HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M77/2020
File Title:	MZAPC v. Minister for Immigration and Border Protection &
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument
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Important Information

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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 OUTLINE OF ORAL SUBMISSIONS

Part I: PUBLICATION

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

Part II: ARGUMENT

1. The appellant's application for a Protection Visa (Class XA), under the criteria specified in s 36(2)(a) and (aa) of the Act, depended heavily, if not entirely, on acceptance of his claims: AS [8]; CAB 55 [6].

2. The appellant's application was refused by a delegate of the Minister on 4 June 2014. The following day, a file that included a certificate under s 438 of the Act and accompanying documents, including the appellants' criminal record, was sent by a delegate of the Minister to the Tribunal: AFM 6–7, 9, 14–22. The appellant applied to the Refugee Review Tribunal for a review of the delegate's decision on 27 June 2014: CAB 54 [4]. Neither the existence of the notification pursuant to s 438, nor the contents or particulars thereof, were disclosed to the appellant. It is common ground that this amounted to a breach of the Tribunal's obligation of procedural fairness: *Minister for Immigration v SZMTA* (2019) 264 CLR 421 at [29]-[38] (JBA 440–443).

3. The key issue in the appeal, as formulated by the Minister, is whether "the appellant needed to prove that the Tribunal actually had regard to (as opposed to "could have had regard to") the information subject to the notification": RS [32], emphasis added.

4. The Tribunal determined the claim in the appellant's absence on 19 September 2014 (AFM 28ff), affirming the decision under review. The Tribunal said that "it had considered all the material before it in relation to his application": AFM 29 [3], emphasis added.

5. The question of fact as to materiality identified by the majority in *SZMTA* (JBA 442 [46]) should be informed by the nature of the departure from the rules of procedural fairness: *Minister v WZARH* (2015) 256 CLR 326, [58]–[60] (Gageler and Gordon JJ) (JBA 368–369). The nature of the departure in this case is explained in *SZMTA* at [29]–[30] (JBA 437–438).

6. The materiality question, at a level of generality, is whether the denial of procedural fairness deprived the appellant of the possibility of a successful outcome: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 (JBA 164). The appellant

submits that materiality is demonstrated in the present case by reference to the following facts:

a. The central issue for the Tribunal was whether it accepted the appellant's claims, particularly that at CAB 55, line 22 [8.5];

b. The Tribunal's determination of the application depended at least in part on the findings at [22]–[23] of the reasons: see Mortimer J at CAB 57 [17]–[18];

c. The Tribunal rejected critical aspects of the appellant's claims. Although it did not find the appellant to be a liar, it expressly said that it had "concerns about the appellant's credibility": see also the matters in AS [15];

d. The Tribunal's findings at [22]–[23] of its reasons were adverse to the appellant's credit, even if only to the extent found by Mortimer J at CAB 67, line 35 [56];

e. There is no explanation in the reasons of the Tribunal, or in the material before it (other than the s 438 material) for the Tribunal's "concerns about the appellant's credibility": compare *MZAOL v Minister for Immigration and Border Protection* [2019] FCAFC 68 (JBA 500 [77]); see also *CQZ15 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 24 at [81]);

f. The s 438 material reflected adversely on the appellant's credibility, and was material that was of its nature credible, relevant and significant: *VEAL* [16]–[19] (JBA 300–2).

7. On the foregoing facts, the denial of procedural fairness is shown to have deprived the appellant of *the possibility* of a successful outcome. Although the adverse s 438 material formed no part of the Tribunal's reasons, it formed part of the material before the Tribunal, all of which the Tribunal had said it had "considered", it was not disavowed by the Tribunal, and the "way was open" (*Kioa v West* (1985) 159 CLR 550, 602–3 (JBA 124–125)) for the material to have worked to the prejudice of the appellant.

8. The respondent's submissions on the appeal (eg at RS [32]) are logical *only* if it be assumed, adversely to the appellant and favourably to the respondent, that the Tribunal definitely did <u>not</u> consider the s 438 material; a matter not proved in this case. In the absence of proof that the Tribunal did not consider the adverse material, there is no barrier

to the appellant establishing that he was deprived of the *possibility* of a successful outcome: Reply [2]–[7].

9. The presumption identified by the majority in *SZMTA* at [47] is not engaged in this case, because:

a. The Tribunal said in its first decision (AFM 29 [3]) that it had considered "all the material before it relating to his application", which plainly included the s 438 material. This evidence is fatal to the respondent's position on the appeal;

b. Mortimer J (at CAB 63 [41]), following *MZAOL* (JBA 498–500 [69]–[76]), wrongly elevated the permissive language of *SZMTA* [47] to a prescription. This Court should affirm as part of its reasoning that this aspect of *MZAOL*, and the very recent decision in *CQZ15* at [82], are incorrect;

c. There is no evident justification for the adverse view of credit, other than the s 438 material, which was credible, relevant and significant;

e. There is a conceded irregularity in the decision-making process going to the very matter in respect of which the Minister submits regularity should be presumed;

d. The Tribunal's decision predated *SZMTA*, and the Tribunal may not have appreciated the requirements of disclosure or the need to address the issue in its reasons: AS [34(c)];

e. The respondent cannot exclude the possibility that the s 438 material had a subconscious effect on the Tribunal in reaching its decision: eg *VEAL* at [19] (JBA 302);

10. In the alternative that the presumption identified by the majority in *SZMTA* at [47] cannot be disengaged, it should be overruled for the reasons given by Nettle and Gordon JJ in *SZMTA*: AS [38].

Dated: 5 March 2021

David Hooke