IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S~~75 and~~ S76 of 2016

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

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The Appellant has grouped the issues into appeal into four (4) issues (3 of which apply to the second respondent), these are:

   a. Issue One[1]: Did the application made by the Plaintiff's properly invoke the jurisdiction of the Federal Circuit Court (on the Notice of Contention raised in the appeal before the Full Court)?[2];

   b. Issue Two[3]: Application of the Rules of Procedural Fairness.[4] Although styled 'application of the rules', this appears to be an argument that there was no duty to accord procedural fairness. The issue is divided into a number of sub issues, namely:

[1] See Appellants' Submissions, p1, 2(a).
[2] See Ground 3; AWC [20] to [35].
[3] See Appellants' Submissions, p1, 2(c).
[4] See Grounds 2, 4 and 5; AWC [36] to [61].

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i. Whether s197C[5] of the *Migration Act* 1958 (Cth) applied to modify the power s198 because the enlivening of the duty under s198 occurred after s197C was enacted;[6]

ii. Whether *Plaintiff S10*[7] creates a blanket rule that there can never be a duty to accord procedural fairness attaching to ss48B, 195A or 417, where the person had previously been the subject to merits review and (in SZSSJ's case) judicial review prior to the relevant proceedings.[8][9]

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c. Issue Three[10]: Whether the Full Court's application of *Lam*[11] and *WZARH*[12] in considering procedural fairness by reference to the conduct of a process by an official was in error because the duty to accord procedural fairness had been statutorily excluded (see AWS [55], [58]) (Please note that this assumes that the appellant is successful on the first sub issue and that procedural fairness is statutorily excluded in the case of s48B, 195A and 417);

d. Issue Four[13]: This issue concerns the content of any duty to accord
20 procedural fairness if it exists.[14] The Appellant expresses this issue as an abstract question about what the content of procedural fairness might be, rather than any specific challenge to factual findings by the Full Court about the content in this case. The Appellant breaks this issue down into the following sub-issues:

i. Did the Full Court err by finding that the duty required the respondent to be informed of the process and criteria for the Minister's decision (Ground 7 (a) AWS [65] to [71];

30 ii. Did the Full Court establish a 'new principle of procedural fairness'[15] by finding[16] that in the present case the failure to disclose the full circumstances of the data breach to the respondent amounted to a denial of procedural fairness (see AWS [72]-[77] and Ground 7 (b));

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[5] See Ground 2, AWS [36] to [46].
[6] See AWS [40] and [42].
[7] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 ("Plaintiff S10")
[8] See AWS [49] and [50].
[9] Presumably overruling the decisions in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 ("Plaintiff M61") and *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ("Plaintiff M70").
[10] See Appellants' Submissions, p1, 2(d).
[11] *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1 ("Lam").
[12] The Full Court considered the decision in *WZARH v Minister for Immigration and Border Protection* (2014) 316 ALR 389 which was subsequently affirmed in *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, (2015) 90 ALJR 25, 326 ALR 1 ("WZARH")
[13] See Appellants' Submissions, p1, 2(e).
[14] See Grounds 5 and 6 and 7 and AWS [62] to [77].
[15] AWS [72]
[16] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 31-32 [118] and [120] and 33 at [124] to [125]

iii. Did the Full Court err by drawing inferences about the potential usefulness to the respondent of having access to the unabridged KPMG Report dealing with the internet access that had made by external users to the respondent's data which compromised by the Appellant for the purposes of whether the provision of that document might have made a difference to the outcome.[17]

3. Importantly, there is no issue or challenge to the Full Court's findings that:

a. The Minister had decided to consider whether to exercise his powers under ss48B, 195A and 417 of the *Migration Act* in relation to *SZSSJ* and *SZTZI* (see AWS [49]). Accordingly, the critical findings of fact by the Full Court at [75][18] are not challenged;

b. The operation of section 197C would only operate at the point at which the question of enlivening of an officers duty under s198 to consider removal arises (AWS [40]);

c. There is no challenge to the findings of the Full Court that, on a proper construction, s197C it is directed to the officer's own consideration of *non-refoulement* obligations and does not preclude the officer giving consideration to whether it is reasonably practicable to remove the respondent in light of the Minister's decision to commence consideration of whether to exercise his powers[19];

d. There is no assertion or evidence that the Minister himself has consciously bought the process started (identified in [3 (a)] above), to a close[20].

e. There is no direct submission that the decision of this Court in *Plaintiff M61*[21] was wrongly decided or overruled by *Plaintiff S10*[22];

f. There is no issue that the data breaches and the process by which their consequences would be considered happened in time *after* any previous application for protection visas or merit review thereof.

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[17] See AWS [62] to [64].
[18] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 22-23 [75] and 26 at [87]
[19] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 16-17 at [48] and [49]; and 37 at [145]
[20] Compare the different argument that the effect of PAM3 meant that the respondent's case would not be referred to the Minister for consideration pursuant to his dispensing personal powers in ss48B, 195A or 417 (AWS [20]) which for the reasons below is an incorrect paraphrase of the PAM 3 provisions to which reference is made.
[21] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.
[22] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144

Part III: *Judiciary Act 1903*

4. It is certified that no notice is required in compliance with section 78B of the Judiciary Act 1903.

Part IV: Facts

5. The essential facts held by the Full Court, and largely accepted by the appellant, are not in dispute and may be summarized as follows.

6. The respondent is a Chinese national who arrived in Australia as an air arrival. In April 2013, she arrived on a visitor's visa of three months' duration. Following the expiration of that visa, in September 2013 she was taken into detention. In October 2013, the respondent applied for a protection visa. On 14 November 2013, this application was refused by the Minister's delegate. The Refugee Review Tribunal affirmed that decision on 10 January 2014.[23]

7. On 10 February 2014 an incident occurred in which names and personal details relating to 9,258 asylum seekers were made available on publicly accessible areas of the web site of the Department of Immigration & Border Protection. ["**the data breach**"]

8. The release of the information carried an appreciable risk that state and non-state actors from the countries from which the protection visa applicants had come might have become aware of the claim advanced in Australia. ["**the sur place claim**"]

9. The general need to maintain the anonymity of protection visa applicants is a longstanding feature of refugee litigation and is reflected in s 91 X of the *Migration Act 1958* (Cth) ('the Act'), which prevents the publication of the name of a protection visa applicant in any Court proceedings.

10. The specific issue of whether the asylum seeker had been accorded a non-statutory process in accordance with a letter of 12 March 2014 [AB 117] – a letter provided in identical terms to 9,258 people in detention whose personal details were inadvertently published online by the Department of Immigration. ["**the adopted process**"]

11. On 30 June 2014, the respondent solicitors wrote to the Department claiming it was possible her personal information had been received by various people, including the Chinese authorities.[24]

12. As held by the Full Court at [3]:

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[23] AB 284; Appellant's Submissions at [15]
[24] AB 284 at [132]; Appellant's submissions at [16]

3. It is the practice of the Department each month to publish on its website, www.immi.gov.au, a document entitled 'Immigration Detention and Community Statistics Summary'. This document contains statistics about asylum seekers. For accessibility reasons the document is published in both Microsoft Word and Adobe PDF formats. On 10 February 2014, the Department, in line with this practice, published the statistics for January 2014 including the Word version. The Word version was dated 31 January 2014. It incorporated information from a Microsoft Excel spreadsheet which included the private details of 9,258 asylum seekers. This data was embedded in charts and graphs in the Excel spreadsheet. When the charts and graphs were copied across to the Word document that personal information came with it. The consequence was that the information was available in the Word version if one accessed the charts and graphs.

13. The Full Court made findings (that are not in controversy) that the data was available for some eight and a half days, and that another copy of it remained available on the internet in the Department's archive until 24 February 2014 and that "*in total, the information was publicly available for around 14 days*".[25]

14. On 24 February 2014, the Department retained KPMG to conduct an investigation, culminating in two reports (an abridged and an unabridged report) dated 5 April 2014 and 20 May 2014.[26] The Full Court again made the following finding which is not in controversy:

"the abridged version told the reader that the personal information had been accessed 123 times from 104 unique IP addresses it did not reveal an exhaustive or any list of what the accessing IP addresses were."

15. On 16 December 2014, s197C of the Act commenced. At that time there was no indication to SZTZI that the unidentified process referred to in the correspondence of 27 June 2014 had ceased.[27] The Full Court correctly characterized this process as an 'investigation' within the meaning of s 7 of the *Interpretation Act 1901* (Cth).[28]

16. On 13 January 2015, the Department informed SZTZI that it was then considering "information relevant to [her] International Treaties Obligation Assessment (ITOA)". It called for submissions within 14 days.[29] The letter also asserted that the ITOA would be directed at non-refoulement.[30]

17. On 5 February 2015, the Department provided the second respondent with the reasons why it thought there was no non-refoulement obligation. As held by the Full Court at [18]:

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[25] *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285 at [5].
[26] *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285 at [6].
[27] AB 284 at [133]; this fact was not referred to in the Appellant's submissions.
[28] AB 285 at [134]l, this fact was not referred to in the Appellant's submissions.
[29] AB 285 at [135]; Appellant submissions at [16]
[30] AB 285 at [135]; Appellant Submissions at [16]

18. The important aspects of this are its reference, again without explanation, to the Department's 'normal processes', the requirement to explain the personal impact of the Data Breach (without a full explanation of what that breach was or how it actually, or may have, affected SZSSJ) and the imposition of a 14 day deadline after the Department's own three month delay.

18. The Full Court then characterized the process in the following terms at [98]-[101] – and again these findings were not challe3nged in any material way In the Appellant Submissions:

98. ... That process is as follows:
(a) the Minister has decided to consider the exercise of his dispensing powers under ss 48B, 195A or 417;
(b) Departmental officials acting under the ultimate direction of the Minister have commenced an ITOA process to assist him in making that decision, which process is directed to gauging Australia's non-refoulement obligations; and
(c) the relevant criteria for the Minister's decision under each provision is the public interest.

99. It is difficult to see how SZSSJ could have made meaningful submissions in this process without having been informed of these matters. In particular, without knowledge of (a) he was denied information concerning the identity of the decision-maker, the personal nature of the decision-making power, its reposal in a Constitutional officeholder responsible to the Parliament or the complicated nature of the decision-making power in play; without knowledge of (b) he could not sensibly have understood what he was being required to make submissions about; and, without knowledge of (c) he was denied any information concerning the ultimate criteria by which the decision in his case was to be made. Procedural fairness is not satisfied by giving a person a hearing if the person does not know why he is being heard, about what or by whom.

19. The Full Court, in consideration of these documents, made the following findings with respect to this process embarked upon by SZSSJ:

101. Starting with the letter of 12 March 2014, the Secretary himself informed SZSSJ of the Data Breach and then said only that 'The Department will assess any implication for you personally as part of its normal processes. You may also raise any concerns you have during those processes'. In the absence of further information, this was procedurally unfair because it did not tell SZSSJ anything as to the precise content of those processes, more than that some unidentified activity would occur in which he could express concerns. In particular, how could SZSSJ explain his concerns if he did not know what the Department was looking at with its as yet unspecified 'processes'.

...

103. The letter of 1 October 2014 indicated for the first time that an ITOA had been commenced on 30 September 2014 which would be looking at non-refoulement. It did not identify the matters in (a) and (c).

...

104. Finally, the letter of 12 February 2015 again identified the ITOA process, this time including a description of it. For the reasons just given, it still failed to identify the matters in (a) to (c), particularly in relation to (b), and the obscure, and obscured, role of the Minister.

19. The Full Court then went further to make the following observations regarding matters similarly enlivened in the matters before this Court:

111. Although the report did not identify precisely what the personal information was, it is apparent that SZSSJ was informed of this in the Department's letter of 12 March 2014. It was his name, date of birth, nationality, gender, details of detention (when, why and where) and family members in detention (if any). It is apparent that this information was such as readily to identify with precision individuals who had applied for protection visas.

112. Most of the abridged report is devoted to detailing how this significant administrative failure occurred. KPMG identified systemic failures and was specific that it was not the result of malicious or deliberate conduct. It dealt with the details of what constituted the breach at Section 4.3 in these terms:

'4.3. Forensic examination of the data disclosure

Our observations with respect to the forensic examination of the data disclosure are summarised as follows:

- *123 accesses via 104 unique internet protocol (IP) addresses attempted to retrieve the file at least once. Analysis of available data has provided the DIBP with some indication of the likelihood of each IP address having access to the personal information of detainees;*

  It is not in the interests of detainees affected by this incident to disclose further information in respect of entities to have accessed the Document, other than to acknowledge that access originated from a range of sources, including media organisations, various Australian Government agencies, internet proxies, TOR network and web crawlers;

- *Attempts were made by KPMG Forensic, as instructed by the DIBP, to reduce the risk of republication of material contained in the Document where a high likelihood of this occurring was identified. Any such efforts were considered in the context of*

the DIBP wanting to avoid disclosing any information which may alert potential recipients of their possession of, or ability to access, the personal information;

- *We have not identified any indications that the disclosure of the underlying data was intentional or malicious; and*

- *The DIBP provided us with earlier versions of the publication, which it had released in prior months. Our review did not identify the same issue, so it appears isolated to the version dated 31 January 2014.'*

113. This is what SZSSJ presently knows. It is apparent that the unabridged version of the report described in the Executive Summary deals with, inter alia, the 'technical examination of the data associated with the disclosure and the potential extent of access to that data'. The statement in the second bullet point under Section 4.3 is opaque. It is not in the interests of SZSSJ – if the statement is taken at face value – to know further information about who accessed the information, other than that such access originated from the sources there identified. We do not understand how this can be so. The inferences which can be drawn are:

- *104 separate IP addresses accessed the information, some more than once;*
- *the identity of the accessors included the identified entities but this was not exhaustive; and*
- *there is 'further information' which is not being disclosed because it would not be in the detainees' interests to do so.*

114. A further inference is available: the 'further information' is set out in the unabridged report. One has then the situation that SZSSJ has not been told who accessed his information and that there is further information about which he is not to be informed because, although it affects him, it would not be in his interests to know it.

20. The Full then observed:

118. What we will say is this. The Department is requiring affected individuals to make submissions to it about the consequence of its own wrongful actions in disclosing their information to third parties without revealing to them all that it knows about its own disclosures. Whilst it is certainly true that the obligation of a decision-maker is generally only to disclose information which is adverse to a claimant, the requirements of natural justice fluctuate with the circumstances of each case: Russell v Duke of Norfolk [1949] 1 All ER 109 at 118; Lam at 14 [37]. The particular circumstances of this case take it far outside the realm of the ordinary.

122. Rare is the case where a decision-maker asks a claimant to make submissions about what should happen in consequence of a failure to

adhere to statutory safeguards of confidentiality committed by the decision-maker affecting the claimant. In such a case, it is inevitable that the decision-maker must show its full hand subject to any proper (and curially supervisable) consideration of confidentiality. This is not because of any presumption that all of the information held by the decision-maker is adverse in the sense discussed in Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72; (2005) 225 CLR 88 or because it is corroborative (see Coutts v Close [2014] FCA 19 at [116] per Griffiths J; cf Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs (2014) 220 FCR 202 at 249-250 [145]-[149] per Kenny J). It is because the Department is conflicted in its role in assessing what the non-refoulement obligations are which arise from its own wrongful conduct. No argument was addressed to us that the bias rule had the effect of wholly barring the Department from addressing that issue, but at the very least, in a practical way, it undermines fairness to suggest that in such an unusual situation the Department does not have to reveal the full circumstances so that the person affected can assess, with full information, whether some adverse impact occurred or may have occurred on which he or she wishes to be heard (absent some good reason not to do so, such as confidentiality).

> *122. The Minister's second argument was that under the process currently being conducted (we would add, on his behalf) the reviewers in the ITOA process will not have access to the unabridged version of the report either. Further, those reviewers had been provided with the following instruction:*
>
> *'When assessing protection claims in relation to the privacy data breach, case officers are instructed to accept that the claimant's personal information released on the department's website may have been accessed by the authorities in the receiving country. The reason for this approach is that, although the KPMG privacy breach review found that there were relatively few internet users who accessed this document, it is not possible to discount the possibility that the authorities in another country may have accessed this document. Accordingly, an assessment of protection claims in relation to the privacy data breach should be undertaken on the assumption that this information may have been accessed by the authorities in the receiving country.'*

123. We assume this direction emanates from, or with the authority of, the Minister. The question of international law for the reviewer will be whether, as a necessary and foreseeable consequence of SZSSJ being removed from Australia to the receiving country, there is a real risk that he will suffer significant harm. Setting the bounds of the debate so that all that will be known is that the authorities in the receiving country 'may' have accessed the information means that this test will necessarily be failed. SZSSJ will need to show that the information was accessed and by whom and why access by those people poses such a significant risk. Far from ameliorating the want of procedural fairness, this instruction erects a process guaranteeing the claim will fail. It is not fair.

124. Quite apart from that, the instruction ignores the possibility of gradations in the risk to the claimant associated with those who have or may have accessed the data. There may be a world of difference between access by the tax authorities of the receiving country and access by the security services. Further, the access may have been by a person or entity who is or is not a governmental authority in respect of whom or which SZSSJ may be able to identify a particular risk. The principles surrounding non-refoulement are not confined to fear of harm from just 'the authorities' in the receiving country. In any event, these matters cannot presently be taken further as it is unknown what information has been withheld in the unabridged KPMG report.

Part V:

21. Except otherwise as provided, the Respondent accepts the Appellant's statement of applicable Constitutional provisions, statutes and regulations.

Part VI:

Issue One: Jurisdiction

22. The Appellant's objection about jurisdiction for *SZTZI* turns on whether s474 (7)(a) of the Act was engaged because of the proposition at AWS [20] that:

    a. As the ITOA recommendation has been made (with a finding that Australia's international protection obligations were not engaged) – it follows that 'consistent with the Department's policy (the PAM3) her case would not be referred to the Minister for consideration pursuant to his personal;

    b. that these circumstances are then equated with 'a decision of the Minister *not to* not exercise, or not to consider the exercise of the powers under ss48B, 195A and 417'; and

    c. because of the (false) equation in (b), it is now asserted that s474(7)(a) and 476(2)(d) of the Act excluded the Federal Circuit Court's jurisdiction.

23. The Appellant's proposition must be rejected. There are a number of fundamental errors in the proposition:

    1. First, the Appellant could hardly rely on act by the ITOA officer which is attended by jurisdictional error to ground an objection to a judicial review jurisdiction co-extensive with s75 (v) of the Constitution[31]

[31] See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

2. Second, it is not factually correct that the PAM3 has the consequence that a negative finding in the ITOA requires that her 'case not be referred to the Minister for consideration'. The PAM 3 simply provides the consequence of the negative finding as "consideration should be given to progressing the person's removal from Australia"[32];

3. Third, the respondent does not need to establish by the outcome of the ITOA that an official has 'referred the matter to the Minister for consideration pursuant to his personal dispensing powers'- that is because there is an undisputed finding of fact in this case that the Minister *had* decided to commence consideration of his 'personal dispensing powers'[33];

4. Fourth, the Appellant's proposition does not deal with the unchallenged finding of the Full Court that it is a mistake to view the terms of the PAM3 in isolation[34]. This must be correct given that the terms of the PAM3 may apply to a multitude of circumstances including where none of the special circumstances present in these cases arise- in particular in cases, unlike the present, where the Minister has not separately taken the step of commencing consideration of his personal dispensing powers[35];

5. Finally, it could not be the case that a personal decision by the Minister to start to consideration of his personal dispensation powers could be stopped by anyone other than the Minister personally.

24. The appellant's submission that 'there was no evidentiary basis to infer that the exercise of the Minister's dispensing powers would be further considered in light of SZTZI's ITOA[36]' should be rejected because it is based on the incorrect proposition said to flow from the PAM3; and also because:

1. There is an accepted factual finding, not challenged in this appeal, that, in SZSSJ and SZTZI's cases, the Minister had decided to commence to whether to exercise his personal dispensing powers;

2. There is no evidence that the Minister ever made a personal decision to stop considering whether to exercise his personal powers.

3. At the time the jurisdiction of the Federal Circuit Court was invoked, the respondent was in immigration detention under s189 and at the time of the hearing there was no imminent threat of removal from Australia pursuant to s198 of the Act. The only explanation for such a

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[32] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 24 [77]
[33] AWS [49]; (2015) 234 FCR 1 at 22-23 [75], [76]; 24-26 [80] to [87] (conclusion at [87])
[34] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 24 [79]
[35] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 24 [81]
[36] AWS [22]

state of affairs is that consideration of the Minister's personal dispensing powers was continuing so as to make removal from Australia not reasonably practicable[37].

25. In these circumstances where the Minister had personally decided to commenced consideration of his powers under ss48B, 195A and 417:

    1. it could not be established by the appellant that there 'had been a decision to *not consider* the exercise [of the powers]' (to the contrary, there had been a decision *to* consider the exercise of the powers); nor

    2. could it be established that the Minister (having commenced consideration of the exercise of those powers) had ever made a personal 'decision to *not exercise* [the powers]' for the purposes of s474 (7)(a) of the Act- the recommendation by the officer in the ITOA cannot be elevated to be such a personal decision by the Minister to *not exercise* his powers.

26. The Full Court's finding at [64][38] is correct and the appellant's jurisdictional challenge based on s474 (7) and ground 3 should be rejected.

27. The appellant's submissions[39] relying on the Ozmanian line of decisions in the Federal Court take the matter no further. None of these cases involved the unchallenged factual finding in this case that the Minister *had decided to consider* whether to exercise his powers under ss48B, 195A and 417 in this case were present. The submission that the *Ozmanian*[40] cases were 'factually indistinguishable from SZTZI"[41] is incorrect.

28. Those cases cannot stand for a proposition that the outcome of the ITOA can determine that the Minister (who has personally decided to embark on a process of consideration of the exercise of the power); has also personally determined to *not* exercise that power. No such analysis is present in those decisions.

29. To the extent that the *Ozmanian* cases have the effect for which the Appellant contends, they would be inconsistent with the reasoning of this Court in *M61*. Had a negative IMR outcome been equated with a personal decision by the Minister to *not* exercise his power under s48B, 195A or 417,

30. Neither does the reasoning of the Full Federal Court in *SZQDZ*[42] somehow create a lacuna in the clear ratio of *M61*. To say that the actions of a

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[37] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 337 [21] and 339 [26]
[38] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 20 [64]
[39] AWS [24] to [28]
[40] *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1; *S1083 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1455 (Moore J) and *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510.
[41] AWS [24]
[42] *SZQDZ v Minister for Immigration and Citizenship* (2012) 200 FCR 207.

Reviewer or ITOA officer are 'decisions' within the extended sense does not mean that they thereby answer the special description in s474 (7)(a) - which is specifically addressed to a decision *by the Minister* to *not* exercise his powers or to not consider the exercise of his powers- consistent with the special and personal nature of the power reposed in the Minister by ss48B, 195A and 417 of the Act.

31. *SZQDZ* is entirely consistent with *M61* because as a pure matter of logic, time limits could not begin to run where there was an unconcluded process that had been commenced by the Minister in taking the first step of deciding to consider whether to exercise his powers and not yet concluded by a corresponding decision by the Minister to bring that process to an end in relation to the applicant[43].

32. There is a tension in the appellant's submissions at AWS [30] to [31] because if it is accepted that the application in SZTZI is in relation to a decision yet to be made (namely a decision to not exercise the power under s48A, 195A or 417) then there can't have been a decision to *not exercise* the dispensing powers for the purpose of s474(7)(a).

33. As accepted in *M61* and *SZQDZ*, because the process which had been started by the Minister had not been terminated by him, there remains utility in a declaration[44] in relation to whether the conduct of the ITOA (IMR) was effected by legal error for the purposes of a future decision by the Minister to conclude the consideration of the exercise of the dispensation powers he has previously decided to undertake.

34. The other basis for the appellant's submission that there was no jurisdiction in the Federal Circuit Court because s198 was not engaged in his case because he did not seek an injunction against removal from Australia at the final hearing: AWS [22].

35. This basis should be rejected. First, there is no question that the application was colourable[45] and that the jurisdiction of the Court was not properly invoked by the application. Second, there cannot be any logical distinction between a party declining to pursue particular relief at final hearing which was sought when the court's jurisdiction was invoked and a court refusing to grant that relief in the result (as it did in M61[46]). Third, there was clearly jurisdiction to make a declaration under s16 of the Federal Circuit Court of Australia Act 1999 which is relevantly analogous to s21 of the Federal Court of Australia Act 1976. Finally, the declaration that the ITOA is effected by legal error is still relevant to the consideration being given by an officer to an anticipated decision by an officer to remove the applicant under s198 of the Act, even if that removal is not immediately imminent such as to warrant a injunctive relief.

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[43] *SZQDZ v Minister for Immigration and Citizenship* (2012) 200 FCR 207 at 220 [46]
[44] *Plaintiff M61* (2010) 243 CLR 319 at 358 [99]-[104]; *SZQDZ* (2012) 200 FCR 207 at 219 [44]
[45] *Palm Springs Ltd v Darling* (2002) 123 FCR 527
[46] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2010) 243 CLR 319 at 359 [101]

36. Ground 3 of the Notice of Appeal does not disclose error by the Full Court and should be dismissed.

Issue Two: Was a Duty to Accord Procedural Fairness excluded

Plaintiff S10 or *Plaintiff M61*?

37. There is no error with the way in which the Full Court approached the decisions of this Court in *Plaintiff S10* and *Plaintiff M61*.

38. The Full Court's findings that the question of the existence of a duty to accord procedural fairness in each case depended on the different circumstances in which the personal dispensation powers arose for consideration in each case.

39. Neither Plaintiff M61 nor Plaintiff S10 established any immutable rule that procedural fairness would (or would not) attach as an abstract concept to each section of the Act isolated from the circumstances in which it arose for consideration. The appellant is incorrect to urge such an approach to determining the existence of a duty.

40. It is accepted that the existence of a duty to accord procedural fairness in the exercise of a particular statutory power may vary depending upon the nature of the circumstances of the exercise of that power. For instance, a bland statutory power to make a decision in the public interest may or may not be exercised in a way which is directed to high levels of policy (in which case it is less likely that a duty to accord procedural fairness arises) or it could be used in a way which is entirely concerned with the circumstances or conduct of a particular individual as the key public interest question, in which case it is more likely that a duty to accord procedural fairness will be an requirement of the exercise of that statutory power.

41. The Full Court made the following critical finding:

> 69. At first blush, the Court appeared to reach the opposite conclusion in *S10.* However, a critical factual difference between the two cases concerned the points at which the Minister had arrived in the exercise of his powers under ss 48B, 195A and 417. In *M61* the Court found as a fact that the Minister had progressed from merely considering whether to exercise these powers and was now engaged in their actual exercise. This was made clear at 349 [66]:
>
> > '66 In these cases, that foundation is revealed by recognising the `significance of the second matter that has been identified: that the inquiries that are made for the purposes of both the RSA and IMR processes are made in consequence of the decision announced in July 2008. There would otherwise appear to be an irreducible tension between the exercise of a

statutory power to detain in a way that prolongs detention, because inquiries are being made, and those inquiries having no statutory foundation. This tension does not arise if the decision to establish and implement the RSA and IMR procedures, announced by the Minister, is understood not just as a direction to provide the Minister with advice about whether power under s 46A or s 195A can or should be exercised, but *as a decision by the Minister to consider whether to exercise either of those powers* in respect of any offshore entry person who makes a claim that Australia owes the claimant protection obligations.'

[Emphasis added]

70. This then formed the foundation for the conclusion in *M61* at 353-354 [78] that once the Minister had decided to enliven the powers, then the rules of procedural fairness attached:

'78 The Minister having decided to consider the exercise of power under either or both of ss 46A and 195A, the steps that are taken to inform that consideration are steps towards the exercise of those statutory powers. That the steps taken to inform the consideration of exercise of power may lead at some point to the result that further consideration of exercise of the power is stopped does not deny that the steps that were taken were taken towards the possible exercise of those powers. Nor does it deny that taking the steps that were taken directly affected the claimant's liberty. There being no exclusion by plain words of necessary intendment, the statutory conferral of the powers given by ss 46A and 195A, including the power to decide to *consider* the exercise of power, is to be understood as "conditioned on the observance of the principles of natural justice" [*Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 615 per Brennan J]. Consideration of the exercise of the power must be procedurally fair to the persons in respect of whom that consideration is being given. And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.'

42. The recommendation turns on a factual finding and therefore there is no error in the position taken by the Full Court. This is critical if there no difference between the instant case and SZSSJ.

43. There is no error in the conclusion of the Full Court at [73] it correctly includes reconciliation of M61 and S10. This is dealt with in the following passages of the Full Court decision:

85. Viewed through that wider lens, it will be seen that, in the circumstances of these appeals, there can be no such thing as an ITOA which has been prepared to assist the Minister in considering whether to lift the bar under his discretionary powers which does not proceed from an exercise of his own authority. The more this must

be so because of the impact of the conduct of the ITOAs on the personal liberty of those who continue to be held in immigration detention in order that that process can be completed. If an ITOA is being conducted, it is because lawful instructions have been given that it should be. That state of affairs both implies, but also reveals, a decision by the Minister that the non-refoulement question in SZSSJ's case is to be examined, that is to say, that the second stage identified in M61 has been reached: Plaintiff S4/2014 v Minister for Immigration and Border Protection(2014) 253 CLR 219 at 232 [27]-[29].

86. Indeed, it is difficult to discern how the Minister would be able to remain at the first stage in a non-refoulement case without, first, breaching Australia's international obligations to assess claims of this kind and, secondly, at the very least in an accessorial capacity the imperative command of s 198. He either considers the claims, so that international law is complied with (and the ITOA process is reviewable because he has arrived at the second stage), or the decision is not reviewable (because he has not considered the claim at all), in which case Australia will be in breach of its international legal obligation to assess non-refoulement claims and every officer who detains one of the 9,258 persons affected by the Data Breach does so in contravention of s 198. Unless the Minister is personally willing to swear that, as the only official in the country with the power to consider SZSSJ's non-refoulement claims, he is not considering doing so and that Departmental officials apparently doing so under the ITOA process are doing so without his authority, it is impossible to conclude that he has not arrived at the second stage.

87. For these reasons then this is a case where the Minister has arrived at the second stage of the process of exercising his dispensing powers. It follows that this is a case governed by M61 rather than S10 and that the rules of procedural fairness, therefore, apply to the ITOA process.

44. The Full Court was correct to appreciate the correct factual inquiry arising from Plaintiff S10 and Plaintiff M61. The correct factual question is whether or not the Minister has made a decision to begin considering the exercise of power under the dispensing powers. If he has, then there is a real process of consideration to which procedural fairness will attach. If not, there is a mere possibility that some process will be undertaken which is not sufficient to attract a duty to accord procedural fairness.

45. In any event, if the point of distinction between M61 and Plaintiff S10 is simply that no duty will arise because of Plaintiff S10 were ever a person has previously made unsuccessful visa applications which had been the subject of merits review (a rule not evident from the reasons of the Court in Plaintiff S10), then such a distinction would not exclude the respondent. She has never had the circumstances of the data breach considered as part of any visa application process or merit review process. She could never

have raised them as part of those application because the events had not yet occurred. Further, the procedure which was promised by the Secretary and the decision by the Minister to consider whether to exercise his dispensing powers arose expressly to give consideration to matters which had arisen by the data breach and which had obviously not previously been considered.

Effect of s197C[47]

46. In light of the absence of any challenge to the separate finding by the Full Court[48] as to the correct construction of the scope of s197C, this ground could not lead to a reversal of the decision and orders of the Full Court.

47. That is, section 197C does not have the effect preventing the officer administering s198 of the Act from having regard to the fact that the Minister had decided to consider whether to exercise his powers under s 48B, 195A and 417 of the Act. Accordingly, s197C does not prevent the utility of the type of judicial review considered by this Court in M61 because it is not directed to eliminate

48. The appellant's challenge is premised on the proposition that s.197C[49] applied to modify the power s198 because the enlivening of the duty under s198 occurred after s197C was enacted (see AWS [40] and [42]).

49. This submission should be rejected. Section 198 is first engaged when the unlawful non-citizen is taken into detention. This must be so because s198 (2) permits continued detention under s189 whilst the Minister has decided to give consideration to exercising his power to permit an application to be made for a visa[50].

50. Although actual removal under s198 of the Act did not take place prior to the enactment of s197C (no doubt because it was not reasonably practicable to do so in light of the Minister's unfinalized decision to consider whether to exercise the dispensing powers), it does not follow that s198 had not been engaged in relation to the respondent prior to the enactment of s197C.

51. The respondent had the right to the continuation of the application of the criterion in s198 as it existed at the time that that consideration under that section was first engaged.

52. The Respondent otherwise adopts the submissions of SZSSJ in relation to this ground.

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[47] See Ground 2, AWS [36] to [46]
[48] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 16-17 [48] to [49]
[49] See Ground 2, AWS [36] to [46]
[50] *Plaintiff M61* (2010) 243 CLR 319 at 338 [25]

53. Ground 2 of the Notice of Appeal discloses no error in the reasons or orders of the Full Court and should be dismissed.

Issue Three: Was the type of duty described in Lam and WZARH excluded by express statutory provision

54. These submissions do not rise above the contention in ground 4 that the reasoning in Plaintiff S10 is to the effect that there is a statutory exclusion of the rules of procedural fairness in any exercise of power under ss 48B, 195A and 417 so as to exclude application of the relevance of circumstances such as those considered in WZARH as being relevant to ascertaining the nature of a duty to accord procedural fairness.

55. For the reasons given above, Plaintiff S10 is not authority for a proposition that any duty to accord procedural fairness is statutorily excluded from s48B, s195A and s417.

56. Accordingly, ground 5 must fail.

Issue Four: Was there an error by the Full Court in the finding that content of the duty to afford procedural fairness had not been complied with?

57. There is no basis to suggest that the Full Court erred by finding that in the circumstances, the duty to accord procedural fairness required the respondent to be informed of the process and criteria for the Minister's decision (Ground 7 (a) AWS [65] to [71]). It is a wholly unexceptional proposition that a person cannot have a meaningful opportunity to provide information and make arguments if he or she is unaware of the criteria to which he or she must direct that information or those submissions[51].

58. The appellant's contention proceeds on the incorrect basis that the ITOA in these cases occurred in isolation. The ITOA occurred in a context of a statement by the Secretary of the Department that 'the department will assess any implications for you personally as part of its normal processes." The respondent has never been told what those processes were, whether they were exclusively and exhaustively comprised of the ITOA[52].

59. The Full Court did not establish a 'new principle of procedural fairness'[53] by finding[54] that in the present case the failure to disclose the full circumstances of the data breach to the respondent amounted to a denial of procedural fairness (see AWS [72]-[77] and Ground 7 (b)).

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[51] (2015) 234 FCR 1 at 29 [99]
[52] (2015) 234 FCR 1 at 8 [16]
[53] AWS [72]
[54] (2015) 234 FCR 1 at 31-32 [118] and [120] and 33 at [124] to [125]

60. The finding by the Full Court was a carefully reasoned and open finding of fact that the failure to provide the respondent with information which it had exclusively in its control which would be relevant to the respondent's capacity to present material and make submissions was procedurally unfair. That is no statement of principle and it is an application of the inherent flexibility of the content of procedural fairness to very unique circumstances. It is Gilbertian to expect that a person can make submissions about the effect on them of the act of another when that other will not tell them about the full extent of the act.

61. Certainly, forceful submissions could have been advanced on behalf of the respondent, SZTZI, had she or her advisors been provided the KPMG report and had disclosed to them the extent of the data breach and the likelihood foreign governments had been made privy to information one would ordinarily expect to be kept confidential.

62. Finally, there is no error by the Full Court in drawing inferences about the potential usefulness to the respondent of having access to the unabridged KPMG Report dealing with the internet access that had made by external users to the respondent's data which compromised by the Appellant for the purposes of whether the provision of that document might have made a difference to the outcome: (see AWS [62] to [64]).

63. The Appellant's submission at AWS [64] should be rejected. It is incorrect to suggest that the Full Court did not embark on any consideration of the recommendation of the ITOA in the respondent's case to ascertain whether a different result might have followed if SZTZI had been provided with additional information.

64. The Full Court considered this issue at paragraphs [149] to [152][55] of its reasons for decision. Those reasons made it clear that the Full Court had also incorporated consideration of its reasons in relation to the impact on SZSSJ capacity to present his case[56]. Given that the focus of the inquiry is on the to the respondent which were lost, this is unsurprising given that she lost the same opportunity to present her case as did SZSSJ

Conclusion

65. There is no error demonstrated in the reasons of the Full Court and the appeal should be dismissed with costs.

Part VII:

66. Not applicable.

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[55] *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) (2015) 234 FCR 1 at 37-38

[56] Relevantly (2015) 234 FCR 1 at [95] and [99] to [105] and [113]

Part VIII:

2. The Respondent estimates that she will require approximately one hour for the presentation of their oral argument.

Dated: 6 May 2016

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