HIGH COURT OF AUSTRALIA

13 February 2019

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZMTA & ANOR;
CQZ15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR;
BEG15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR
[2019] HCA 3

Today the High Court unanimously allowed an appeal in *SZMTA* and unanimously dismissed appeals in *CQZ15* and *BEG15*. The appeals, each from a decision of the Federal Court of Australia, concern the effect on a review by a Tribunal under Pt 7 of the *Migration Act 1958* (Cth) of a notification given by the Secretary of the Department of Immigration and Border Protection to the Tribunal that s 438 of the Act applies in relation to a document or information.

In each case, a visa applicant applied to a Tribunal for review of a decision by a delegate of the Minister for Immigration and Border Protection. As required by s 418(3) of the Act, the Secretary of the Department gave to the Registrar of the Tribunal documents considered relevant to the review. Subsequently, a delegate of the Secretary or an officer of the Department notified the Tribunal that s 438 applied to certain information in the documents. Section 438 applies to a document or information either if the Minister has lawfully certified that disclosure of any matter in the document or of the information would be contrary to the public interest, or if the document, any matter in the document or the information was given to the Minister or the Department in confidence. If a Tribunal is notified that s 438 applies to a document or information, the Tribunal may have regard to any matter in the document or to the information, and, in certain circumstances, it may disclose to the applicant for review any such matter or the information. In each case, neither the Tribunal nor the Secretary disclosed to the visa applicant the fact of the notification purportedly made under s 438. In *CQZ15* and *BEG15*, s 438 did not apply to any documents or information before the Tribunal, and so the notification was invalid. In *SZMTA*, s 438 did not apply to at least some of the documents or information before the Tribunal, and so the notification was invalid to at least that extent. In each case, the Tribunal affirmed the decisions under review. The visa applicants sought judicial review of the Tribunal's decisions in the Federal Circuit Court of Australia.

In *CQZ15*, the Federal Circuit Court held that the invalidity of the notification and the non-disclosure of the fact of the notification had resulted in jurisdictional error. A Full Court of the Federal Court allowed an appeal by the Minister and remitted the matter for a determination of the materiality of the Tribunal's denial of procedural fairness. In *BEG15*, the Federal Circuit Court held that the information covered by the notification could have made no difference to the outcome of the Tribunal's review. The same Full Court of the Federal Court as in *CQZ15* dismissed an appeal by the visa applicant. In *SZMTA*, the invalidity of the notification was not raised by the visa applicant until his appeal from the Federal Circuit Court to a single judge of the Federal Court, who held that the Tribunal had made a jurisdictional error and allowed the appeal.

By special leave, the visa applicants in *CQZ15* and *BEG15* and the Minister in *SZMTA* appealed to the High Court. The High Court unanimously held that the fact of a notification to the Tribunal that s 438 applies to a document or information will trigger an obligation of procedural fairness on the part of the Tribunal to disclose the fact of the notification to the applicant for review. By

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majority, the High Court held that a breach by the Tribunal of that obligation will result in jurisdictional error if, and only if, the breach is material, in the sense that the breach deprives the applicant of the possibility of a successful outcome. By majority, the High Court also held that an invalid notification will result in jurisdictional error if, and only if, the notification is material. In *CQZ15*, the Federal Court was correct to remit the matter to the Federal Circuit Court. In *BEG15*, the Federal Court was correct to find no appealable error in the Federal Circuit Court's decision. In *SZMTA*, the Tribunal's denial of procedural fairness was immaterial, and the Federal Court was wrong to find that the Tribunal had committed a jurisdictional error.

- *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.*