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

SUBMISSIONS OF THE FIRST RESPONDENT

PART I FORM OF SUBMISSIONS

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

PART II CONCISE STATEMENT OF ISSUES

2. The issue that arises on this appeal is how materiality is to be established in circumstances where, on review of a decision made under s 65 of the *Migration Act 1958* (Cth) (**Act**), the Administrative Appeals Tribunal (**Tribunal**) receives a notification under s 438 of the Act in respect of information that is potentially adverse to the visa applicant, and the Tribunal fails to disclose to the visa applicant the existence of the notification.

3. It is not in issue that the failure to disclose the existence of such a notification constitutes a breach of an implied obligation of procedural fairness.[1] Nor is it in issue that a breach of that implied obligation of procedural fairness will constitute jurisdictional error only if the breach is material to the Tribunal's decision, in the sense that compliance with the obligation could realistically have resulted in the Tribunal making a different decision.[2]

4. The key point of difference between the parties concerns what a visa applicant in those circumstances, such as the appellant, needs to prove in order to establish that the Tribunal's decision could realistically have been different had the Tribunal disclosed the existence of the notification.

5. The appellant submits that all he was required to prove was that the potentially adverse information subject to the notification in this case "could … have been considered by the Tribunal", and that, if he had been afforded procedural fairness, the Tribunal's decision could have been different (AS [32]).

6. By contrast, the Minister submits that the primary judge was correct to hold that the appellant was required to prove that the Tribunal did consider the potentially adverse information subject to the notification. That is because, unless the Tribunal actually considered that information, disclosure of the existence of the notification (and the

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1 See *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (***SZMTA***) at [27] (Bell, Gageler and Keane JJ), [115] (Nettle and Gordon JJ).

2 *SZMTA* (2019) 264 CLR 421 at [38], [45] (Bell, Gageler and Keane JJ). The appellant's submissions recognise that it was necessary for the appellant to establish materiality, and that this required him to show that the breach of the implied obligation of procedural fairness deprived him of the possibility of a different outcome (AS [2], [22]-[23]).

provision of "a full opportunity to make submissions" about it[3]) could not have resulted in the Tribunal making a different decision. In those circumstances, to require the appellant to prove that the Tribunal actually considered the information was to do no more than to require him to prove that he was "deprived of the possibility of a successful outcome".[4]

7. In order to prove that the Tribunal considered the information subject to the notification, the appellant needed to identify "circumstances appearing in the evidence [which] [gave] rise to a reasonable and definite inference"[5] that that occurred. Indeed, he needed to rebut the conflicting inference, arising from what can be expected to occur in the regular administration of s 438 of the Act,[6] that the information subject to the notification was not considered. The appellant could not point to anything in the Tribunal's reasons, or elsewhere in the evidence, to contradict that inference. In those circumstances, the primary judge was "justified in inferring that the Tribunal paid no regard to the notified document or evidence in reaching its decision".[7] Once that finding was made (CAB 68 [58]), it followed that the appellant had failed to prove that the Tribunal's admitted breach of its implied obligation of procedural fairness was a jurisdictional error. The primary judge was correct to so hold.

PART III SECTION 78B NOTICES

8. The Minister has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). No notice is required.

PART IV MATERIAL FACTS IN CONTENTION

9. Subject to the matters identified in paragraphs 10 and 11 below, the Minister agrees with the summary of the material facts set out in AS [6]-[15] and [17]-[21]. AS [16] concerns the inferences that the appellant contends should be drawn from the Tribunal's decision record in this case. The Minister does not agree that those inferences can be drawn. That point is addressed in paragraphs 12 to 16 and 47 to 57 below.

3 *SZMTA* (2019) 264 CLR 421 at [49] (Bell, Gageler and Keane JJ).
4 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 (***Stead***) at 147 (the Court).
5 *Bradshaw v McEwans* (1951) 217 ALR 1 (***Bradshaw***) at 5 (the Court).
6 See *SZMTA* (2019) 264 CLR 421 at [47] (Bell, Gageler and Keane JJ).
7 *SZMTA* (2019) 264 CLR 421 at [47] (Bell, Gageler and Keane JJ). See also *Bradshaw* (1951) 217 ALR 1 at 5 (the Court); *Luxton v Vines* (1952) 85 CLR 352 (***Luxton***) at 358 (Dixon, Fullagar and Kitto JJ); *Holloway v McFeeters* (1956) 94 CLR 470 (***Holloway***) at 480-481 (Williams, Webb and Taylor JJ).

10. In relation to AS [11], the court outcomes report disclosed that, on 30 September 2011, the appellant was convicted of the following offences (AFM 10-22): three counts of drink driving; eight counts of driving while disqualified; one count of "state false name"; three counts of using an unregistered vehicle on a highway; two counts of using a vehicle not in a safe and roadworthy condition; one count of removing a defective vehicle label; and one count of failing to wear a seatbelt. It is not clear on what basis the appellant suggests that the court outcomes report disclosed a further offence of "state false name".

11. In relation to AS [12], although it was common ground before the primary judge that an offence in the nature of the "state false name" offence could contribute to a decision-maker forming an adverse view of a person's honesty, the Minister did not accept that there was any basis to infer that that offence had contributed to the Tribunal forming an adverse view of the appellant's honesty (CAB 60-61 [31]). To the contrary, the primary judge was correct in stating that the "Tribunal's reasons do not disclose any real assessment of the appellant's honesty at all" (CAB 67 [57]).

12. In relation to AS [16], and the Tribunal's decision record more broadly, the appellant's assertions that the Tribunal formed an adverse view of his honesty, that the Tribunal disbelieved his account "because of its adverse view of his credibility" (AS [16]) and that his credibility was "a (if not the) determinative issue" before the Tribunal (AS [34]) are not correct.

13. As the primary judge recognised (CAB 67 [56]), this was a review where the Tribunal accepted many aspects of the appellant's claims. In particular, it accepted that there was a dispute between the appellant's father and uncle over land in Punjab, and that, when he visited Punjab in 2003 or 2004, the appellant was taken to a house by his cousin, drugged and held there until his father arrived and paid an amount for his release (CAB 11 [22]). The Tribunal also accepted that the appellant stopped going to Punjab after that incident until he came to Australia in 2006 (CAB 11 [22]). However, the Tribunal did not accept that the appellant had been subject to continuing threats in relation to the land dispute, or that his relatives had a continuing adverse interest in him (CAB 11 [23]). The Tribunal gave three reasons for that finding (CAB 11 [23]):

    13.1. the appellant was able to reside in Delhi for two or three years after the kidnapping incident without facing any further harm from his uncles and his relatives;

13.2. by the time of the Tribunal's decision, the kidnapping incident was 12 to 13 years ago; and

13.3. the appellant's evidence was that, in more recent times, his father had been pressured but not actually harmed or threatened by the relatives despite having refused to sign over the land.

14. In relation to this last point, the Tribunal reasoned that, in circumstances where the dispute over the land originated in relation to the appellant's father, and the appellant's father had the ability to sign a document giving the relatives the land, then, if the relatives had actually wanted to harm the appellant because of the land dispute, they would also have threatened or harmed the appellant's father in relation to that dispute (CAB 11 [23]). The Tribunal rejected two alternative explanations for the lack of threats or harm against the father (CAB 11 [23]):

14.1. it did not accept as "credible or plausible" that, simply because the father was in Delhi rather than Punjab, this would deter the relatives from undertaking threatening or violent action against the father to obtain legal ownership of the land; and

14.2. it did not accept as "credible or plausible" that the relatives would refrain from threatening the father (but would threaten or harm the appellant) merely because the appellant's mother's brother was a policeman.

15. Before the primary judge, the appellant's argument focused on the Tribunal's use of the words "credible or plausible", and the differences in meaning between those terms. However, as the primary judge observed, "[w]hen the Tribunal used [the words] 'credible or plausible' … it did not appear … to display much consciousness about the substantive difference between the two phrases, nor to see any difference as especially material to its fact-finding" (CAB 67 [56]). Rather, the Tribunal found that the alternative explanations were not credible because they were not plausible. In both cases, the Tribunal accepted the premise underlying the appellant's explanation — that the appellant's father was in Delhi, and that the appellant's mother's brother was a policeman — but did not consider that either of those matters would realistically have deterred the appellant's relatives from threatening or harming his father if the appellant's claims were true.

16. In light of the above, there is, as the primary judge observed, no indication that the Tribunal formed any adverse view of the appellant's honesty (CAB 67 [57]). Instead, as

the primary judge put it, "[t]his was a review where the Tribunal largely accepted the appellant's narrative, and his claimed circumstances, but rejected the visa application because it was not satisfied the appellant's fears were well-founded" (CAB 67 [56]).

PART V ARGUMENT

A. GROUND ONE

(a) Introduction

17. On its review of the delegate's decision to refuse to grant the appellant a visa, the Tribunal received a notification that s 438(1)(b) of the Act applied in relation to certain information (the **notification**) (AFM 9). The Tribunal did not disclose the existence of the notification to the appellant. This amounted to a breach of an implied obligation of procedural fairness.[8] Before the primary judge, the appellant argued that this breach had the result that the Tribunal's decision was affected by jurisdictional error.

18. As the appellant accepted before the primary judge, and accepts on this appeal (AS [2], [23]), the fact that the Tribunal breached an implied obligation of procedural fairness was not sufficient to establish that its decision was affected by jurisdictional error. To establish jurisdictional error, the appellant needed to prove that the Tribunal's breach of that obligation resulted in its decision lacking characteristics necessary for it to be given force and effect by the Act.[9]

19. The Act does not deny legal force and effect to every decision that is made in breach of a legal condition or requirement, including an implied obligation of procedural fairness.[10] Rather, this Court's decisions establish that the Act incorporates a threshold of materiality before such a breach will constitute jurisdictional error.[11] Ordinarily, including where the relevant breach is a failure to disclose the existence of a notification

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8 *SZMTA* (2019) 264 CLR 421 at [27] (Bell, Gageler and Keane JJ), [115] (Nettle and Gordon JJ).

9 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***) at [24], [27]-[29] (Kiefel CJ, Gageler and Keane JJ), [64], [67] (Edelman J). See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91] (McHugh, Gummow, Kirby and Hayne JJ).

10 *SZMTA* (2019) 264 CLR 421 at [45] (Bell, Gageler and Keane JJ). See also *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (***SZIZO***) at [35]-[36] (the Court); *Hossain* (2018) 264 CLR 123 at [27]-[29] (Kiefel CJ, Gageler and Keane JJ), [65], [67], [76] (Edelman J).

11 See *Hossain* (2018) 264 CLR 123 at [29] (Kiefel CJ, Gageler and Keane JJ), [67]-[71] (Edelman J); *Wei v Minister for Immigration and Borer Protection* (2015) 257 CLR 22 at [23] (Gageler and Keane JJ). More generally, see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***) at 40 (Mason J); *Craig v South Australia* (1995) 184 CLR 163 at 179 (the Court); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (***Yusuf***) at [82] (McHugh, Gummow and Hayne JJ).

under s 438, that threshold is met only where the breach is shown to have deprived the person seeking to establish jurisdictional error of "the possibility of a successful outcome".[12]

20. Thus, in order to prove that the Tribunal's decision was affected by jurisdictional error, the appellant was required to prove that the Tribunal's failure to disclose the existence of the notification under s 438 deprived him of the possibility of a successful outcome. Put another way, it was necessary for him to prove that, if the Tribunal had disclosed the existence of the notification, that could realistically have resulted in the Tribunal making a different decision. The appellant apparently accepts that he needed to prove those things. The difference between the parties concerns what it was necessary for the appellant to do in order to discharge that burden.

21. In *SZMTA*, a majority of this Court explained the approach that should be taken by a court on judicial review in determining whether the Tribunal's failure to disclose the existence of a notification under s 438 deprived a visa applicant of the possibility of a successful outcome.[13] In *MZAOL v Minister for Immigration and Border Protection*, a Full Court of the Federal Court explained how that approach should be applied where the information subject to the notification was potentially adverse to the visa applicant.[14] The reasoning in both judgments is heavily influenced by the statutory framework, including the inferences that arise from s 438 itself. The appellant's submissions (including, in particular, AS [2(b)] and [22]-[25]) pay insufficient attention to that statutory framework.

22. By his first ground of appeal, the appellant contends that the primary judge erred by requiring him to do more than was necessary to establish that the Tribunal's failure to disclose the existence of the notification deprived him of the possibility of a successful outcome. This ground should be rejected for the simple reason that the primary judge correctly applied *SZMTA* and *MZAOL*. Those authorities, in turn, applied the now established propositions that:

    22.1. the breach of a condition on the exercise of a statutory power will only constitute jurisdictional error if the breach is material, in the sense that compliance with the

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12 *SZMTA* (2019) 264 CLR 421 at [38], [45] (Bell, Gageler and Keane JJ); *Hossain* (2018) 264 CLR 123 at [30] (Kiefel CJ, Gageler and Keane JJ), [72] (Edelman J), citing *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [56] (Gageler and Gordon JJ).

13 (2019) 264 CLR 421 at [45]-[51] (Bell, Gageler and Keane JJ).

14 [2019] FCAFC 68 (***MZAOL***) at [52]-[53], [66], [69]-[78] (the Court).

condition could realistically have resulted in a different decision;[15] and

22.2. the question whether the breach of a condition on the exercise of a statutory power is material is a question of fact,[16] in respect of which the person seeking to establish jurisdictional error bears the onus of proof.[17]

23. These submissions explain why the approach adopted in *SZMTA* and *MZAOL* is correct at the level of principle (paragraphs 24 to 46 below), before addressing how that approach applied to the facts of this case (paragraphs 47 to 57 below).

(b) Proving that the appellant was deprived of the possibility of a successful outcome

24. *SZMTA* expressly holds that the question whether a breach of a condition on the exercise of a statutory power is material, in the sense that compliance with the condition could realistically have resulted in a different outcome, is a question of fact.[18]

25. In order to answer that question in this case, it was necessary for the primary judge to make findings about "how the Tribunal in fact acted in relation to the notified document or information".[19] That is because it is only possible to determine whether a breach of a condition on the exercise of the Tribunal's power to conduct a review could have affected the outcome of the Tribunal's decision if it is first known what occurred in the course of making that decision. As Edelman J observed in *Hossain*, the assessment of whether a person was deprived of the possibility of a successful outcome "does not take place in a universe of hypothetical facts"; rather, the materiality of an error "is assessed against the existing facts before the Tribunal".[20]

26. This proposition is not unique to the Tribunal. In *Stead*, for example, the plaintiff's counsel was denied an opportunity to make submissions at trial about the reasons why the trial judge should not accept a particular witness' evidence on a particular issue. The trial judge ultimately accepted that witness' evidence on that issue, which was adverse to

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15 See notes 10 to 12 above.

16 *SZMTA* (2019) 264 CLR 421 at [46] (Bell, Gageler and Keane JJ). See also *SZIZO* (2009) 238 CLR 627 at [35] (the Court).

17 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 (***Plaintiff M64***) at [24] (French CJ, Bell, Keane and Gordon JJ); *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 (***BVD17***) at [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

18 *SZMTA* (2019) 264 CLR 421 at [46] (Bell, Gageler and Keane JJ).

19 *SZMTA* (2019) 264 CLR 421 at [50] (Bell, Gageler and Keane JJ); *MZAOL* [2019] FCAFC 68 at [66] (the Court).

20 *Hossain* (2018) 264 CLR 123 at 148 [78]; see also at [35]-[36], [50] (Kiefel CJ, Gageler and Keane JJ).

the plaintiff's case.[21] In light of that fact about the trial judge's ultimate decision, the Court was able to conclude that the denial of an opportunity to make submissions deprived the plaintiff of the possibility of a successful outcome.[22] But, had the trial judge instead acted consistently with the indication given at trial and not accepted that witness' evidence, it could hardly be said that the same conduct by the trial judge (that is, stopping the plaintiff's counsel from making submissions on the point) would have deprived the plaintiff of the possibility of a successful outcome. That illustrates that there is nothing novel in the conclusion that it is often necessary to consider the decision actually made, and the decision-making process actually adopted, in order to determine whether a jurisdictional error has occurred.

27. It will often be straightforward for a person seeking to establish jurisdictional error to prove that he or she was deprived of the possibility of a successful outcome. Where the breach of a condition on the exercise of a statutory power is, for example, a failure to have regard to a mandatory relevant consideration, it will usually be necessary for such a person to prove only that the consideration left out of account had some significance to the exercise of the power.[23] Where the breach involves a denial of an opportunity to be heard, it will often be evident that, if the person was afforded that opportunity, the outcome might have been different.[24] But that is not always the case.[25]

28. It is here that the terms of s 438 become critical. Properly construed, the effect of that provision is that, where the Tribunal receives a valid notification under s 438, it has no power to have regard to the information that is the subject of the notification unless it positively exercises its discretion under s 438(3)(a) to do so.[26] For that reason, as discussed in paragraphs 36 to 41 below, where the Tribunal has received a notification under s 438, then, absent some contrary indication in the Tribunal's reasons or elsewhere

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21 *Stead* (1986) 161 CLR 141 at 143-144 (the Court).

22 *Stead* (1986) 161 CLR 141 at 145-146 (the Court).

23 See *Peko-Wallsend* (1986) 162 CLR 24 at 40 (Mason J), recognising that a failure to take into account a relevant consideration (that is, a consideration that the Act required be taken into account) would not result in a decision being set aside if in all the circumstances that consideration was "so insignificant that the failure to take it into account could not have materially affected" the decision. See also *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at [97] (Crennan and Bell JJ).

24 See *Stead* (1986) 161 CLR 141 at 145-146 (the Court); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [80]-[81] (Gaudron and Gummow JJ), [104] (McHugh J).

25 *SZMTA* (2019) 264 CLR 421 at [49] (Bell, Gageler and Keane JJ).

26 See *SZMTA* (2019) 264 CLR 421 at [23] (Bell, Gageler and Keane JJ). See also *MZAOL* [2019] FCAFC 68 at [71]-[75].

in the evidence, a court on judicial review will be "justified in inferring that the Tribunal paid no regard to the notified document or information in reaching its decision".[27]

29. The significance of a finding that the Tribunal paid no regard to the information subject to a notification will differ depending on whether that information supported the visa applicant's claims, or was potentially adverse to them. In the former case, where the Tribunal has failed to disclose the existence of the notification (or where the notification is invalid), a finding that the notified information was not considered will suggest that a jurisdictional error has occurred, unless the information to which the notification related was "of such marginal significance to the issues which arose in the review that the Tribunal's failure to take it into account could not realistically have affected the result".[28]

30. By contrast, in the case of a notification concerning potentially adverse information (as is the case here), unless the court on judicial review finds that the information was actually considered by the Tribunal, a failure to disclose the existence of the notification (or an invalid notification) will not constitute a jurisdictional error. That is because in such a case, even if the Tribunal had disclosed the existence of the notification, the best possible outcome for the applicant would have been the same as what in fact occurred: that is, that the Tribunal paid no regard to the adverse information in making its decision.[29]

31. It is well established that "it is the plaintiff in an application for judicial review of administrative action who has the onus of establishing on the balance of probabilities the facts on which a claim to relief is founded".[30] One such fact is that the alleged error deprived the plaintiff of the possibility of a successful outcome, because unless that fact is proved the alleged error will not be jurisdictional.[31] For that reason, in this case, the

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27 *SZMTA* (2019) 264 CLR 421 at [47] (Bell, Gageler and Keane JJ).
28 *SZMTA* (2019) 264 CLR 421 at [48] (Bell, Gageler and Keane JJ).
29 The appellant suggests that, in those circumstances, a visa applicant might seek to have the Tribunal member recuse himself or herself (AS [36]). However, to suggest that the information would have provided the basis for such an application, or indeed that the outcome could have been different merely because the Tribunal member could have been different, is to engage in conjecture: see *Hossain* (2018) 264 CLR 123 at [36] (Kiefel CJ, Gageler and Keane JJ).
30 *BVD17* (2019) 93 ALJR 1091 at [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
31 See notes 10 to 12 above. See also *Hossain* (2018) 264 CLR 123 at [72] (Edelman J); *SZMTA* (2019) 264 CLR 421 at [38] (Bell, Gageler and Keane JJ).

appellant necessarily bore the onus of proving that the alleged error deprived him of the possibility of a successful outcome.[32]

32. Contrary to the appellant's submissions (AS [32]), he could not discharge that burden by proving that the Tribunal could have had regard to the information subject to the notification and that, if it had done so, its decision could have been different. That is insufficient because, if the Tribunal did not in fact have regard to notified information that was adverse to the appellant when making its decision, then logically that information cannot have affected the Tribunal's decision. That, in turn, means that the Tribunal's failure to disclose the existence of the notification could not have deprived the appellant of the possibility of a successful outcome. For that reason, in order to discharge the burden of proving that a failure to disclose the existence of the notification was a jurisdictional error, 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.[33]

33. There is nothing in that conclusion that is inconsistent with this Court's decision in *Stead* (cf AS [31]). Indeed, *Stead* supports the conclusion that a plaintiff who alleges that a denial of procedural fairness involves a jurisdictional error must prove that the alleged error deprived him or her of the possibility of a successful outcome.[34] The point of present importance is that, in cases where the court on judicial review does not find that the Tribunal paid regard to potentially adverse information subject to a notification under s 438, the visa applicant will not have discharged the burden of showing that the Tribunal's failure to disclose the existence of the notification deprived him or her of the possibility of a successful outcome.

34. Nor is there any inconsistency with this Court's decision in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[35] (cf AS [31]). That decision is distinguishable, because the Tribunal in *VEAL* had not received a notification under s 438, and thus no inferences could be drawn based on that provision. In *VEAL*, the Tribunal received a letter from a third party containing allegations adverse to the

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32 *SZMTA* (2019) 264 CLR 421 at [46] (Bell, Gageler and Keane JJ). See also *SZGUR Minister for Immigration and Citizenship v* (2011) 241 CLR 594 (***SZGUR***) at [67] (Gummow J; Heydon and Crennan JJ agreeing); *Plaintiff M64* (2015) 258 CLR 173 at [24] (French CJ, Bell, Keane and Gordon JJ); *BVD17* (2019) 93 ALJR 1091 at [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

33 *MZAOL* [2019] FCAFC 68 at [53], [78] (the Court).

34 *Stead* (1986) 161 CLR 141 at 147 (the Court).

35 (2005) 225 CLR 88 (***VEAL***).

appellant. The Tribunal did not disclose to the appellant the existence of the letter, or give him an opportunity to comment on it, because the Tribunal decided to give the letter "no weight".[36] Despite that statement, the Court held that the Tribunal's failure to give the appellant an opportunity to comment on the substance of the allegations in the letter was a denial of procedural fairness that amounted to jurisdictional error.[37] However, it was central to that conclusion that:[38]

> The information which was contained in the letter was relevant to [the Tribunal's decision whether the appellant was entitled to a protection visa] and it could not be ignored by the Tribunal. The Tribunal was able to put the information aside from consideration in its reasons only because it reached the conclusion, on other bases, that the appellant was not entitled to a visa. But that step, of putting the information in the letter aside from consideration, could not be taken before reaching the conclusion that the application should be refused.

35. By contrast, where the Tribunal receives a notification under s 438, it has no power to have regard to the information subject to the notification unless it positively exercises its discretion under s 438(3)(a) to have regard to the information.[39] Thus, in contrast to the letter in *VEAL* which "could not be ignored by the Tribunal", information subject to a notification under s 438 must be ignored by the Tribunal unless the Tribunal exercises its discretion under s 438(3)(a) to have regard to it. Any apparent inconsistency between *SZMTA* and *VEAL* is therefore explained by differences in the applicable statutory scheme.

(c) Drawing inferences from what can be expected to occur

36. Like any question of fact, the question of how the Tribunal acted in relation to the information subject to the notification was to be determined by the primary judge by inferences drawn from the evidence.[40] Here, the relevant evidence included the Tribunal's decision record (CAB 5-14), the notification (AFM 9), and the information subject to the notification (AFM 11-22).

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36 *VEAL* (2005) 225 CLR 88 at [5] (the Court).

37 *VEAL* (2005) 225 CLR 88 at [27] (the Court). Although the Court did not use the language of "jurisdictional error", in allowing the appeal from the Full Court of the Federal Court it made orders dismissing an appeal from a decision of Merkel J in which his Honour found that the Tribunal's decision was affected by jurisdictional error: see (2005) 225 CLR 88 at 89, 100.

38 *VEAL* (2005) 225 CLR 88 at [27] (the Court) (emphasis added).

39 See *SZMTA* (2019) 264 CLR 421 at [23] (Bell, Gageler and Keane JJ).

40 *SZMTA* (2019) 264 CLR 421 at [46] (Bell, Gageler and Keane JJ). In this case, the evidence adduced on the application for judicial review was supplemented by further evidence adduced on appeal, with leave of the primary judge: see CAB 55-56 [11].

37. Because the appellant bore the onus of establishing that the Tribunal had regard to the information subject to the notification, it was necessary for the appellant to identify "circumstances appearing in the evidence [which] [gave] rise to a reasonable and definite inference"[41] that that had occurred. Put another way, it "fell to the [appellant] to establish a basis for drawing the inference necessary to make out the alleged jurisdictional error".[42] In order to discharge that onus, the appellant needed to identify circumstances that "[did] more than give rise to conflicting inferences of equal degrees of probability so that the choice between them [was] [a] mere matter of conjecture".[43] He needed to show that it was "more probable"[44] that the Tribunal had in fact considered the information subject to the notification.

38. In drawing inferences from the evidence, the primary judge was entitled to be "assisted by reference to what can be expected to occur in the course of the regular administration of the Act".[45] That a court on judicial review may be assisted in drawing inferences by reference to what can be expected to occur in the course of the regular administration of the Act has repeatedly been recognised in relation to s 430 of the Act (and equivalent provisions).[46] There is no reason why that principle should not apply equally to s 438.

39. The majority in *SZMTA* explained how s 438 may assist a court in drawing inferences about how the Tribunal acted in relation to information subject to a notification, stating:[47]

> … the Tribunal can be expected in the ordinary course to treat a notification by the Secretary that the section applies as a sufficient basis for accepting that the section does in fact apply to a document or information to which the notification refers. Treating the section as applicable to a document or information, the Tribunal can then be expected in the ordinary course to leave that document or information out of account in reaching its decision in the absence of the Tribunal giving active consideration to an exercise of discretion under s 438(3). Absent some contrary indication in the statement of the Tribunal's reasons for decision or elsewhere in the evidence, a court on judicial review of a decision of the Tribunal can therefore be justified in inferring that the Tribunal paid no regard to the notified document or information in reaching its decision.

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41 *Bradshaw* (1951) 217 ALR 1 at 5 (the Court).
42 *SZGUR* (2011) 241 CLR 594 at [67] (Gummow J; Heydon and Crennan JJ agreeing).
43 *Bradshaw* (1951) 217 ALR 1 at 5 (the Court). See also *Luxton* (1952) 85 CLR 352 at 358 (Dixon, Fullagar and Kitto JJ); *Holloway* (1956) 94 CLR 470 at 480-481 (Williams, Webb and Taylor JJ).
44 *Bradshaw* (1951) 217 ALR 1 at 5 (the Court).
45 *SZMTA* (2019) 264 CLR 421 at [47] (Bell, Gageler and Keane JJ).
46 See *Yusuf* (2001) 206 CLR 323 at [35] (Gaudron J), [69] (McHugh, Gummow and Hayne JJ); *SZGUR* (2011) 241 CLR 594 at [31] (French CJ and Kiefel J), [62], [69] (Gummow J; Heydon and Crennan JJ agreeing).
47 (2019) 264 CLR 421 at [47] (Bell, Gageler and Keane JJ) (emphasis added).

40. The above passage clearly holds that, in the absence of any contrary indication in the Tribunal's decision record or elsewhere in the evidence,[48] the proper inference is that the Tribunal paid no regard to the information subject to the notification in making its decision. The appellant's submission that the above passage establishes only that the inferences to which it refers "can" be drawn, rather than "must" be drawn, is wrong (AS [28]-[29]). Administrative decision-making should not be arbitrary. Consistency in such decision-making requires that inferences arising from the "regular administration of the Act" should be drawn unless there is evidence that rebuts them. The "facts at hand" are relevant only if and to the extent that they rebut those inferences (cf AS [33]). It is not "juridically confused" to require the appellant to prove that adverse information was considered by the Tribunal (cf AS [29]), because in a case like this one, where the information subject to the notification was potentially adverse to the appellant, it was logically impossible for the appellant to prove that he was deprived of the possibility of a successful outcome unless he proved that the information subject to the notification was actually considered by the Tribunal. There is no need to "neutralise … [the] effect upon the mind of the decision-maker" (AS [36]) of information that the decision-maker did not consider.

41. For the above reasons, the onus was on the appellant to identify an "indication in the statement of the Tribunal's reasons for decision or elsewhere in the evidence" sufficient to overcome the inference that the Tribunal "paid no regard" to the information subject to the notification. It was to this onus that the primary judge referred when she referred to a "presumption" that the Tribunal paid no regard to the information if there was no exercise of the discretion in s 438(3) (CAB 66 [50]). Although the majority in *SZMTA* did not use the word "presumption", the approach taken by the primary judge was entirely consistent with that explained by the majority in *SZMTA*.

(d) Re-opening *SZMTA*

42. In the event that the Court accepts the above submission, the appellant seeks leave to re-open *SZMTA* "to the extent that [it] is to be understood as requiring an applicant to rebut a presumption that adverse information was ignored" (AS [38(a)]). That leave should be refused.[49]

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48 The question whether there was such a contrary indication is addressed in paragraphs 47 to 57 below.

49 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ)

43. *First*, for the reasons given above, that aspect of the reasoning in *SZMTA* is consistent with principles worked out in a succession of cases, and is not inconsistent with *Stead* and *VEAL*. To the extent that the reasoning of the majority in *SZMTA* may appear to differ from that in *Stead* and *VEAL*, the differences arise because materiality is a question of fact, and the inferences that can be drawn in resolving that question of fact vary with the statutory context.

44. *Second*, there was a single majority judgment in *SZMTA*, meaning that there was no difference between the reasons of the justices constituting the majority.

45. *Third*, it cannot sensibly be suggested that the reasons of the majority in *SZMTA* have given rise to "considerable inconvenience". The only basis identified by the appellant for that assertion is the comment of the primary judge that the analysis that is required is "convoluted" and "confusing". However, her Honour went on to summarise that analysis in straightforward terms (CAB 66 [50]). In the short time since *SZMTA* was decided, that decision has been relied on in a significant number of cases, and those cases do not reveal any particular difficulty in applying that decision.[50]

46. *Fourth*, as noted in the previous paragraph, a considerable number of decisions have been made on the basis of *SZMTA*.

(e) The primary judge's findings of fact were correct

47. The primary judge was correct to find, on the facts, that the Tribunal did not have regard to the potentially adverse information that was subject to the notification (CAB 68 [58]), and therefore that "the conceded denial of procedural fairness did not involve a

[50] See, eg, *CQR17 v Minister for Immigration and Border Protection* (2019) 269 FCR 367 at [43]-[52] (Jagot J), [126]-[139] (Derrington J); *MZAOL* [2019] FCAFC 68 at [41]-[79] (the Court); *Parvin v Minister for Immigration and Border Protection* (2019) 269 FCR 247 at [43]-[60] (O'Callaghan J; Perram and Perry JJ agreeing); *Hua v Minister for Home Affairs* [2019] FCAFC 158 at [33] (the Court); *BJK17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2019) 272 FCR 15 at [37]-[38] (the Court); *Chi Cong Le v Minister for Immigration and Border Protection* (2019) 272 FCR 1 at [35]-[41] (the Court); *CAQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 203 at [43] (Mortimer J), [128] (Derrington and Steward JJ); *BQQ15 v Minister for Home Affairs* [2019] FCAFC 218 at [59], [86] (the Court); *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104 at [67]-[72] (the Court); *PQSM v Minister for Home Affairs* [2020] FCAFC 125 at [132]-[155] (Banks-Smith and Jackson JJ); *CRU18 v Minister for Home Affairs* [2020] FCAFC 129 at [31]-[39] (the Court); *Matthews v Minister for Home Affairs* [2020] FCAFC 146 at [54]-[59] (the Court); *Huynh v Minister for Immigration and Border Protection* [2020] FCAFC 153 at [76]-[99] (the Court); *XFKR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 167 at [78]-[79] (the Court).

jurisdictional error" (CAB 68 [58]). The appellant failed to prove the contrary.[51] That is so for the following reasons.

48. *First*, as the primary judge recognised (CAB 66 [52]), there was no indication in the Tribunal's decision record, or elsewhere in the evidence, that the Tribunal had exercised its discretion under s 438(3)(a) to have regard to the information subject to the notification, or that it had exercised its discretion under s 438(3)(b) to disclose that information to the appellant.

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49. *Second*, the fact that the Tribunal had not exercised its discretion under s 438(3)(b) to disclose the information subject to the notification to the appellant made it difficult for the appellant to prove that the Tribunal had positively determined to take the information into account (CAB 66 [53]). As the Full Court explained in *MZAOL*, the "obvious unfairness for an applicant" of the Tribunal taking adverse information subject to a notification into account without exercising its discretion under s 438(3)(b) to disclose

20 that information to the visa applicant provides a basis to infer that the Tribunal "would not, without good reason, make an affirmative decision to have regard to notified information which it has determined should not be disclosed to the applicant".[52] Having regard to the "nature" of the information subject to the notification in this case (essentially, the appellant's own criminal record), no such "good reason" was evident (CAB 67 [57]).

30 50. *Third*, the Tribunal did not refer in its reasons to any of the information subject to the notification. Having regard to s 430 of the Act, the absence of any such reference supports the inference that the information subject to the notification was not the basis for any of the Tribunal's findings of fact.[53]

51. *Fourth*, the information subject to the notification was objectively of, at most, marginal relevance to the issues arising on the Tribunal's review.[54] Before the primary judge, the

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51 The analysis below proceeds on the basis that it was the appellant who bore the onus of establishing that the Tribunal in fact had regard to the information subject to the notification. If, contrary to the submissions in paragraphs 24 to 46 above, the Minister bore the onus of establishing that the Tribunal paid no regard to the information subject to the notification, the same matters equally demonstrate why the primary judge was correct to conclude that the more probable inference was that the Tribunal paid no regard to that information.

52 *MZAOL* [2019] FCAFC 68 at [74]-[75] (the Court).

53 See *Yusuf* (2001) 206 CLR 323 at [69] (McHugh, Gummow and Hayne JJ). See also *MZAOL* [2019] FCAFC 68 at [61] (the Court).

54 Of course, even if the information subject to the notification had been relevant, that would not provide a basis to infer that the Tribunal had regard to that information, for the reasons explained in *MZAOL* [2019] FCAFC 68 at [72], [75] (the Court); see also at [62], [65], [67].

only aspect of that information that the appellant contended was potentially relevant was the "state false name" offence in the court outcomes report (CAB 57-58 [20]). That was said to be relevant because it was capable of affecting the Tribunal's assessment of the appellant's honesty. In this Court, the appellant goes so far as to say that his credibility "was a (if not the) determinative issue" in the Tribunal's review (AS [34(a)]).

52. That submission should not be accepted. As the primary judge observed, there was "nothing in the impugned parts of the Tribunal's reasons, nor anywhere else in those reasons … which suggest[ed] that this was a review where the Tribunal had formed a clear opinion the appellant had lied" (CAB 67 [56]). Instead, as the primary judge observed, "[t]his was a review where the Tribunal largely accepted the appellant's narrative" (CAB 67 [56]); the Tribunal's decision record "[did] not disclose any real assessment of the appellant's honesty at all, let alone an assessment of a kind that might suggest its reasoning was affected by the presence of the 'State false name' conviction in the s 438 notification information" (CAB 67 [57]).

53. In light of the above, it is not surprising that the primary judge found that the "appellant has not proven that the 'State false name' conviction … actuated or affected the Tribunal's opinion of the appellant as a narrator or a claimant" (CAB 67-68 [57]). That is, the primary judge found that the appellant had failed to prove that the conviction for the "state false name" offence affected the Tribunal's assessment of the appellant <u>at all</u>. That finding was plainly open, having regard not just to the inferences addressed above, but also to the fact that the conviction was not even mentioned by the Tribunal, the record of it was "buried in the Victoria police record" (CAB 67 [55]), and the objective characterisation of that offence was not inevitably one affecting the appellant's honesty, because the context in which the appellant committed that offence "might as much suggest panic and consciousness of guilt on the part of the appellant, as any deliberate plan to deceive" (CAB 67 [55]).

54. The appellant advances three additional arguments in an attempt to demonstrate that — notwithstanding the matters addressed above — the primary judge should have found that the Tribunal had regard to the information subject to the notification. Each of those arguments should be rejected.

55. *First*, the appellant contends that the primary judge should have inferred that the Tribunal considered that information because it was "reasonably likely that the Tribunal member

read through the whole file in sequential order" (AS [34(b)]). This submission involves mere conjecture about how the Tribunal approached its task.[55] Further, it ignores the positive obligation imposed on the Secretary by s 438(2)(a), which relevantly provides that, "[i]f … the Secretary gives to the Tribunal a document or information to which [s 438] applies, the Secretary … must notify the Tribunal in writing that this section applies in relation to the document or information". The purpose of that obligation is to assist the Tribunal to comply with s 438(3) and (4) in relation to documents or information to which s 438 applies. In light of that provision, in the regular administration of the Act, it is to be expected that the Secretary would take steps to bring any notification under s 438(2) to the attention of the Tribunal, such that the Tribunal would not inadvertently consider information that is subject to a notification under s 438 without having positively exercised its discretion under s 438(3)(a) to do so.

56. *Second*, the appellant contends that the primary judge ought not to have drawn inferences based on what might be expected to occur in the regular administration of the Act because the Tribunal might not have understood s 438(3)(a) (AS [34(c)]). Again, that submission involves nothing more than conjecture. It is also contrary to the reasoning of the majority in *SZMTA*, which recognised that it is appropriate to draw inferences based on what can be expected to occur in the course of the regular administration of the Act in the absence of evidence (as opposed to speculation) that contradicts such an inference.[56]

57. *Third*, the appellant contends that the primary judge ought not to have drawn inferences based on what might be expected to occur in the regular administration of the Act because the Tribunal had not complied with an implied obligation of procedural fairness to disclose the existence of the notification (AS [35]). Again, that submission cannot be reconciled with *SZMTA*, where there had similarly been a failure to comply with the implied obligation of procedural fairness to disclose the existence of the notification, yet the relevant inferences were still drawn.

B. GROUND TWO

58. By his second ground of appeal, the appellant contends that the primary judge erred by proceeding on the basis that the appellant's conviction for the "state false name" offence

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55 For example, the appellant adduced no evidence that the documents provided to the Tribunal by the Secretary under s 418(3) of the Act were arranged in the same order as the Department's file, or that the documents on the Department's file were arranged from least to most recent rather than (as might be expected) with the most recent documents appearing at the front of the file.

56 *SZMTA* (2019) 264 CLR 421 at [47] (Bell, Gageler and Keane JJ).

was the only conviction rationally capable of affecting the Tribunal's assessment of the appellant's credibility. As the appellant acknowledges, that submission is contrary to the position contended for by both parties below (AS [39]; CAB 57-58 [19]-[20], 60-61 [31]). The appellant's counsel at trial having adopted what the primary judge described as "an appropriately restrained approach to the potential relevance of the s 438 information" (CAB 66 [54]), the appellant should not now be permitted to contend that primary judge erred by confining her analysis to the matters raised by his submissions.[57] The appellant is bound by the conduct of his case.[58] Ground 2 should be dismissed for that reason alone.

59. Further or alternatively, for the reasons given in paragraphs 47 to 57 above, the primary judge was correct to conclude that the appellant had not established that the Tribunal had regard to any of the information subject to the notification. The primary judge's relevant finding referred to the appellant's criminal record as a whole: it was not limited to the "state false name" conviction (CAB 67-68 [57]-[58]).[59] Having found that "the Tribunal's reasoning was not in fact affected by the potentially adverse information in the first place" (CAB 68 [58]), the primary judge correctly concluded that it followed that there was no realistic possibility that an opportunity to make submissions about the information would have produced a different outcome.[60] That same reasoning applies to the appellant's entire criminal history.

60. Accordingly, it is not to the point whether or not the appellant's driving-related offences were theoretically capable of affecting the Tribunal's assessment of his "credibility" (AS [40]-[43]; cf his submissions before the primary judge, which focused on "honesty" (CAB 58 [20])). Even if his convictions for driving-related offences were potentially relevant in that way, the Tribunal had no power to have regard to them absent an

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57 That is particularly true in circumstances where the appellant had already changed his argument between the trial and appeal, rendering the judgment of the Federal Circuit Court irrelevant: AS [17]; CAB 56 [14].

58 *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 (Gibbs CJ, Wilson, Brennan and Dawson JJ).

59 Apart from the "state false name" offence, none of the appellant's convictions involved any element of dishonesty. Moreover, each of the convictions were recorded in September 2011 (two years before the appellant's first protection visa application, and three years before the Tribunal's decision), and the circumstances of those offences were far removed from the circumstances underlying the appellant's claims to have a well-founded fear of persecution in India. In those circumstances, if the Tribunal had expressly relied on the information subject to the notification as a basis to form an adverse view of the appellant's honesty, there would have been a real question of whether it was reasonably open for it to do so. However, there is nothing to suggest that the Tribunal reasoned in that way.

60 *MZAOL* [2019] FCAFC 68 at [66], [78] (the Court).

affirmative exercise of discretion under s 438(3)(a), and it should be inferred that no such exercise of discretion occurred.[61] The appellant having failed to prove that his criminal record was considered by the Tribunal at all, he cannot prove that the fact that he was unable to make submissions about that criminal record deprived him of the possibility of a different decision. For that further reason, Ground 2 must be dismissed.

PART VI NOTCE OF CROSS-APPEAL / NOTICE OF CONTENTION

61. Not applicable. The Respondent has not filed a notice of cross-appeal or notice of contention.

PART VII ESTIMATED HOURS

62. It is estimated that 1.5 hours will be required for the presentation of the oral argument of the Minister.

Dated: 30 October 2020

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[61] *MZAOL* [2019] FCAFC 68 at [72], [75] (the Court); *SZMTA* (2019) 264 CLR 421 at [23], [47] (Bell, Gageler and Keane JJ).

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

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