to draw an inference that the Tribunal had considered any of the information subject to the s 438 notification, including the "state false name" offence: CAB 66-68 [52]-[57]; RS [47]-[53].

12. None of the arguments advanced by the appellant in an attempt to demonstrate that the primary judge should have found that the Tribunal had regard to the s 438 information should be accepted. They are all inconsistent with *SZMTA*: RS [55]-[57].

Ground Two

13. The appellant submitted in the court below that the conviction for "state false name" was the only conviction rationally capable of affecting the Tribunal's assessment of the appellant's credibility: CAB 58 [20], 66 [54]; AS [39]. He is bound by the conduct of his case: RS [58].

- *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483 (the Court)

14. In any event, the primary judge's finding that the Tribunal did not have regard to the information subject to the s 438 notification was not limited to the "state false name" offence: CAB 67-68 [57]; RS [59]-[60]. For the reasons given in relation to the first ground of appeal, there is no reason to doubt the correctness of that finding.

Stephen Donaghue Mark Hosking

5 March 2021