IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **Nos. S75 and S76 of 2016**

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
First Appellant

SECRETARY OF THE DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION
Second Appellant

and

SZSSJ
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
First Appellant

SECRETARY OF THE DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION
Second Appellant

KATHY BACKHOUSE
Third Appellant

and

SZTZI
Respondent

APPELLANTS' SUBMISSIONS

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Part I: Certification

1. The submissions are in a form suitable for publication on the internet.

Part II: Issues

2. These appeals arise from steps taken by the Department of Immigration and Border Protection (**Department**) to deal with the implications of an incident on 10 February 2014 in which the name and some personal information of persons in detention as at 31 January 2014 was made available online (the **Data Breach**). The following issues are raised:

   a) Whether the Federal Circuit Court (**FCC**) has jurisdiction to hear and determine a claim in relation to conduct that constituted a migration decision because it was conduct preparatory to a decision under the first appellant (**Minister**)'s dispensing powers under ss 48B, 195A and 417 of the *Migration Act 1958* (**the Act**), in circumstances where in SZTZI's case the result of an officer's assessment meant that the decision would not be referred to the Minister for further consideration and in SZSSJ's case any removal under s 198 could flow only from a decision not to exercise those dispensing powers.

   b) Whether s 198 of the Act and s 7(2) of the *Acts Interpretation Act 1901* (**AIA**) confer on a person who claimed protection prior to the enactment of s 197C of the Act a right not to be removed from Australia until a procedurally fair assessment of non-refoulement claims is conducted.

   c) The application of the rules of procedural fairness to conduct preparatory to the exercise of the Minister's dispensing powers under ss 48B, 195A and 417, in light of this Court's decision in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (***S10***).

   d) Whether conduct of officers of the Department is capable of generating an obligation of procedural fairness, in circumstances where the rules of procedural fairness have otherwise been excluded.

   e) If an obligation to accord procedural fairness applies, what does it require a person be informed of, in relation to:

      i) the process and criteria for the Minister's decision; and

      ii) the circumstances of the Data Breach?

   f) Whether there existed a threat sufficient to justify the grant of an injunction against removal in SZSSJ's case.

Part III: *Judiciary Act 1903*

3. The Appellants consider that no notice under s 78B of the *Judiciary Act 1903* is required.

Part IV: Citation of reasons for judgment

4. These appeals are from orders made by the Full Court of the Federal Court of Australia (**Full Court**) on 25 September 2015 in *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1. That was an appeal from orders made by the FCC in *SZSSJ v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 1148, heard at the same time as an appeal from orders made by the FCC in *SZTZI v Secretary of the Department of Immigration* [2015] FCCA 1271.

Part V: Facts

SZSSJ

5. SZSSJ arrived in Australia on 27 May 2005 on a student visa. After being detained on 3 October 2012,[1] he applied for a protection visa. It was refused by a delegate of the Minister and that refusal was affirmed by the Refugee Review Tribunal (**RRT**) on 19 February 2013.[2] Subsequent applications for judicial review and ensuing appeals were dismissed.[3] SZSSJ was in detention on 31 January 2014, and was therefore affected by the Data Breach.

6. On 10 February 2014, the Department published a document online entitled "Immigration Detention and Community Statistics Summary", which contained (via charts and graphs included in the Microsoft Word version of the document) a link to certain personal information of persons held in detention on 31 January 2014.[4]

7. At the time of the Data Breach, subject to the result of a special leave application[5] or a favourable decision by the Minister under one or other of his dispensing powers, SZSSJ was liable to removal from Australia following applicable administrative steps, as an unlawful non-citizen who could not lawfully make a valid application for any further visas.[6]

8. On 7 March 2014, SZSSJ commenced proceedings in the FCC in relation to the Data Breach.[7] On 12 March 2014, the Secretary wrote to the persons affected by the Data Breach, including SZSSJ, stating the nature of the information disclosed, expressing deep regret and stating that the Department would "*assess any implications for you personally as part of its normal processes*" (**12 March letter**).[8] On 20 June 2014, the FCC held that it lacked jurisdiction to consider SZSSJ's application.[9] SZSSJ appealed the FCC's decision.

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1 (2015) 234 FCR 1 at 7 [11]
2 (2015) 234 FCR 1 at 7 [8]
3 *SZSSJ v Minister for Immigration* [2013] FCCA 654; *SZSSJ v Minister for Immigration and Border Protection* [2013] FCA 1223
4 (2015) 234 FCR 1 at 6 [3]
5 Which was dismissed on 2 April 2014: [2014] HCASL 73; see (2015) 234 FCR 1 at 8 [15]
6 (2015) 234 FCR 1 at 7 [8], [9]
7 (2015) 234 FCR 1 at 6 [7]
8 (2015) 234 FCR 1 at 7-8 [12], [13]
9 [2014] FCCA 1379 at [19]; (2015) 234 FCR 1 at 8 [16]

9. On 27 June 2014, an officer of the Department wrote to SZSSJ asking him to put in writing any concerns he might have regarding the impact of the Data Breach (**27 June letter**).[10] He responded on 4 and 11 July 2014.[11] On 1 October 2014, an officer of the Department wrote to SZSSJ to inform him that an ITOA had been commenced to assess whether his circumstances engaged Australia's non-refoulement obligations.[12]

10. On 29 October 2014, the Full Court allowed SZSSJ's appeal, and remitted the matter to the FCC: (2014) 231 FCR 285. The Full Court found that the evidence established that the outcome of the ITOA process would produce one of two courses. If SZSSJ was found to be a person in respect of whom Australia owes protection obligations, his case would be referred to the Minister for consideration under the Minister's intervention powers under the Act (which the Court noted included ss 48B, 195A and 417). Alternatively, if the assessment was negative, subject to any other proceedings challenging that assessment or any other impediment to removal, removal planning would commence.[13] The Full Court held that the FCC had jurisdiction (having regard to s 474(2) and (3)(h) of the Act) on the basis that the Department had, since 12 March 2014, been engaged in conduct preparatory to a decision required to be made under the Act, namely whether or not to remove SZSSJ from Australia under s 198(6) of the Act.[14]

11. The Act was amended on 16 December 2014 to insert s 197C. The same day, SZSSJ filed a second further amended application in the FCC seeking, inter alia, an injunction against removal pending consideration of Australia's non-refoulement obligations *"from: the release of the applicant's personal information in or about February 2014"*.[15]

12. On 23 December 2014, an officer of the Department wrote to SZSSJ setting out information to be considered in relation to the ITOA and inviting a response. His then solicitors responded on 20 January 2015.[16]

13. The FCC dismissed the second further amended application on 28 April 2015.[17] In the course of those proceedings, an affidavit of Deirdre Marie Russack, Director of the Protection Visa Procedures section of the Onshore Protection Branch of the Department, was read.[18] It was Ms Russack's unchallenged evidence that, and the FCC found, that the appellants would not attempt to remove SZSSJ from Australia before the International Treaties Obligations Assessment (**ITOA**) process was concluded.[19] SZSSJ appealed. The Minister

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10 (2015) 234 FCR 1 at 8-9 [17]
11 (2015) 234 FCR 1 at 9 [19]
12 (2015) 234 FCR 1 at 9-10 [21]
13 (2014) 231 FCR 285 at 295 [39]
14 (2014) 231 FCR 285 at 295-296 [40]; (2015) 234 FCR 1 at 10-11 [24], [25]
15 [2015] FCCA 1148 at [18]
16 (2015) 234 FCR 1 at 11-12 [28]
17 [2015] FCCA 1148
18 [2015] FCCA 1148 at [17]
19 [2015] FCCA 1148 at [25]; see (2015) 234 FCR 1 at 12 [31]

relied on a notice of contention filed 22 July 2015, on the ground that the FCC did not have jurisdiction to grant the relief sought by reason of s 476(2)(d) of the Act (not an argument raised in the FCC).[20] The Full Court upheld the appeal. The Full Court held, as a factual matter, that the Minister had decided to consider the exercise of his powers under ss 48B, 195A and 417 of the Act in respect of persons affected by the Data Breach;[21] and that officers conducting the ITOAs were engaged in conduct preparatory to decisions by the Minister under those sections.[22]

14. The Full Court set aside the FCC's orders and in their place, issued a declaration that the process conducted from 12 March 2014 to date to assess the implications for SZSSJ of the Data Breach had been procedurally unfair; and an injunction against the Minister or Secretary removing SZSSJ from Australia until 14 days after the determination of that process.[23]

SZTZI

15. SZTZI is a Chinese national who arrived in Australia in April 2013 on a visitor's visa. After being detained in September 2013 following the expiry of her visa, she applied for a protection visa. It was refused by a delegate of the Minister and that refusal was affirmed by the RRT on 10 January 2014.[24] SZTZI was in detention on 31 January 2014, and was therefore affected by the Data Breach. SZTZI did not seek judicial review of the RRT's decision.

16. SZTZI received a copy of the 12 March letter and the 27 June letter. She responded to the 27 June letter through her solicitors on 30 June 2014.[25] On 13 January 2015, an officer of the Department wrote to SZTZI to inform her that an ITOA had been commenced to assess whether her circumstances engaged Australia's non-refoulement obligations.[26]

17. On 5 February 2015, an officer of the Department wrote to SZTZI setting out information to be considered in relation to the ITOA and inviting a response. Her solicitors responded on 11 February 2015.[27]

18. On 23 March 2015, the ITOA was finalised, the third appellant concluding that Australia's non-refoulement obligations were not engaged in relation to SZTZI.[28] SZTZI commenced proceedings in the FCC. Prior to the FCC hearing, she narrowed her claim for an injunction such that she no longer sought an injunction against removal from Australia but instead sought an injunction against the Minister relying on the ITOA decision.[29] She also sought a

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20 (2015) 234 FCR 1 at 9 [60]
21 (2015) 234 FCR 1 at 23-25 [76]-[84]
22 (2015) 234 FCR 1 at 22 [75]; see also at 25-26 [85]
23 See (2015) 234 FCR 1 at 33-34 [126]-[129]
24 (2015) 234 FCR 1 at 34 [131]
25 (2015) 234 FCR 1 at 34 [132]
26 (2015) 234 FCR 1 at 35 [135], [136]
27 (2015) 234 FCR 1 at 35 [136], [137]
28 (2015) 234 FCR 1 at 35-36 [139]
29 (2015) 234 FCR 1 at 36 [140], 37 [146]

declaration that the third appellant's recommendation was unlawful. The FCC dismissed the application on 12 May 2015.[30]

19. SZTZI appealed, and the Minister relied on a notice of contention filed 22 July 2015, on the same ground as in SZSSJ's case. The Full Court upheld the appeal, stating that the Department's procedure was procedurally unfair "*for the reasons we have given in* SZSSJ *(including in relation to the notice of contention)*".[31]

Part VI: Argument

Jurisdiction (ground 3 in both appeals)[32]

SZTZI

10 20. By ss 474(7)(a) and 476(2)(d) of the Act, the FCC's jurisdiction is excluded in relation to a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's powers under, relevantly, ss 48B, 195A and 417. As noted above, SZTZI's ITOA had concluded with a finding that she did not engage Australia's non-refoulement obligations, with the result that, consistent with the Department's policy in relation to ITOAs (the **PAM3**)[33] her case would not be referred to the Minister for consideration pursuant to his personal dispensing powers in ss 48B, 195A or 417.

21. The Full Court acknowledged that the recommendation in SZTZI's ITOA was conduct preparatory to the making of a decision for the purposes of s 474(3)(h) of
20 the Act.[34] The Full Court nevertheless did not give separate consideration in SZTZI's case to the Minister's submission on the notice of contention that the FCC's jurisdiction was excluded under ss 474(7)(a) and 476(2)(d). It implicitly rejected the submission by granting declaratory relief.

22. In *SZSSJ*, the Full Court held that this jurisdictional exclusion did not apply for two reasons: because the injunction sought related to an anticipated decision under s 198; and because there was not yet present a decision not to exercise the dispensing powers.[35] Neither reason was applicable to SZTZI, who did not seek an injunction against removal,[36] and who had been found not to engage Australia's non-refoulement obligations. There was no evidentiary basis to infer that the
30 exercise of the Minister's dispensing powers would be further considered in light of the result of SZTZI's ITOA.[37]

23. The Minister's decision not to exercise, or not to consider exercising, his dispensing powers in SZTZI's case comprised the statement in the PAM3 that

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30 [2015] FCCA 1271; see (2015) 234 FCR 1 at 36 [140]
31 (2015) 234 FCR 1 at 38 [152]
32 Appeal ground numbers herein correspond with paragraph numbers in the Notices of Appeal
33 Extracted (2015) 234 FCR 1 at 23 [77]
34 (2015) 234 FCR 1 at 36-37 [144]
35 (2015) 234 FCR 1 at 13 [64]
36 (2015) 234 FCR 1 at 37 [146]
37 See, similarly, *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 (***Raikua***) at 522 [63]

consideration should be given to removal if an ITOA finds that non-refoulement obligations are not engaged,[38] operating upon the third appellant's judgment in the ITOA that SZTZI did not engage those obligations.[39] The FCC's jurisdiction is excluded in respect of such a decision. The Full Court erred in failing to so find.

24. In finding there was no decision not to exercise the powers referred to in s 474(7)(a) in *SZSSJ*, the Full Court implicitly distinguished three existing Federal Court authorities relied on by the Minister,[40] including a decision subsequently described by the Federal Court as "*manifestly correct*".[41] These Federal Court cases were factually indistinguishable from SZTZI's case. In each of them, there had been no decision by the Minister not to exercise the relevant power under s 417. Instead, applying guidelines for determining whether requests for the exercise of the Minister's power should be referred to the Minister, officers of the Department (or, in *Ozmanian*, a ministerial advisor) determined not to refer an applicant's request for intervention to the Minister.[42] The court in each instance held that the conduct was a decision of the Minister for the purposes of the jurisdictional exclusion.[43] The Full Court erred in implicitly distinguishing this line of cases.

25. *Ozmanian* was decided prior to the repeal and substitution of Pt 8 of the Act by the *Migration Legislation Amendment (Judicial Review) Act 2001*. At that time, s 475(2) specified that certain decisions were not "*judicially reviewable decisions*" including "*a decision of the Minister not to exercise, or not to consider the exercise of, his or her power under section ... 417*": s 475(2)(e). Section 485(1) relevantly provided that the Federal Court did not have "*any jurisdiction in respect of judicially-reviewable decisions or decisions covered by subsection 475(2)*" other than that provided by Pt 8 of the Act. No definition of "decision" was included in the Act.[44] The Full Court nevertheless rejected the contention that s 485 of the Act did not manifest a sufficiently clear intention to oust the jurisdiction to review conduct engaged in for the purpose of a decision under s 417, pursuant to s 6 of the *Administrative Decisions (Judicial Review) Act 1977*.[45]

26. Justice Sackville approached the matter on the basis that the principles stated in *Bropho v Western Australia*[46] and *Coco v The Queen*[47] applied to the construction of s 485 of the Act, such that it was necessary to identify an unmistakeable and unambiguous intention to exclude the Federal Court's jurisdiction to review

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38 (2015) 234 FCR 1 at 23 [77]

39 *Raikua* (2007) 158 FCR 510 at 522 [62]-[63]

40 *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 (***Ozmanian***) at 15-27 (Sackville J, Jenkinson and Kiefel JJ agreeing); *S1083 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1455 (***S1083***) at [18] (Moore J) (special leave refused: [2006] HCATrans 15) and *Raikua* at 519-523 [39]-[64] (Lindgren J)

41 *SZLJM v Minister for Immigration and Citizenship* [2008] FCA 300 at [9] (Flick J)

42 *Ozmanian* at 9-11; *S1083* at [5]; *Raikua* at 513-514 [13]-[14]

43 See also *QAAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 309 (Spender, Kiefel and Emmett JJ)

44 See *Ozmanian* (1996) 71 FCR 1 at 16

45 Ibid

46 (1990) 171 CLR 1 at 18

47 (1994) 179 CLR 427 at 436-437

conduct engaged in for the purpose of the decision, as well as jurisdiction to review the decision itself.[48] His Honour identified such an intention, having regard to the ordinary meaning of s 485(1) in its statutory context and the special character of the Minister's discretionary power under s 417.[49]

27. Justice Moore applied the reasoning in *Ozmanian* to an early version of s 476(2) in *S1083*;[50] as did Lindgren J when considering both the former and the present s 476(2), and the present s 474, in *Raikua*.[51] Justices Moore and Lindgren regarded the differences in language between the former s 485 and the former and present s 476(2) (as well as s 474(7),[52] in *Raikua*) as immaterial for the purpose of construing the limitation on jurisdiction.[53]

28. In any event, the inclusion in the Act of a definition of "decision" including "*conduct preparatory to the making of a decision*" (s 474(3)(h))[54] made express what the Full Court in *Ozmanian* implied from the terms of the former s 485(1), namely that "decision" is to be given a wide meaning, extending to conduct for the purposes of a decision. The jurisdictional exclusion has remained expressed by reference to "*a decision of the Minister not to exercise, or not to consider the exercise*" of the dispensing powers since its introduction, notwithstanding the expanded definition of "decision". Parliament repeated the formulation used in the former s 475(2)(e) in s 474(7), and should be taken to have intended the words of exclusion to bear the meaning judicially attributed to them;[55] a presumption strengthened by the simultaneous enactment of the judicially accepted interpretation of "decision".

29. Furthermore, subsequent to this Court's finding in *Plaintiff M61/2010E v Commonwealth* that inquiries undertaken in the Refugee Status Assessment (**RSA**) and Independent Merits Review (**IMR**) processes had a statutory foundation, as steps taken towards the possible exercise of power under either or both of ss 46A and 195A,[56] the Full Federal Court held in *SZQDZ v Minister for Immigration and Citizenship*[57] that the recommendation of an Independent Merits Reviewer had no statutory or other legal force and could not be characterised as "*a decision of an administrative character made or proposed to be made ... under [the] Act*" within the meaning of s 474(2).[58]

30. The Full Court held that the conduct referred to in s 474(3)(h) must still have the character of "*a decision of an administrative character made or proposed to be made ... under [the]*

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48 (1996) 71 FCR 1 at 24

49 Ibid, at 25-27

50 [2004] FCA 1455 at [18]; see also *Applicant S1083 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 295 (Allsop J)

51 *Raikua* (2007) 158 FCR 510 at 519-523 [39]-[64].

52 Inserted by the *Migration Litigation Reform Act 2005*

53 *S1083* [2004] FCA 1455 at [18]; *Raikua* (2007) 158 FCR 510 at 522 [58]-[59], 522-523 [64]

54 Inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001*

55 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106; see also *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 at 324-325 [8] (Gleeson CJ), 346-347 [81] (McHugh J)

56 (2010) 243 CLR 319 (***M61***) at 349 [66], 350-351 [70], 353-354 [78]

57 (2012) 200 FCR 207 (***SZQDZ***) (Keane CJ, Rares and Perram JJ)

58 Ibid at 218 [39]

Act" (s 474(2)), explaining that the availability of serial challenges in respect of every step in processes leading to a decision under s 46A by application of an expansive construction of s 474(3)(h) would be an "*odd result*" and would ignore the fact that such processes have no legal force.[59] Like SZTZI, the applicants in *SZQDZ* sought an injunction to prevent the Minister taking into account the reviewer's recommendations in any future consideration of the exercise of his powers (in *SZQDZ*, under s 46A). The Full Court held that an application for that relief enlivened the jurisdiction of the Federal Magistrate's Court under s 476(1), as an injunction sought "*in relation to*" a migration decision yet to be made.[60] The Full Court in *Minister for Immigration and Citizenship v SZQRB*[61] rejected an argument that *SZQDZ* was wrongly decided.

31. Section 46A is not amongst the dispensing powers falling within the jurisdictional exclusion under ss 474(7)(a) and 476(2), so it was not necessary for the Full Court to consider that exclusion in *SZQDZ*. However, *SZQDZ* confirms that an ITOA assessor's finding does not by itself amount to a migration decision.[62] The only judicially reviewable migration decision in SZTZI's case was the decision of the Minister in his consideration of the exercise of his dispensing powers. Characterised as either a decision already made, by operation of the PAM3 on the third appellant's ITOA finding (as in *Raikua*) or as one yet to be made, but hypothetically adopting the ITOA finding (as in *SZQDZ* and as suggested by the injunction sought by SZTZI), the Minister's decision was clearly a decision not to exercise, or not to further consider the exercise, of the powers in ss 48B, 195A and 417. It falls squarely within the jurisdictional exclusion.

SZSSJ

32. SZSSJ's ITOA was incomplete at the time of the Full Court's decision. However, it is not disputed that SZSSJ's ITOA was being undertaken with a view to the possible exercise of power under ss 48B, 195A and/or 417. As the Full Court noted, the exercise of those powers was the only means by which SZSSJ's protection claims could be "*vindicate[d] under Australian law*".[63] There were two possible outcomes of SZSSJ's ITOA. Either he would be found not to engage Australia's non-refoulement obligations, in which case there would be no referral to the Minister and no further consideration of the exercise of powers under ss 48B, 195A and 417 (a decision to which s 474(7)(a) and 476(2) would apply), or there would be a favourable decision in relation to the exercise of those powers and no judicial review would be sought.

33. As noted above, the first reason the Full Court gave for its jurisdictional finding was that the injunction sought related to an anticipated decision under s 198, not a

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59 Ibid at 218 [40], 219 [43]

60 Ibid at 220 [45]

61 (2013) 210 FCR 505 (***SZQRB***) at 546-547 [201]-[208]

62 *SZQDZ* is consistent with Lindgren J's observation in *Raikua* that the decision of the Departmental officer (Ms Connolly) was not susceptible to judicial review: (2007) 158 FCR 510 at 522-523 [64]

63 (2015) 234 FCR 1 at 24-25 [82]

decision falling within s 474(7)(a).[64] The Full Court erred by failing to take into account that the necessary precursor to the discharge of statutory duties under s 198 to which the injunction related was a decision to which s 474(7)(a) applied.

34. The discharge of statutory duties under s 198 could only follow from a decision by the Minister not to exercise, or not to further consider exercising, his powers under ss 48B, 195A and 417 in SZSSJ's favour. That is because removal would not be regarded as reasonably practicable while the possible exercise of the Minister's powers was under consideration.[65] In addition, the injunction sought, pending consideration of Australia's non-refoulement obligations according to law,[66] must have been claimed on the basis that the existing ITOA process did not constitute a lawful assessment of those non-refoulement obligations. That is, the injunction was sought by reason of conduct constituting a migration decision only because it was conduct preparatory to the making of a decision in respect of which the FCC's jurisdiction was excluded.

35. The Full Court's second reason for its jurisdictional finding disregards the fact that in each of *Ozmanian*, *S1083* and *Raikua* no decision had been made by the Minister in the individual cases. It also gives rise to the incongruity recognised in *Ozmanian*[67] and also (outside the s 474(7) context) in *SZQDZ*,[68] namely that the FCC's jurisdiction is excluded in relation to the Minister's decision itself, but not conduct engaged in for the purposes of that decision. Such incongruity in the operation of the Act should be rejected by this Court.

Application of the rules of procedural fairness (grounds 2, 4 and 5 in both appeals)

Sections 197C and 198 (ground 2)

36. The Full Court held[69] that prior to the enactment of s 197C of the Act, SZSSJ had "*a right not to be removed until a procedurally fair assessment of his non-refoulement claims was conducted*". That right was said to arise under s 198 as explained in *SZQRB*, to have accrued "*at the moment he made his claim for non-refoulement*" and to be preserved by s 7(2)(c) and (e) of the AIA.[70] The effect of this analysis is that the rules of procedural fairness would apply to the determination of SZSSJ's and SZTZI's non-refoulement claims; and that s 197C has no application to anyone who had made a protection claim prior to 16 December 2014, notwithstanding that it was enacted in an act partially entitled "*Resolving the Asylum Legacy Caseload*".

37. The Full Court erred in three respects when it found that SZSSJ and SZTZI had an accrued right of the kind it identified, providing scope for the operation of s 7(2) of the AIA, as at 15 December 2014.

38. *First*, there was no accrued right in existence at the relevant time. Accepting that

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64 Ibid at 20 [64]
65 See ibid at 14-15 [39]
66 See [2015] FCCA 1148 at [18], setting out the injunction sought
67 (1996) 71 FCR 1 at 25
68 (2012) 200 FCR 207 at 219 [43]
69 (2015) 234 FCR 1 at 18 [54]
70 (2015) 234 FCR 1 at 16 [47], 18 [56], 19 [58]

s 7(2)(c) of the AIA protects contingent rights,[71] it is nevertheless necessary to identify a right that is in existence (even if inchoate) at the time of the amendments in question in order for it to operate.[72] The reasoning in *SZQRB* on which the Full Court relied as to the content of the accrued right[73] offers no support for the notion that a right not to be removed arises and accrues when a protection claim is made. Instead, Lander and Gordon JJ (Flick J agreeing) refer to the unlawfulness of removal absent assessment of claims for protection "*when it is sought to exercise the power of removal*".[74]

39. An officer had sought to exercise the power to remove SZQRB; his removal was scheduled for the day after he commenced the substantive proceeding in the Federal Magistrate's Court.[75] Justices Lander and Gordon found that he was liable to removal.[76] SZQRB's entitlement to an injunction was not based upon any entitlement to a lawful ITOA, but premised upon his threatened imminent unlawful removal from Australia.[77] The Explanatory Memorandum for the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* states that s 197C was "*intended to provide that decisions such as* SZQRB ... *are no longer 'good law' for the purposes of removal*".[78]

40. Section 198 imposes duties on officers when certain conditions are satisfied.[79] Properly construed, s 197C operates when the question of the enlivening of an officer's duty of removal under s 198 arises. After its commencement, s 197C modified the duty of an officer considering removal, at the time when that duty arose.

41. The Full Court accepted as "*probably correct*" the Minister's submission that s 197C altered the relevant criteria attaching to the exercise of the power in s 198(6), but found that characterising s 197C as affecting the duty under s 198 was not "*mutually exclusive*" with the first respondent having a right, under s 198, as at 15 December 2014, the day before the Act was amended.[80] Acknowledging the lack of mutual exclusivity[81] does not identify the point in time at which the duty to which the right affected by the insertion of s 197C corresponds arises.

42. The Full Court's reasoning erroneously assumes that, before any question of the enlivening of the duty to remove arises, s 198 confers a right not to be removed upon which s 7(2) of the AIA operates. No duty to remove either SZSSJ or

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71 *Esber v Commonwealth* (1992) 174 CLR 430 at 440

72 *Australian and International Pilots Association v Qantas Airways Ltd (No 3)* (2007) 162 FCR 392 at 399 [22] (Tracey J)

73 (2015) 234 FCR 1 at 18 [54]

74 *SZQRB* (2013) 210 FCR 505 at 549 [228]

75 Ibid, 513-515 [31]-[35]

76 Ibid, 527 [106]

77 Ibid, 521 [63], 554 [267], [268]

78 At [1139]

79 *M38/2002 v Minister for Immigration and Multicultural Affairs* (2003) 131 FCR 146 at 165 [63] (Goldberg, Weinberg and Kenny JJ)

80 (2015) 234 FCR 1 at 18-19 [57]

81 In a Hohfeldian sense: WN Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16, 30-32

SZTZI had arisen as at 15 December 2014. SZSSJ was not regarded as available for removal while his protection claims were being assessed in the ITOA.[82] SZTZI's claims had not yet been assessed via the ITOA process, which commenced in her case in January 2015.

43. *Secondly*, even if SZSSJ and SZTZI had an accrued right not to be removed arising under s 198 of the Act immediately prior to the commencement of s 197C, the right could only have been in the form of a right not to be removed unlawfully. The right, assuming it existed both before and after the introduction of s 197C, was a right correlating to an officer's duty to remove only in certain circumstances. If the right is correlative of the duty in s 198, the amendment effected by s 197C to the circumstances in which removal will be lawful[83] altered the content of the right correlating to an officer's duty to remove.

44. *Thirdly*, the provisions of the Act introducing s 197C disclose a contrary intention sufficient to displace the operation of s 7(2) of the AIA.[84] The text of s 197C(2) expressly states that an officer's duty under s 198 arises "*irrespective of whether there has been*" a past assessment of non-refoulement obligations according to law. The timing of the assessment, if any, is completely irrelevant. Furthermore, the transitional provision in item 27 of Sch 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, not mentioned by the Full Court, states that the amendments made by Pt 1 of Sch 5, including s 197C, "*apply in relation to the removal of an unlawful non-citizen on or after the day this item commences*". Item 27 of Sch 5 commenced on 16 December 2014. It is clear and unequivocal in its operation, with the effect that s 197C applies in respect of all removals taking place on or after that date. No distinction is drawn between removals of persons who made non-refoulement claims prior to 16 December 2014 and those who made claims subsequently.

45. Finally, in sourcing the right to a procedurally fair assessment of non-refoulement claims in s 198 and *SZQRB*, the Full Court erroneously assumed the reasoning in *SZQRB* was applicable to persons whose claims were being considered in the context of a potential future exercise of the dispensing powers under ss 48B, 195A and 417, which would not be subject to the requirements of procedural fairness in light of *S10*.

46. In *SZQRB*, the right to a procedurally fair assessment of the applicant's claims prior to removal flowed from an application of *M61*,[85] insofar as that case identified procedural fairness as an aspect of assessment of claims undertaken for the purpose of the Minister considering whether to exercise power under ss 46A or 195A according to law,[86] not from any feature of s 198. In circumstances where, for the reasons explained below, *S10* was applicable notwithstanding the Full Court's factual finding that the Minister had decided to consider whether to exercise his

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82 See [2015] FCCA 1148 at [25]

83 As to the effect of s 197C, see (2015) 234 FCR 1 at 16-17 [48]-[52]

84 See s 2 of the AIA

85 (2013) 210 FCR 545 at 544-546 [200], 549 [226] (Lander and Gordon JJ); 577-578 [389] (Flick J)

86 *M61* (2010) 243 CLR 319 at 353 [77]

powers under ss 48B, 195A and 417, the Full Court erred in applying this aspect of *SZQRB* as though the statutory context was identical. Even if s 197C had not been enacted, s 198 did not confer a right to procedural fairness on SZSSJ or SZTZI.

Application of *S10* (ground 4)

47. The relief sought by SZSSJ and SZTZI was premised on establishing a past (or threatened) denial of procedural fairness. In *S10*, the plurality held that obligations of procedural fairness did not attach to the dispensing powers under ss 48B, 195A and 417 of the Act, because of the combination of features of those powers identified by their Honours.[87]

10 48. The Full Court perceived a tension between *M61* and *S10*.[88] Their Honours noted that in *S10*, French CJ and Kiefel J stated that the Minister had not taken a step to consider the exercise of his non-compellable powers equivalent to that taken in *M61*.[89] The Full Court suggested that, in such a case, an applicant had no right or interest to which an obligation of procedural fairness may attach.[90] The Court turned to the plurality judgment in *S10* and reasoned that the plurality were "*merely highlighting the same factual matters to which French CJ and Kiefel J had referred*".[91] The Full Court thus distinguished *S10* on the basis of a factual finding (not challenged in this application) that the Minister had decided to consider whether to exercise his powers under ss 48B, 195A and 417.[92] The Court regarded this factual distinction
20 as "critical".[93]

49. The Full Court erred in distinguishing *S10*; holding that the rules of procedural fairness applied in a manner inconsistent with binding authority. As in *S10* (and unlike in *M61*), SZSSJ and SZTZI had made unsuccessful visa applications, which had been the subject of merits review and (in SZSSJ's case) judicial review prior to the present proceedings. The plurality in *S10* rejected an argument that the plaintiffs' rights or interests were not affected by the failure to engage in their favour the exercise of the dispensing powers.[94] Indeed, Plaintiff S51 (one of the group of cases heard together) had been in detention or community detention since his arrival in Australia.[95]

30 50. Instead, the ratio of *S10*, namely that the dispensing powers in ss 48B, 195A, 351 and 417 are not conditioned on observance of the principles of procedural fairness, is found in the plurality's decision (at [99]-[100]) and involves a conclusion of statutory construction. The plurality identified nine statutory factors giving rise to a necessary intendment to exclude procedural fairness in relation to ss 48B, 195A, 351 and 417. These features were of "*determinative significance*". The passage from the

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87 *S10* (2012) 246 CLR 636 at 667-668 [99]-[100] (Gummow, Hayne, Crennan and Bell JJ)
88 (2015) 234 FCR 1 at 20-21 [69]
89 Ibid at 21 [71], citing *S10* (2010) 246 CLR 636 at 653 [45], [46]
90 Ibid
91 Ibid at 22 [73]
92 Ibid at 22-23 [74]-[76], 26 [87]
93 Ibid at 22 [75]
94 (2012) 246 CLR 636 at 659 [70]
95 Ibid at 645 [18]

plurality's judgment extracted by the Full Court[96] did not highlight the same factual matters as French CJ and Kiefel J: instead, their Honours were explaining the significance of the statutory features that excluded procedural fairness. Justice Heydon relied on a different range of statutory features,[97] but not to make "*the same point*" as French CJ and Kiefel J.[98]

51. The combination of statutory features relied on in *S10* applied equally before the Full Court in the present proceedings. The plurality's conclusion in *S10* was not based on whether or not the Minister had "*reached the first stage*"[99] in any of the four cases heard together by the High Court. In fact, as French CJ and Kiefel J noted, in Plaintiff S51's case a request for the exercise of power under s 417 was referred to the Minister, who "*noted that there was enough evidence to warrant* further consideration"[100] (emphasis added) and requested a submission, ultimately deciding that he would not intervene in relation to the request. Their Honours noted that the form of minute signed by the Minister indicates that he refused to "*further consider*" the exercise of his powers. The Minister in Plaintiff S51's case had clearly decided to consider exercising his dispensing power under s 417 and had progressed to what the Full Court regarded as the second step, namely engagement in the actual exercise of the power.[101] *S10* could not be distinguished on the basis that the Minister had not taken a step to exercise his dispensing powers in relation to any of the four plaintiffs in that case.

52. There is an evident inconsistency between the Full Court's application of the rules of procedural fairness to the ITOA process and the reasoning in *S10* holding that any future exercise of the same dispensing powers whose exercise the Full Court found the Minister was considering would not be subject to those requirements. The Full Court was bound by *S10*, notwithstanding its factual finding that the Minister had decided to consider the exercise of his dispensing powers.

Generation of procedural fairness obligations by conduct (ground 5)

53. In SZSSJ's case, the Full Court held that an obligation of procedural fairness arose from indications in three letters that SZSSJ would have the opportunity to make submissions (also, in one letter, a statement that he would be afforded procedural fairness) and in the PAM3 that procedural fairness would apply.[102] This issue as to the application of procedural fairness only arose if the rules of procedural fairness did not otherwise apply, on the ground that is the subject of ground 3. The Full Court found that the relevant conduct supplied an "*independent basis*" for the conclusion that procedural fairness applied to the ITOA process.[103]

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96 Ibid at 668 [100]

97 Ibid at 673-674 [121]

98 Cf the Full Court: (2015) 234 FCR 1 at 22 [73]

99 Cf (2015) 234 FCR 1 at 21-22 [71] (referring to the two-stage process set out at 20 [66])

100 (2012) 246 CLR 636 at 645 [20]

101 The plurality note that Plaintiff S51 unsuccessfully sought the engagement and exercise of the Minister's powers under ss 48B and 195A, but do not refer to the consideration given to the exercise of power under s 417: (2012) 246 CLR 636 at 664 [88]

102 (2015) 234 FCR 1 at 26 [88]-[89], 28 [96]

103 Ibid at 26 [88]

54. The extent to which the Full Court picked up these findings in SZTZI's case by holding that the procedure adopted in her case was procedurally unfair "*for the reasons given in* SZSSJ"[104] is unclear, but these findings are the subject of ground 4 to the extent they were adopted by the Full Court in relation to SZTZI.

55. In relying on *Attorney-General (Hong Kong) v Ng Yuen Shiu*,[105] *Annetts v McCann*[106] and *Haoucher v Minister for Immigration and Ethnic Affairs*[107] for the proposition that statements made on the Minister's behalf could independently generate a duty to afford procedural fairness, the Court took a step not taken in any of those cases, by finding that procedural fairness arose by statements or conduct in circumstances where it had been statutorily excluded.

56. In *Ng Yuen Shiu*, the exercise of power in question was the making of a removal order under the *Immigration (Amendment) (No. 2) Ordinance 1980* (Hong Kong). There was no doubt that there was no statutory requirement for an inquiry before the making of a removal order.[108] The question addressed by the Privy Council was whether, at common law, the applicant was entitled to a fair inquiry held prior to the making of a removal order against him. The reasoning in *Ng Yuen Shiu* was, as the Full Court noted,[109] premised on the concept of legitimate expectation. More significantly in the present context, the justification for the principle adopted by the Privy Council that a legitimate expectation may be based on a statement or undertaking by a public authority was expressed to be subject to compatibility with statutory requirements. As Lord Fraser explained, when a public authority has promised to follow a particular procedure: "*it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty*".[110]

57. *Haoucher* likewise involved a decision to deport a person, made pursuant to a provision of the Act that imposed an obligation on the Minister to reconsider a deportation order in light of the AAT's recommendation. The case was not decided on whether the statutory context was sufficient to generate an obligation of procedural fairness, regardless of the relevant government policy,[111] though that would doubtless now be accepted.[112] Both Deane and McHugh JJ recognised an entitlement to procedural fairness arising from the government's criminal deportation policy, whilst also acknowledging the relevant common law principle operated only in the absence of contrary legislative intent.[113] In *Annetts*, the critical question was not whether procedural fairness applied, but whether the *Coroner's Act*

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104 Ibid at 38 [152]
105 [1983] 2 AC 629
106 (1990) 170 CLR 596 (***Annetts***)
107 (1990) 169 CLR 648 (***Haoucher***)
108 [1983] 2 AC 629 at 634
109 (2015) 234 FCR 1 at 26-27 [91]
110 [1983] 2 AC 629 at 638
111 (1990) 169 CLR 648 at 654 (Deane J)
112 See eg *Annetts* (1990) 170 CLR 596 at 598
113 (1990) 169 CLR 648 at 653, 655 (Deane J); 679, 681 (McHugh J)

1920 (WA) disclosed a legislative intention to exclude it (it did not).[114]

58. None of these cases considered whether the common law would recognise an obligation to accord procedural fairness against a background of statutory exclusion. If procedural fairness is excluded by the requisite plain words of necessary intendment,[115] a court would no longer be merely "*supply[ing] the omission of the legislature*" or ascertaining the parliament's "*true intention*"[116] in upholding an obligation to comply with its requirements.

59. This Court has accepted that there is a false dichotomy involved in the "unproductive" debate whether procedural fairness is to be identified as a common law duty or an implication from statute.[117] However, given the power being exercised in the statutory context applicable in the present appeals, there was no room for operation of an implied legislative intent to apply procedural fairness upon the statements made in the letters to SZSSJ and in the PAM3. By imposing an obligation to accord procedural fairness as a result of statements in the letters and the PAM3 in these circumstances, the Full Court implicitly accepted that the executive can, by its conduct, override the will of the legislature.

60. No authority establishes that statements or conduct may give rise to procedural fairness obligations in a statutory decision making context notwithstanding the exclusion of such obligations. In *Re Minister for Immigration and Citizenship; ex parte Lam*[118] and *Applicant NAFF of 2002 v Minister for Immigration and Multicultural Affairs*[119] (both of which were relied on by the Full Court)[120] procedural fairness already applied; the representation in question was not found to generate the obligation.[121] Similarly, in *Minister for Immigration and Border Protection v WZARH*, the Minister accepted that procedural fairness attached to the IMR review process.[122] In *M61*, this Court did not find that a statement in the RSA manual that procedural fairness would apply to the RSA procedures[123] gave rise to an obligation of procedural fairness. If such a statement was itself sufficient, it is surprising that this Court took the route it did[124] to reach that conclusion.

61. In a context where the rules of procedural fairness have been excluded through

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114 (1990) 170 CLR 596 at 598-599 (Mason CJ, Deane and McHugh JJ. Nothing in the Act disclosed such an intention: at 600), see also at 604 (Brennan J) (construing the Act to include terms supplied by the common law) 617 (Toohey J) (undoubtedly correct to state natural justice applied)

115 *Annetts* (1990) 170 CLR 596 at 598

116 *Kioa v West* (1985) 159 CLR 550 at 609 (Brennan J), cited in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ)

117 *S10* at 666 [97] (Gummow, Hayne, Crennan and Bell JJ); see also *M61* (2010) 243 CLR 319 at [74]

118 (2003) 214 CLR 1 (***Lam***)

119 (2004) 221 CLR 1 (***NAFF***)

120 (2015) 234 FCR 1 at 27 [92]

121 See *Lam* (2003) 214 CLR 1 at 12-13 [34] (Gleeson CJ); *NAFF* (2004) 221 CLR 1 at 8 [27] (McHugh, Gummow, Callinan and Heydon JJ)

122 (2015) 90 ALJR 25 (***WZARH***) at 32-33 [33] (Kiefel, Bell and Keane JJ)

123 *M61* (2010) 243 CLR 319 at 343 [43]

124 Ibid at 351-354 [72]-[79]

the use of language revealing the requisite "*necessary intendment*",[125] the executive or officials may decide to act procedurally fairly in any event and indicate that this course has been adopted. To do so does not give rise to enforceable obligations: it remains a matter of non-binding policy.

Content of procedural fairness (grounds 6 and 7 in both appeals)

Departure from representation (ground 6)

62. The Full Court's finding of a departure from the representation to SZSSJ concerning the application of procedural fairness[126] (the subject of ground 6 in SZTZI's case to the extent picked up by the reference to the "*reasons we have given in* SZSSJ")[127] depends on the Full Court's reasoning as to the content of procedural fairness, the subject of ground 7. If that reasoning was erroneous, its application in the context of the threshold question of the application of procedural fairness also involved error. In any event, the test for whether there is a duty to accord procedural fairness does not turn upon its content.[128]

63. The Full Court additionally erred by drawing inferences about the content of the information SZSSJ had sought, including the unabridged KPMG report (not before the Full Court), and about the usefulness of the submissions that might have been made based on it.[129] While the Full Court observed of the Data Breach that "*once the information was released on the internet the extent of its distribution was unknowable*",[130] by contrast to this Court's analysis of why an interview by the Second Reviewer might have made a difference to the outcome of the IMR process in *WZARH*,[131] the Full Court did not give consideration to what the extent of distribution meant for the assessment of Australia's non-refoulement obligations as a result of the Data Breach, or for the usefulness of submissions that SZSSJ or SZTZI might have made if provided with the information sought.

64. By contrast to the position in *NAFF*, in which the availability of the Tribunal's reasons enabled the plurality to conclude it was "*likely inference*" that the Tribunal member's impression as to the benefits of compliance with the procedure the subject of her representation was sound,[132] the Full Court did not have the reasons of the officer conducting SZSSJ's ITOA available, because the ITOA was incomplete. The third appellant's reasons were available in SZTZI's case, but the Full Court did not embark on any consideration of them to assess whether a different result might have followed if SZTZI had been provided with additional information. Those reasons indicate that the third appellant considered possibilities beyond access to SZTZI's personal information by Chinese

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125 *S10* (2012) 246 CLR 636 at 668 [100]
126 (2015) 234 FCR 1 at 27-28 [93]-[95]
127 Ibid at 38 [152]
128 *Day v Harness Racing NSW* (2014) 88 NSWLR 594 at 613-614 [97]-[99] (Leeming JA, McColl and Macfarlan JJA agreeing)
129 See (2015) 234 FCR 1 at 28 [95]
130 Ibid at 37 [150]
131 (2015) 90 ALJR 25 at 34 [43]
132 *NAFF* at 12-13 [43] (McHugh, Gummow, Callinan and Heydon JJ)

authorities.[133] The Full Court erred by failing to consider them before reaching its conclusion. The acceptance or rejection of her protection claim arising from the Data Breach was likely to turn on her profile in China, not any question of whether a particular IP address accessed the relevant Microsoft Word file (access having originated from sources including internet proxies and web crawlers).

Disclosure of process (ground 7(a))

65. The three matters required to be disclosed by the Full Court concerning the process taking place[134] assume that the Minister will be the final decision-maker and that he will apply the public interest test under ss 48B, 195A or 417 in each case. Accepting that the decision-making process has the Minister and the public interest test under the dispensing powers potentially at its end, it is nevertheless true that for the process to reach that stage, an officer conducting an ITOA must conclude that Australia's non-refoulement obligations are enlivened.

66. The decision-making process in the respondents' cases involved multiple steps, as in *M61*. The role of the officer undertaking the ITOA assessment was to consider Australia's non-refoulement obligations, as was explained in the letter sent to SZSSJ on 1 October 2014[135] and the equivalent letter sent to SZTZI on 13 January 2015.[136] There was no evidence to suggest that the officer's role included consideration of public interest matters or reporting on them to the Minister. The sections of the PAM3 pertaining to ITOAs which were supplied to SZSSJ,[137] stated that, if Australia's non-refoulement obligations were not found to be engaged by an officer conducting an ITOA, consideration should be given to progressing removal, indicating that the matter would not be referred to the Minister in the event of a negative assessment of non-refoulement obligations.[138] The same was true if an assessor or reviewer concluded that Australia did not owe protection obligations to a person at the conclusion of the RSA and IMR processes in *M61*.[139]

67. The Full Court does not appear to have rejected the proposition that the ITOA process may be concluded fairly and lawfully by a Departmental officer, without referral to the Minister, if the officer determines that Australia's non-refoulement obligations are not engaged. The Full Court nevertheless held that procedural fairness dictated that SZSSJ and SZTZI be told more than was required to pass through the officer's assessment of non-refoulement obligations, including that the Minister was the final decision-maker when that was only one possible outcome of the ITOA process. It also required the ITOA officer to disclose the public interest criteria for the Minister's decision under the dispensing powers,[140] despite the public interest being outside the remit of the officer's assessment of non-

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133 In the section headed "Findings of Fact (Credibility)"; cf (2015) 234 FCR 1 at 32-33 [122]-[124]
134 (2015) 234 FCR 1 at 28 [98]
135 Extracted (2015) 234 FCR 1 at 9-10 [21]
136 (2015) 234 FCR 1 at 35 [135]
137 Via the letter to his solicitor of 12 February 2015: see (2015) 234 FCR 1 at 12 [29]
138 See the extract of the PAM3, (2015) 234 FCR 1 at 23-24 [77]
139 (2010) 243 CLR 319 at 343 [44], 344 [49]
140 (2015) 234 FCR 1 at 28 [98(c)]

refoulement obligations.

68. In a multi-stage decision-making process, procedural fairness may impose varying requirements at different stages before an operative decision.[141] Later stages in such a process may only be reached if earlier stages result in a particular outcome. The purpose of notice, as an aspect of the hearing rule of procedural fairness, is to enable participation[142] by a person affected in the process of making a decision. The relevant question, at the stage of the decision-making process reached in SZSSJ's and SZTZI's cases, was what did procedural fairness require the ITOA officer to disclose about his or her assessment of non-refoulement obligations and what was being considered in that assessment, in order to enable SZSSJ and SZTZI to participate effectively in the ITOA process.

69. SZSSJ and SZTZI were given, in the 12 March letter, a detailed description of the nature of the personal information the subject of the Data Breach.[143] The 12 March letter stated that the information disclosed did not include any information about protection claims.[144] SZSSJ and SZTZI were subsequently told that the officer undertaking the ITOA would consider Australia's non-refoulement obligations under the relevant international treaties and would assess any protection claims they may have in relation to the disclosure of their personal information in the Data Breach[145] (in effect, an invitation to make further protection claims based on the disclosure of this information). They were invited to provide any further information they wished to have taken into consideration in the ITOA. Having been "alerted" to the ITOA procedure to which they were currently subject, they were "*in a position to tailor their evidence and submissions accordingly*".[146]

70. In those circumstances, procedural fairness did not require that SZSSJ and SZTZI also be told that, if they were found to engage Australia's non-refoulement obligations at the ITOA stage, the Minister would consider other matters going to the public interest (something which would only occur in a subsequent stage of the process, not yet commenced). The Full Court erred in finding that it did.

71. A separate question might arise as to what matters may need to be disclosed as a matter of procedural fairness if a person's case is referred to the Minister after an ITOA finding that Australia's non-refoulement obligations are engaged. That was not a question before the Full Court in these appeals.

Disclosure as a result of Departmental 'conflict' (ground 7(b))

72. The Full Court developed a new principle of procedural fairness in finding that procedural fairness required the disclosure of the "*full circumstances*" of the Data Breach, not because the information was adverse to the respondents or

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141 See eg *Greyhound Racing NSW v Cessnock & District Agricultural Association* [2006] NSWCA 333 at [98] (Basten JA, Beazley and Hodgson JJA agreeing)

142 See eg *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78 at 100 [117] (Weinberg J), quoting M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) at 409-410

143 (2015) 234 FCR 1 at 30 [111]

144 The 12 March letter is extracted in full (2014) 231 FCR 285 at 286-287 [6]

145 See (2015) 234 FCR 1 at 9-10 [21] (SZTZI was sent an equivalent letter)

146 *WZARH* (2015) 90 ALJR 25 at 37 [63] (Gageler and Gordon JJ)

"corroborative",[147] but on the basis that the (whole) Department was "conflicted" in assessing non-refoulement obligations said to arise from its "*wrongful conduct*".[148]

73. No authority was cited in support of this principle and the nature of the Department's conflict of interest was not explained (conflict of interest not having been raised in oral argument before the Full Court).[149] The Full Court also did not explain the relevance of the Department's conflict in light of its finding that the Minister is the relevant decision-maker.

74. The Full Court attributed responsibility for the Data Breach to the Department as a whole.[150] It assumed that the fact that one or more officers within the relevant reporting, web management and web operations, publishing and governance teams of the Department unintentionally left charts and tables linking to personal information in a Microsoft Word file to be published online, the inclusion of which personal information was not discovered by others prior to publication,[151] would generate some species of apprehension in relation to all other officers' assessments of non-refoulement obligations. That assumption was not justified.

75. There was no evidence that any officer conducting an ITOA was in any way involved in the Data Breach. Officers conducting ITOAs were not engaged in any form of investigation of the events giving rise to the Data Breach or who within the Department was responsible for it. Instead, it was accepted that the Data Breach resulted from publication of a report on the Department's website.[152] Officers conducting ITOAs were instructed to make an assumption about the personal information "*released on the department's website*".[153]

76. There was also no basis for attributing to officers conducting ITOAs any 'interest' in either the engagement of Australia's protection obligations in any particular Data Breach case; or the outcome of the Minister's consideration of the exercise of his dispensing powers in Data Breach cases generally.

77. The fact that the Data Breach occurred via the Department's website does not provide a principled reason for concluding that officers could not lawfully proceed with an ITOA assessment absent the provision of information about the "*full circumstances*" of the Data Breach. The Full Court erred in so finding.

Injunctive relief (ground 8, SZSSJ only)

78. The Full Court's grant of an injunction to SZSSJ contradicted its own reasoning to the effect that officers of the Department lacked power to remove him, including because the Minister was still engaged in consideration of the exercise of his dispensing powers and s 197C did not apply. This finding also contradicted

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147 In the sense used in *Coutts v Close* [2014] FCA 19 at [116]

148 (2015) 234 FCR 1 at 32 [121]

149 See ibid. SZSSJ alleged in a letter of 4 July 2014 that the Department had a conflict of interest due to the Data Breach: see (2014) 231 FCR 285 at 288 [10]

150 (2015) 234 FCR 1 at 31-32 [118], 32 [121]

151 KPMG, *Management Initiated Review Privacy breach - Data management* (Abridged report), 20 May 2014, p 8, 10; see (2015) 234 FCR 1 at 29-30 [109]

152 See eg the 1 October 2014 letter to SZSSJ: (2015) 234 FCR 1 at 9-10 [21]

153 (2015) 234 FCR 1 at 32-33 [122]

the FCC's finding that the appellants would not attempt to remove SZSSJ from Australia before the ITOA process was concluded.[154] These inconsistencies are serious and should not be allowed to remain.

79. This Court explained in *M61* that it was unnecessary to consider the grant of an injunction in circumstances where there was no present threat of removal.[155] The points referred to by the Full Court in considering the question of relief (described as the Minister's submissions)[156] were no mere matters of submission; there was unchallenged sworn evidence accepted by the FCC in its finding that the appellants would not attempt to remove SZSSJ from Australia before the ITOA process was concluded.[157] The Full Court erred in failing to find there was no threat of unlawfully removing SZSSJ such as to justify the grant of an injunction.

Part VII: Applicable statutes

80. See annexure.

Part VIII: Orders sought

81. In proceedings no. S75 of 2016, the appellants seek the following orders:

1. *The appeal be allowed.*
2. *Orders 1, 2(a) and 2(b) of the Full Court, dated 25 September 2015, are set aside and in lieu thereof, order that the appeal be dismissed.*

82. In proceedings no. S76 of 2016, the appellants seek the following orders:

1. *The appeal be allowed.*
2. *Orders 1, 2 and 3 of the Full Court, dated 25 September 2015, are set aside and in lieu thereof, order that the appeal be dismissed.*

Part IX: Oral argument

83. The appellants estimate that they will require approximately two and a half hours for the presentation of their oral argument.

Dated: 15 April 2016

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154 [2015] FCCA 1148 at [25]
155 *M61* at [8]; see also *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436 at 445
156 (2015) 234 FCR 1 at 33-34 [127]
157 [2015] FCCA 1148 at [25]

Annexure

1. Legislative provisions

Migration Act 1958 (Cth) as at 15 December 2014 (electronic compilation no. 118, dated 11 December 2014, registered 24 December 2014, subsequently amended by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* Sch 6, items 4-7)

198 Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) neither applied for a substantive visa in accordance with subsection 195(1) nor applied under section 137K for revocation of the cancellation of a substantive visa;

regardless of whether the non-citizen has made a valid application for a bridging visa.

(5A) Despite subsection (5), an officer must not remove an unlawful non-citizen if:

(a) the non-citizen has made a valid application for a protection visa (even if the application was made outside the time allowed by subsection 195(1)); and

(b) either:

(i) the grant of the visa has not been refused; or

(ii) the application has not been finally determined.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(11) This section does not apply to an unauthorised maritime arrival to whom section 198AD applies.

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 Sch 6, items 4-7

4 Before subsection 198(1)

Insert:

Removal on request

5 Before subsection 198(1A)

Insert:

Removal of transitory persons brought to Australia for a temporary purpose

6 At the end of subsection 198(1A)

Add:

Note: Some unlawful non-citizens are transitory persons. Section 198B provides for transitory persons to be brought to Australia for a temporary purpose. See the definition of ***transitory person*** in subsection 5(1).

7 After subsection 198(1A)

Insert:

(1B) Subsection (1C) applies if:

(a) an unlawful non-citizen who is not an unauthorised maritime arrival has been brought to Australia under section 198B for a temporary purpose; and

(b) the non-citizen gives birth to a child while the non-citizen is in Australia; and

(c) the child is a transitory person within the meaning of paragraph (e) of the definition of ***transitory person*** in subsection 5(1).

(1C) An officer must remove the non-citizen and the child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved).

Migration Act 1958 (Cth) as at 16 December 2014 (and as presently in force: electronic compilation no. 128, dated 10 March 2016, registered 13 April 2016)

197C Australia's non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198

(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

(2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

Migration Act 1958 (Cth) (electronic compilation no. 118, dated 11 December 2014, registered 24 December 2014, s 474 subsequently amended by the *Tribunals Amalgamation Act 2015*, Sch 2, items 115-121; s 476 subsequently amended by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), Sch 4, item 22)

474 Decisions under Act are final

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

(3) A reference in this section to a decision includes a reference to the following:

(a) granting, making, varying, suspending, cancelling, revoking or refusing to make an order or determination;

(b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);

(c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;

(d) imposing, or refusing to remove, a condition or restriction;

(e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article;

(g) doing or refusing to do any other act or thing;

(h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;

(j) a failure or refusal to make a decision.

(4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

Decisions that are not privative clause decisions		
Item	**Provision**	**Subject matter of provision**
1	section 213	Liability for the costs of removal or deportation
2	section 217	Conveyance of removees
3	section 218	Conveyance of deportees etc.
4	section 222	Orders restraining non-citizens from disposing of property
5	section 223	Valuables of detained non-citizens
6	section 224	Dealing with seized valuables
7	section 252	Searches of persons
8	section 259	Detention of vessels for search

Decisions that are not privative clause decisions		
Item	**Provision**	**Subject matter of provision**
9	section 260	Detention of vessels/dealing with detained vessels
10	section 261	Disposal of certain vessels
11	Division 14 of Part 2	Recovery of costs
12	section 269	Taking of securities
13	section 272	Migrant centres
14	section 273	Detention centres
15	Part 3	Migration agents registration scheme
16	Part 4	Court orders about reparation
17	section 353A	Directions by Principal Member
18	section 354	Constitution of Migration Review Tribunal
19	section 355	Reconstitution of Migration Review Tribunal
20	section 355A	Reconstitution of Migration Review Tribunal for efficient conduct of review
21	section 356	Exercise of powers of Migration Review Tribunal
22	section 357	Presiding member
23	Division 7 of Part 5	Offences
24	Part 6	Establishment and membership of Migration Review Tribunal
25	section 421	Constitution of Refugee Review Tribunal
26	section 422	Reconstitution of Refugee Review Tribunal
27	section 422A	Reconstitution of Refugee Review Tribunal for efficient conduct of review
28	Division 6 of Part 7	Offences
29	Division 9 of Part 7	Establishment and membership of Refugee Review Tribunal
30	Division 10 of Part 7	Registry and officers
31	regulation 5.35	Medical treatment of persons in detention

(5) The regulations may specify that a decision, or a decision included in a class of decisions, under this Act, or under regulations or another instrument under this Act, is not a privative clause decision.

(6) A decision mentioned in subsection 474(4), or specified (whether by reference to a particular decision or a class of decisions) in regulations made under subsection 474(5), is a ***non-privative clause decision***.

(7) To avoid doubt, the following decisions are ***privative clause decisions*** within the meaning of subsection 474(2):

(a) a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 195A, 197AB, 197AD, 198AE, 351, 391, 417 or 454 or subsection 503A(3);

(b) a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal;

(c) a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 or 444;

(d) a decision of the Minister under Division 13A of Part 2 to order that a thing is not to be condemned as forfeited.

476 Jurisdiction of the Federal Circuit Court

(1) Subject to this section, the Federal Circuit Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution.

(2) The Federal Circuit Court has no jurisdiction in relation to the following decisions:

(a) a primary decision;

(b) a privative clause decision, or purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500;

(c) a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C;

(d) a privative clause decision or purported privative clause decision mentioned in subsection 474(7).

(3) Nothing in this section affects any jurisdiction the Federal Circuit Court may have in relation to non-privative clause decisions under section 8 of the *Administrative Decisions (Judicial Review) Act 1977* or section 44AA of the *Administrative Appeals Tribunal Act 1975*.

(4) In this section:

primary decision means a privative clause decision or purported privative clause decision:

(a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or

(b) that would have been so reviewable if an application for such review had been made within a specified period.

Tribunals Amalgamation Act 2015, Sch 2

115 Subsection 474(4) (table items 17 to 22)

Repeal the items.

116 Subsection 474(4) (table item 23)

Omit "Offences", substitute "Part-5 reviewable decisions: offences".

117 Subsection 474(4) (table items 24 to 27)

Repeal the items.

118 Subsection 474(4) (table item 28)

Omit "Offences", substitute "Part-7 reviewable decisions: offences".

119 Subsection 474(4) (table items 29 and 30)

Repeal the items.

120 Paragraph 474(7)(a)

Omit ", 391, 417 or 454", substitute "or 417".

121 Paragraphs 474(7)(b) and (c)

Repeal the paragraphs.

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload Act 2014 (Cth), Sch 4

22 Subsection 476(4) (at the end of the definition of *primary decision*)

Add:

; or (c) that has been, or may be, referred for review under Part 7AA (whether or not it has been reviewed).

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload Act 2014 (Cth) (electronic compilation no. 1, dated 14 April 2015, registered 24 April 2015, and as currently in force)

Schedule 5 - Clarifying Australia's international law obligations

27 Application–Part 1

The amendments made by Part 1 of this Schedule apply in relation to the removal of an unlawful non-citizen on or after the day this item commences

Acts Interpretation Act 1901 (Cth) (electronic compilation no. 28, dated 25 March 2015, registered 25 March 2015, and as currently in force)

7 Effect of repeal or amendment of Act

No revival of other Act or part

(1) The repeal of an Act, or of a part of an Act, that repealed an Act (the ***old Act***) or part (the ***old part***) of an Act does not revive the old Act or old part, unless express provision is made for the revival.

No effect on previous operation of Act or part

(2) If an Act, or an instrument under an Act, repeals or amends an Act (the ***affected Act***) or a part of an Act, then the repeal or amendment does not:

(a) revive anything not in force or existing at the time at which the repeal or amendment takes effect; or

(b) affect the previous operation of the affected Act or part (including any amendment made by the affected Act or part), or anything duly done or suffered under the affected Act or part; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the affected Act or part; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.

Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the affected Act or part had not been repealed or amended.

Note: The Act that makes the repeal or amendment, or provides for the instrument to make the repeal or amendment, may be different from, or the same as, the affected Act or the Act containing the part repealed or amended.

Interpretation

(3) A reference in subsection (1) or (2) to the repeal or amendment of an Act or of a part of an Act includes a reference to:

(a) a repeal or amendment effected by implication; and

(b) the expiry, lapsing or cessation of effect of the Act or part; and

(c) the abrogation or limitation of the effect of the Act or part; and

(d) the exclusion of the application of the Act or part to any person, subject-matter or circumstance.

(4) A reference in this section to a part of an Act includes a reference to any provision of, or words, figures, drawings or symbols in, an Act.