HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M77 of 2020

BETWEEN: **MZAPC**
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise Statement of the Issues

2. The essential issues on this appeal are:

   (a) whether, in judicial review proceedings, the onus in relation to materiality requires an applicant to establish more than the possibility of a different outcome;

   (b) further to (a), whether an applicant for judicial review must rebut a presumption that undisclosed material omitted from the reasons for decision was not considered by the decision-maker;

   (c) whether, if properly understood by the primary judge, *Minister for Immigration and Border Protection v SZMTA*[1] was correctly decided; and

[1] (2019) 264 CLR 421, especially at 445 [45]–[47].

(d) whether only "dishonesty offences" are capable of impacting adversely upon the credibility of an applicant.

3. The appellant submits that the answer to each question is "No".

Part III: Section 78B Notice

4. Notice under s78B of the *Judiciary Act* 1903 (Cth) is not required.

Part IV: Citations

5. The media neutral citations of the decisions below, neither of which is reported, are:

(a) *MZAPC v Minister for Immigration & Anor* [2016] FCCA 1414; and

(b) *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024.

10 **Part V: Statement of Facts**

6. On 22 January 2006, the Appellant, a citizen of India, arrived in Australia on a student (Class TU subclass 572 Vocational Education and Training Sector) visa. That visa ceased on 15 March 2008.[2]

7. On 30 August 2007, the Appellant applied for a student (Class D subclass 880 Skilled – Independent Overseas Student) visa. The application was refused on 18 April 2012. The Appellant sought review of the decision at the Migration Review Tribunal on 16 May 2012. The Tribunal found that it had no jurisdiction because the application was lodged out of time. On 13 September 2013, an application for judicial review to the Federal Circuit Court (**FCCA**) was dismissed.[3]

20 8. On 22 January 2014, the appellant applied to the Department of Immigration for a Protection (Class XA) visa under s65 of the *Migration Act* 1958 (Cth) (**the Act**). The appellant's claim (as summarised in the first respondent's submissions in the Federal Circuit Court[4]) was that:

(a) while he was an Indian citizen at birth, he became stateless after his family disowned him after 2008;

(b) his family disowned him because of the society he was in;

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[2] Core Appeal Book (**CAB**) 54.25.
[3] CAB 54.32-35.
[4] CAB 33.10ff.

(c) his uncle threatened to, and tried to, kill him in relation to a dispute between the appellant's father and uncle over land;

(d) when travelling in the Punjab in 2004, he was kidnapped and his father was asked to sign over the land, however the appellant was rescued after a settlement was given;

(e) he has changed his religion by cutting his hair and acquiring the Australian lifestyle and, as a result, his family disowned him;

(f) his uncles will kill him for the land, or he will be abducted and killed if he goes back to India;

(g) as he has been disowned, he will not get land or accommodation; and

(h) if the authorities got involved, it would involve more risk to his family – it is a family dispute and not disclosed to the authorities because of its risk.

9. On 4 June 2014, the Minister's delegate refused to grant the protection visa.[5]

10. On 5 June 2014, before an application for review had been filed with the Refugee Review Tribunal, a delegate of the Minister notified the Tribunal that s438(1)(b) of the Act applied in respect of certain material that had been given to the Tribunal[6] (**the s438 Notification**). The letter expressed the delegate's view that the information "should not be disclosed to the applicant or the applicant's representative because … [it] was shared by Victoria Police with the Department for investigative purposes only."

11. The contents of the information to which the s438 Notification applied can be summarised as follows:

(a) an "Immigration Status Service Report" dated 31 March 2012, which stated inter alia that "SC Mayar advised that the [appellant] has over 28 pages of offences and is currently on a suspended sentence until Sept 2012"[7] – despite this, however, the only "criminal record" in the material was the 9-page document (described at (d) below);

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[5] CAB 54.40-50.
[6] Appellant's Book of Further Materials (**AFM**) 9.
[7] AFM 11.

(b) a screenshot of a "Client Detail" page for the appellant, including a facial image and information such as his name, date of birth, relationship status and residential address;[8]

(c) a facsimile cover sheet for a 10-page facsimile message dated 31 March 2012 from Victoria Police to the Department, containing the words "as per your request for investigative purposes only";[9] and

(d) a 9-page "Court Outcomes Report" generated by the Victoria Police for the stated purpose: "ACCUSED – PRIORS FOR INVESTIGATION", describing proceedings before the Dandenong Magistrate's Court on 30 September 2011.[10] The report suggests that the appellant was convicted of various driving-related offences on that occasion, and also an offence of "STATE FALSE NAME". The appellant had also received a three-month suspended term of imprisonment for "drink driving" and "driving while disqualified", along with a range of other non-custodial punishments for six other offences of "drive while disqualified", two other offences of "drink driving" and further individual offences of "state false name", "use unregistered vehicle", "use vehicle not in a safe and roadworthy condition", "removing a defective vehicle label" and "failing to wear a seatbelt in a moving vehicle". It further appears from the record that two other charges of "drink driving" were withdrawn and dismissed.

12. It was common ground before Mortimer J that the "state false name" offence could be described as an offence involving dishonesty, and "could have contributed to a decision-maker forming an adverse view of the [a]ppellant's honesty".[11] It is also readily apparent that an (unproven) assertion that "the [appellant] has over 28 pages of offences" was capable of bearing upon the appellant's credibility or reliability.

13. On 27 June 2014, the appellant applied to the Refugee Review Tribunal for a review of the delegate's decision to refuse to grant the protection visa.[12] The appellant appeared before the Tribunal on 15 October 2014.[13] The Tribunal did not disclose to the Appellant that it had received the s438 Notification. It was common ground before

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[8] AFM 12.
[9] AFM 12.
[10] AFM 14–22.
[11] CAB 58 [20].
[12] CAB 54.40-50.
[13] CAB 54.40-50.

Mortimer J,[14] and is common ground in this Court, that the failure to disclose the existence of the s438 Notification amounted to a breach of the Tribunal's obligation of procedural fairness.

14. On 19 September 2014, the Tribunal affirmed the decision under review.[15] However, it subsequently emerged that the appellant had not been informed of the time at which his application would be heard. Accordingly, on 25 September 2014 the Tribunal decided that it would "revisit" or "re-open" the appellant's case.[16]

15. On 4 November 2014, the Tribunal, as previously constituted, and having now held a hearing in which the appellant participated, once again affirmed the decision of the delegate of the Minister not to grant a protection visa (**the Decision**).[17] The Tribunal concluded that the appellant "does not face a real chance of persecution in the reasonably foreseeable future in India for any reason … from his relatives over the land dispute",[18] and that his "fear of persecution is not well founded".[19] In its reasons for reaching that conclusion (beginning at CAB 8), the Tribunal:

(a) stated that it had "some concerns about the [appellant's] credibility";[20]

(b) found that the appellant had visited Amritsar in 2003 or 2004, had been taken to a house by his cousin, and was drugged and held there until his father arrived and paid AU$3,500 for his release, but disbelieved that the appellant had been threatened on that occasion;[21]

(c) did not accept "that the [appellant] had been the subject of continuing threats in relation to the land dispute";[22]

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[14] CAB 60 [30].
[15] AFM 28.
[16] AFM 40-41.
[17] CAB 54.40-50.
[18] CAB 11 [23].
[19] CAB 14 [39].
[20] CAB 11 [22].
[21] CAB 11 [22].
[22] CAB 11 [23].

(d) did not accept "as credible or plausible" two aspects of the appellant's account,[23] namely that:

(i) simply because his father was in Delhi and not Amritsar, this would deter the relatives from undertaking threatening or violent action against his father to obtain ownership of the land; and

(ii) "the relatives would not threaten or harm his father (but would threaten or harm the [appellant]) because his mother's brother was a policeman"; and

(e) did not accept that the relatives "have a continuing adverse interest in the [appellant]".[24]

10 16. It was common ground before Mortimer J that the Decision "depended at least in part" on the Tribunal making the above findings, which "led it to reject what might be seen as the central claim made by the [a]ppellant in support of his protection visa application".[25] There can be no doubt, in the appellant's submission, that the Tribunal disbelieved critical aspects of the appellant's account, and did so because of its adverse view of his credibility or reliability. There was no basis in any of the material before the Tribunal, other than the s438 Notification, for any question to arise as to the appellant's credibility or reliability, and no such issue was ever raised with the appellant for him to address.

17. On 10 December 2014, the appellant applied for judicial review of the Tribunal's
20 decision. On 17 May 2016, the FCCA dismissed the application.[26] The issues that arise in this appeal were not argued before the FCCA, and its reasons for dismissing the application are not addressed further in these submissions.

18. By notice of appeal dated 7 June 2016,[27] the appellant appealed to the Federal Court of Australia. The appeal was held in abeyance pending the publication of the judgment of this Court in *SZMTA*.[28]

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[23] CAB 11 [23].
[24] CAB 11 [23].
[25] CAB 57 [17].
[26] CAB 55 [8].
[27] CAB 55.30-40.
[28] Supra; CAB 55 [10].

19. On 15 October 2019, the appellant filed an amended notice of appeal identifying a single ground of appeal,[29] namely that:

> The Federal Circuit Court erred by not finding that [the Decision] affirming the first respondent's decision not to grant the appellant a Protection (Class XA) visa was affected by jurisdictional error, in that the Tribunal failed to comply with the rules of procedural fairness.

20. The particulars of the alleged denial of procedural fairness related to the failure of the Tribunal to disclose "the fact that it had received the s438 Notification".[30]

21. On 4 December 2019, Mortimer J made orders dismissing the appeal.[31] Her Honour found that the appellant had failed to discharge his burden of proving the materiality of the s438 notification,[32] because "the Tribunal's reasoning was not in fact affected by the potentially adverse information in the first place".[33]

Part VI: Argument

Ground 1

22. The test for materiality was established in *Stead v State Government Insurance Commission*,[34] in which the Court relevantly held as follows:

> Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference ... However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to

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[29] CAB 46.
[30] CAB 46.
[31] CAB 53.
[32] CAB 66 [51].
[33] CAB 68 [58].
[34] (1986) 161 CLR 141 at 145–146.

have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact.

23. The Court continued: "[a]ll the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome" (at 147), and said (at 147), by reference to *Balanzuela v De Gail*,[35] that it was for "the respondent … to demonstrate that the rejected evidence could have made no difference to the result". In other words, once the applicant has demonstrated the loss of a "possibility of a successful outcome" – or, to put the matter negatively, that a remittal would not "inevitably result in the making of the same order" (at 145) – materiality will be established unless the respondent shows that compliance could not have made any difference.

24. These passages contemplate a shifting of onus,[36] which occurs once the applicant for judicial review has demonstrated the loss of a "possibility of a successful outcome". At that point, as Dixon CJ put it in *Balenzuela v De Gail*,[37] summarising a judgment of Lindley J: "it was for the party showing cause against a new trial to show that the misdirection did not influence the result." This is also consistent with what this Court recently described as "not only 'an elementary rule of the law of evidence' but 'a rule of common sense': that the burden of proof is upon the party who asserts a fact, not on the party who denies it."[38] As a matter of common sense, and consistently with the way the matter was approached in *Stead*, if the applicant can point to the possibility of a different outcome on remitter, it is for the respondent to establish that the error could have made no difference to the result.

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[35] (1959) 101 CLR 226.
[36] See also *Purkess v Crittenden* (1960) 108 CLR 158 at 167-168 per Barwick CJ, Kitto and Taylor JJ.
[37] (1959) 101 CLR 226 at 233.
[38] *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 299 [39]; see also 300 [40], where the Court applied the maxim in *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970.

25. In the 34 years since *Stead* was decided, it has been applied on countless occasions, in this Court,[39] the Full Federal Court[40] (including in *MZAOL v Minister for Immigration and Border Protection*[41]), by State courts of appeal,[42] and other courts of review. In *SZMTA*, a majority of this Court applied *Stead* without indicating any intention to overrule or qualify its authority. On the contrary, the majority articulated the test for materiality in the language of *Stead* itself: "[t]he breach is material if it operates to deny the applicant an opportunity to give evidence or make arguments to the Tribunal and thereby to deprive the applicant of the possibility of a successful outcome."[43] There is no suggestion in *SZMTA* (or, indeed, in *Hossain v Minister for Immigration and Border Protection*[44]) of any intention to change the content of the test articulated in *Stead*.[45]

26. Despite this, the primary judge regarded herself as bound to apply an "approach", attributed by the Full Court in *MZAOL* to the majority in *SZMTA*. The primary judge held that this "approach" required an applicant for judicial review to prove two matters:[46]

    (a) first, that "the Tribunal in fact took the s 438 information into account, despite there being no evidence of it exercising the discretion in s 438(3)(a) to do so, and despite the 'presumption' that the Tribunal paid no regard to the information if there was no exercise of the discretion in s 438(3)" (**the First Limb**); and

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[39] Including in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 88–89 [4] (Gleeson CJ), 116–117 [80] (Gaudron and Gummow JJ), 132 [133] (Kirby J); 155 [211] (Callinan J); *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 499–500 [57] (Kirby and Callinan JJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 339 [43] (Kiefel, Bell and Keane JJ); *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134–135 [30]–[31], 136 [35] (Kiefel CJ, Gageler and Keane JJ); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 433 [2], [4], 445 [45]–[46] (Bell, Gageler and Keane JJ).
[40] *Uriaere v Minister for Home Affairs* [2019] FCAFC 235 at [21]; *Nguyen v Minister for Home Affairs* [2019] FCAFC 128 at [49].
[41] [2019] FCAFC 68 at [40], [45]–[48] and [51].
[42] See recently and by way of example, *JE v Secretary, Department of Family and Community Services* [2019] NSWCA 162 at [53]–[56]; *Whall v Stamp* [2019] NSWCA 163 at [9]; *Zaghloul v Woodside Energy Limited* [2019] WASCA 187 at [114]; *Zerjavic v Chevron Australia Pty Ltd* [2020] WASCA 40 at [89]–[90].
[43] *SZMTA*, supra, at 433 [2].
[44] (2018) 264 CLR 123.
[45] Cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438–439.
[46] CAB 66 [50].

(b) secondly, that the outcome of the review "could have realistically been different" if the appellant had an opportunity to make submissions to the Tribunal about that information (**the Second Limb**).[47]

27. The appellant submits that the primary judge erred in attributing this "approach" to the majority in *SZMTA*. The two-limb approach was not articulated, in terms, by the majority. It is a gloss upon the majority's guidance at [47], which erroneously elevates that guidance into matters required to be proven or disproven by an applicant. In the key passage in *SZMTA* at [47], the majority identified three available inferences:

(a) first, that the Tribunal can be expected to treat a s438 notification as valid;

(b) secondly, that the Tribunal can be expected in the ordinary course to leave that document or information out of account in the absence of the Tribunal giving active consideration to an exercise of discretion under s438(3); and

(c) thirdly, absent some contrary indication in the reasons for decision or elsewhere in the evidence, a court can be justified in inferring that the Tribunal paid no regard to the notified document or information.

28. These inferences were not posited as laying down any rigid or inflexible "approach" or "presumption" of the kind understood and applied below. Their Honours said that a court "*can* therefore be justified in inferring that the Tribunal paid no regard to the notified document or information" (our emphasis). Their Honours did not say that the Tribunal *must* draw that inference unless it is rebutted or displaced by the applicant.

29. A difficulty with Mortimer J's "approach" is that the First Limb becomes, in effect, an element of an applicant's cause of action, requiring proof on the balance of probabilities. This is juridically confused. Where the Tribunal's error consisted of an admitted failure to disclose the existence of the s438 Notification, all the appellant had to demonstrate was that he was deprived of the possibility of a different outcome. The position would be different where, for example, an applicant sought to establish that the decision-maker had taken into account an irrelevant consideration. In such a case, the applicant must establish that the irrelevant consideration was, in fact, taken into account. But a denial of procedural fairness is a conceptually distinct species of error. The error consists in

[47] See *MZAOL*, supra, at [73]–[76], which Mortimer J was bound to apply.

the denial of an opportunity to be heard – it does not require positive proof that any material was actually considered.

30. In *Balanzuela v De Gail*,[48] Dixon CJ cited (at 233) a judgment of Cussen J,[49] to the following effect: "it is an error to think there never can be a wrong or miscarriage unless it can be shown that the jury were in fact influenced in giving their verdict by a misdirection" (our emphasis). This passage is directly inconsistent with the First Limb (at [26(a)] above). An "approach" in which a denial of procedural fairness is presumed to be immaterial, unless expressly mentioned by the Tribunal or otherwise displaced by the applicant, involves exactly the kind of error identified by Cussen J.

31. Insofar as the First Limb involves a "presumption", it is inconsistent with the contemplation in *Stead* of a shifting of onus (see [24] above). As the Court said in *Stead* (at 147), it is for "the respondent … to demonstrate that the rejected evidence could have made no difference to the result". The "presumption" is also at odds with *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*.[50] There, the Tribunal's reasons contained an affirmative statement that it had given the adverse information in question "no weight". The High Court nonetheless unanimously held that the Tribunal's denial of procedural fairness in respect of that information justified an order setting the decision decide. *Applicant VEAL of 2002* shows that materiality can be established even in the face of an affirmative statement that material was not considered. This cannot be reconciled with a requirement that an applicant rebut a "presumption" that material was ignored, when the Tribunal's reasons are otherwise silent.

32. In the present case, the decision-maker formed an adverse view of the applicant's credibility but did not indicate whether or not the adverse material influenced that view. In such a case, the "realistic possibility" test can be understood as involving two "could" questions: first, *could* the adverse information have been considered by the Tribunal; and, secondly, had procedural fairness been accorded, *could* a different result have obtained? The error in Mortimer J's "approach" concerns the first question. The First Limb requires an applicant for judicial review to prove, not that the adverse information *could* have been considered, but that it was *in fact* considered. Apart from being

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[48] (1959) 101 CLR 226.
[49] *Holford v Melbourne Tramway and Omnibus Co Ltd* [1909] VLR 497 at 526.
[50] (2005) 225 CLR 88.

inconsistent with the dictum of Cussen J, this would present the applicant with what Nettle J described on the special leave application as "the impossible task of proving what was in the mind of the decision-maker".[51]

33. The appellant submits that this outcome was not intended by the majority in *SZMTA*. Contrary to the reasons of the primary judge, the key passages in *SZMTA* at [47] are properly understood as identifying matters that are logically *capable* of supporting an ultimate conclusion of immateriality, which may or may not arise depending on the facts at hand. It is important in this context to pay some regard to the underlying facts in two of the three appeals decided by the Court in *SZMTA*.[52] In *BEG15*, the information contained in the documents the subject of the s438 certificate "was largely known to the appellant, was not relevant to the decision to be made by the Tribunal, had not in fact been taken into account by the Tribunal and could have made no difference to the outcome of the review".[53] In *SZMTA*, the documents the subject of the s438 certificate were beneficial to the applicant. They had previously been provided to the applicant, in response to a request under the *Freedom of Information Act* 1982 (Cth),[54] and "could not realistically have made any difference to the Tribunal's decision".[55] Presented with facts of this kind, the inferences posited by the majority at [47] are readily drawn. But those inferences will not arise in every case. They are not a surrogate for ordinary processes of reasoning, nor for the test articulated in *Stead*. So much is confirmed at [48], where the majority embraces the language of "realistic possibility" of a different outcome, and by footnotes 78 and 79, which respectively cite *Stead* and *Aala*.

34. The present case was very different to *BEG15* and *SZMTA*:

    (a) First, the appellant's credibility was a (if not the) determinative issue (see [16] above). The Tribunal rejected central aspects of the appellant's claims, but did not explain why it had "concerns" about his credibility. The Tribunal's concerns could only logically have arisen from: (1) the perceived implausibility of the

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[51] *MZAPC v Minister for Immigration and Border Protection & Anor* [2020] HCATrans 113 at 8.308-310 (14 August 2020), also at 9.350-354 per Gordon J.
[52] One of the three appeals, *CQZ15,* does not need to be mentioned because the tender of the evidence of the documents the subject of the s438 certificate had been erroneously rejected, so that the relevant documents were not before the Court: *SZMTA* at 447 [55].
[53] Supra at 448 [61] per Bell, Gageler and Keane JJ (emphasis added); 468 [123] per Nettle and Gordon JJ.
[54] Supra at 450 [66] per Bell, Gageler and Keane JJ.
[55] Supra at 452 [71] per Bell, Gageler and Keane JJ.

appellant's claims; (2) the appellant's demeanour at the hearing; or (3) the s438 information (which was the only material probative of the appellant's credibility before the Tribunal). The Tribunal did not explain which (or which combination) was determinative, and it is unnecessary and inappropriate for the Court to speculate. It suffices to observe that the s438 information *could have* played a part.

(b) Secondly, the nature of adverse credit material is that it may have unknown or subconscious effects upon processes of reasoning. In this context, it is reasonably likely that the Tribunal member read through the whole file in sequential order, rather than at random, and therefore would have read and digested the impugned information before becoming aware of the s438 notification.[56] The Tribunal would, therefore, be fixed with the prejudicial knowledge that the appellant had a criminal record, before reading the notification stating that s438 applied to that information. It is very difficult, as the Court emphasised in *Stead*, to conclude that according procedural fairness could have made no difference.

(c) Thirdly, the Tribunal's decisions predated both *SZMTA* and *MZAFZ v Minister for Immigration and Border Protection*,[57] in which the duty to notify an applicant of a s438 notification, and of a decision to consider material the subject of such a notification, was recognised. It might be thought unlikely that a Tribunal acting in November 2014 would have anticipated these developments in the case law.[58] A Tribunal member reading s438 prior to 2016, who did not appreciate the need to accord procedural fairness in relation to a s438 notification, could very well have thought that they were at liberty to have regard to the information (per s438(3)(a)) without saying that they had done so.

35. Further, it is a fact that the Tribunal member failed to appreciate that he was under an implied obligation to afford procedural fairness to the applicant by disclosing that he had received a notification under s438(2)(a) of the Act. It is highly unlikely that a Member who was unaware of, and failed to comply with, the implied obligation of

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[56] The affidavit of Jarrod Blusztein affirmed on 25 January 2018 (AFM 5–7 [6]–[7]) reveals that the information in question was contained at folios 35 Side B to 40 of the File, whereas the notification was contained at folio 74 of the File.
[57] [2016] FCA 1081 at [50].
[58] As Mortimer J recognised at CAB 65-66 [49].

disclosure attaching to s438(2)(a)[59] would nonetheless have been aware of, and can be assumed to have complied with, the implied obligation of disclosure attaching to s438(3)(a).[60] The two obligations are of the same kind, and arise in the same way. A Member ignorant of one implied obligation should be taken to be ignorant of the other. It is illogical to infer, much less presume, regularity from that which is known to be irregular.

36. The non-disclosure of the s438 notification deprived the appellant of the opportunity both to comment on the notification, and also to make two kinds of application. First, the appellant could have asked the Member to exercise his discretion in s438(3)(b) to provide the information to him. This discretion could have been exercised in the appellant's favour. The material was not confidential in nature – there was no informant or other intelligence disclosed. Instead, the material comprised public records of no particular importance or sensitivity to anyone except the appellant. Having been provided with the material under s438(3)(b), the appellant would then have had the opportunity to comment upon it and potentially neutralise its effect upon the mind of the decision-maker. Secondly, the appellant could have asked the Member to disqualify himself. The basis for that application is that the Member, having already received and considered the prejudicial material, had already purported to refuse the application once on 19 September 2014,[61] and was now purporting to conduct a fresh hearing of the application in circumstances where he had already published reasons on the same application on an earlier occasion. It is unnecessary "to engage in a hypothetical enquiry"[62] as to how these applications would have fared, beyond noting that they could have led to a different outcome. The appellant lost the opportunity to cure the prejudice, including any subconscious prejudice, caused by the Tribunal's consideration of the s438 information.

37. For these reasons, the primary judge could not safely conclude that a denial of procedural fairness, on an issue concerning the acceptance or rejection of the evidence of the appellant, could have had no bearing on the outcome.

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[59] As for the implied obligation of disclosure attaching to s438(2)(a), see *SZMTA* at [27].
[60] As for the implied obligation of disclosure attaching to s438(3)(a), see *SZMTA* at [23].
[61] AFM 28. As to the events surrounding the making of that decision, and the subsequent decision to "revisit" or "reopen" the case "because of jurisdictional error" as the appellant had been unaware of the first hearing, see AFM 23–56.
[62] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 344–345 [68] (Gageler and Gordon JJ).

Overruling SZMTA

38. In the alternative, if *SZMTA* requires an affirmative answer to either of issues (a) or (b) (at [2] above), the appellant would seek leave to re-open *SZMTA* to that extent. The indicia for overruling earlier High Court authority[63] are substantially satisfied here:

(a) First, to the extent that *SZMTA* is to be understood as requiring an applicant to rebut a presumption that adverse information was ignored (ie by delving into the mind of a decision-maker) that principle was not carefully worked out in a significant succession of cases. The putative First Limb (at [26(a)] above) is inconsistent with prior authority, including *Stead* (see [22] to [24] above) and *VEAL* (see [31] above), which were not expressly overruled.

(b) Secondly, although *SZMTA* was not marked by a difference between the reasons of the justices constituting the majority, it was marked by a strong dissenting judgment of two members of the 5-member Bench on the issue.

(c) Thirdly, the decision has led to considerable inconvenience. As the primary judge noted: the "working out of the consequences of the approach set out in *SZMTA* presents some challenges";[64] the analysis is "difficult to understand and apply";[65] and is "'convoluted' and 'confusing'".[66]

(d) Fourthly, there is no suggestion that the decision has been independently acted upon in a manner that militates against reconsideration.

Ground 2

39. In the Court below, the appellant endeavoured to persuade the primary judge that the Tribunal's adverse credit findings could have been influenced by the s438 materials. To that end, both parties submitted that, with the sole exception of the "state false name" offence, all of the convictions referred to in the s438 information were "not rationally capable of affecting the Tribunal's assessment of the appellant's credibility".[67] The appellant submits that this was an error.

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[63] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438–439.
[64] CAB 61 [34].
[65] CAB 62 [40].
[66] CAB 65 [48].
[67] CAB 58 [20] and 60 [31].

40. The appellant's continued breaches of court orders and the law, constituted by "driving while disqualified" and "drink driving", were rationally capable of undermining his credibility or reliability on account of the anti-social and inherently deceptive nature of the conduct involved. There is no warrant for assuming that only the "state false name" offence could have had any bearing on the Tribunal's assessment of the appellant's credibility or reliability. On the contrary, it would have been open to the Tribunal to reason that a person who had frequently disobeyed the law might similarly disregard their obligations to make truthful and accurate statements in a protection visa application, and to give truthful and accurate evidence in a hearing.

41. The confined approach to credibility reasoning attributed to the Tribunal[68] was perhaps more apposite to the strictures of a criminal trial, with its close attention to the rational capability of the evidence in question to affect the assessment of the likelihood of a fact in issue (relevantly, whether a person is credible) and the closely circumscribed scope for cross-examination as to credibility.[69] But such a rigorous approach was inapposite in considering to what use an administrative decision-maker (in an inquisitorial tribunal not bound by any rules of evidence) might have put the material.

42. Even in the context of criminal trials, criminal conduct not involving dishonesty has been considered to be capable of undermining credibility. In *R v Lumsden*,[70] Hulme J (with whom Mason P agreed) was concerned with the question of whether offences of "drug supply" and "having goods reasonably suspected of being stolen in custody" were matters capable of having "substantial probative value" for the purposes of the credibility rule and its exception in s103 of the *Evidence Act* 1995 (NSW). Hulme J answered that question in the affirmative, holding that drug supply was "indicative of a disregard of a law designed and calculated to reduce harmful conduct within the community".[71]

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[68] CAB 66–67 [52]–[58].
[69] See, for example, s103 of the *Evidence Act* 1995 (Cth).
[70] [2003] NSWCCA 83 (3 April 2003).
[71] Ibid at [56].

43. The Supreme Court of Canada has recognised that criminal convictions not related to dishonesty can impact on credibility. In *R v Corbett*,[72] Dickson CJ adopted the following statement from a United States decision:[73]

> What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know. So it seems to us in a real sense that when a defendant goes onto a stand, "he takes his character with him ...". Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey, as in the case at bar, though the violations are not concerned solely with crimes involving "dishonesty and false statement."

44. Australian tribunal decisions have applied driving records as a "make-weight" to fashion adverse character assessments. In *Bartlett v Minister for Immigration and Border Protection*,[74] the Tribunal said at [45]:

> The applicant's driving offences may, at first blush, be considered relatively minor when viewed against the balance of his history. However, the theme of attendant recklessness and indifference to laws and rules governing the operation of a motor vehicle is, in and of itself significant. Indeed, laws that protect road users "go to the essential safety of the community". Other parts of his criminal history are perhaps more serious than his driving/traffic convictions. But, his failure to understand right from wrong when operating a motor vehicle – be it drinking and driving, driving without a licence, or driving an unregistered vehicle – can only lead me to conclude that this component of his history further confirms the seriousness of his offending and potential risk to the community.

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[72] [1988] 1 SCR 670 at [25].
[73] Citing *State v Duke*, 123 A.2d 745 (N.H. 1956), at 746; quoted with approval in *State v Ruzicka*, 570 P.2d 1208 (Wash. 1977), at 1212.
[74] [2017] AATA 1561.

45. Such reasoning reflects the experience of ordinary life, that a person might justifiably be regarded as less trustworthy in the eyes of a decision-maker where that person has repeatedly broken the law, even where the laws broken gave effect to norms other than honesty.

46. In any event, it is impossible to exclude the possibility that the Tribunal might have reasoned in this way, whether consciously or subconsciously. For the primary judge to raise the possibility of other possible and less damaging interpretations of the s438 information[75] was to enter upon the merits, because it substituted her Honour's own view of the proper reasoning to be applied in respect of that information for the way the Tribunal may have reasoned.

47. In considering the materiality of the denial of procedural fairness, the primary judge was in error in not considering the entire criminal history of the appellant, as the Tribunal may have done.

Part VII: Orders sought

48. The appellant seeks the following orders:

1. Appeal allowed with costs.

2. Set aside orders 2, 3, 4 and 5 made by Mortimer J on 4 December 2019, and in lieu thereof, order that:

   a. the appeal be allowed with costs;

   b. orders 3 and 4 made by Judge Harnett on 17 May 2016 be set aside;

   c. in their place, order that:

      i. the decision of the Refugee Review Tribunal dated 4 November 2014 be quashed;

      ii. the matter be remitted to the Administrative Appeals Tribunal, differently constituted; and

      iii. the first respondent pay the appellant's costs.

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[75] CAB 67 [55].

Part VIII: Estimate for hearing

49. The appellant estimates that he will require 1½ hours in oral submissions.

DATED: 2 October 2020

DAVID HOOKE SC
Jack Shand Chambers
Telephone: (02) 9233 7711
Email: hooke@jackshand.com.au

SEBASTIAN HARTFORD DAVIS
Banco Chambers
Telephone: (02) 9376 0600
Email: hartforddavis@banco.net.au

STEPHEN LAWRENCE
Black Chambers
Telephone: (02) 8542 4974
Email: stephen@blackchambers.com.au

DANIEL REYNOLDS
Eleven Wentworth
Telephone: (02) 8023 9016
E: danielreynolds@elevenwentworth.com

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M77 of 2020

BETWEEN: **MZAPC**

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

LIST OF LEGISLATIVE PROVISIONS

1. *Migration Act* 1958 (Cth), s438 (current version - the section has not been amended).