IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S75 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

APPELLANTS' REPLY (ANNOTATED)

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Part I: Certification

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

Part II: Reply

Jurisdiction (ground 3)

2. The relevant jurisdictional exclusion is effected by a combination of ss 474(7)(a) and 476(2)(d) of the *Migration Act 1958* (**the Act**). Section 476(2)(d) excludes the Federal Circuit Court (**FCC**)'s jurisdiction "*in relation to*" a privative clause decision or purported privative clause decision mentioned in s 474(7). True it is that the former s 485, considered in *Minister for Immigration and Multicultural Affairs v Ozmanian,*[1] excluded jurisdiction "*in respect of*" decisions "*covered by*" the former s 475(2), but each of the former s 475(2)(e), the former s 476(2)[2] and the present s 474(7)(a) used the identical formulation: "*a decision of the Minister not to exercise, or not to consider the exercise*" of the dispensing powers. The words "*in respect of*" in s 476(2)(d) could hardly be said to be materially different to the words "*in relation to*" in the former s 475(2)(e), and the word "decision" in s 485 was construed in *Ozmanian* to extend to preparatory conduct of the same kind now expressly included in the definition of "decision" in s 474(3)(h). *Ozmanian* and *S1083* did not involve "*materially distinct issues of statutory construction*" such as to justify SZSSJ's contention[3] that the incongruity recognised in *Ozmanian* does not arise.[4]

3. The fact that s 474(7) uses "*compound expressions*" to refer to "*a particular kind of decision*" (FRS at [25]) is not a basis for excluding paragraph (h) of the definition of "decision" in s 474(3) from s 474(7), to the extent the latter refers to the exercise of the powers in ss 48B, 195A and 417. There is no conflict between ss 474(3)(h) and 474(7) of the kind referred to in *Goodwin v Phillips*[5] warranting the application of the maxim *generalia specialibus*. That maxim only applies when two provisions cannot be reconciled.[6] Section 474(3) provides an inclusive definition of "decision" for the purposes of s 474. It should be applied throughout the section, to the extent it is capable of being engaged. It may be accepted that some parts of s 474(3) are not capable of being engaged by s 474(7). Indeed, no decision-making power is likely to include all aspects of the definition in s 474(3). However, on a natural and ordinary reading of s 474(7), s 474(3)(h) would properly be engaged by the use of the word "decision", and should be applied.

4. In circumstances where it is accepted that the Minister had decided to consider whether to exercise his dispensing powers under ss 48B, 195A and 417, there is no reason to doubt the proposition that removal of SZSSJ under s 198 could only follow from a decision of the Minister not to exercise those dispensing powers: cf FRS at [27].

5. That the FCC would retain jurisdiction over a separate cause of action that is not "*in relation to*" a privative clause decision or purported privative clause decision mentioned in s 474(7) does not mean that the jurisdictional exclusion in s 476(2)(d) should not apply to SZSSJ's case: cf FRS at [26], [28]. At the time of his first appeal to the Full Court in

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1 (1996) 71 FCR 1 (***Ozmanian***)

2 Considered in *S1083 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1455 (***S1083***)

3 First Respondent's Submissions (**FRS**) at [23]

4 See Appellants' Submissions (**AS**) at [27], referring to Moore and Lindgren JJ's views as to the immaterial differences in language between the former s 485 and the former and present ss 476(2) and 474(7)

5 (1908) 7 CLR 1 at 14 (O'Connor J)

6 *Purcell v Electricity Commission of New South Wales* (1985) 59 ALJR 689 at 692 (Mason ACJ, Wilson, Brennan and Dawson JJ)

October 2014, SZSSJ simply sought an injunction against removal.[7] He further amended his application in December 2014 to seek an injunction against removal pending consideration of Australia's non-refoulement obligations from the Data Breach "*according to law*", on grounds alleging breaches of procedural fairness in the "*process through which the impact of the Data Breach on [him] was being assessed*", including the ITOA process.[8] As a result, by the time the jurisdictional objection was raised, any future decision to remove SZSSJ would not and could not be "*conceptually distinct*" from a decision to which s 474(7)(a) applied: cf FRS at [28].

6. SZSSJ's submission at [29] is not correct. If a person sought an injunction to prevent removal on a basis unrelated to a decision falling within s 474(7), say on the construction of s 198, the FCC would have jurisdiction. It would not lose jurisdiction simply because the Minister commenced consideration of a dispensing power. However, it would lose jurisdiction if the person amended the application to seek relief based upon an alleged flaw in process leading to a decision under s 474(7) (as occurred in this case), which is and has always been outside that court's jurisdiction.

Application and content of the rules of procedural fairness (grounds 2, 4-7)

7. Ground 2: SZSSJ lacked an accrued right "*arising under s 198*"[9] of the Act as at 15 December 2014 based on a denial of procedural fairness that had "*already occurred*" such as to confer on him a vested cause of action entitling him to an injunction against removal: cf FRS at [33]. If the appellants are correct in relation to the application of *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,[10] no cause of action for breach of procedural fairness could have been made out as at 15 December 2014, in circumstances where SZSSJ's claims were being considered in the context of a potential future exercise of the powers under ss 48B, 195A and 417. As made clear by the terms of its first declaration, the Full Court's finding that the Department's representations about future procedure generated a separate obligation of procedural fairness[11] flowed from a consideration of the cumulative effect of the three letters to SZSSJ during 2014 and the statements in the PAM3 supplied with the letter of 12 February 2015. In any case, there was evidence that SZSSJ was not regarded as available for removal as at that date; there was then no present threat of removal such as to justify the grant of an injunction.[12]

8. The accrued right, if any, not to be removed unlawfully (AS at [43]), remained constant both before and after the enactment of s 197C: the only alteration was to the circumstances in which removal would be lawful. SZSSJ's characterisation of this as a retrospective alteration to the content of an accrued right (FRS at [34]) is inaccurate.

9. The appellants accurately attribute the basis of the right to a procedurally fair assessment of the claims in *Minister for Immigration and Citizenship v SZQRB*[13] to *M61*: cf FRS at [40]. In *SZQRB*, Lander and Gordon JJ drew from *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[14] the proposition that a person cannot be removed without his or her claims being assessed pursuant to Australian law, but the foundation for the proposition that such an assessment must be procedurally fair was *M61*.[15] That is unsurprising, given *M70* was not concerned with any alleged breach of procedural fairness.

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7 Amended Application, 13 June 2014, see (2014) 231 FCR 285 at 290 [20], Appeal Book (**AB**) at 20

8 Second Further Amended Application, Final orders sought at [2], Grounds at [6], AB at 37-41

9 (2015) 234 FCR 1 at 18 [56] (AB at 352)

10 (2012) 246 CLR 636 (***S10***)

11 (2015) 234 FCR 1 at 26 [88], [89], 27 [93], 28 [96] (AB at 361, 363, 364)

12 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (***M61***) at [8]

13 (2013) 210 FCR 505 (***SZQRB***)

14 (2011) 244 CLR 144 (***M70***)

15 *SZQRB* (2013) 210 FCR 505 at 545-546 [200] at points 12 and 21.3 (citing *M70* at [95]-[98] and [239])

10. Ground 4: SZSSJ's submission that all of the *S10* plaintiffs' protection claims had been considered in the protection visa process and that "*there had been no change in circumstances*" (FRS at [50]) is not correct. The Act at the relevant time did not make provision for the consideration of complementary protection claims, which were instead considered pursuant to the ministerial guidelines with respect to the exercise of the dispensing powers including ss 351 and 417.[16] Plaintiff S10 submitted that in his request under ss 48B and 417, he made a protection claim that had not previously been considered: that the Taliban had killed three of his close relatives and were still searching for him.[17] Plaintiff S43 submitted that she had made a new claim based on findings in her judicial review applications that a letter from the Department was confusing.[18]

11. It is also incorrect to suggest, as SZSSJ does (FRS at [51], [55]), that *S10* was distinguishable based on the absence of any decision by the Minister to consider the exercise of the dispensing powers in relation to the four plaintiffs. At least in relation to Plaintiff S51, the Minister had progressed to what the Full Court regarded as the second step.[19] Nor did all the plaintiffs in *S10* lack interests affected by the prolongation of detention of the kind identified in *M61* (which SZSSJ says "*only arises at the second stage*": FRS at [53]): Plaintiff S51 had been in detention or community detention since his arrival.[20] The plurality's reasoning in *S10* was expressly based on the combination of statutory features of the dispensing powers identified rather than whether or not the Minister had decided to consider the exercise of those powers, their Honours stating that "*it will be necessary to consider these facts in detail only if the issues of statutory construction be decided adversely to the Minister*".[21]

12. There is no suggestion in the plurality's reasons in *S10* that the "*necessary intendment*" operated only in relation to certain types of interests or in relation to the power at "*the first stage*": cf FRS at [56], [57]. Several of the features relied upon attended the exercise of what SZSSJ calls the "*power of actual consideration*" only, including the tabling requirement, the Minister's decision as to the public interest, the content of the public interest test and what is/is not a mandatory relevant consideration at the "*second stage*".[22]

13. Ground 5: The Full Court did not find that the representations made by the Department generated an "*additional interest*" of SZSSJ: cf FRS at [59]. SZSSJ requires leave to rely on his Notice of Contention in order to make good this alternative basis for the Full Court's finding as to the effect of the representations. Leave should not be granted, in circumstances where SZSSJ's procedural fairness argument was not advanced in this form in either court below, nor is there any evidence of reliance notwithstanding that SZSSJ characterises this as a "*reliance interest*" (FRS at [65]). The Full Court did not make any findings about reliance, stating instead that it is "*not clear that SZSSJ would have acted any differently if the statements had not been made*".[23] Nor should SZSSJ be allowed to characterise the existing evidence as evidence of reliance, given this point was not raised and so could not be tested by the appellants through that lens.

14. Even if leave is granted, the notice of contention must fail. It is implicit in the Full Court's finding that the representations supplied an "*independent basis*"[24] for the application of the

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16 See *S10* (2012) 246 CLR 636 at 649-650 [34]-[35]

17 See [2012] HCATrans 17 at 40; [2012] HCATrans 18 at 57; the Minister contested that this was a new claim [2012] HCATrans 18 at 32; the Court did not determine the issue

18 See [2012] HCATrans 17 at 56; the Minister denied a change in circumstances [2012] HCATrans 18 at 34

19 (2012) 246 CLR 636 at 654 [20], see AS at [51]

20 Ibid at 645 [18]

21 Ibid at 656 [58]

22 Ibid at 667-668 [99(ii), (iv), (v) and (vi)]

23 (2015) 234 FCR 1 at 27 [93] (AB at 363)

24 Ibid at 26 [88] (AB at 361)

rules of procedural fairness that this "basis" would stand even if the Court's answer to the "*fourth issue*", namely the application of *S10* was incorrect: cf FRS at [58]. SZSSJ's argument attributes to the executive an ability to create enforceable procedural fairness obligations in circumstances where the Parliament has actively decided, via the use of "*plain words of necessary intendment*",[25] that procedural fairness is to be excluded, notwithstanding that the relevant provisions empower the Minister to adversely affect interests in the manner described in *Annetts*.

15. This argument resurrects the discarded concept of legitimate expectations (disguised by reference to "interests") based on normative justifications for procedural fairness, notwithstanding this Court's rejection of "*ideas of good administration*" as a basis for imposing obligations on the executive.[26]

16. SZSSJ does not explain the source of his interest in "*the government being held to its promises*" (FRS at [69]) other than the fact of the making of the representations. There is circularity in this argument: the representation is said to be enforceable because its making conferred an interest in enforcing it. Enabling such representations to generate enforceable rights would involve a form of procedural estoppel, inconsistent with the rejection of administrative law estoppel by Australian courts.[27] Judicial recognition of reliance "*on the legal order in place in the law area in which people act or are exposed to risk of injury*" in the field of choice of law rules and "*similar values*" said to underlie principles of *stare decisis* and the presumption against retrospectivity[28] do not justify enforcing the Department's representations as a matter of public law. Such a result would create incoherence, given that the mere making of the representations would not give rise to a contract, would be insufficient to raise an estoppel in pais[29] and, even if negligent, would give rise exclusively to a cause of action in damages.

17. Ground 6: SZSSJ's reliance on the Full Court's inferences about the content of the unabridged KPMG report[30] (FRS at [76]) is misplaced. Those inferences do not consider the impact of the "unknowable" extent of distribution, the consequence of which was that the personal information of all failed protection claimants affected "*could have been accessed by the very person(s) from whom the failed protection seeker feared harm*",[31] regardless of whether their IP addresses had been identified by KPMG. The appellants do not contend that it was incumbent on SZSSJ to show what outcome was "likely" if he had been given the unabridged KPMG report (cf FRS at [74], see AS at [64]), but submit that the Full Court relied on the erroneous inferences to conclude that access to the unabridged report might have made a difference to the outcome of his **incomplete** ITOA.

18. Ground 7: SZSSJ's contention that ground 7(a) misapprehends the extent of the Full Court's findings and that success on this ground would be insufficient because of breaches of procedural fairness in letters from the Department up to 12 February 2015 (FRS at [78]-[82]) is wrong. The Second Further Amended Application sought specific declarations in relation to the 27 June and 1 October letters, which the Full Court did not grant: see AB at 381. As Kiefel J recognised in *Ozmanian*, there is no entitlement to declaratory relief simply because a past breach of natural justice is shown, if the declaration will have no

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25 *M61* (2010) 243 CLR 319 at 352, citing *Annetts v McCann* (1990) 170 CLR 596 (***Annetts***) at 598

26 *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (***Lam***) at 11 [32] (Gleeson CJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 (***Quin***) at 56 (Dawson J)

27 See *Lam* (2003) 214 CLR 1 at 22 [69] (McHugh and Gummow JJ); *Annetts* (1990) 170 CLR 596 at 605 (Brennan J); *Minister for Immigration, Local Government and Ethic Affairs v Kurtovic* (1990) 21 FCR 193 at 196 (Neave J), 201 (Ryan J), 208-216 (Gummow J); cf (1990) 170 CLR 1 at 18-19 (Mason CJ)

28 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 536 [75]

29 Including an estoppel by representation; see *Legione v Hateley* (1983) 152 CLR 406 at 430

30 (2015) 234 FCR 1 at 31-32 [113], [114] (AB at 367, 368)

31 Ibid at 32 [120] (AB at 369)

effect.[32] Ground 7 attacks the only aspects of the declaration that have utility in that they will produce foreseeable consequences for the parties,[33] namely the additional disclosure required in relation to the ITOA process and of the "*full circumstances*" of the Data Breach. The Full Court's reasons acknowledge (at [106]) that it remained possible for the three matters it identified at [98] "*to be addressed in a procedurally fair manner*" in the incomplete process, the Court's decision itself having "*lifted the shroud*" on that process.

19. Contrary to SZSSJ's suggestion (FRS at [83]), he did not lack information about why the ITOA was being conducted or where it might lead. The 1 October 2014 letter informed him that it was being conducted to assess whether the circumstances of his case engaged Australia's non-refoulement obligations; and that it had been commenced because he was affected by the Data Breach: AB at 114. The 12 February 2015 letter advised that, if the ITOA concluded that non-refoulement obligations were engaged, his case "*will be referred to the Minister for consideration under the Minister's intervention powers*": AB at 63.

20. SZSSJ's submission that the Court should imply from the PAM3 that officers conducting his ITOA had discretion to take into account more than non-refoulement obligations in deciding whether to refer his case to the Minister (FRS at [84]) is misplaced, in view of the 12 February 2015 letter and Ms Russack's evidence that, if an assessor concludes that Australia's non-refoulement obligations are engaged with respect to SZSSJ, "*his case will be referred to [the Minister] for consideration under his personal powers under the Act*".[34]

21. Far from "*simply extend[ing]*" principles concerning disclosure of "corroborative" or exculpatory information in identifying a requirement to disclose the "*full circumstances*" of the Data Breach, the Full Court rejected reliance on such notions.[35] SZSSJ has not filed a notice of contention on this issue and should not be permitted to argue it.

22. If SZSSJ is correct that the Full Court did not find the Department as a whole was responsible for the Data Breach (RS at [88]), any conflict of interest could rise no higher than a suggestion of a reasonable apprehension of bias arising if officers directly involved in the Data Breach were to conduct ITOAs. There was never a suggestion that this was occurring and no reasonable apprehension of bias case of that nature has been run by SZSSJ (or SZTZI). Yet the Full Court found that the Department's conflict was such as to require disclosure of the "*full circumstances*" of the Data Breach, clearly (and erroneously) attributing responsibility (and a resulting conflict) to the entire Department, including officers conducting ITOAs.

Injunctive relief (ground 8)

23. The error alleged in ground 8 is of the kind referred to in *House v The King*.[36] The Full Court failed to take into account a material consideration, namely, its own reasoning that officers of the Department lacked power to remove SZSSJ. SZSSJ's submission that there is no relevant inconsistency in the Court's reasoning because he might be removed notwithstanding an absence of power to remove him (FRS at [92]) assumes that the appellants would ignore the reasons of the Full Court.

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32 (1996) 71 FCR 1 at 32
33 *M61* (2010) 243 CLR 319 at 359 [103]; *Ainsworth v Criminal Justice Comm'n* (1992) 175 CLR 564 at 582
34 Affidavit of Deirdre Russack affirmed 20 March 2015 at [14], AB at 100 [emphasis added]; see AS at [66]
35 (2015) 234 FCR 1 at 32 [121] (AB at 369-370), cf FRS at [87]
36 (1936) 55 CLR 499 at 505