IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S
No. 36 of 2018

BETWEEN:

Minister for Immigration and Border Protection
Appellant

and

SZMTA
First Respondent

Administrative Appeals Tribunal
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS IN REPLY

Part I: Internet publication.

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

Part II: Concise statement of issues.

2. The appellant incorrectly seeks to characterize the issue arising from the appeal as whether "the Court may speculate about how the Tribunal may have responded to the notification to determine whether the Tribunal has afforded procedural fairness."

3. To state the issue in this way places the issue at a such a level of isolation and abstraction as to not be determinative of whether White J's finding of jurisdictional error by the Tribunal involved error.

Filed for the first respondent by:
Shelley Legal
Suite F Level 1
110 George Street
PARRAMATTA NSW 2150

Telephone: (02) 9615 9605
Fax: (02) 9615 9795
Ref: Lydia Shelly
Email: lydia@shellylegal.com.au

4. There is no dispute that the notification under s 438(2) of the *Migration Act* 1958 (**Notification**) issued by the Minister to the Tribunal was invalid.[1] Indeed, the appellant complains that the underlying documents to which the notification purported to relate had already been provided to the applicant in a different statutory context,[2] and accordingly, the documents could not possibly have had the confidentiality or secrecy necessary to properly invoke s 438 of the Act.

5. The appeal does not challenge the finding that the Tribunal proceeded with the review on the basis that the notification was valid and that s 438 of the Act was applicable to the Review. There is nothing in the reasons of the Tribunal that suggest that the Notification was found to be invalid or that the Tribunal did not consider itself bound by the provisions of s 438 of the Act.

6. There is no challenge to the finding that the existence of the Notification and the Tribunal's application of s 438 of the Act was never revealed to the first respondent by it.

7. The appeal appears to be concerned only with whether Justice White indulged in impermissible speculation, and whether the respondent had discharged an evidentiary onus before Justice White to prove how the underlying documents (as opposed to the Notification itself) *could have* been used by the Tribunal.

8. The real issues on the appeal should be stated as follows:

    1. Is jurisdictional error established by a Tribunal acting on a Notification invalidly issued under s 438 of the Act because it followed a procedure contrary to law;[3] (arising on the Notice of Contention)?

    2. Was it open to Justice White to find that the first respondent was denied procedural fairness by not being given an opportunity to make submissions as to whether the notification was invalid, and thereby the powers on review were exercised adversely to

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[1] [2017] FCA 1055 at [54] CAB 69 and [56] CAB 70.8 which findings are not challenged.
[2] In response to a Freedom of Information Request in which some documents had been provided in support of requests to the Minister under s 48B and s 417 of the Act: AS [8] and [2017] FCA 1055 at 53, CAB 69.
[3] See formulation in *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 at 11 [40].

the first respondent by the wrongful application s 438 of the Act by the Tribunal; (Ground 1)?

3. If the Tribunal acts on an invalid notification under s 438, is the applicant also required to prove that the Tribunal denied the applicant procedural fairness by withholding the substance of the documents purportedly covered by the notification; (Ground 2)?

4. Is "practical injustice" required to be established only by reference to the content of the underlying documents or also by reference to the failure to disclose the existence of the notification and the application of the procedure under s438 by the Tribunal; (Ground 2)?

Part III: Section 78B of the Judiciary Act 1903 (Cth).

9. The first respondent considers that no notice need be given in compliance with this provision.

Part IV: Statement of material facts

10. On 19 April 2011, in response to an application by the first respondent for documents under the *Freedom of Information Act* 1982 (Cth), the Department of Immigration and Border Protection provided the whole of its file to the first respondent.

11. On 17 June 2014, the Department of Immigration and Border Protection gave a Notification covering 15 identified folios, including a letter from a colleague of the first respondent of 13 August 2010 addressed to the Minister in support of the first respondent, on the ground that the folios were given to an officer of the Department or the Minister "in confidence".[4]

12. The Notification was not given to the first respondent.

13. The Tribunal did not exercise its discretion under s 438(3)(b) of the Act to disclose the information covered by the Notification or to tell the first respondent of the existence of the Notification.

[4] [2017] FCA 1055 at [52].

14. The applicant had 3 years and 2 months earlier,[5] been provided with the documents which had been purportedly covered by the notification issued to the Tribunal.[6] The documents had been released in the context of a Ministerial request, however the applicant was never given any indication by the Tribunal that those very same documents were to be received by it on the basis of the Notification, rather than under the normal course in s 418(3) of the Act. Accordingly, the applicant had no knowledge that the Tribunal was following a procedure whereby, unless it made a positive discretionary decision to provide the documents, it could not make reference to those documents, including any concerns issues or use to which it would put those documents during the hearing or in its decision under s 430 of the Act.

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15. Ultimately, the key factual matters upon which his Honour's finding of jurisdictional error is based cannot be in dispute.

16. The Minister issued a notification to the Tribunal under s 438 (2)(a) of the Act in relation to 15 folios which related to the applicant personally;

17. The Notification[7] did not meet the criteria required by s 438 in that:

    i. any confidence attaching to the documents had been waived by the release (3 years
20 earlier and in a different statutory context) of the documents to the applicant;

    ii. at least some of the documents to which the notice related had clearly not been given in confidence to the Minister or an officer of the Department;

    iii. the reasons for the issue of notification included an assertion that the documents contain information relating to an internal working document and business affairs which is not a proper basis for the invocation of s 438.

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[5] (that is on 19 April 2011) see [2017] FCA 1055 at [42] CAB 66.35
[6] The notification was issued to the Tribunal on 17 June 2014: see [2017] FCA 1055 at [41] CAB 66
[7] Appellant's Book of Further Materials at 11

18. The documents that had been released to the applicant 3 years earlier comprised 278 pages,[8] of which the documents covered by the notice were a dispersed 15 folio subset.

19. 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 during the review, or in the decision under s 430 of the Act.

20. The applicant never knew of the existence of the notification or the identity of the information or documents which were placed before the Tribunal *in this way,*[9] and in respect of which it had been told to apply the provisions of s 438 of the Act;

21. The Tribunal never suggested that it regarded the notification under s 438 as invalid and it can be inferred that it did in fact regard it as valid. There is no evidence to the contrary.

22. It would not be obvious that the Tribunal had the documents covered by the Notification because they related to a different statutory process than the protection visa application which was before the Tribunal - that is they related to the Minister's consideration of exercising personal powers under s417 or 48B of the Migration Act.

23. Because of the very nature of the misapplication of the power under s 438 and the wrongful secrecy that followed, neither the applicant (nor anyone else) could ever have known, much less prove, how the Tribunal would have used the documents or information to the which the notification attached. Nor could anyone know, or prove, if the Tribunal disregarded that material.

24. Clearly the face of the notification contained information adverse to the applicant's interests in that it asserted that the Tribunal was obliged to apply the secrecy procedures contained in s438 of the Act and the applicant never had an opportunity to address that information.

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[8] Appellant's Book of Further Materials page 6 [5]- Affidavit of Thomas Shaw.
[9] As opposed to having been put before the Tribunal under s 418 of the Act, in relation to which material no non-disclosure obligations arise.

25. Further, the content of some of documents to which the Notification applied were about the applicant personally and could be used adversely to his interests:

    a. through omission – namely favourable information from Mr Reimer.[10]

    b. directly contrary to his claims – namely the findings of the Delegate of the Minister (approved by 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 application[11] or identified any issues which engaged Australia's obligations under the Convention Against Torture or the International Covenant on Civil and Political Rights.[12]

Part V: Applicable constitutional, statutory or regulatory provisions

26. The applicant's reference to the statutory provisions in Part VI of its submissions is incomplete. The submissions fail to address the other provisions in Part 7 of the Act to which s 438 of the Act relates.

27. Section 438 of the Act,[13] has a significant effect on the statutory process for Review which would otherwise apply under Part 7 of the Act as can be seen from direct reference to it in sections 422B (2) and 427 (1)(c) of the Act.

28. Section 438, if applicable, also necessarily modifies the obligations of the Tribunal that would otherwise arise under ss 423A (2), 424A, 425 and s 430 to disclose information and issues to the applicant for review throughout the entirety of the review process including in the reasons for decision. If the Tribunal applied s 438, no-one could ever know whether the material was or was not taken into account because the obligation to identify the relevant material to which it has regard in s 430 must be read subject to the prohibition,[14] on disclosure in s 438.

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[10] Appellant's Book of Further Materials p 25
[11] Appellant's Book of Further Materials p 14.28
[12] Appellant's Book of Further Materials p 18.20
[13] Note the decision of the Tribunal was given on 17 September 2015 and so Compilation No. 124 dated 1 July 2015 is relevant.
[14] Subject to a positive decision to exercise the discretion under s 438 (2) to disclose the information notwithstanding the Notification- a very different process to that which would apply without the Notification.

Part VI: Respondent's statement of argument.

Introduction

29. The appellant's submissions do not separately address each ground of appeal. Nonetheless these submissions are divided to address each ground separately.

30. Both of the appellant's grounds of appeal turn on the unsound 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.

31. Further, the very fact of the wrongful application of s 438 means that no-one (including the Court) can know how that secret information was or was not used by the Tribunal in its decision which, but for s 438, would be transparent because of s 430 of the Act.

32. The Notice of Contention is addressed at Part VII of the submissions in accordance with the prescribed form. The First Respondent will seek to address that issue first in its oral submissions because the statutory scheme informs the balance of the appeal. Briefly, the Notice of Contention turns on the following propositions:

a. The Tribunal clearly followed an incorrect statutory process to the review by applying the non-disclosure provisions of s 438, in circumstances where that section did not in truth apply and the notification by the Minister under s 438 (2)(a) was incorrect.

b. By not correctly applying the statutory processes,[15] to the review, the Tribunal clearly misapplied the Act and misapprehended its jurisdiction in the way correctly described by Beach J in *MZAFZ v Minister for Immigration and Border Protection and Another* (2016) 243 FCR 1 (**MZAFZ**) at [40].[16]

[15] It should be noted that those processes including s438 (which does not otherwise appear in Division 7 Part 6) are a statutorily prescribed code of process which codify procedural fairness: s422B of the Act.
[16] (2016) 243 FCR 1 at 11.

c. As the appellant correctly notes, the errors upon which it relies are contingent on the only relevant error being a denial of procedural fairness,[17] as opposed to a failure to apply the correct statutory processes prescribed by the Act.

The appellant's first ground of appeal

33. The appellant's first ground of appeal is that White J erred by relying on the "mere possibility" that the Tribunal may not have had regard to certain information. There are four objections to the appellant's argument.

10 34. *First*, the words "mere possibility" are the appellant's words. The words actually used by White J are that the tribunal "may, in that circumstance, have chosen not to have regard to the identified documents",[18] and "[a]ccount should also be taken of the prospect that, by reason of the presence of the delegate's notification, the tribunal did not have regard to information in the identified documents which may have assisted the [first respondent]".[19]

35. His Honour's actual words are findings on the balance of probability of the reaction of the tribunal on receiving a purportedly valid Notification in the circumstance where the Tribunal may properly have been reluctant to advert to documents that it thought the first respondent had not seen.

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36. *Secondly*, the appellant argues at paragraph [19] of his submissions that White J was "speculat[ing]" that the Tribunal had not had regard to the letter of support of 13 August 2010 referred to by White J in his reasons.[20] However, the best evidence is the tribunal's reasons where it states it has 'considered the documents and letters in support provided to the Department and Tribunal'.[21] The letter of support of 13 August 2010 is not listed, indicating that, on the balance of probability, the tribunal did not have regard to the letter.

37. *Thirdly*, the appellant appeals on the basis that White J acted on a "mere possibility", when it was the tribunal's conduct that made it impossible to determine exactly what evidence or other

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[17] See AS [18].
[18] CAB70.26,
[19] CAB 70.38-71.2
[20] CAB 70.32.
[21] CAB19.37-20.10

material had formed the basis for the tribunal's findings of fact. Beach J at [49] of his decision in *MZAFZ* accepted that his findings contained "regrettable but *unavoidable* speculation" [emphasis added]. The reason being, that section 438(3)(b) of the Act, giving the Tribunal discretion as to whether it may disclose any matter or information to an applicant, undermines s 430(1) of the Act, requiring the Tribunal to make a written statement, referring to the evidence or any other material on which the findings of fact are based. The resulting uncertainty makes a degree of speculation on the part of a court on review, unavoidable.

38. *Fourthly*, the appellant's use of the words "mere possibility' diverts attention from the reality that this appeal is an attack on the decision of Beach J in *MZAFZ*. The appellant's attack on the decision of *MZAFZ* is made reasonably plain at paragraphs [10], [11], and [14] of his submissions, in which Beach J's holding that he was "entitled to assume that the tribunal acted in some unspecified way on the invalid notification", is extracted, the absence of comment on Beach J's holding by the Full Bench in *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 (**Singh**) is pointed out, and White J's reliance on Beach J's holding in the decision under appeal is established.

39. White J at [56], expressly following Beach J, held that he was "entitled to infer that the tribunal did act in some unspecified way on the invalid notification",[22] and applied it by finding at [60] "the prospect that, by reason of the presence of the notification, the tribunal did not have regard to information in the identified documents".[23]

40. The appellant cannot succeed in demonstrating error in White J's approach unless he succeeds in demonstrating that Beach J in *MZAFZ* was wrong. However, *MZAFZ* was considered and followed in *Singh*, special leave for the Minister to appeal *Singh* to this court was refused on 12 May 2017, and on the present appeal the appellant has not advanced a case that *MZAFZ* was wrong.

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[22] CAB70.3-5
[23] CAB 70.38-71.2

The appellant's second ground of appeal

41. The appellant discounts the findings of White J on the unsatisfactory Notification and presses attention on his Honour's findings about the use of the underlying documents.

42. The appellant's focus on the significance of the underlying documents to which the section 438 notification related, rather than the notification itself, diverts attention from the proper characterization of White J's decision.

43. Contrary to the Full Court of the Federal Court's decision in *BEG15 v Minister for Immigration and Border Protection*,[24] it is the Notification itself and its adverse effect on the first respondent's interests by wrongfully engaging s 438 of the Act, not the underlying documents, that is significant.

44. White J's finding at [54], was that the issue of the Notification misled the Tribunal.[25] The consequence is that the Tribunal believed that it had a discretion under section 438 of the Act which it may not have had, potentially sending the Tribunal down a statutory path which it was not authorized to take as a consequence of the Tribunal understanding that it may have been under an obligation of secrecy which it was not.

45. The Tribunal has clearly believed itself to have a valid Notification before it. There is nothing to indicate that the Tribunal considered the Notification to be invalid or that it did not believe the processes in section 438 of the Act were applicable and binding on it.

46. The Tribunal had no choice but to apply the processes in section 438 of the Act once it wrongly presumed the Notification issued by the Minister was valid. The failure of the Tribunal to list the letter of support of 13 August 2010,[26] is consistent with the tribunal believing it was bound to a process under s 438 of the Act.

47. Accordingly, the Tribunal has applied a statutory process or followed a statutory provision which it was not authorized to apply as part of its statutory review process.

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[24] [2017] FCAFC 198
[25] CAB 69.33
[26] See CAB 19.37-20.10

48. Conversely, 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, unaffected by consideration of a section 438 notification.

49. As already submitted, 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. Section 438(3)(b), when validly engaged, turns the obligation to disclose such documents into a discretion to do so.

50. 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 that that should govern the Tribunal's decision – a mandatory or discretionary disclosure of evidence or other material on which the findings of fact based.

51. The denial of the opportunity for the first defendant to argue that the Notification was invalid and that the proper procedure was for the Tribunal to disclose evidence and material on which the Tribunal's finding of fact were based mattered, because the failure of the Tribunal to record that it had regard to the letter of 13 August 2010 led to White J having to engage in the type of "unavoidable speculation" referred to by Beech J at paragraph [49] of *MFAFZ*.

52. The finding of White J at [54], that the Notification "was defective because it purported to apply to at least some documents which could not reasonably be regarded as having been given to the Minister or to an officer of the Department 'in confidence",[27] makes it clear that had the first respondent been informed of the Notification at the time of the hearing before the Tribunal, he would have had reasonable grounds for a submission that it was invalid and that the proper process for the Tribunal was governed by s 430, not s 438, of the Act.

Part VII: Notice of contention

53. White J at observed at [53] that "it is not easy to see" that some of the documents covered by the Notification could answer the statutory description in section 438(1)(b).[28] His Honour found at [54] that the notice was "defective" because it purported to apply "to at least some

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[27] CAB 69. 29-37
[28] CAB 69.20

documents and information which could not reasonably be regarded" as having been given in confidence.[29] Later, White J at [59] referred unequivocally to the "invalid notification".[30]

54. Nevertheless, White J also found at [54] "it is not necessary to decide presently whether the mistaken claim that a document or documents had been provided in confidence has the effect of invalidating the notification".[31] His Honour, given the finding in *MZAFZ* that a purported s 438 notification not complying with section 438(1)(a) of the Act was invalid, may have been saying that he was unprepared to commit himself to a general proposition that a notification not complying with 438(1)(b) was invalid. Nevertheless, there is no doubt in the particular instance of this case, he found that the notification was, in fact, invalid.

55. The consequence of the invalidity of the notification is that it has affected the process of the Tribunal so that it has carried out its function contrary to s 430 of the Act. Because the invalidity of the notification goes to the process of review, not the outcome of the review, it does not matter whether or not the underlying documents were relied on by the Tribunal.

56. It is unsurprising that the Tribunal would not refer to documents covered by the Notification, including the letter of support of 13 August 2010,[32] where it took the view that it was under an obligation to keep those documents secret. The absence of reference to the letter of support of 13 August 2010 in the Tribunal decision is consistent with it having wrongly believed them to be subject to a section 438 notification and is evidence of jurisdictional error.

57. In *MZAFZ*, Beach J clearly (and correctly) differentiated between the nature of the jurisdictional error where:

    a. a notification was *invalid* (namely failure of the Tribunal to comply with s438 of the Act);[33] and

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[29] CAB 69.35
[30] CAB 70.19
[31] CAB 69.30
[32] see CAB19.37-20.10
[33] (2016) 243 FCR 1 at 11 [40]-[44]

b. a notification was in fact *valid* (in which case there could be a denial of procedural fairness if the underlying documents could have been but were not put to the applicant).[34]

58. It was only on the assumption that a notification was valid, but had not been provided to the applicant, that issues arose as to whether the documents covered by the notification would otherwise have been required to have been provided to the applicant for the purposes of procedural fairness.

59. The correct approach to the consequence of the invalidity of the notification issued for the purposes of s 438 of the Act was taken by Beach J in *MZAFZ* at [40] to [44].[35] That approach is to focus on the place of s 438 within the Tribunal's functions under the statutory scheme of review to ascertain if a failure to comply with that section gave rise to jurisdictional error.

60. That is, Beach J correctly found that the *statutory* consequences of a breach of s 438 were as follows: first, the purported issue of an invalid notification 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 notification, the Tribunal's process of consideration of whether to make disclosure under s 424AA or s 424A would necessarily be influenced by the incorrect belief of the applicability of s 438; and third, the Tribunals' consideration of its own obligations and functions under s 438, which it is required to consider, must have been effected by the false premise of the validity of the notification.

61. The obligations and requirements imposed on the Tribunal under s 438 cannot be excised from the overall statutory framework of its review function.

62. In *MZAFZ*, the correct focus was on the effect of the invalidity of the notification on the statutory processes of review in light of the role s 438 plays in that statutory framework.[36] This approach was consistent with the test for invalidity and jurisdictional error explained in *Project*

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[34] (2016) 243 FCR 1 at 12 [45]-[66]
[35] (2016) 243 FCR 1 at 11
[36] (2016) 243 FCR 1 at [39] to [44]

Blue Sky,[37] which asks whether it was a purpose *of the legislation* that an act done in breach of s 438 should be invalid.

63. The correct approach to the effect of invalidity of the notification on the statutory review process undertaken by the Tribunal leaves no room for consideration of the potential effect of the breach on the particular prospects of the particular applicant, rather than importance placed on a breach of that section by the statutory framework.[38]

64. This approach by Beach J on *MZAFZ* was correctly endorsed by a Full Court in *Singh*, although it only had to dealt with the second limb of the *MZAFZ* approach, namely a situation where the notification was *valid* and the issue became one of a denial of procedural fairness.[39]

65. Here, the real question was whether the Tribunal was engaged in jurisdictional error by departing from the statutory processes to which it was subject under the Migration Act, by having before it an invalid notification and misapplying s 438 of the Act.

66. There is no place in determining the validity of a decision affected by a breach of the legislation to conduct a backward looking analysis of what may have happened in the Tribunal had it observed the law by reference to a test of 'practical injustice'. The primary issue which is that 'if the Tribunal acted on the invalid notification it followed *a procedure contrary to law*' and the related issue of whether 'the purported issue of an invalid notification by the Delegate of the Minister infected *the process or procedure* adopted by the Tribunal in relation to such documents'.[40]

67. Once jurisdictional error had been established as a consequence of the tribunal following a wrong statutory path, it was unnecessary for White J to find that the tribunal had denied the first respondent procedural fairness.

Part VIII: Estimated time for argument

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[37] (1998) 194 CLR 355 at 390 [93] per McHugh, Gummow, Kirby and Hayne JJ.
[38] *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
[39] See *Singh* at [42] where the Full Court qualified the procedural fairness obligation as being an "the effect of the notification, *if valid* (emphasis added). In *Singh*, the Full Court noted that there was no issue before it that the notification was invalid: at [68].
[40] [2016] FCA 1081 at [40].

68. The first respondent estimates he will require 90 minutes for oral argument.

S E J Prince **S Blount** **P W Bodisco**

Counsel for the First Respondent

May the 4th 2018