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 REPLY SUBMISSIONS

Part I: Certification

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

Part II: Reply

2. The respondent's contention that an applicant must prove that adverse material was considered before a denial of an opportunity to comment on that material can amount to jurisdictional error is directly contrary to *Kioa v West*.[1] There, this Court set aside the decision of a tribunal for failure to afford procedural fairness in respect of adverse information that was *not* referred to in the Tribunal's reasons and was *not* found to have been considered. Brennan J held at 603 that:

> Evidently the delegate did not rely on this allegation in making his decision, for his statement of reasons ... did not refer to it[.] Although it is right to conclude that the allegation in par 22 formed no part of the delegate's reasons, it was contained in the material before him which he proposed to consider in coming to a decision. (emphasis added)

3. Similarly, Mason J held at 588:

> Although the statement of reasons makes no reference to the contents of par 22, it does not disavow them. As the paragraph was extremely prejudicial, the appellants should have had the opportunity of replying to it. (emphasis added)

4. Wilson J held at 602–3:

> The learned Solicitor-General for the Commonwealth argues that because there is no mention of par 22 in the delegate's reasons for this decision the failure to provide Mr Kioa with an opportunity to be heard in respect of it cannot be material. But the situation must be judged in terms of the procedure followed before the decision was made. The delegate received a submission recommending that he sign orders for deportation and it cannot be denied that the concern expressed in par 22 was a factor which contributed to and supported the recommendation ... In any event, it is not necessary to show that the allegation contained in par 22 did work to the prejudice of Mr and Mrs Kioa. It is enough to show that the way was open for it do so. (emphasis added)

5. *Kioa* thus holds that it is sufficient that adverse material was *before* the decision-maker. This is inconsistent with the respondent's meretricious proposition (**RS** [6], [32], [40]) that an applicant deprived of procedural fairness is required to prove that adverse material was actually considered because, absent that fact, the material "could not have resulted in the Tribunal making a different decision". That proposition is contrary to *Balenzuela v De Gail*[2] (not mentioned in the RS), *Kioa*, *Stead*,[3] *VEAL*[4] and what the appellant submits is the correct reading

[1] (1985) 159 CLR 550.
[2] (1959) 101 CLR 226.
[3] (1986) 161 CLR 141.
[4] (2005) 225 CLR 88.

of the majority reasoning in *SZMTA*. As well as being contrary to authority, it is wrong in principle, because it is predicated upon the wrong test for materiality. An applicant for judicial review is required to prove that he could have been deprived of a different outcome. An applicant is not required to prove that he was deprived of a different outcome. The respondent's submissions are predicated upon the latter test, because they assume that an applicant must prove every condition necessary for the different outcome to have occurred. On that view, the appellant would be required to prove, at least, that:

(a) the tribunal in fact had regard to the adverse information;

(b) the adverse information in fact caused the tribunal to make the decision that it made; and

(c) submissions from the appellant on the adverse information would in fact have produced a different result.

6. If *any* of these necessary conditions did not exist, then it would follow (as the respondent says of the condition at [5(a)] above) that affording procedural fairness "could not have resulted in the Tribunal making a different decision". Yet that is not what the law requires. The demonstration of materiality does not require proof of the actual existence of every fact necessary for a different result.

7. As the respondent elsewhere accepts, all that is required is that the appellant demonstrate that he could have been deprived of a different outcome. Clearly enough, it is open to a respondent to seek to demonstrate that the existence of any of these necessary conditions was *impossible*. For example, if the Minister could show that it was impossible for the Tribunal to have had regard to the information, then it would follow that compliance with the law "could not possibly have made a difference".[5] But so long as there remains a *possibility* of a different outcome, then the applicant has discharged its onus. The essential error in the Minister's submission is thus to replace a test of possibilities with one of probabilities, or in other words, to replace "could" with "did". To accept the Minister's submission would be to overturn a long line of authority.[6]

8. The respondent's submission, if accepted, would amount to a watershed in the development of Australian administrative law. While the respondent contends that this is an

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[5] *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [110] (Gordon J).
[6] *Holford v Melbourne Tramway and Omnibus Co Ltd* [1909] VLR 497 at 526; *Balanzuela v De Gail* (1959) 101 CLR 226 at 234; *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147, and the authorities applying *Stead* set out at fn 39 of the Appellant's Submissions dated 2 October 2020. See also more recently *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897 at [4] (Kiefel CJ and Gageler J); *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [72] (Nettle J), [95], [103], [109]–[110] (Gordon J).

unremarkable application of *Stead*, *SZMTA* and *MZAOL*, he does not confront the practical consequences of the view for which he contends. Nor does the respondent engage meaningfully with the primary judge's observations in relation to the test her Honour considered she was bound to apply, and its effect on her Honour's decision-making in this case.[7]

9. In *SZMTA*, the inferences described at [47] enured to the benefit of the applicant, assisting him in the proof of his case. But as Mortimer J observed,[8] such inferences can work the opposite way where an applicant has to prove that *adverse* information was *taken into account* (rather than proving that *helpful* information was *ignored*). In such cases, if the Minister's approach be right,[9] those inferences make it significantly more difficult, if not impossible in practical terms, for an applicant to succeed. The inferences identified in *SZMTA* at [47] become presumptive barriers standing in the way of a conclusion of materiality, which an applicant must overcome by adducing affirmative evidence to rebut them.

10. As Gordon J observed in *ABT17 v Minister for Immigration and Border Protection*,[10] such an approach "places the onus on an individual to show why public power should be re-exercised, without the necessary facts, or the ability to obtain the necessary facts." How is an applicant to prove that a tribunal considered a document, where the reasons for decision are silent on that point? If the demonstration of materiality requires an applicant to affirmatively prove the tribunal's subjective state of mind, then an applicant must adduce evidence of the tribunal's unstated state of mind and reasoning process. The need for such evidence would be compounded by the non-availability of any inferences in the applicant's favour arising from the absence of any evidence from tribunal members.[11] A decision-maker's duty of "material observance"[12] of its procedural obligations should not vary according to the availability of an ordinarily unavailable body of evidence. It does not appear that this is what the majority in *SZMTA* contemplated (but if they did, it is respectfully submitted that *SZMTA* is wrong to that extent).

11. There is a large body of law, beginning at least with this Court's decision in *Hardiman*,[13] cautioning administrative tribunals and their members against taking an active part in

[7] CAB 61 [34], 62–63 [40]–[43], 64–65 [45], 65 [48], 66 [51].
[8] CAB 63 [43].
[9] RS [40].
[10] [2020] HCA 34 at [109].
[11] *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 1000 [199].
[12] *SZMTA*, supra, at [9].
[13] *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

proceedings seeking judicial review of their decisions.[14] Yet the respondent's approach in this matter would require applicants for judicial review to compel the decision-makers to become actively involved as participants in the litigation. Furthermore, the appellant would in any event have been largely *precluded* from taking such steps by legislative provisions preventing tribunal members from being required to give evidence or produce documents in court proceedings.[15]

12. This is not what the demonstration of materiality requires. Rather, as explained at AS [22]–[24], and established in *Balenzuela*, it is sufficient for an applicant to show (by way of argument) that a different outcome is logically possible or open, at which point it is for the respondent to establish that that the error could have made no difference to the result.

10 13. At RS [35], the Minister seeks to distinguish *VEAL* on the basis that the information in that case "could not be ignored". But that aspect of the Court's reasoning in *VEAL* related to the anterior question of whether there had been a denial of procedural fairness at all; that is, whether there existed an "obligation to reveal the information to the appellant".[16] That question precedes, and is conceptually distinct form, the question of materiality. That question is not in issue here, as it is common ground that there has been a denial of procedural fairness. As for the second question – materiality – the Court considered it appropriate to set the decision aside, notwithstanding an express disavowal of reliance. *A fortiori*, it should be prepared to do so notwithstanding a tribunal's *silence* on that topic. This is consistent with the submissions made for the appellant in *VEAL*: "An applicant is not required to persuade a court by way of evidence
20 not to accept the disavowal ... The decision in *Kioa v West* did not turn on whether the decision-maker in fact took the adverse material into account".[17]

14. The respondent also has no convincing answer to the appellant's submission[18] that one would not assume that the Tribunal member complied with an implied obligation of disclosure when he has *already* been shown to have failed to comply with another obligation of the exact same kind and arising in exactly the same way. It is no answer to say that in *SZMTA* there had similarly been a failure to comply with the implied obligation of procedural fairness to disclose

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[14] Ibid at 35–36; *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; *Ho v Professional Services Review Committee No 295 (No 2)* [2007] FCA 603; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 1000 [199].
[15] As to the RRT, this was the effect of s 377(5) of the *Migration Act* 2001 (Cth) as it stood until 1 July 2015. As to the AAT, this is the effect of s 66(3) of the *Administrative Appeals Tribunal Act* 1975 (Cth) as it has stood at all relevant times. This very matter troubled members of this Court in argument in *Applicant VEAL of 2002 v MIMIA* [2005] HCATrans 476 at pp34.1493–37.1610.
[16] See *VEAL*, supra, at 96–97 [17]–[19].
[17] *VEAL*, supra, at 89–90; semble at 95–97 [14]–[19] per curiam.
[18] AS [35].

the existence of the notification.[19] There, the Tribunal's error was immaterial because the s438 information was "of such marginal significance" that an opportunity to make submissions on it "could not realistically have made any difference to the result" (*SZMTA* [72]). In effect, the Court made an assumption in the applicant's favour that the Tribunal left the information out of account, but held that this could not have made a difference anyway. The statements supporting the availability of that inference were not dispositive: what was dispositive was the immateriality of the information itself. Here, this Court is being invited, apparently for the first time, to bring an end to an applicant's judicial review proceedings on the basis that a decision-maker can be expected to have complied with an implied obligation of disclosure arising in relation to s438(3)(a), when it has already been demonstrated that he failed to comply with the cognate implied obligation of disclosure in relation to s438(2)(a). It is contradictory to draw inferences from the "regular administration of the Act" in the face of proven *irregular* administration of the Act, especially where the proven irregularity is of the same kind as the regularity proposed to be inferred.

15. It is not, contrary to RS [55] and [56], "mere conjecture" to infer that the Tribunal read the material in the order in which it was arranged in the file.[20] That inference arises naturally. What *is* conjecture is to assume that the Secretary would "take steps to bring any notification to the attention of the Tribunal", when the Tribunal was not constituted until weeks later.[21]

16. Finally, the Minister inaccurately represents the Decision: contrary to RS [15], it cannot confidently be said that "the Tribunal found that the alternative explanations were not credible because they were not plausible". That is one of the *three* possible bases, identified at AS [34(a)], for the Tribunal's *express* finding that it had "some concerns about the *applicant's credibility*".[22] It cannot be concluded from the Decision alone which, or which combination, of factors caused the Tribunal to have concerns about the applicant's credibility. It is submitted that this appeal must be allowed because the Decision *could* have turned upon the adverse view of credibility, and the adverse view of credibility *could* have been based upon or influenced by the undisclosed material.

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[19] Cf RS [57].
[20] The order in which the file was arranged when provided electronically was established by the Minister's affidavit evidence, and it strains credulity to think the order was rearranged without being read.
[21] The Minister's submission at [55] overlooks that at the time the s438 material was provided to the Tribunal on 5 June 2014 (AFM 9), the Tribunal had not been constituted, the application not having been made until 27 June 2014 (CAB 76/22).
[22] Cf RS [16].

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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