IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S135 of 2018

BETWEEN:

BEG15
Appellant

and

10 **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

SUBMISSIONS OF THE FIRST RESPONDENT

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Part I: Certification

1. The first respondent, the Minister for Immigration and Border Protection (**Minister**), certifies that these submissions are in a form suitable for publication on the Internet.

Part II: Issues

2. The issues that arise in this appeal are as follows.

3. *First*, whether the provision to the second respondent, the Administrative Appeals Tribunal (**Tribunal**), of a certificate purportedly but not validly issued pursuant to s 438 of the *Migration Act 1958* (Cth) (**Act**) necessarily (that is, in itself) results in jurisdictional error on the part of the Tribunal.

4. *Secondly*, whether the Tribunal in the present case acted on a certificate, conceded to be invalid, in any way that resulted in the Tribunal falling into jurisdictional error.

5. There was also argument in the Full Court as to whether the Tribunal denied the appellant procedural fairness by not disclosing to him the existence of the certificate or its contents, disclosing the extent to which it was proposing to take the underlying material into account, and inviting him to make submissions as to its validity and how (if at all) the Tribunal should exercise its powers in s 438(3)(b) with respect to those documents. The Minister makes some submissions about this below, in the event that his understanding that the appellant does not press any separate procedural fairness argument is incorrect.

6. *Finally*, if issues of procedural fairness do arise, there is an anterior question whether s 422B of the Act excludes any general law procedural fairness obligations in respect of the certificate. This question arises as a result of the Minister having filed a notice of contention on 31 May 2018: Core Appeal Book (**CAB**) 89.

Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

7. The Minister has considered whether notices are required to be issued pursuant to s 78B of the *Judiciary Act 1903* (Cth) and has formed the view that they are not required.

Part IV: Contested facts

8. The facts relevant to the present appeal, the procedural background, and the reasons given by the Tribunal and the primary judge are set out at [1]-[18] of the judgment of the Full Court of the Federal Court: CAB 67-72.

9. The Minister generally agrees with the appellant's summary of the background to the present case in Part V of his submissions (**AS**). Further, it is not in dispute that the Tribunal did not raise the certificate with the appellant. However, several factual issues should be noted.

10. The appellant appears to hint, at AS [14], that the summary of the earlier Tribunal's findings, contained in one of the documents subject to the certificate, had some influence on the reconstituted Tribunal's reasoning. That is contrary to findings made below (CAB 54 [66], 76 [33]) which were clearly correct. The Tribunal's reasons indicate that it had read the first decision for itself (CAB 8 [9]); and there was no error in that.

11. It is suggested that the Tribunal accepted the validity of the certificate and proceeded on that basis (at AS [26], [46]). To the contrary, there is no evidence that the Tribunal ever turned its mind to what, if anything, the certificate required or permitted it to do. It may well not have engaged with that issue, given that the documents covered by the certificate had no bearing on the issues in the review. On this issue the appellant bore the onus.[1]

12. The position which the Full Court is said *not* to have adopted (AS [31]) – that the certificate had no effect on the Tribunal's performance of its statutory task – was at least implicit in the findings of the primary judge (summarised at CAB 71-72 [16]-[17] and endorsed at CAB 76 [33]). No actual step taken or not taken on the basis of the certificate has been identified.

13. The conclusion which the Full Court is said to have rejected (AS [32]) was not one expressed by the primary judge at CAB 54 [66]. Further, there is no evidence to support the assertion, which the appellant made in the Full Court and has repeated at AS [32], that one of the documents covered by the certificate was the means by which

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1 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 616 [67] per Gummow J, 634 [91] per Heydon J, 623 [92] per Crennan J.

the Tribunal found out the outcome of the earlier proceedings (the Tribunal itself having been a party to those proceedings).

Part V: Argument

Section 438 and jurisdictional error

14. Section 438 was inserted into the Act by the *Migration Reform Act 1992* (Cth) as part of a suite of reforms to the migration legislation consequent upon the establishment of the former Immigration Review Tribunal.[2] It confers discretions on the Tribunal, in the context of a review under Part 7 of the Act, in relation to a document or information to which the section applies, to "have regard to any matter contained in the document, or to the information" and to "disclose any matter contained in the document, or the information, to the applicant". Relevantly, s 438 only applies to a document or information if the Minister "has certified, in writing, that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate ... that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed": subpara (1)(a).

15. The exercise of the discretions in s 438(3) may, in some cases, displace the Tribunal's duties in Division 4 of Part 7 of the Act. For example, the Tribunal may decide not to disclose to the review applicant a matter contained in the document or information of which it would, otherwise, be obliged to give clear particulars under s 424A(1) or which would need to be raised with the review applicant in order to give to him or her a hearing of the type required by s 425(1).

16. The implications of this are twofold.

17. *First*, if the Tribunal believes that information or a document is subject to s 438, when it is not, it might take a step that is contrary to its procedural duties in Division 4 of Part 7 of the Act (such as those contained in ss 424A(1) and 425(1)), and thereby make a jurisdictional error. That may occur if, for example, the Minister issues a

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2 Section 438 was then numbered s 166GC. It was renumbered by the *Migration Legislation Amendment Act 1994* (Cth). It has not been relevantly amended since its enactment.

certificate for the purposes of s 438(1)(a) which does not specify a reason that could form the basis for a claim by the Commonwealth for public interest immunity.

18. *Secondly*, given that the Tribunal's exercise of its discretions in s 438(3) may adversely affect a review applicant's rights and interests, the Tribunal may have procedural fairness obligations with respect to a certificate issued for the purposes of s 438. It will be argued in Part VI of these submissions that such obligations are excluded by s 422B. Assuming for the moment that that argument is not accepted, the Tribunal's procedural fairness obligations may include disclosing the existence of the certificate and giving to the review applicant an opportunity to make submissions as to what the Tribunal should do in response to it.[3]

19. Each of the above implications is fact-dependent. As to the first, the fact that an 'invalid' certificate has been given to the Tribunal does not, in itself, result in jurisdictional error. The Tribunal might, for example, perceive the invalidity and ignore the certificate. Or it might, while purporting to exercise a discretion under s 438(3), nevertheless deal with the documents or information consistently with its obligations under Part 7 of the Act. In the latter case, the Tribunal will have made an error of law but the error would be within jurisdiction as it would not be material to the conduct or outcome of the review.[4] The notion of a breach or misapplication of s 438 (*cf* AS [30], [34], [39], [41], [43], [45] and [47]) does not assist the appellant in circumstances where that section confers discretions on the Tribunal; and nothing was done in purported reliance on that discretion that, arguably, contravened any applicable requirement.

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3 *MZAFZ* at 12-13 [50] per Beach J. The same conclusion was reached in relation to a certificate issued under s 375A of the Act (under which the Tribunal has no discretion comparable to s 438(3)) in *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 (***Singh***) at 315-317 [42]-[52] per Kenny, Perram and Mortimer JJ.

4 *cf Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ ("... and the tribunal's exercise or purported exercise of power is thereby affected"); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (***Aala***) at 141 [163] per Hayne J; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (***Yusuf***) at 351 [82] per McHugh, Gummow and Hayne JJ; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at [21] per Gleeson CJ, [45]-[48] per Gaudron J, [174]-[183] per Gummow J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1175-1176 [57] per McHugh and Gummow JJ; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at 640 [36] per French CJ, Gummow, Hayne, Crennan and Bell JJ; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 572 [67] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Brown v West* (1990) 169 CLR 195 at 203 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353 per Mason J (as his Honour then was) (in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) context).

20. The appellant's references to the Tribunal 'acting on' the certificate tend to obscure the real issue. The Tribunal cannot be said to have 'acted on' a certificate in any relevant way unless it does, or refrains from doing, something in reliance on an authority purportedly conferred by the certificate. Further, as the Full Court correctly observed at CAB 75 [30], even if the Tribunal 'acts upon' an invalid certificate, that does not, in itself, result in jurisdictional error. In each case, it will be necessary to examine the Tribunal's actions and consider whether they resulted in failure to comply with a statutory obligation. The Tribunal may, for example, decide to exercise its discretion in s 438(3)(b) adversely to a review applicant; but that, in itself, is of no moment if the material was not of a kind that the Tribunal was obliged to disclose. To the extent that *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 (***MZAFZ***) suggests otherwise, it is wrong.

21. As to the second, procedural fairness operates only as a condition of the validity of exercises of power that adversely affect a person's rights or interests.[5] Absent such an exercise of power, procedural fairness cannot be said to have been denied. Thus, the Tribunal would not contravene the principles of procedural fairness if it decided to exercise its powers in s 438(3) favourably to the review applicant without first hearing from him or her.[6] Nor is there any denial of procedural fairness if the failure to provide a hearing does not deny the review applicant a chance of a successful outcome.[7] That will be the case if the documents or information covered by a certificate are incapable of having any bearing on the decision of the Tribunal, since in that event any decision the Tribunal makes about the certificate will be of no moment. In those circumstances, the review applicant will not have lost any opportunity to advance his or her case.[8] Alternatively, in those circumstances the

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5 See, for example, *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (***Saeed***) at 258 [11] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 352 [74] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 652 [497] per Keane J; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 (***WZARH***) at 335 [30] per Kiefel, Bell and Keane JJ, 340 [51] per Gageler and Gordon JJ.

6 *cf Aala* at 122 [104] per McHugh J.

7 *WZARH* at 341 [56] per Gageler and Gordon JJ.

8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 (***Lam***) at 14 [38] per Gleeson CJ; *WZARH* at 342-343 [57], [60] per Gageler and Gordon JJ.

Court can and should refuse relief in the exercise of its discretion as the learned primary judge held.

22. Accordingly, any finding that the Tribunal has fallen into jurisdictional error in dealing with a certificate (whether invalid or valid) or denied a review applicant procedural fairness must depend on the evidence as to the nature of the document or information to which the certificate pertains and what the Tribunal did in response to the certificate. The Full Court was correct so to conclude in the present case at CAB 75 [30].

10 *The present case*

The Tribunal did not act upon the certificate (or otherwise fall into jurisdictional error)

23. There is no reason to disturb the findings of the primary judge at CAB 54 [66]. The Tribunal's written statement prepared pursuant to s 430(1) of the Act does not refer to the certificate and there is no record in the evidence of any reliance on the discretions in s 438(3). Contrary to AS [41] and [45]-[47], there is nothing in the evidence to suggest that the Tribunal acted on the certificate – that is, treated it as material in some way to the decision on review[9] – or gave any weight to the underlying documents. If a particular matter has not been referred to in the Tribunal's
20 written statement, the proper inference for a reviewing court to draw is that it was not considered by the Tribunal to be material to the review.[10] Here, the Tribunal, at CAB 8 [10], listed all of the documents to which it had regard, apart from the country information to which it referred later in its written statement. It is telling that neither the certificate nor the underlying material is referred to, as s 430(1)(d) would have required the Tribunal to refer to them had they formed the basis for any finding on a *material* fact. (Had s 438 applied it might have made disclosure of the content of the documents discretionary, but would not have displaced the requirement to identify this material to the extent that it formed the basis for any finding: *cf* AS [38], [49].)

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9 *CQZ15* at 14 [65].

10 *Yusuf* at 331-332 [10] per Gleeson CJ, 337-338 [33]-[35] per Gaudron J, 346 [68]-[69] per McHugh, Gummow and Hayne JJ.

24. Reference to the documents themselves shows that nothing in them was capable of affecting any analysis of whether the appellant was a refugee or a person in respect of whom Australia otherwise had non-*refoulement* obligations. Hence, nothing in those documents gave rise to any disclosure obligation under s 424A(1) or s 425(1). One document summarised an earlier decision made by the Tribunal (which, as noted above, the Tribunal as reconstituted seems to have read for itself) and described the legal flaw which the Minister's lawyers had identified as the basis for conceding that it was invalid. The other document canvassed the appropriateness of compliance action (which was not a matter for the Tribunal), without making any comment about the appellant or his claims, and noted that the matter was to be remitted to the Tribunal. Neither was relevant to the review. Given the nature of the documents the subject of the certificate, therefore, it is highly unlikely that the Tribunal gave, or was ever minded to give, them any weight in conducting the review. That makes it unlikely that the Tribunal placed any reliance on the certificate in not referring to the documents or raising them with the appellant.

25. Further, even if (contrary to the findings below) the Tribunal did act upon the certificate in that sense, the nature of the documents was such that they did not enliven the Tribunal's duties under ss 424A(1) and/or 425(1). Thus, it cannot be said that the Tribunal, by acting upon the certificate, took any course inconsistent with its statutory obligations.

26. Contrary to the appellant's submissions at [33], the Full Court did not conflate the two aspects of Beach J's reasoning in *MZAFZ*. The Full Court's reasons at CAB 72 [17]-[18] reveal that it understood that Beach J had identified two errors in *MZAFZ*; and the two streams are noted in the summary of the appellant's submissions at CAB 72-73 [20]-[21]. At CAB 75 [30], the Full Court rejected what it termed the "rigid and unqualified propositions" advanced by the appellant, referring as it did so to both limbs of the argument: 'acting on' an invalid certificate and denial of procedural fairness. In its analysis of the facts (including its reference to 'practical injustice' at CAB 76 [33]), the Full Court was concerned, properly, with the materiality of any error of law the Tribunal might have made about the effect of the certificate. Any conflation of the two strands of argument reflected the appellant's drafting of the ground of appeal to the Full Court (CAB 61), which the Court paraphrased at CAB 72 [19].

The Tribunal did not deny the appellant procedural fairness

27. The appellant's submissions at [34] assert the irrelevance of procedural fairness in the case of an invalid certificate, and the Minister does not read those submissions as advancing any independent argument that procedural fairness was denied in the present case.[11] It is true that procedural fairness adds nothing if the appellant is correct in his rigid analysis of the consequences of an invalid certificate. It may also be correct that, if the Tribunal does not act on the certificate in any way that makes its invalidity critical, it will follow that the failure to afford a hearing in relation to the certificate does not give rise to any practical injustice and, hence, does not constitute a denial of procedural fairness.

28. To the extent that procedural fairness is in issue (and accepting for the moment that procedural fairness required a hearing concerning how the Tribunal was to respond to the certificate, before it took any step adverse to the appellant's interests), it is submitted that there was no denial of procedural fairness in the present case. As noted above, and as the Full Court held at CAB 75 [30], the issue turns on the facts and circumstances of the particular case, including whether the documents are capable of having any bearing on the decision of the Tribunal. That does not mean that the reviewing court is trespassing into the merits of a review applicant's claims, contrary to AS [52], [55] and [57]-[59]. If the documents the subject of the certificate are shown to be of no, or peripheral, relevance to the review (as those in the present case plainly were (*contra* AS [54])), it cannot be said that any decision about how to respond to the certificate denies the review applicant an opportunity to advance his or her case.[12]

29. Here, the circumstances relevantly included the following:

    a. The Tribunal did not make any conscious decision under s 438(3) as to whether to have regard to the underlying documents or whether to disclose their contents.

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11 *cf* AS [53], which refers only to a valid certificate; and *cf* the primary judge's understanding of the issues at CAB 54 and the submissions summarised by the Full Court at CAB 72-73).

12 *cf Lam* at 14 [38], cited in *WZARH* at 342 [57].

b. The contents of the underlying documents were such that they did not have to be disclosed in any event.

c. Even if the Tribunal turned its mind to exercising the power in s 438(3)(b), it is difficult to conceive how submissions from the appellant could have persuaded it that the underlying documents should be disclosed, given that they had no bearing on the issues in the review and were not within any ordinary disclosure obligation.

d. Access to the documents would not have materially assisted the appellant, as they had no relevance to any issue in the review.

10 30. In any event, the Full Court was correct to conclude, at CAB 76 [32]-[33], that the primary judge did not err in holding that, even if the Tribunal denied the appellant procedural fairness, relief should be withheld in the exercise of the court's discretion. The contents of the documents the subject of the certificate negatived the suggestion that the non-disclosure of those documents deprived the appellant of a chance of a successful outcome before the Tribunal.[13] The appellant's submissions at [60] fail to identify the "clea[r] utility in granting relief to permit [him] to be heard by the Tribunal" given the nature and content of the documents the subject of the certificate.

Part VI: Notice of contention

20 31. The Full Court adopted its observation in *Minister for Immigration and Border Protection v BJN16* (2017) 253 FCR 21 that non-disclosure of a s 438 certificate *may* give rise to a denial of procedural fairness (CAB 75 [30]), and the submissions above have assumed that it was correct to do so. By his notice of contention, the Minister argues that, to the extent that the issues in the Full Court turned on questions of procedural fairness, they should have been resolved on the basis that procedural fairness *did not* require the Tribunal to disclose the existence or content of the certificate, invite the appellant to make submissions as to its validity, disclose the extent to which (if any) the Tribunal was proposing to take the underlying material into account, and give to the appellant an opportunity to seek a favourable exercise

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13 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147 per Mason, Wilson, Brennan, Deane and Dawson JJ; *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 (***SZBYR***) at 1198 [29] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *WZARH* at 339 [43], 341 [56].

of the power in s 438(3)(b). Put shortly, the Minister contends that the procedural fairness obligations that would otherwise apply to the exercise of Tribunal's powers in s 438(3) are displaced by s 422B.

32. Section 422B relevantly provides as follows:

> ***Exhaustive statement of natural justice hearing rule***
>
> *(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*
>
> *(2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.*
>
> ...

33. The words "in relation to the matters it deals with" in s 422B(1) require "[a] search ... for a larger subject matter or matters"[14] and do not merely refer to the specific procedures required by the particular provisions in Division 4. On that basis, ss 424A and 425 represent the full extent of the Tribunal's obligations to raise adverse information and issues with the review applicant. Read with those provisions, therefore, s 422B(1) stands against any operation of the 'natural justice hearing rule' that would require the disclosure and canvassing of other matters such as the existence of a s 438 certificate and how the Tribunal should exercise its powers under s 438(3).

34. Further, there is no reason why s 422B(2) should not be construed in the same manner.[15] The "matter" with which s 438 deals is the issue of certificates in respect of information of the kind described in subs (1), as well as the consideration of that information by the Tribunal and its possible disclosure to a review applicant. In so far as s 438 deals with that matter and relates to the conduct of a review under Division 4, it states, exhaustively, the requirements of the natural justice hearing rule.

35. Seen in this way, s 438(3)(b) both provides for a power for the disclosure of information the subject of a certificate and specifies the procedure by which that

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14 *Saeed* at 267 [41].

15 *cf Singh* at 315 [38].

power is to be exercised: by "having regard to any advice given by the Secretary under subsection (2)". That power must, of course, be exercised reasonably.[16] However, the operation of s 422B(2) in conjunction with s 438 leaves no room for general law principles of procedural fairness to impose requirements for the disclosure of a certificate or the fact of its existence. In so far as the Full Court reasoned otherwise, it erred. And in so far as *MZAFZ* and *Singh* (the latter being concerned with s 357A(2), an analogue of s 422B(2)) held otherwise, they were wrongly decided.

Part VII: Estimate

36. The Minister estimates that he will require approximately 45 minutes for the presentation of oral argument (including in reply on his notice of contention).

Dated: 26 July 2018

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16 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.