SHORT PARTICULARS OF CASES
APPEALS

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MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZMTA & ANOR (S36/2018)

Court appealed from: Federal Court of Australia
[2017] FCA 1055

Date of judgment: 5 September 2017

Special leave granted: 16 February 2018

In October 2012 SZMTA applied for a protection visa, on the ground provided in s 36(2)(aa) of the *Migration Act* 1958 (Cth) ("the Act"). He sought what is known as "complementary protection", after being unsuccessful in applying for a protection visa (and also in pursuing administrative and judicial review) on the basis that he be recognised as a refugee. He claimed that, if returned to his native Bangladesh, he would be tortured and possibly be killed by Islamic fundamentalists because he was a practitioner and promoter of Buddhism.

After a delegate of the Appellant ("the Minister") had refused SZMTA's application, SZMTA lodged an application for a review by the Administrative Appeals Tribunal ("the Tribunal"). On the next day a delegate of the Minister gave written notice to the Tribunal under s 438(2)(a) of the Act ("the Notification") that certain documents in the Minister's file on SZMTA's claim ("the Documents") were confidential and that they should not be disclosed to SZMTA. The Documents were claimed to be confidential on the basis that they contained information, relating to internal working documents and business affairs, that had been given to the Minister or his Department in confidence. Section 438(3) of the Act provided that the Tribunal may have regard to such information and may disclose it to the applicant if the Tribunal thought such disclosure appropriate. In proceeding to deal with SZMTA's application, the Tribunal made no such discretionary disclosure. The Tribunal then affirmed the delegate's decision.

An application by SZMTA to the Federal Circuit Court was dismissed by Judge Street on 1 June 2016.

An appeal to the Federal Court was allowed by White J, upon a ground (not raised in the Federal Circuit Court) which essentially alleged that the Tribunal had erred in the procedure it had adopted in relation to the Notification. After examining the Documents, White J found that "[t]he [N]otification was defective because it purported to apply to at least some documents and information which could not reasonably be regarded as having been given to the Minister or to an officer of the Department 'in confidence'." His Honour also found no indication of whether the Tribunal had had regard to the Documents. White J found that although SZMTA was in possession of the Documents at the time his application was before the Tribunal, the Tribunal had likely assumed otherwise, given the recommendation of non-disclosure contained in the Notification. The Tribunal therefore may have chosen to disregard the Documents, causing it to fail to take into account certain information that would have assisted SZMTA. White J then remitted the matter to the Tribunal.

The grounds of appeal are:

- White J erred by relying upon the mere possibility that the Tribunal may not have had regard to certain information, because of the presence of a notification made to it under s 438(2) of the Act, to find that the Tribunal had denied SZMTA procedural fairness.

- White J erred by failing to hold that the Tribunal had not denied SZMTA procedural fairness because every document the subject of the notification under s 438(2) of the Act was in the possession of SZMTA prior to the Tribunal hearing.

CQZ15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (M75/2018)

Court appealed from:	Full Court, Federal Court of Australia [2017] FCAFC 194
Date of judgment:	29 November 2017
Date special leave granted:	10 May 2018

The appellant, a citizen of Iran, applied for a protection visa which was refused by a delegate of the Minister on 7 October 2013. On the same day, another delegate purported to issue a certificate under s 438(1)(a) of the *Migration Act 1958* (Cth) ("the Act") and a notification under s 438(2) of the Act stating that the disclosure of certain information on a file of the Department of Immigration and Citizenship would be contrary to the public interest.

The appellant applied to the Administrative Appeals Tribunal for review of the delegate's decision to refuse the protection visa. The Secretary of the Department gave the Registrar of the Tribunal the documents in his possession or control considered relevant to the review of the decision, including the certificate. On 12 February 2015, another delegate notified the Tribunal that s 438(1)(b) of the Act applied in relation to "information provided to [the Department] as an allegation relevant to [an identified file]" because it was given to the Minister in confidence ("the notification"). At the hearing in April 2015, neither the certificate nor the notification was disclosed to the appellant by the Tribunal. The information the subject of the certificate and the notification was also not disclosed. On 15 October 2015 the Tribunal affirmed the delegate's decision to refuse the protection visa.

The appellant applied to the Federal Circuit Court for judicial review of the Tribunal's decision. The Minister filed a court book which included the certificate and notification, but not the documents to which they related. Subsequently, the Minister filed, without leave, an affidavit affirmed by one of its solicitors, Vincenzo Murano ("the Murano affidavit"). Exhibited to this affidavit were the certificate, the notification and the documents said to be subject to them. The appellant's legal representatives objected to the filing of the Murano affidavit and sought its removal from the Court file. Judge Riley upheld the objection, on the basis that she was bound by the Federal Court decision of *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 ("MZAFZ").

On 30 January 2017, Judge Riley set aside the Tribunal's decision. Her Honour considered that *MZAFZ* and *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 required her to hold that the Tribunal had erred by failing to disclose the certificate and the notification; that such an error constituted a breach of procedural fairness and jurisdictional error; and that the matter should be remitted to the Tribunal for determination according to law.

The Minister's appeal to the Full Federal Court (Kenny, Tracey & Griffiths JJA) was successful. The Court did not consider that the decisions in *MZAFZ* and *Singh* compelled the conclusion that the contents of the documents covered by s 438 certificates can never be relevant in a judicial review proceeding in which the Tribunal has made a decision without disclosing to an applicant that the Minister has issued a certificate (or the Secretary has given a notification) that the documents identified in the certificate (or the notification) had been provided to it.

The Court noted that since Judge Riley's decision in this case, there have been a number of instances in which Federal Circuit Court judges have received evidence of this kind and examined the documents to which notifications applied, and, in consequence, held that the failure to disclose the existence of the notification did not give rise to a denial of procedural fairness. For the most part this conclusion was reached in these cases because the material in the documents was found to be completely irrelevant to the issues which fell for the Tribunal's decision.

The Court held that it was open to the Minister to read the Murano affidavit for the purpose of showing that, even though the Tribunal had not disclosed existence of the certificate and the notification to the appellant there was in fact no denial of procedural fairness; or that, if there was, relief should nonetheless be withheld as a matter of discretion. The Federal Circuit Court should have admitted the Murano affidavit with its accompanying exhibits, and considered and determined the case the Minister sought to make in the judicial review proceeding.

The grounds of appeal include:

- The Full Court of the Federal Court erred in departing from the decision of another Full Court, *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305, without first finding that other decision to be plainly wrong;
- The Full Court of the Federal Court erred in conflating two issues: whether there had been a breach of common law procedural fairness, which had vitiated the decision of the second respondent under ss 414 and 415 of the Act; and whether, in respect of the established jurisdictional error, relief might be refused in the exercise of discretion on the basis that the ultimate decision could not have been any different.

The first respondent has filed a summons seeking leave to file a notice of cross-appeal out of time. The ground of the proposed cross-appeal is that the Full Court erred in failing to consider the first respondent's second ground of appeal.

This appeal is listed for hearing together with 2 other appeals which raise similar issues, namely *Minister for Immigration and Border Protection v SZMTA & Anor* and *BEG15 v Minister for Immigration and Border Protection & Anor*.

BEG15 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S135/2018)

Court appealed from: Full Court of the Federal Court of Australia [2017] FCAFC 198

Date of judgment: 29 November 2017

Special leave granted: 10 May 2018

The Appellant is a Sri Lankan citizen who arrived in Australia in 2012. His application for a protection visa was rejected by a delegate of the Minister for Immigration and Border Protection, a decision ("the First Decision") which was later affirmed by the then Refugee Review Tribunal ("the Tribunal"). (The First Decision was however later set aside by the Federal Circuit Court.) It is the Tribunal's second decision ("the Second Decision"), also affirming the delegate's decision, which is the subject of the Appellant's proceedings in this Court.

At issue is whether the primary judge, Judge Smith, erred in failing to find that the Second Decision was affected by jurisdictional error. This allegedly arose because the Tribunal failed to find that a certificate ("the Certificate"), issued pursuant to s 438 of the *Migration Act* 1958 (Cth) ("the Act"), was invalid. There was also a consequential failure by the Tribunal to put the material covered by the Certificate to the Appellant for comment, allegedly amounting to a denial of procedural fairness. The Certificate itself related to folios 142-144 of the Department of Immigration and Border Protection's file. It was however was invalid on its face and the proceedings in the Federal Circuit Court were conducted on that basis.

Judge Smith held that there was nothing in the folios covered by the Certificate that was either adverse to the Appellant, relevant or significant to the Second Decision. It did not therefore need to be disclosed to him. Furthermore, as there was nothing which was adverse to the Appellant, s 424A of the Act also did not apply. Judge Smith not only found that there was no jurisdictional error committed by the Tribunal, but in the alternative, he would have refused relief in the exercise of the Court's discretion.

On 29 November 2017 the Full Federal Court (Kenny, Tracey & Griffiths JJ) unanimously dismissed the Appellant's appeal. Their Honours held that Judge Smith's conclusions were open to him. Neither the invalidity of the Certificate, nor the failure by the Tribunal to provide the Appellant with a copy of it (or the documents covered by it), gave rise to any practical injustice.

The grounds of appeal include:

- The Full Federal Court erred (at [30]) in finding that jurisdictional error would not be established by a Tribunal acting on a certificate purportedly issued under s 438 of the Act which was invalidly issued.

- The Full Federal Court erred in failing to apply the correct reasoning of Beach J that if the Tribunal acted on the invalid certificate it followed a procedure contrary to law: *MZAFZ v Minister for Immigration and Border Protection* [2016] FCA 1081 at [40]; 243 FCR 1.

On 31 May 2018 the First Respondent filed a notice of contention, the ground of which is:

- The Full Federal Court should have dismissed the Appellant's appeal on the ground that the Tribunal was not under an obligation of procedural fairness to:

    a) disclose the existence or content of any certificate issued pursuant to s 438(1) of the Act;
    b) give to the Appellant an opportunity to make submissions on its validity;
    c disclose the extent to which (if any) the Tribunal was proposing to take into account the material covered by the Certificate; or
    d) give to the Appellant an opportunity to seek a favourable exercise of the discretionary power in section 438(3)(b) of the Act,

and that, to the extent that *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 and *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 held otherwise, they were wrongly decided.

QLN147 v THE REPUBLIC OF NAURU (M27/2018)

Court appealed from: Supreme Court of Nauru [2018] NRSC 2

Date of judgment: 20 February 2018

The appellant is a citizen of Sri Lanka, of Tamil ethnicity. He fled from Sri Lanka to India in October 2013, and travelled from India to Australia in July 2014. He was then transferred to Nauru for the purposes of having his claims assessed.

He claimed refugee status on the basis of fear of harm because he is a Tamil from North Sri Lanka, has the imputed political opinion of a supporter of the Liberation Tigers of Tamil Eelam ("LTTE") because he gave a LTTE member a lift in his boat, and is a member of the particular social groups of "Sri Lankan Tamils from Mannar area", "Tamil failed asylum seekers" and "Sri Lankan Tamils previously resident in India as lawful/unlawful refugees".

On 26 November 2016 the Refugee Status Review Tribunal of Nauru ("the Tribunal") affirmed the decision of the Secretary of the Department of Justice and Border Control that the appellant was not recognised as a refugee under the 1951 *Refugees Convention relating to the Status of Refugees*, and was not owed complementary protection under the *Refugees Convention Act* 2012 (Nr) ("the Act").

The appellant appealed to the Supreme Court of Nauru (Marshall J). His sole ground of appeal was whether the Tribunal failed to consider a claim to invoke the Republic's complementary protection obligations, or significant evidence in support of that claim, which concerned the harm the appellant would suffer during any period on remand in a Sri Lankan prison as a consequence of having left Sri Lanka illegally.

Marshall J noted that the Tribunal gave its conclusions on the complementary protection claims as follows:

"*As noted, the Tribunal accepts that on return to Sri Lanka the applicant could be arrested and charged with a breach of the* Immigrants and Emigrants Act *over his illegal departure for India in 2013. … While it is possible that he could be held on remand for a small number of days while awaiting a hearing in a magistrates court, in cramped and unsanitary conditions, the Tribunal does not accept that this in itself would constitute torture or cruel, inhuman or degrading treatment or punishment of a kind prohibited by Nauru's international human rights commitments. … the evidence before the Tribunal does not indicate that returnees who have been charged with illegal departure and remanded in custody have been tortured whilst on remand and the Tribunal does not accept that the applicant will be tortured whilst being held on remand*" .

Marshall J accepted the respondent's submission that the failure of the Tribunal to make specific reference to the material provided by the appellant about the conditions in prisons in Sri Lanka was unremarkable. That material was very general and did not relate to the specific matter required to be considered by the Tribunal which was whether detention for up to three days on remand in Negombo prison would amount to cruel and inhumane treatment. The material did not address that issue so the Tribunal was not required to expressly refer to it in coming to its decision on complementary protection.

His Honour held that the Tribunal's finding that the possibility of the appellant being held on remand "for a small number of days" in "cramped and unsanitary conditions" would not "in itself" amount to "torture or cruel, inhuman or degrading treatment or punishment of a kind prohibited by Nauru's international human rights commitments" was open to the Tribunal on the material before it.

As to the argument that the Tribunal failed to give adequate reasons for its decision Marshall J noted that the Tribunal referred to the submissions of the appellant's representative, including the fact that it cited "a range of country information relative to human rights conditions in Sri Lanka... and the forms of harm the applicant claims to fear on return". There was no requirement to deal with each item of that material that touched on prison conditions in Sri Lanka in the absence of material directly relevant to short term remand prisoners held at Negombo prison. This aspect of the appellant's contentions was also rejected.

The grounds of the appeal include:

- The Supreme Court of Nauru erred in rejecting the appellant's argument that the Tribunal made errors of law by:
  (1) failing to consider the appellant's evidence regarding all of the conditions in Sri Lankan prisons and why they cumulatively constituted cruel, inhuman or degrading treatment;
  (2) alternatively, if the Tribunal had considered such evidence but regarded it as irrelevant, the Tribunal erred;
  (3) and in any event, if the Tribunal rejected this evidence, it failed to give adequate reasons for doing so.

QLN146 v THE REPUBLIC OF NAURU (M26/2018)

Court appealed from: Supreme Court of Nauru [2018] NRSC 1

Date of judgment: 20 February 2018

The appellant is a citizen of Sri Lanka, of Tamil ethnicity and Christian religion. He departed Sri Lanka for India in 2008, and boarded a boat in India that arrived in Australia in July 2014. He was transferred to Nauru in August 2014.

He claimed refugee status on the basis of a fear of harm deriving from his provision of buses to the Liberation Tigers of Tamil Eelam ("LTTE") to use during their political campaign for the 2005 Presidential election, as he feared that he would be imputed with the political opinion of a supporter of the LTTE. He also feared harm on the basis of being a Tamil from North Sri Lanka, and being a member of the particular social group of failed asylum seekers.

On 26 November 2016 the Refugee Status Review Tribunal of Nauru ("the Tribunal") affirmed the decision of the Secretary of the Department of Justice and Border Control that the appellant was not recognised as a refugee under the 1951 *Refugees Convention relating to the Status of Refugees*, and was not owed complementary protection under the *Refugees Convention Act* 2012 (Nr) ("the Act"). The Tribunal set out five reasons which cumulatively led it to reject the appellant's claim to have been targeted by the authorities for his support of the LTTE. Those reasons concerned the appellant's credibility.

The appellant appealed to the Supreme Court of Nauru (Marshall J). He contended, inter alia, that the Tribunal erred in finding his claim concerning the circumstances of his departure from his home region "difficult to believe". The appellant claimed that he and his family had left from the airport near his hometown and flown to Colombo. He said he paid a bribe equal to $1,750 AUD to a local army commander to allow him to escape. The Tribunal stated that it did not underestimate the extent of corruption in Sri Lanka and was willing to accept that the applicant may have had access to some wealth even though he claimed at the hearing that he was running low on funds toward the end of his time in Colombo. But even giving these considerations due weight the Tribunal was not satisfied that this conduct was consistent with that of a person who was terrified of being detected by the authorities.

Marshall J considered that the Tribunal had complied with its obligation under s 34(4) of the Act to set out its reasons for decision, its finding on any material questions of fact and to refer to the evidence on which findings of fact were made, and there was no error of law contained in the Tribunal's reasons for doubting the appellant's credibility.

The grounds of the appeal include:

- The Supreme Court of Nauru erred in affirming the decision of the Refugee Status Review Tribunal.
- The Supreme Court of Nauru erred by accepting the Republic's characterisation of the Tribunal's reasons. Thus, the Court found that the Tribunal accepted that the appellant may have bribed an army commander to facilitate his escape, and did not find that the commander would not accept a bribe.

WILLIAMS v WRECK BAY ABORIGINAL COMMUNITY COUNCIL & ANOR (C5/2018)

Court appealed from: Court of Appeal of the Supreme Court of the Australian Capital Territory [2017] ACTCA 46

Date of judgment: 23 October 2017

Special leave granted: 21 March 2018

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) (the "*Land Grant Act"*) is Commonwealth legislation applicable to a community of Aboriginal persons living on a tract of land in the Jervis Bay area. Under the *Land Grant Act,* a body corporate known as the Wreck Bay Aboriginal Community Council ("the Council") was established and granted ownership of the land occupied by the community. The members of the Council consist of those Aboriginal persons who resided on the land as at 24 May 1986 together with persons who have since been accepted as members of the community at a general meeting of the Council.

Under s 6 of the *Land Grant Act* the Council has certain functions including "…[taking] action for the benefit of the Community in relation to the housing, social welfare, education, training or health needs of the members of the Community."

The *Residential Tenancies Act 1997* (ACT) ("the *RT Act*") is ACT legislation which governs the relationship between landlords and tenants and seeks to balance their respective rights.

The *Jervis Bay Territory Acceptance Act 1915* (Cth) was amended in 1988 to include, inter alia, s 4A which provides that "Subject to this Act, the laws … in force from time to time in the Australian Capital Territory are, so far as they are applicable … to the [Jervis Bay] Territory ("JBT") and are not inconsistent with an Ordinance, in force in the JBT as if the JBT formed part of the Australian Capital Territory."

S 46 of the *Land Grant Act* provides that: "This Act does not affect the application to Aboriginal Land of a law in force in the Territory to the extent that that law is capable of operating concurrently with this Act."

The issue in this appeal is the extent to which the *RT Act,* as a law in force in the JBT, applies to Aboriginal Land under the *Land Grant Act* over which the first respondent, the Council, granted a lease.

The appellant is a registered member of the Council and has been the tenant of premises in the Wreck Bay village, in the JBT, leased to him by the Council pursuant to a residential tenancy agreement since 1989. The premises are located on Aboriginal Land: that is, land which has been granted to the Council pursuant to s 8 of the *Land Grant Act*.

In April 2015 the appellant commenced proceedings in the ACT Civil and Administrative Tribunal ("ACAT") against the Council seeking compensation of $25,000 under s 83(d) of the *RT Act* and an order that repairs be carried out on the premises. The Council applied to strike out the application on the basis that

ACAT had no jurisdiction to hear the dispute because there was not a residential tenancy agreement between the parties. ACAT decided in December 2015 that the appellant had been occupying the premises under a residential tenancy agreement within the meaning of s 6A of the *RT Act* and therefore ACAT did have jurisdiction. The proceedings were subsequently removed to the ACT Supreme Court by consent. This was done by the Council filing an application in June 2017 in the ACT Supreme Court, by way of a Special Case, in relation to whether the *RT Act* applied to Aboriginal Land. The Attorney-General for the Australian Capital Territory (the second respondent) intervened in those proceedings. On 25 August 2016 Elkaim J held that the *RT Act* did so apply. The Council appealed to the Court of Appeal which allowed the appeal, finding that the *RT* Act was incapable of operating concurrently with the *Land Grant* Act and accordingly, that Sections 8 and 9 of the *RT Act* did not apply to Aboriginal Land.

In this Court the appellant submits that the provisions of the *RT Act* relevant to his claim are capable of operating concurrently with the provisions of the *Land Grant Act* relating to leases. Thus the relevant provisions of the *RT Act* are not prevented from applying to the residential tenancy agreement.

The first and second respondents submit that the Court of Appeal was correct in its determination that the *RT Act* and *Land Grant Act* were incapable of concurrent operation, and as such, the provisions of the *RT Act* are not applicable to the residential tenancy agreement.

A Section 78B Notice was filed by the Council in May 2018. There has been no intervention by any State or other Territory Attorney-General in response.

The appellant's grounds of appeal to the High Court are:

- That the Court of Appeal erred in law in holding that Sections 8 and 9 of the *RT Act* as applied in force in the Jervis Bay Territory by Section 4A of the *Jervis Bay Territory Acceptance Act 1915* (Cth) are not capable of operating concurrently with the *Land Grant Act* in accordance with Section 46 of the *Land Grant Act.*

- That the Court of Appeal erred in law in holding that the *RT Act* does not apply to Aboriginal Land for the purposes of Section 46 of the *Land Grant Act* to the extent to which Sections 8 and 9 of the *RT Act* would apply to a lease granted by the Council.