



Minister for Immigration and Border
Protection v SZMTA & Anor

APPELLANT'S OUTLINE OF ORAL ARGUMENT

1. This outline is in a form suitable for publication on the internet.
2. The Reasoning of White J in the Federal Court is unclear. The better understanding is that his Honour did not hold the certificate to be invalid but held that the Tribunal might have exercised the discretion in s 438(3)(a), and decided not to have regard to material that might have assisted the first respondent, without affording him a hearing (CAB 69 [54], 70-71 [59]-[60]; WS [17]).
3. That reasoning does not identify any error by the Tribunal because it does not involve any finding that the Tribunal exercised the discretion in the manner suggested (WS [19]-[20]).
4. If such a finding was to be made, the first respondent (the appellant below) bore the onus of showing, at least, that the suggested exercise of discretion occurred (WS [21]). There is no evidence that it did (Reply [11]). Further, an inference that the Tribunal chose to ignore relevant material supportive of the applicant should not lightly be drawn (WS [23]).
5. If (alternatively) White J is understood to have held that the Tribunal erred because notification was "invalid" and had been acted upon "in some unspecified way" (CAB 70 [56]), that reasoning is flawed at least because it was necessary for the first respondent to show that a misunderstanding about the effectiveness of the notification had led the Tribunal to exceed a power or fail to perform a duty (WS [24]-[25]).
 - *Hossain v Minister for Immigration*, tab 2 in *BEG15* book, at [24], [31]
6. As to the Notice of Contention:

- a. It has not been shown that the notification was relevantly “invalid” (there was no concession or finding to this effect - noting this notification concerned confidentiality and not public interest) (Reply [8]-[10]).
- b. Even if it was, there is no proper basis to find that the Tribunal acted on it in any relevant way (Reply [11]-[12]).
- c. Such a finding is necessary. It is not open to “assume” that the Tribunal did something with the notification. Nor could the invalidity of a certificate *ipso facto* stultify the Tribunal’s review (Reply [13]-[16]).

Geoffrey Kennett

Rachel Francois

10 September 2018

Liability limited by a scheme approved under Professional Standards legislation