IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M75 of 2018

BETWEEN:

CQZ15
Appellant

and

Minister for Immigration and Border Protection
First Respondent

10 **Administrative Appeals Tribunal**
Second Respondent

APPELLANT'S SUBMISSIONS

Part I – Certification regarding publication on the Internet

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

PART II – Concise statement of issues

2. The appeal turns on whether the documents which the First Respondent (the **Minister**) sought to put into evidence in the Federal Circuit Court were relevant to the Appellant's application for judicial review of the decision of the Second Respondent (the **AAT**).

   2.1 If the documents were not relevant, they were not admissible. If they were not
20 admissible, there was no error in the orders of the Federal Circuit Court setting aside the decision of the AAT and remitting to it, for determination according to law, the Appellant's application for review of the Minister's decision.

   2.2 The Appellant contends (as he did in the Full Court) that the documents were not relevant to disprove the existence of jurisdictional error by the AAT (breach of common law procedural fairness, more particularly the hearing rule).

   2.3 The Appellant also contends (as he did in the Full Court) that the documents were not relevant to whether, given the existence of jurisdictional error, relief might have been refused by the Federal Circuit Court on the sole basis sought to be argued by the Minister, namely futility.

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3. With respect to 2.2 above, the issue that is presented is how was the Full Court able to depart from the decision of another Full Court (*Minister for Immigration and Border Protection v Singh*[1]), without first finding that earlier decision to be plainly wrong.

4. With respect to 2.3 above, the issue that is presented is what is the correct approach to be adopted by a Ch III court when considering whether, in the exercise of its discretion, the constitutional writs will not issue, in circumstances where:

   4.1 there has been a breach by the AAT of its obligation to afford common law procedural fairness to an applicant appearing before it;

   4.2 accordingly, the AAT's decision is '*regarded, in law, as no decision at all*'[2]; and

10 4.3 there is no 'independent basis' upon which the Ch III court could conclude that the same decision[3] would have been made by the AAT, or would be made by the AAT on remitter.

PART III – Certification regarding s 78B of *Judiciary Act 1903*

5. The Appellant has considered whether notice should be given in compliance with s 78B of the *Judiciary Act 1903*. He has formed the view that, in respect of the issue of what a Ch III court can do, in considering whether relief for breach of procedural fairness might be refused on the ground of futility, it should be given. He has given it.

PART IV – Citation of judgments below

6. The decision of the Full Court is reported. See: *Minister for Immigration and Border*
20 *Protection v CQZ15* (2017) 253 FCR 1.

7. There are two decisions of the Federal Circuit Court. The first decision, reported, dealt with the ruling by Judge Riley on, effectively, admissibility of the documents sought to be put into evidence by the Minister. See: *CQZ15 v Minister for Immigration and Border Protection* (2016) 315 FLR 127.

8. The second decision, not reported, relevantly dealt with the consequences of the ruling, having regard to the authorities at that time, namely *MZAFZ v Minister for Immigration*

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1 (2016) 244 FCR 305 (***Singh***) (Kenny, Perram and Mortimer JJ). This Court dismissed the Minister's application for special leave to appeal: *Minister for Immigration and Border Protection v Singh* [2017] HCATrans 107 (Keane and Gordon JJ).

2 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (***Bhardwaj***) at 614-5 [51] (Gaudron and Gummow JJ), 618 [63] (McHugh J), 645-7 [151]-[153] (Hayne J). See also: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (***Plaintiff S157***) at 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 206 [52] (the Court).

3 This is the decision to affirm the Minister's decision under s 65 of the *Migration Act 1958* (Cth) (the **Act**), to refuse the grant of a protection visa to the Appellant.

and Border Protection,[4] and *Singh*. See: *CQZ15 v Minister for Immigration and Border Protection* [2017] FCCA 130.

PART V – Narrative statement of relevant facts found or admitted

9. The Appellant is a citizen of Iran (Core Appeal Book (**CAB**) 50 [2]). On 21 November 2012, he applied for a protection visa (CAB 71 [1]). In broad terms, his claims were of fear of persecution on the grounds of actual and imputed political opinion, religion, having left Iran illegally, and membership of particular social groups (people who fail to adhere to stict Islamic mores or who are westernised, and failed asylum seekers) (CAB 50 [2]).

10. On 7 October 2013, a delegate of the Minister refused the Appellant's application for a protection visa (CAB 71 [1]).

11. Also on 7 October 2013, another delegate of the Minister purported to issue a certificate under s 438(1)(a) of the Act and notification under s 438(2) (collectively, the **certificate**) (CAB 71 [3]; Appellant's Book of Further Materials (**ABFM**) 10).

12. On 10 October 2013, the Appellant applied to the Refugee Review Tribunal, which later became the AAT,[5] for review of the delegate's decision (CAB 71 [1]).

13. Sometime after the Appellant had applied to the AAT, the Secretary of the Department, pursuant to s 418 of the Act, gave to the Registrar the documents in his possession or control which he considered to be relevant to review of the decision, including the certificate (CAB 72 [4]).

14. On 24 December 2014, pursuant to and in compliance with the duty in s 425 of the Act, the AAT invited the Appellant to appear before it on 9 April 2015 (CAB 72 [5]).

15. On 12 February 2015, another delegate notified the AAT, under s 438(2) of the Act, that s 438(1)(b) applied in relation to '*information provided to [the Department] as an allegation relevant to [an identified file]*', because it had been given to the Minister in confidence (the **notification**) (CAB 71 [6]; ABFM 11).

16. On 9 April 2015, the AAT conducted a hearing with the Appellant (CAB 71 [7]).

17. It was, at all times, not disputed by the Minister that the AAT never disclosed to the Appellant the existence of either the certificate or the notification (CAB 52 [9]; 72 [7]).

18. On 15 October 2015, the AAT affirmed the delegate's decision (CAB 4).

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4 (2016) 243 FCR 1 (***MZAFZ***) (Beach J).

5 Although some of the steps which occurred before the AAT affirmed the delegate's decision involved the Refugee Review Tribunal, for ease of reading in the remainder of Part V the Appellant will refer generally to the tribunal as 'the AAT'.

19. On 11 December 2015, the Appellant applied to the Federal Circuit Court for judicial review of the AAT's decision. His application was out of time, but an extension was given (CAB 51-2 [3]-[8]).

20. On 11 May 2016, the Federal Circuit Court made orders requiring the Minister to file a court book (CAB 72 [8]; ABFM 1-2).

21. On 20 May 2016, the Minister filed a court book, with an index (CAB 72 [8]; ABFM 3-9). That court book included the certificate and the notification, but not the documents that were behind them. In fact, their non-reproduction was expressly noted (CAB 72-3 [9]-[10]).

10 22. On 7 September 2016, judgment was handed down in *MZAFZ*.

23. On 15 September 2016, the Appellant filed an amended application for judicial review (CAB 29-34).

24. On 22 September 2016 and 6 October 2016, first the Appellant and then the Minister filed their respective submissions in the Federal Circuit Court (CAB 73 [12]).

25. On 12 October 2016, the Minister electronically filed, without leave (and without prior notice to the Appellant of his intention), an affidavit affirmed by Vincenzo Murano (**first Murano affidavit**) which exhibited: the certificate; the notification; the documents behind the certificate; the documents behind the notification (CAB 73 [12]).

26. The Appellant objected to the filing of the first Murano affidavit and sought its removal
20 from the court file. The Minister declined to seek leave to remove the affidavit from the court file (CAB 73 [12]).

27. On 20 October 2016, Judge Riley heard the Appellant's objection to the first Murano affidavit having been filed, without leave, without notice to the Appellant, and in the face of what Beach J had held in *MZAFZ*. The Minister maintained at the hearing that he wanted to rely on the materials exhibited to the first Murano affidavit. Judge Riley upheld what was formulated, in the orders, as the Appellant's objection to the court reading the first Murano affidavit (CAB 47).

28. The parties position at the end of the *ex tempore* ruling, was that her Honour could determine the remaining issues on the submissions, without a further hearing.

30 29. On 19 December 2016, the Full Court of the Federal Court handed down its decision in *Singh*.

30. There was correspondence with the Federal Circuit Court regarding what it should do, whilst the Minister's application for special leave to appeal in *Singh* was pending (see reference to a submission by the Minister that the court should wait, at CAB 54 [12]).

31. On 30 January 2017, Judge Riley handed down her decision, and made orders quashing the decision of the AAT and remitting to it the matter of the Appellant's application for review of the delegate's decision, to be determined according to law (CAB 48-57, 58-9).

32. On 20 February 2017, the Minister filed his appeal from the decision of Judge Riley (CAB 60-3).

33. On 12 May 2017, this Court dismissed the Minister's application for special leave from the Full Court's decision in *Singh*.

34. Prior to the hearing of his appeal in this matter, the Minister filed in the Federal Court an affidavit affirmed on 29 August 2017 by Vincenzo Murano (**second Murano affidavit**). It did little more than exhibit, in a sealed envelope, the first Murano affidavit (CAB 79 [41]).

35. On 29 November 2017, the Full Court upheld the Minister's appeal, and remitted the matter to the Federal Circuit Court (CAB 94).

Part VI – Argument

Jurisdictional error – denial of common law procedural fairness

36. In the court below, the Appellant argued that it was clear that the Full Court in *Singh* had decided (by reasoning that was applicable *a fortiori* in the case of s 438 of the Act[6]), that common law procedural fairness required the AAT to disclose to an applicant for review the fact that it had been given a certificate under s 375A of the Act. Failure by the AAT to disclose the existence of the certificate, irrespective of what documents or information were covered by that certificate, was jurisdictional error. (CAB 81 [50])

37. The Minister did not advance any submission that *Singh* was plainly wrong. This was the correct position to adopt, given this Court had not long before refused his application for special leave to appeal in that case.

38. The Appellant argued that, unless the court below departed from *Singh* (and, on its own authorities, it could not do so unless it first held that *Singh* was plainly wrong[7]), it was an open and shut case of jurisdictional errors on the admitted facts that neither the existence of the certificate, nor the existence of the notification, had been disclosed by the AAT to the Appellant. It followed that the documents behind the certificate and the notification could not be relevant to any '*fact in issue*', at the point of the enquiry of whether there had been jurisdictional error.

39. The Minister's position was that, somehow, *Singh* could be distinguished. The argument was to the effect that, if only the court would admit into evidence the documents and would consider them, it might then conclude that there had been no denial of procedural

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6 The Minister did not argue, either in the court below or in response to the application for special leave, that the reasoning from *Singh* might not apply because of differences between s 375A and s 438.

7 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at 560 [27]-[29] (the Court); *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 519 [61] (the Court).

fairness. The Appellant said the Minister's position presupposed that jurisdictional error could be 'negatived', by embarking on a factual analysis at the end of which the court might come to the conclusion that there had been '*no practical injustice*' in an applicant for review not having had dislosed to him/her the documents which the AAT had received under cover of a s 438 certificate.[8]

40. Effectively, the court below accepted the submission by the Minister that *Singh* could be distinguished. The Appellant says that the court below erred in so doing.

41. The context for considering what, precisely, was decided by the Full Court in *Singh*, is as follows.

10 41.1 This was an appeal by the Minister from the decision of Judge Jarrett who had found, following *MZAFZ*, that the AAT's failure to disclose the existence of a s 375A certificate was a denial of procedural fairness and jurisdictional error.[9] Before Judge Jarrett, the Minister had made no attempt to put into evidence the documents behind that certificate. The documents were not in evidence for any other reason.

41.2 The Minister's grounds of appeal were:[10]

> 1. The Court below erred in holding that the Second Respondent (the **Tribunal**) denied the First Respondent procedural fairness, and thereby made a jurisdictional error, by not disclosing to the First Respondent that a delegate of
20 the Appellant had issued a certificate under s 375A of the *Migration Act 1958* (Cth) (the **Act**).
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> ...
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> 3. ... the Court below erred in holding that s 357A of the Act did not operate to displace any general law obligation of procedural fairness in so far as the Tribunal would otherwise have been obliged to disclose to the First Respondent that a delegate of the Appellant had issued a certificate issued under s 375A of the Act.

41.3 Relying on the difference between s 375A and s 438 (considered in *MZAFZ*), the Minister submitted to the Full Court in *Singh* that:[11]

30 > ... the existence of a certificate issued [under s 375A] was not something which could, in any event, enliven an obligation of procedural fairness requiring the certificate's disclosure ... the existence of the certificate was not something which affected an applicant's rights, interests or legitimate expectation.

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8 For ease of reading, where it is not necessary to distinguish between a certificate plus notification given pursuant to s 438(1)(a), and a notification given pursuant to s 438(1)(b), the Appellant will refer to that document as a 's 438 certificate'.

9 (2016) 313 FLR 1.

10 *Singh* at 311 [19].

11 *Singh* at 313 [28]-[29].

> ... reliance [by Judge Jarrett] upon *MZAFZ* was misplaced because s 438 explicitly permitted the information subject to a certificate to be disclosed to an applicant which was not so under s 375A.

42. The Full Court dismissed the Minister's appeal. In doing so, the Full Court held that Judge Jarrett was correct in holding that the non-disclosure by the AAT to the person appearing before it of the existence of the s 375A certificate was a breach of common law procedural fairness, and jurisdictional error.[12] More particularly, the Full Court:

42.1 approved the reasoning of Justice Beach in *MZAFZ*, in respect of s 442B;[13]

42.2 held that s 357A constituted no impediment to common law procedural fairness applying in relation to disclosure of a s 375A certificate;[14]

42.3 found that the content of that fairness obligation at common law was to disclose the existence of the s 375A certificate;[15] and

42.4 found that, unless by the giving of the certificate the very confidentiality which s 375A was designed to protect might be compromised, the obligation extended to giving that certificate to the applicant.[16]

43. The Minister's argument for distinguishing the Full Court's decision in *Singh*, seemingly (but not in truth) on the facts, was broadly along these lines.

43.1 *In Singh,* the Full Court had observed that[17] no submission had been made that the documents behind the certificate were irrelevant to the issues under review (meaning, under review by the AAT), and that any such submission would have required for its assessment that the Court examine the documents itself.[18]

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12 *Singh* at 307 [3]: '*The principal issue on the appeal is whether the Tribunal was required to disclose the existence of the certificate to Mr Singh. For the reasons which follow, we are of the view that it was, and that the conclusion of the Federal Circuit Court in this regard were correct*'.

13 *Singh* at 315 [39].

14 *Singh* at 315 [40].

15 *Singh* at 317 [52]; and see also at 319 [64].

16 *Singh* at 317 [53]-[54].

17 *Singh* at 310 [16].

18 The observation by the Full Court that '*no submission was made to this Court that the material ... was irrelevant*', must have been directed, entirely or at least primarily, to lack of such a submission on the part of the Minister. In particular, it was explained by the Minister below, in his written submissions, that his non-pressing for admission of that material was as a consequence of the Minister abandoning certain grounds of appeal that went to the question of whether or not the AAT had complied with the obligation in s 359A of the Act, to give to the applicant for review particulars of adverse information.

43.2 Further, the Full Court had stated that,[19] for future cases, the Minister should provide the confidential information '*manually in a sealed envelope with a clear statement on the front of it as to its contents*'.

43.3 Accordingly, the Minister argued, the Full Court must have impliedly accepted that, in some other case, it would be relevant for the court to consider the documents behind a certificate. The Minister further argued that relevance would rest in showing that (see CAB 91 [88]):

(a) there had been no denial of procedural fairness (because, e.g., the documents were irrelevant to the issues under review); or

10 (b) relief should be refused on the discretionary ground of futility.

This is the argument which the court below accepted (CAB 88 [77], [79], 92 [89]).

44. The answer to the Minister's argument that this case could be distinguished from *Singh* is, so far as the point at [43.3(a)] is concerned, that the Full Court in *Singh* dismissed the Minister's appeal because it upheld the decision of Judge Jarrett who had found that there existed an obligation of fairness requiring the AAT to disclose to the applicant the existence of the s 375A certificate, which obligation had been breached. The *obiter* remarks by the Full Court in *Singh*, which were prompted by the half-hearted attempt by the Minister to put into evidence the documents behind the certificate, cannot detract from what was in fact decided.

20 45. Effectively, in the court below the Minister made submissions (see CAB 85-6 [66]-[67], [72], recording them) along very similar lines to the submissions he had made to this Court in *Minister for Immigration and Border Protection v WZARH*.[20] As in *WZARH*, the Minister relied on statements made by Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*.[21] As in *WZARH*, the Minister misinterpreted those statements.

46. Contrary to the approach taken by the Full Court in this case (CAB 85-6 [68]-[69]), the correct position is as follows.

46.1 If there is jurisdictional error, because the administrative decision-maker failed to do what common law procedural fairness (in the hearing rule) required it to do,
30 '*practical injustice*' is necessarily shown (and see CAB 86 [70]-[71], recording the Appellant's submission to the court below).

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19 *Singh* at 319 [67].

20 (2015) 256 CLR 326 (***WZARH***).

21 (2003) 214 CLR 1 (***Ex parte Lam***) at 14 [38].

46.2 Further, a finding of jurisdictional error (which can only be made after the Court has paid close regard to the terms of the statute, including any privative clauses), *ipso facto* establishes materiality of the error.[22]

47. In these 'certificate cases', what is required by fairness in its essentially practical nature[23] has been determined. It was determined by the Full Court in *Singh*. Fairness requires a process of decision-making during which the AAT will disclose, to an applicant who has applied for review of a Minister's decision, that it has received a s 438 certificate. Fairness does **not** require that applicant to '*demonstrate what would have occurred if procedural fairness had been observed*'.[24] It follows that one simply does not get to enquire, as the Minister contended should occur (CAB 80 [45]), and as was accepted by the Full Court (CAB 85-8 [68], [69], [72], [73], [76], 91 [87]), whether the documents or information that sit behind a s 438 certificate were '*material to the review*' (CAB 80 [45], the Full Court noting the Minister's submission).

48. Given there was jurisdictional error (see *Singh*), and that neither the documents behind the certificate nor the documents behind the notification were relevant to 'negative' that finding (see *Singh*; *WZARH*), the only issue should have been that identified at [43.3(b)] – whether the documents might be relevant to a fact which the Minister wanted to put in issue *viz.* that the decision would not have been any different had breach of procedural fairness not occurred (or, perhaps, that no different decision will be made by the AAT on remitter).[25] This issue, the Appellant accepts, was not something which had been argued and decided in *Singh*, nor, it would seem, in the earlier decision of *MZAFZ*.

Refusal of relief for futility – in the case of a denial of common law procedural fairness

49. The starting point for consideration of this issue is this Court's decision in *Ex parte Aala*.

50. *Ex parte Aala* concerned breach of procedural fairness by the Refugee Review Tribunal, occasioned by an erroneous statement to the applicant for review as to the materials that

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22 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 (***Ex parte Aala***) at 91 [17] (Gaudron and Gummow JJ)).

Cf some of the arguments which have been made, regarding 'materiality' and 'jurisdictional error', in other appeals presently reserved before this Court, such as *Hossain v Minister for Immigration and Border Protection*, and *Shrestha v Minister for Immigration and Border Protection.*

23 *Ex parte Lam* at 14 [37] (Gleeson CJ).

24 *WZARH* at 342 [58] (Gageler and Gordon JJ).

25 In the court below, the Minister's submissions were more consistent with the position that the decision would not have been any different, i.e., a backward-looking test, although he carefully avoided taking a position on whether a backward-looking or a forward-looking test should be applied. The flavour of the Minister's submissions can be discerned by how the Full Court found for him – see CAB 87 [73].

were before it. The prosecutor gave evidence about what he would have said, had he not been mislead by that statement.

51. The prosecutor sought the writs of mandamus and prohibition, with certiorari in aid. This Court's reasons focused on prohibition, because the Minister's main submission was that s 75(v) of the Constitution did not extend to issuing prohibition for denial of procedural fairness. The Minister's subsidiary submission was that, assuming the writ of prohibition might go, relief should nevertheless be refused on the basis that the breach made no difference to the outcome.[26] This invited a backward-looking analysis, which Justice McHugh adopted.[27]

10 52. It is convenient to set out a number of paragraphs from the reasons of Justices Gaudron and Gummon in *Ex parte Aala*:[28]

> No doubt the discretion with respect to all remedies in s 75(v) is not to be exercised lightly against the grant of a final remedy, particularly where the officers of the Commonwealth in question do not constitute a federal court and there is no avenue of appeal to this Court under s 73 of the Constitution. The discretion is to be exercised against the background of the animating principle described by Gaudron J in *Enfield City Corporation v Development Assessment Commission*. Her Honour said:
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> > "Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows
> 20 that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less."
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> Some guidance, though it cannot be exhaustive, as to the circumstances which may attract an exercise of discretion adverse to an applicant is indicated in the following passage from the judgment of Latham CJ, Rich, Dixon, McTiernan and Webb JJ in a mandamus case, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*. Their Honours said:
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> 30 > "For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of

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26 Although the arguments that were run, and thus the Court's reasons, dealt with prohibition, the same position attains in respect of the writ of mandamus. See: *Ex parte Aala* at [54].

27 See, e.g., at 122 [104]: '*In this case, however, the denial of natural justice did not affect the outcome. After analysing the reasons of the ... Tribunal and the history of the proceedings, the best conclusion is that the Tribunal would have found that the prosecutor did not have a well-founded fear of persecution even if it had had the four statements before it*'.

28 At [55]-[59], footnotes omitted, emphasis added

> a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld."

When dealing apparently with certiorari and declarations, Lord Denning MR in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* said:

> "He may be debarred from relief if he has acquiesced in the invalidity or has waived it. If he does not come with due diligence and ask for it to be set aside, he may be sent away with nothing. If his conduct has been disgraceful and he has in fact suffered no injustice, he may be refused relief."

The reference by the Master of the Rolls to the refusal of relief because the applicant in fact suffered no injustice requires further attention. There are authorities which suggest that, where the complaint is one of denial of procedural fairness, the nature of the alleged irregularity may be a matter going to discretion to deny a remedy on the footing that, in any event, no different result would have been reached.

It is one thing to refuse relief on the ground of utility because, as Lord Wilberforce put it, '*[t]he court does not act in vain*'. For example, the application for an administrative determination may be one which, irrespective of any question of procedural fairness or individual merits, the decision-maker was bound by the governing statute to refuse. Or the prosecutor's complaint may be the refusal by the decision-maker of an opportunity to make submissions on a point of law which must clearly have been answered unfavourably to the prosecutor. Again, the decision under review may have no legal effect and no continuing legal consequences may flow from it. In such a situation, the reasoning in *Ainsworth v Criminal Justice Commission*, where the remedy refused was certiorari, indicates that prohibition will not lie.

However, the conditioning of a statutory power so as to require the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction. The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures. ...

53. Although the principle from *Stead v State Government Insurance Commission*[29] was applied in *Ex parte Aala*, that case (*Stead*) required consideration of the circumstances when breach of the rules of natural justice by a court will require that a party be granted a fresh trial.[30] Different issues come into play when the breach is by an administrative decision-maker, particularly when s 75(v) of the Constitution applies, securing '*a basic element of the rule of law*'.[31] To make one obvious point, in such a case the governing principle is that the constitutional writs will go in respect of jurisdictional error.

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29 (1986) 161 CLR 141 (***Stead***).

30 See also *Nobarani v Mariconte*, presently reserved before this Court.

Different issues again are at play, and the principle from *Stead* won't apply, when the error by a court resulted in a party receiving no hearing at all. See *DWN042 v The Republic of Nauru* (2017) 92 ALJR 146 at 151 [20]-[21] (Keane, Nettle and Edelman JJ).

31 *Plaintiff S157* at 482 [5] (Gleeson CJ). See also, generally, *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 at 901-3 [38]-[49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

54. Other cases may and do arise, in the context of the Act and review of a decision of the Minister made pursuant to s 65 (including ones involving visas other than protection visas), where the jurisdictional error is other than denial of procedural fairness. Again, while the principle from *Stead* will be applicable, particular care will need to be paid to the precise jurisdictional error.

55. In this particular case of breach of procedural fairness, occurring as it did in respect of a decision of the AAT purportedly made pursuant to ss 414 and 415 of the Act, and which involved review of a decision of the Minister to refuse to the Appellant the grant of a protection visa, the following matters are important:

10 55.1 The AAT's duty in s 414(1) remains unperformed. This is so, even if the AAT's decision is not set aside, given that that decision is to be '*regarded, in law, as no decision at all*'.[32]

55.2 If the matter were remitted, the AAT would be required to discharge its duty by reference to the facts as they existed at that time (including the situation in Iran, as relevant to the claims made by the Appellant). The AAT's task would be to decide whether there was a real chance of persecution of (or real risk of significant harm to) the Appellant if he were to be returned to Iran, which would require the AAT to consider the foreseeable future, looking forward from that point in time.

56. Returning to the issue in this case, i.e., whether Judge Riley erred in her ruling because
20 the documents were relevant to a fact the Minister wanted to put in issue, *viz.* that the decision would not have been any different (or, perhaps, that no different decision will be made by the AAT on remitter), the Appellant says as follows.

57. First, the proper test is forward-looking, for a number of reasons.

57.1 The considerations identified in the above quoted passages from *Ex parte Aala*, all support the conclusion that the person is not to be deprived of a hearing according to law (meaning, relevantly, one still to occur that is not affected by the breach).

57.2 The duty of the administrative decision-maker remains unperformed. There is, in law, no decision at all. And it is not for a Ch III court to, effectively, attempt to re-enact what would have happened (but for the breach), including as to how the
30 exercise of possible functions and powers conferred by the Act on the AAT, with some attendant restrictions, may have played out.[33]

It may be noted that, in *Lee v Minister for Immigration and Citizenship*,[34] the Full Court

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32 *Bhardwaj* at 614-5 [51].

33 See, e.g., ss 424, 424AA, 424A, 424B and 427 of the Act.

34 (2007) 159 FCR 181 at 183 [1] (Moore J), 194 [51] (Besanko J), 198 [69] (Buchanan J).

of the Federal Court decided that the proper test is the forward-looking one.

58. Secondly, on the forward-looking test, it will be impossible for a court to say that the future decision will not be any different. In the case of review by the AAT of a decision of the Minister refusing to grant a protection visa, that future decision will depend on the evidence (including country information) as at that time.[35]

59. Thirdly and following from 57.2 above, a backward-looking test is not available because, for the purposes of withholding relief, a Ch III court would need to engage with the counterfactual of what would have happened at the hearing, had there been no breach. The counterfactual assumes, contrary to what in fact happened, that the AAT did inform the applicant for review that it had received a certificate from the Minister and further, as required by *Singh*, that it gave the applicant a copy of that certificate. The question that is then presented is: What can the court do?

60. In considering that question, it must be borne in mind that:

60.1 the applicant is not required to go into evidence about what he/she would have said or done;[36]

60.2 the court does not know what the applicant may have said or done, including because the court does not know what knowledge the applicant might bring to understanding the significance to him/her of:

(a) what is disclosed on the face of the certificate;

(b) the documents / information to which that certificate is directed, should the AAT exercise the discretion in s 438(3) in favour of disclosure.

The court could do nothing less than speculate about what the AAT might have said or done in response to what the applicant might have said or done (which is unknown). The court would be attempting to put itself in the shoes of an administrative decision-maker, for the purposes of first considering and then ruling out, as that decision-maker, all

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35 Conceivably, there can be extreme cases where relief will be refused on any test, including forward-looking, for example, where the applicant for a protection visa has since died. However, plainly the Appellant's case is not an extreme or unusual case at all. Further and in any event, refusal of relief in such a case would, again, have nothing to do with the documents behind the certificate.

Further, it may be accepted that different issues will arise where, for example, the AAT's decision was made on two truly independent bases, and one of those was not affected by any form of jurisdictional error. Again, not this case.

36 *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511 at 524-525 [57]-[58] (the Court); *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541 at 557-559 [87]-[89] (the Court); *WZARH* at 342-3 [58]-[60] (Gageler and Gordon JJ).

possible scenarios favourable to the applicant.[37]

61. On a backward-looking test, the documents behind a s 438 certificate could not possibly be relevant to withholding relief because, constitutionally, it is not the role of a Ch III court to engage with that level of reconstruction of what would or might have occurred with the decision-making process, had there been no breach of procedural fairness.

62. To the extent that:

62.1 s 476(1) of the Act purports to vest on the Federal Circuit Court authority to engage in the above-identified speculation;

62.2 s 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth) purports to vest that same jurisdiction on the Federal Court, when hearing an appeal from the Federal Circuit Court exercising jurisdiction conferred by s 476(1),

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those provisions infringe the principle of separation of powers.[38]

63. Put differently, and with specific reference to s 75(v) of the Constitution. The role of any Ch III court vested with jurisdiction to issue the constitutional writs is '*neither more nor less than the enforcement of the rule of law over executive action*'.[39] Absolutely clear

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37 In *SZQGA v Minister for Immigration and Citizenship* (2012) 204 FCR 557, Barker J said as follows (at 590-1 [157]): '*The position, as noted above, in relation to denial of procedural fairness is less ambiguous. Ultimately the decision in Ex parte Aala, following Stead, is that denial of procedural fairness, while not falling into a distinct category of its own, will often lead to the effective invalidation of an impugned decision. One can understand how this is so. It will often be extremely difficult to say what decision might have been made by an administrative decision-maker if there had been no denial of procedural fairness in a given case — and it is not for the review court to speculate. To try to reconstruct a decision-making process or to rework the apparent basis upon which a decision has been made, in order to state with any confidence what the result might have been or would have been but for denial of procedural fairness, is likely to be a speculative and unproductive task and certainly one likely to lead to injustice, because the judicial reviewer is not equipped and is not charged with responsibility to make the sort of administrative decision that the primary decision-maker has been set up to determine*'.

See also: Aronson *et al*, *Judicial Review of Administrative Action and Government Liability* (6th ed) (2017), at [7.380]: '*A second problem is that the task can easily descend into a form of merits review, in the court essentially determines what it considers was the appropriate outcome*'.

38 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271-2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

39 *Church of Scientology v Woodward* (1956) 154 CLR 25 at 70 (Brennan J).

See also: *Enfield City Corporation v development Assessment Commission* (2000) 199 CLR 135 at 157 [56] (Gaudron J) (the passage is quoted by Justices Gummow and Gaudron in *Ex parte Aala*, and is reproduced above).

See further: Gageler, "The legitimate scope of judicial review: the prequel" (2005) 26 *Australian Bar Review* 303 at 304-6 (under the heading "Constitutional foundations").

As one aspect of the rule of law, and relevantly to the need for equality of application of that rule to those *'exercising executive and administrative powers'* and those *'who are or may be affected by the exercise of those powers'*, the Federal Circuit Court should not, relying on *Attorney-General (NSW) v*

cases where relief would be futile are one thing. Cases that require the court to think and act as the administrative-decision maker, when its role is in truth to enforce the limits of legality of the action of that decision-maker, are quite another.

64. The documents behind the two certificates in this case could not have been relevant to any arguable '*fact in issue*' arising from a desire of the Minister to prevent the issuing of constitutional writs. There was no error in the orders made by Judge Riley, and the Full Court was in error (CAB 91-2 [88]-[90]) in setting those orders aside.

Part VII – Orders sought

65. The appeal is allowed.

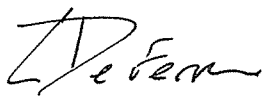
66. Orders 1, 2 and 3 made by the Full Court of the Federal Court on 29 November 2017 be set aside and, in lieu thereof, there be an order that the First Respondent's appeal to that Court be dismissed.

67. The First Respondent pay the Appellant's costs of this appeal.

Part VIII – Estimate of time

68. The Appellant estimates he will require 45 minutes to 1 hour to present his argument.

Dated: 28 June 2018



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Quin (1990) 170 CLR 1 at 35-6 (Brennan J), routinely refuse relief to applicants for protection visas on the basis that they are impermissibly seeking merits review, but uphold discretionary defences by the Minister that, precisely, invite merits review.