

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S36 of 2018

BETWEEN:

Minister for Immigration and Border Protection



Appellant

and

SZMTA

First Respondent

Administrative Appeals Tribunal

Second Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Internet publication.

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

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

Overview

2. The First respondent will address the issues in the case in the following order.
3. The first issue is jurisdictional error based on a wrong application of s438 of the Migration Act by reason of the invalid certificate/notification to the Tribunal by the Minister under that section (**Invalidity Issue**): Notice of Contention (CAB 86)*.
4. The second issue is whether Justice White was correct to find that there had been a denial of procedural fairness to the first respondent (respondent) as described in *MZAFZ* (see CAB 67 [43] and 70 [56]) and:
 - a. rejecting the Minister's contention (CAB 70 [58]) that because the documents the subject of the notification had been earlier provided to the respondent in answer to an FOI request there could be no practical injustice to the respondent (ground 2): Notice of Appeal CAB83; and

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- b. by holding that the possibility (the word ‘mere’ adds nothing) (at CAB 70 [59]) that the second respondent may not have had regard to favourable information because of the s483 notice (ground 1).

(together **the procedural fairness issue**).

Invalidity

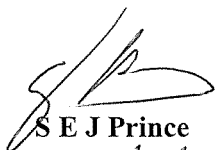
5. The nature of the error arising from the finding by White J that the certificate/notification under s 438 was invalid (CAB 69 [53] and [54]) was:
- 10 a. The notification under s 438 of the Act issued by the Minister to the Tribunal was invalid, the Court was entitled to infer this had been acted on in some unspecified way by the Tribunal and this constituted jurisdictional error in the way discussed by Beach J in MZAFZ at [40]. This finding is buttressed by the correct acceptance that the presence of the invalid certificate may have affected *the process by which the Tribunal reached its decision* (at [58] (emphasis added)).
6. The issue of materiality turns on the legal nature of the error in the context of the statutory scheme¹. The materiality is to be gauged by the effect of the error in the conduct of the review or the decision.
7. Legal nature of the error:
- 20 a. the error goes to the proper construction by the decision maker of the statute investing jurisdiction and a mistaken understanding of the statutory procedures he or she was required to apply to *the conduct of the review*.
- b. The error must mean that the Tribunal has misconceived its duty in conducting the review because it erroneously held the view that it had to maintain secrecy unless it exercised a discretion in favour of the Respondent- which it did not;
- c. The terms of s438 particularly when combined with s422B and 430 have a ‘rule like quality’ which can easily be identified and applied². The requirements of s438 are not a goal to be achieved’ but a ‘rule to be obeyed’. Whilst s438 contained in its framework a discretion, that does not mean that proper compliance and application of s438 was discretionary.
- 30 d. The error must necessarily affect the decision of the Tribunal because it wrongfully restricted the expression of the reasons for that decision under s430.

Procedural Fairness

¹ See *Hussain v Minister for Immigration* [2018] HCA 34 at [64] and [72]; “error is made in a way that affects the exercise of power”: *Minister for Immigration v Yusef* (2001) 206 CLR 323 at 351 [82] ; see *Wei v Minister* (2015) CLR 22 at 35 [33].

² *Project Blue Sky v ABA* (1998) 194 CLR 355 at 391 [95]- see also 392 [98]

8. By focusing on the notification which was not disclosed to the first respondent, rather than the underlying documents, it becomes clear that the first respondent was denied an opportunity of making submissions on the validity of the notification, which in turn affected the procedure governing the Tribunal's decision – either a discretionary disclosure of any matter under s 438 of the Act, or a mandatory reference to the evidence or any other material on which the findings of fact were based under s 430 of the Act
9. In respect of the appellant's "impermissible speculation" point, the Tribunal acted in a way consistent with the non-disclosure obligations under s 438 of the Act in the conduct of the review because it made no reference to (and thereby no disclosure of) the documents or information covered by the notification under s 438 of the Act during the review.
10. Nevertheless, the appellant appeals on the proposition that an applicant who is not aware that the Tribunal is treating certain documents as secret (without statutory authority) is required to prove how those documents were used, or not used, by the person who kept the secret.
11. The very nature of the (mis)application of the power under s 438, means that neither the applicant nor anyone else could know, much less prove, how the Tribunal used the documents or information to which the notification attached. Nor could anyone know, or prove, if the Tribunal disregarded that material.
12. In respect of the appellant's evidentiary onus point, some of the documents to which the notification applied were about the appellant personally and could be used adversely to his interests either by *failing to have regard* to them – namely favourable information from Mr Reimer³ - or *having regard* to them - namely the findings of the Delegate of the Minister that the totality of the particularized information recorded in the s 48B and 417 material did not provide any credible new information that would enhance his chances of making a successful protection visa application⁴ or identified any issues which engaged Australia's obligations under the Convention Against Torture or the International Covenant on Civil and Political Rights.⁵


S E J Prince

10/9/16

³ Appellant's Book of Further Materials p 25

⁴ Appellant's Book of Further Materials p 14.28

⁵ Appellant's Book of Further Materials p 18.20