HIGH COURT OF AUSTRALIA

27 July 2016

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR v SZSSJ & ANOR
MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ORS v SZTZI
[2016] HCA 29

Today the High Court unanimously held that the Department of Immigration and Border Protection's processes in response to an unauthorised release of personal information of two former protection visa applicants did not deny those applicants procedural fairness.

The Department made available on its website an electronic document containing embedded information disclosing the identities of 9,258 applicants for protection visas then in immigration detention ("Data Breach"), including SZSSJ and SZTZI. The Data Breach continued for two weeks.

The Department retained external consultants KPMG to investigate the Data Breach. A report produced by KPMG ("KPMG Report") identified 104 unique IP addresses from which the electronic document had been accessed. The Department then notified applicants affected by the Data Breach. It began to conduct "International Treaties Obligations Assessments" ("ITOAs"), through standardised procedures prescribed in a publicly available document ("Procedures Advice Manual"), to assess the Data Breach's effect on Australia's non-refoulement obligations to those applicants. Officers conducting ITOAs were instructed to assume that an affected applicant's personal information may have been accessed by authorities in the country in which he or she feared persecution or other relevant harm.

SZSSJ and SZTZI were informed that ITOAs were being conducted in respect of their protection claims in accordance with the Procedures Advice Manual. An abridged version of the KPMG Report having been made publicly available, SZSSJ and SZTZI requested unabridged copies of the KPMG Report. Those requests were refused.

SZSSJ commenced proceedings in the Federal Circuit Court of Australia seeking relief in respect of the Data Breach before an ITOA had been completed. SZTZI commenced proceedings in that Court after an ITOA concluded that her claims did not engage Australia's non-refoulement obligations. Both those proceedings were dismissed. The Full Court of the Federal Court of Australia allowed their appeals, holding that they were denied procedural fairness by virtue of the Department's failures adequately to explain the ITOA processes and to provide the unabridged KPMG Report. The Full Court also rejected a submission that the Federal Circuit Court's jurisdiction to hear SZSSJ's and SZTZI's claims was excluded by s 476(2)(d) of the *Migration Act* 1958 (Cth).

By grants of special leave, the Minister appealed to the High Court, which unanimously allowed the appeals. The High Court held that SZSSJ and SZTZI were owed a duty to be afforded procedural fairness in the ITOA process but that they were not denied procedural fairness. The applicants were squarely put on notice of the nature and purpose of the ITOAs and of the issues to be considered. The instruction given to officers conducting ITOAs to assume that SZSSJ's and SZTZI's personal information may have been accessed by authorities in the countries in which they feared persecution or other relevant harm meant that not providing the unabridged KPMG Report did not constitute a denial of procedural fairness. The High Court also held that the Full Court correctly concluded that the Federal Circuit Court had jurisdiction to hear SZSSJ's and SZTZI's claims.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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