IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M75 of 2018

BETWEEN:

CQZ15
Appellant

Minister for Immigration and Border Protection & Anor
Respondents

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I – Certification regarding publication on the Internet

1. This outline is in a form suitable for publication on the Internet.

PART II – Propositions[1]

Minister's proposed notice of cross-appeal

2. The proposed notice of cross-appeal is against the whole of the judgments of the Full Court given on 29 November 2017 (substantive), and on 14 February 2018 (costs).

3. An appeal is a procedure for correction of error: *Minister v SZVFW* [2018] HCA 30 at [30]. Orders 1 and 2 made on 29 November 2017 (CAB 94) are as sought by the Minister (CAB 61-2). No error is shown. Nor is error shown regarding Orders 1 and 2 made on 14 February 2018 (CAB 108).

4. That leaves Order 3 made on 29 November 2017. That order gives effect to the submission by the Minister as to how the appeal could be disposed of, if he were to succeed on ground 1 (**AR, [6.1]**). No error is show. Section 35A of the *Judiciary Act* cannot be satisfied.

5. The cross-appeal, the Minister admits (**MR, [3]**), is a conditional one. It is not competent: *CFMEU v Hadgkiss* (2009) 174 FCR 237 at [2], [28]-[29], [130]-[131].

6. The Minister is attempting to obtain relief from this Court which would allow him, on remitter, to argue for the opposite position to the one he took in his appeal (**AR, [12]-[14]**), noting that:
   a. correctness of *Singh* and *MZAFZ* (ss 357A and 422B do not displace the common law obligation to disclose existence of a certificate), is not in issue in this appeal;
   b. had the Minister put it in issue below, the Appellant would have argued against him then. (And would argue against him in this Court.)

7. Note when the Minister's appeals in this case and *BJN16* were reserved by the Full Court (12 and 14 September 2017), and when it was, in *BEG15*, that the Minister filed his notice of contention (in court, on 22 September 2017).

8. The course being pursued by the Minister, having regard to both this case and *BEG15*:
   a. offends against the '*basal purpose of the doctrine*' of estoppel by conduct: *Grundt* (1937) 59 CLR 641 at 674; *Thompson v Palmer* (1933) 49 CLR 507 at 547;
   b. is an attempt to set up, as a defence to the Appellant's appeal, a ground that would have been crucially relevant to his appeal below, contrary to *Anshun* (1981) 147 CLR 589 at 602, 604;
   c. brings the administration of justice into disrepute: *Rogers v The Queen* (1994) 181 CLR 251 at 286-7; *Tomlinson* (2015) 225 CLR 507 at [22], [24], [25].

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[1] In this outline, the parties' submissions will be referred to as follows: Appellant's Submissions – **AS**; Minister's Submissions – **MS**; Appellant's Reply – **AR**; Minister's Reply – **MR**.

The *ratio* of *Singh* and *stare decisis*

9. The Appellant submitted below that the *ratio* of *Singh* was that failure to disclose existence of a certificate is jurisdictional error (**AS, [36]**); and the Minister was inviting the court to fall into error, by asking it to depart from its earlier decision without first finding it to be wrong (**AS, [38]-[39]**).

10. *Stare decisis* is a principle of law, reflecting and giving effect to: one common law of Australia; an integrated system of courts. It is not merely a matter of practice and procedure, or of judicial comity: Beazley, Vout and Fitzgerald, *Appeals and Appellate Courts* (2014) at [3.26] (*cf* **MS, [14]**). It is the duty of an intermediate court of appeal to find that its previous decision was wrong, before departing from it: *Gett v Tabet* [2009] NSWCA 76 at [277]-[279], [294]-[296]. The pre-emininent way in which the law develops, when there is a recent decision of an intermediate court of appeal where the point was fully argued, is by seeking special leave. It was done in *Singh*.

11. The Appellant's analysis of *Singh* to derive its *ratio* is correct (**AS, [41]-[42]**). The material were these, and only these: the Secretary had given a certificate to the tribunal; the tribunal had not disclosed its existence to the applicant. The Minister does not refute any aspect of that analysis.[2]

12. '*In this case*' (*Singh* at [52]), procedural fairness required the tribunal to not only disclose existence of the s 375A certificate, but to give a copy of it to Mr Singh. This is because '*in this case*' (*Singh* at [53]), giving it would not undermine the confidentiality that s 375A is designed to protect.

***Minister v WZARH* (2015) 256 CLR 326 and *Hossain v Minister* [2018] HCA 34**

13. Errors in the procedures by which administrative decisions are made can be variously different. The consequences of such errors are to be considered having regard to statute and common law.

14. One form of error is not giving an opportunity to the affected person to deal with credible, relevant and significant (potentially) adverse information: *Kioa v West* at 629.[3] Another, for a decision-maker to inadvertedly mislead the person into not taking a step that she would have taken: *Aala*; *Muin*. Yet another, where the procedure that is adopted in and of itself causes an unfairness: *WZARH* at [38], [45]-[46] (Kiefel, Bell and Keane JJ); [60], [62], [64], [67] (Gageler and Gordon JJ).

15. Whether the form of error is adjudged to be a breach of procedural fairness,[4] because adjudged to be of sufficient gravity (*Hossain* at [19]), and thus jurisdictional error (*Aala* at [59]; *Hossain* at [31]), is ultimately conclusory, for the same reasons that jurisdictional error is a functional, conclusory concept: *Kirk* at [64]; *Hossain* at [18]-[20], [24]-[25].

16. The above does not mean one elevates into the enquiry '*What does the common law, in the hearing rule, require?*', some speculation into whether the decision could not have been any different had there been a proper hearing (when there has not been one). To do so would distort the common law, given that its '*concern ... is with procedures rather than with outcomes*': *WZARH* at [55].

17. Procedural fairness requires the tribunal to disclose, to every applicant who appears before it, that it had received from the Secretary a s 438 certificate, irrespective of what that individual would say in response, precisely because otherwise she never does get a say: **AS, [46]-[47]**; **AR, [23]-[26]**.

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2 Note explanation by the Minister regarding his appeal in *Singh* as '*all-or-nothing submission*' (**AS, fn 18; AR, fn 12**), necessarily premised on an acceptance that those facts were the only material ones.

3 With respect to Part 7 of the Act, see 424AA and 424A (to be read with s 422B).

4 *Cf Hossain* at [30]. Contrast *Aala* at [59]-[60]: '*Unless the limitations ordinarily implied on the statutory power is to be rewritten as denying jurisdictional error for "trivial" breaches of the requirement of procedural fairness, the bearing of the breach upon the ultimate decision should not itself determine whether prohibition under s 75(v) should go. ... Cases said to turn upon "trivial" breaches are often better understood on other grounds*'. See also *Aala* at [17].

18. It is always the case that disclosure of the existence of a certificate might have made a difference to the course of the hearing. For one thing, the applicant could have made submissions as to exercise of the discretion in s 438(3). Or, even without being given a copy, she could have submitted it might be invalid (obliging the tribunal to consider the issue), and that the documents should be given to her.[5] To say none of those steps might have been taken, or that none could have made any difference to the decision that might ultimately have been made, is to unavoidably engage in an analysis that is not directed to enforcing the limits of legality, but attempts a re-run of the administrative action.

19. The Full Court in *Singh* was correct to hold that non-disclosure of the existence of a certificate is an error of sufficient gravity.[6] Correct, because compliance with that obligation might always make a difference to the decision which the tribunal might make, after it followed proper process. In terms of legal analysis, 'certificate' cases are no different to *WZARH*.

The invalid certificate

20. The certificate given by the Secretary to the RRT was invalid (CAB 87, [74]), and, after receiving, the RRT determined it would not decide the review favourably to the Appellant (see s 425(2)(a)). If some notion of 'acting upon' could be relevant in this appeal, the conclusion must be that the RRT did 'act upon' that invalid certificate (**AR, [17], [32]**).

21. In any event (and more fundamentally), the Minister's appeal was against final orders. An error (if any – none is shown) in the interlocutory ruling is no consequence (**AR, [16], [28]-[32]**).

Discretionary refusal of relief on the ground of futility

22. The test is 'forward-looking' (**AS, [51]-[58]**):
    a. arguably always, when the error is denial of procedural fairness (*Lee v Minister* (2007) 159 FCR 181 at [1], [49]-[51], [53], [69]; see also *Nobarani* [2018] HCA 36 at [48]);
    b. certainly, in the case of a tribunal's decision which affirms a Minister's decision to refuse a protection visa (principles from *Aala*; *Bhardwaj*) (**AS, [51]-[53]**),

    and the Minister has no aswer to the proposition that, on that test, the documents behind a certificate could not possibly be relevant (**MS, [38]; AR, [33]**).

23. A 'backward-looking' test cannot be correct. A re-enactment of the process that should have been adhered to by the tribunal (but was not), with the court evaluating all possibilities as to how that process (the hearing under the Act, conformably with fairness) may have run had there been no error with it, for the purpose of the court being satisfied that the tribunal's decision could not have been different, would breach the separation of powers principle (**AS, [55]-[58]**).

24. The 'chameleon principle' may support the validity of a Cth statute which confers powers or duties on either administrative bodies or on courts. It has no application to s 75(v) (**AR, [34]**). The Minister is unable to point to any authority for the contrary proposition. *Pasini* is not on point.

Dated: 10 September 2018

Lisa De Ferrari

Catherine Symons

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5 This, irrespective of any attempt by the tribunal to evaluate relevance: **AR, [26.3]** noting *CCM15*.

6 That the error, failure to disclose the existence of a certificate, is a jurisdictional one, is precisely what the Minister challenged in his application for special leave to appeal, which this Court refused.