

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:



No S 135 of 2018

BEG15
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

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ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Outline of the propositions that the first respondent intends to advance in oral argument

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2. The appellant's case in this appeal turns on two propositions:
 - a. First, invalidity – the issue is described in the First Respondent's outline in SZMTA.
 - b. Second, a notification of either an invalid, or a purportedly valid, certificate under s 438 of the Act to a Tribunal that is not disclosed to the applicant, denies the applicant practical procedural fairness because the applicant is denied the opportunity to be heard on whether the certificate is valid or invalid, affecting whether conduct of the review, the statutory rules to be applied to the conduct of the review and the decision by interfering with the disclosure otherwise required by s 430 of the Act.

Invalidity (see also points [5] to [7] of Respondent's Outline in SZMTA)

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3. *Appeal Grounds 1-3* There was no effective dispute below in either the court at first instance or on appeal that the certificate was invalid on its face.^{1 2}

¹ [2016] FCCA 2778 at [58] (CAB 50:37-51:8).

² [2017] FCAFC 198 at [2] (CAB 67:21-37)

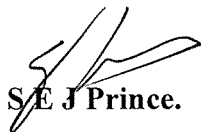
4. The error by the Full Court was to conflate jurisdictional error based on the *invalidity* of the certificate with the nature of the jurisdictional error which could be relevant where a *valid* certificate was issued.
5. The correct approach to the consequence of the invalidity of the certificate issued for the purposes of s 438 of the Act was taken by Beach J in *MZAFZ* at [40] to [44]³. First, the purported issue of an invalid certificate by the delegate of the Minister infected the process or procedure adopted by the Tribunal in relation to such documents; second, in acting on the invalid certificate, the Tribunal's process of consideration of whether to make disclosure under s424AA or s424A would necessarily be influenced by the incorrect belief of the applicability of s438; and third, the Tribunal's consideration of its own obligations and functions under s438, which it is required to consider, must have been effected by the false premise of the validity of the certificate.
6. A further consequence of invalidity is that the Tribunal has not conducted the review in accordance with the statutory processes which it was obliged to apply, namely the process of review under s 430 of the Act. It is a requirement of section 430(1)(d) of the Act that the Tribunal must refer to documents and other material that formed a basis for findings of fact. However, section 438(3)(b), when validly engaged, turns the obligation to disclose such documents into a discretion to do so.
7. The Full Court's approach, introduces extraneous considerations to the question of invalidity flowing from a breach of the Act by a decision maker⁴. Namely, that the question of validity of the Tribunal's act is determined by reference to the *effect of the breach* on the particular prospects of the particular appellant.
8. It is sufficient if the invalid certificate has materially affected the tribunal's decision. In the present instance, the invalid certificate has materially affected the tribunal's decision by sending it down a wrong statutory path. The invalid certificate has wrongfully invoked s 438 of the Act, under which the disclosure of any matter is discretionary, and prevented the tribunal from making its decision under s 430 of the Act under which the Tribunal must refer to the evidence or any other material on which the findings of fact were based.

³ (2016) 243 FCR 1 at 11

⁴ *SAAP v Minister for Immigration and Citizenship* (2005) 228 CLR 294 at [77], [78] and [83] per McHugh; [173] per Kirby J; [205]; [208]-[209] per Hayne J

Procedural Fairness

9. *Appeal Grounds 4 and 5.* The Full Court's approach to procedural fairness promotes an assessment by the court of the likely impact that the underlying documents would have had on the Tribunal in the absence of any reference to the material in the Tribunal's decision.
10. But any assessment beyond establishing the relevance of documents as favourable, neutral or unfavourable to the appellant's visa application involves an impermissible consideration of the merits of the visa application rather than the legality of the decision making process undertaken by the Tribunal.
11. In this sense, the Appellant's submissions are consistent with the reasoning of White J in *SZMTA v Minister for Immigration and Border Protection* [2017] FCA 1055 at [52]-[53] being heard concurrently with this appeal.
12. Where even a purportedly *valid* certificate is not given to an applicant to the Tribunal, the question of procedural fairness concerns whether the applicant is denied an opportunity to know of the existence of the certificate and make submissions about the validity of the *certificate*⁵ as the validity or invalidity of the certificate affects the procedure – under s 438 or s 430 of the Act – by which the decision is to be made⁶. In any event, even if regard is had to the underlying documents, they are of a prejudicial nature and their impact on the mind of the Reviewer cannot be excluded.
13. Section 422B does not assist the Minister because the requirements of procedural fairness arising from s 438 are not excluded by s422B they are embraced by it. The requirements of procedural fairness inherent in s 438 are of the same nature of those in s425- the section is to operate in a procedurally fair way s422B does not turn it into a strict algorithm.


S/E J Prince.

⁵ *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 315 at [49], [51], [52] and [58]; *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 at 13 [51] to [53] and [55].

⁶ In *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 315, it was accepted that not knowing of the existence of a certificate (even if valid) necessarily limits an applicant's right to participate in the hearing on that issue.