IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M75 of 2018

BETWEEN:

CQZ15
Appellant

and

Minister for Immigration and Border Protection
First Respondent

Administrative Appeals Tribunal
Second Respondent

APPELLANT'S REPLY

Part I – Certification regarding publication on the Internet

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

PART II – Reply

A. Minister's application for special leave to cross-appeal (and for an extension of time in which to do so)

2. In this case, the Minister's position before the Full Court was that he accepted that *Singh* and *MZAFZ* were correctly decided, insofar as they stood for the propositions that: there may be an obligation of procedural fairness to disclose the existence of a s 438 certificate (or notification); and s 422B did not operate so as to exclude that common law obligation (Appellant's Book of Materials in Reply (**ABMR**) 41 (lines 27-34); 78 (lines 5-8)). See also Minister's written submissions dated 26 July 2018 at paragraph 32.

3. It was the Full Court's acceptance of the Minister's position which allowed it to: find against the Appellant's contention that *Singh* stood for the proposition that procedural fairness always required the AAT to dislose the existence of a certificate (and failure to do so was, without more, jurisdictional error); and avoid confronting the fact that, before it could depart from *Singh*, it was required to conclude that that decision was plainly wrong. See CAB 81 [50], 88 [77].

4. In another appeal that is before this Court and which is due to be heard on the same day as this appeal, the Minister wants to argue for the contrary position. In submissions filed in the *BEG15* appeal in support of his notice of contention, the Minister says (at [35]):

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> [T]he operation of s 422B(2) in conjunction with s 438 leaves no room for general law principles of procedural fairness to impose requirements for the disclosure of a certificate or the fact of its existence. In so far as the Full Court reasoned otherwise, it erred. And in so far as *MZAFZ* and *Singh* (the latter being concerned with s 357A(2), an analogue of s 422B(2)) held otherwise, they were wrongly decided.

(The above argument about the operation of s 422B is indistinguishable from that which the Minister put, about s 357A, in his application for special leave to appeal in *Singh*).

5. '*In so far as the Full Court reasoned otherwise*' refers to the Full Court's adoption in *BEG15* (at [30]), of the observation that the Full Court had made in *BJN16*,[1] namely that the non-disclosure of a s 438 certificate may give rise to a denial of procedural fairness. (This is made clear, as well, by the Minister's submissions in the *BEG15* appeal at [31].) A similar observation was made by the Full Court in this case (CAB 85-6 [68]).

6. In this case, it was also the position of the Minister that:

   6.1 if the Full Court found for him on ground 1, it could do one of two things: consider ground 2,[2] by admitting and considering the second Murano affidavit; or remit the matter to the Federal Circuit Court (ABMR 34 (lines 35-41));

   6.2 if the Full Court found against him on ground 1, then the '*secondary issues*', by which counsel meant whether there had been '*no denial of procedural fairness in the particular facts of this case in the light of ... the documents and information that were the subject of the certificate or, alternatively, whether the court should or should not exercise its discretion to grant relief to [the Appellant]*', would not arise on the appeal (ABMR 34 (lines 25-33)); and

   6.3 ground 2(b) of his notice of appeal should be read as abandoned (ABMR 30).

7. The Appellant respectfully submits that this Court should not permit the Minister to take, in this Court, an approach contrary to the one which he took in the Full Court.

8. Paragraph 42 of the Minister's submissions dated 26 July 2018 says as follows:

> The Full Court did not consider it appropriate to deal with the Minister's second ground of appeal, which alleged errors in the final judgment of the Federal Circuit Court. If this Court were to find that the Full Court erred in remitting the matter to the Federal Circuit Court, the Minister would wish to be able to agitate paras (a) to (c) of that ground (which in principle remain alive even if the evidence the subject of ground 1 is not admitted). Since this Court does not have the benefit of the Full Court's reasoning on these points (and their disposition may be affected by other matters currently before the Court), in the event that

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1 *Minister for Immigration and Border Protection v BJN16* (2017) 253 FCR 21 at 31 [63] (Kenny, Tracey and Griffiths JJ).

2 Grounds 2(c) and 2(d) were about lack of 'practical injuctice', either expressly or because said to arise in '*the circumstances of the case*'. Ground 2(a) was agitated by the Minister before Judge Riley (under cover of formally submitting that *MZAFZ* had been wrongly decided), on lack of 'practical injuctice'. See ABMR 35 (line 36) to 36 (line 4); 42 (lines 10-17); and 76 (line 31) to 78 (line 42). See also Full Court's reasons at CAB 83-4 [59]-[60].

> the Appellant succeeds here, it would be appropriate for the matter to be remitted to the Full Court for these issues to be dealt with. ...

9. To the extent that, by paragraph 42, the Minister would wish to contend that the Full Court erred in remitting the matter, instead of itself considering grounds 2(a) and 2(c) of his notice of appeal (and doing so, after admitting the second Murano affidavit), this contention would be plainly contrary to the Minister's submissions in the Full Court that such an approach was open to be taken in the event the Minister's appeal on ground 1 was upheld. See paragraph 6.1 above.

10. To the extent that, by paragraph 42, the Minister would wish to contend that:

10 10.1 even if this Court were to find that the Full Court erred in setting aside the orders made by Judge Riley quashing the decision of the AAT (that is, even if this Court should find that Her Honour was correct in her ruling on the evidence),

10.2 still, this Court should remit the matter to the Full Court to deal with ground 2,

this contention would be both:

10.3 contrary to the Minister's submissions in the Full Court. See paragraph 6.2 above;

10.4 with regards to ground 2(c), an invitation for this Court to allow the Minister to argue, in the Full Court on remitter, that *Singh* was wrongly decided.

11. Although the Minister is far from transparent about his desire to argue in this case (not just in *BEG15*) that *Singh* was wrongly decided, at least he notes, in paragraph 42, that
20 '*disposition*', by the Full Court on a remitter from this Court, of grounds 2(a), 2(b)[3] and 2(c) '*may be affected by other matters currently before this Court*'.

12. Given that, whatever may have been the position taken by the Minister in some other case, in this case the Minister accepted that *Singh* was correctly decided, the Appellant respectfully submits the Minister ought not be permitted to attempt to argue for a contrary position by subterfuge.

13. If the Minister wants to argue **in this case** that *Singh* was wrongly decided, it would only be proper for him to do so **in this Court**. That would require the Minister to properly raise the issue against the Appellant **in this Court**. The proposed notice of cross-appeal does not do so. There is no notice of contention, nor could there be one.

30 14. Respectfully, the Appellant ought not be deprived of the opportunity to answer in this Court a case of "*Singh* was wrongly decided", and instead find himself again before the Full Court faced with binding authority[4] that would be directly against how the Minister argued his appeal from Judge Riley's decision when he was first before the Full Court.

15. With respect to ground 2(a) of his notice of appeal in the Full Court, and the Minister's

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3 As noted above, ground 2(b) was abandoned.

4 On the Appellant's understanding of the interactions between the three appeals which are listed for hearing on 10 September 2018, this could only occur if the Minister were to succeed on his notice of contention in *BEG15*.

contention at paragraph 42 that '*in principle [it] remain[s] alive even if the evidence the subject of ground 1 is not admitted*', the starting point is precisely that, for this part of the argument, the Minister accepts that Judge Riley was correct in her ruling that the first Murano affidavit was not relevant.

16. Even if the acceptance was to be read as limited to correctness of the ruling with respect to the Appellant's two grounds of review alleging breach of the obligation to disclose the existence of the certificate and notification, that acceptance is sufficient. The Minister's appeal to the Full Court was in respect of the orders made on 30 January 2017.[5] If there was no error in Judge Riley's order, made on 30 January 2017, quashing the AAT's decision for either of those jurisdictional errors, no different result can ensue on any remitter by this Court to the Full Court.[6]

17. In any event, no error was made by Judge Riley in concluding that the AAT had 'acted on' the invalid certificate, and nothing relevant to displace that conclusion could possibly be sourced from the documents behind that certificate. This is so because:

17.1 the Secretary gave the certificate to the AAT before it (the AAT), pursuant to s 425 of the Act and in compliance with the duty therein, invited the Appellant to appear before it (CAB 71-2 [3]-[4]);

17.2 before the AAT came under the duty to extend that invitation, it was required to have concluded, '*on the basis of the material before it*', that it would not decide the review in the Appellant's favour;

17.3 the certificate was part of the '*material before it*';

17.4 unless the AAT had entirely disregarded the very existence of the certificate and its inclusion in the '*material before it*' (and there was not a scintilla of evidence it had done so), the AAT would necessarily have 'acted on' the certificate – it was part of the material the AAT would have considered, in coming to the conclusion that it would not decide the review in the Appellant's favour;[7]

17.5 the presumption of regularity, in particular given what the certificate purported to be (an 'alert' to the AAT about a potential public interest immunity claim), would be against any argument by the Minister (which, in any event, was never made) that the AAT would not have considered the certificate; and

17.6 the documents behind the certificate could not possibly be relevant to any attempt by the Minister (if made, which it was not) to prove that the AAT had disregarded the existence of the certificate.

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5 The appeal was brought pursuant to s 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth).

6 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 482-484 [4]-[7], [9] (Gaudron, McHugh and Hayne JJ). Section 24(1E) of the *Federal Court of Australia Act 1976* (Cth) does not evidence an intention to displace the application of the principle from *Gerlach*: *Shannon v Commonwealth Bank of Australia* (2014) 318 ALR 420 at 424 [19] (Logan J).

7 And see s 438(3)(a) of the Act, extending to the exercise of any of the AAT's powers.

18. Unlike paragraph 42 of his submissions, the Minister's proposed notice of cross-appeal is not limited to grounds 2(a), 2(b) and 2(c). If it is the intention of the Minister to also contend for error by the Full Court by reason of a failure to deal with ground 2(d), the Appellant will respond with the same submissions he has made at paragraph 9 above.

19. Further, ground 2(d) plainly raises an issue the resolution of which (assuming for present purposes, and against the Appellant, that documents behind a certificate or notification are relevant), would depend on the facts of this case. There is nothing about '*disposition*' of this ground that '*may be affected by other matters currently before the Court*'.

20. Finally with respect to ground 2(d), and further supporting the conclusion that there was no error by the Full Court in remitting the case, the following should be noted:

    20.1 the position of the Appellant before the Full Court was that, if the second Murano affidavit was admitted by the Full Court, he would have relied on the affidavit of Ms Amy Faram affirmed on 4 September 2017 (ABMR 15; 20; 67 (lines 30-45); 71 (lines 15-35); CAB 80 [42]-[43]);

    20.2 this position before the Full Court thus reflected the position before Judge Riley, that if the first Murano affidavit had been admitted by Her Honour, the Appellant would have sought leave to amend his application for judicial review to include grounds in respect of the contents of the documents that were behind the certificate and notification (put into evidence by the first Murano affidavit) (ABMR 4, 16).

21. For the above reasons, and noting further that the Minister has made no submissions which address the requirements of s 35A of the *Judiciary Act 1903* (Cth), the Appellant submits that this Court ought not dispense with the requirement of rule 42.08.1, and it ought not grant special leave to appeal.

22. Finally, the proposed notice of cross-appeal seeks to disturb the orders for costs made on 14 February 2018. There is nothing in any of the Minister's materials that even remotely suggests an error by the Full Court in making those orders.

B. Balance of the Minister's submissions dated 26 July 2018

What does common law procedural fairness require

23. The Minister's arguments in this case (and in related ones, such as *BEG15* and *BJN16*) have always been predicated on too narrow an approach to the issue, *viz.* whether an applicant before the AAT lost an opportunity to deal with adverse, or potentially adverse, documents or information behind a s 438 certificate or notification. See, e.g., paragraph 36 of his submissions.[8] (In that paragraph, as well, the Minister purposely slides into the

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[8] *Cf* paragraph 38, where the Minister views the opportunity as one to '*comment **on the certificate***' (emphasis added), and how loss of that opportunity '*could not have changed any findings of the Tribunal*'. How, exactly, a Ch III court would go about determining what the AAT might have done in response to an applicant's '*comment[ing] on the certificate*', i.e., what the AAT might have decided with respect to any exercise of the discretion found in s 438(3)(b) and reposed in it, without the court

issue of whether relief might be refused on the discretionary ground of futility – '*whether non-disclosure of the certificate deprived the review applicant of the possibility of a successful outcome*'). See also paragraph 12(2) of his submissions. (In that paragraph, as well, the Minister purposely leaves unsaid by whom is 'materiality' of the documents to the issues arising in a Part 7 review of the Minister's decision to be adjudged, the AAT or a court on a subsequent judicial review.)

24. In truth, the problems that are presented when the AAT fails to disclose the existence of a certificate or notification can be many, and variously different. It is for this reason that the Full Court in *Singh* was right to focus on what went wrong with the process[9] (not whether the ultimate decision may have been any different[10]), holding that procedural fairness requires disclosure by the AAT **irrespective** of what documents or information might be behind a non-disclosed certificate. Further, the Full Court in *Singh* was right to say that, unless giving the certificate would undermine the purpose to which s 375A was directed,[11] procedural fairness required the AAT to give a copy of it to the applicant.

25. On the Minister's view of jurisdictional error, it is impossible to see how, in *Singh*, the Full Court could have concluded that there had been a denial of procedural fairness without deciding whether Mr Singh's ability to challenge the validity of the s 375A certificate could have made any difference.[12] Even if the certificate was invalid (a matter left undetermined), if the documents / information behind it were not relevant to any of the issues arising on the Part 5 review, that fact, on the Minister's view of the law, would have obliged the Full Court to find that there had been no jurisdictional error, as Mr Singh would not have been '*deprived ... of the possibility of a successful outcome*'.

26. By way of some examples of the problems that are presented, and why they are problems with the 'process':

    26.1 there could be something in the terms of the certificate (or notification) itself in respect of which the applicant before the AAT might wish to be heard;[13]

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usurping the role of the AAT, is left completely unsaid.

9 To same effect, Beach J in *MZAFZ*.

10 This Court has, on numerous occasions, made it pellucidly clear that the concern of the rules of procedural fairness is with the process that should be followed, not with the decision that is made.

11 This consideration does not arise with respect to s 438.

12 See, in this regard, the explanation given by counsel for the Minister (who was counsel for Mr Singh in the Minister's appeal to the Full Court in that case), about how the documents behind the certificate in that case had been sought to be put by the Minister before the Full Court, as fresh evidence on the appeal – i.e., only relevant to a ground of appeal which was abandoned. Further, counsel explained, in *Singh* the Minister's position as to the obligation of procedural fairness to provide the certificate '*was, really, an all-or-nothing submission ... that a certificate doesn't affect rights or interests and doesn't condition any relevant power to affect rights and interests*' (ABMR 61 (line 22) to 62 (line 18)).

13 In this case, the notification was in respect of information, provided to the Department in confidence, which was '*an allegation relevant to*' the Appellant's file held by the Department (ABFM 13). The Appellant could have, even without the information being disclosed, made submissions that any allegation made against him, if anonymous, ought to be entirely disregarded. (Query whether,

26.2 the documents behind the certificate or notification might be viewed by the AAT as not relevant to the issues on the review (even if potentially adverse), or they might be viewed as meaningless, but they take on a different complexion when the applicant brings her understanding to them – in such a case, if the applicant has no knowledge of the existence of the certificate, she is necessarily disabled from being able to make submissions directed at persuading the AAT to exercise the discretion to provide her with the documents,[14] and disabled from engaging with any views as may be expressed by the AAT when presented with such submissions such as, e.g., that it does not see those documents as relevant to the issues on the review;

26.3 the documents might even be perceived by the AAT to be adverse, and the AAT might think it can deal with the issue by telling the applicant that it intends to give them no weight at all, when in fact they provide support for the applicant's case.[15]

Whether the Tribunal 'acted on' an invalid certificate

27. For the purposes of the Minister's primary submissions (*cf* paragraph 16 above), there is, of course, no acceptance that Judge Riley was correct in quashing the AAT's decision on the two grounds of review that alleged breaches of procedural fairness.

28. The Minister's appeal was only in respect of the final orders made on 30 January 2017, the main one of which was the order quashing the decision of the AAT and remitting the matter for determination according to law. If the earlier interlocutory ruling of Judge Riley made on 20 October 2016, on relevance of the Murano affidavit, did not affect that final order made by Her Honour, the Full Court erred in setting that final order aside.

29. Accordingly, if the Appellant is correct and the first Murano affidavit is not relevant to whether:

29.1 the decision of the AAT was vitiated by jurisdictional errors – two breaches of the obligation to disclose the existence of a certificate or notification;

29.2 relief might be refused on the only ground that has ever been ventilated by the Minister, namely futility,

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consistently with this Court's decision in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, there could be a legally reasonable exercise of the discretion in s 438(3)(b) not to disclose at least the gist of the allegation.) And if not anonymous, that the AAT ought to take further steps to ascertain, e.g., the motivation of the person making it (see, in that regard, the powers of the AAT found in s 427(1)(d) and (4)), before doing anything else, including before attempting to put that allegation out of its mind (assuming this were possible: see *Applicant VEAL of 2002*).

[14] It might also be that the certificate is invalid. If so, no question of a discretion in s 438(3)(b) would come into play. There would be no basis for the AAT to refuse to provide those documents to the applicant, given that they were provided *ex parte* by the Secretary pursuant to s 418(3) meaning that, rightly or wrongly, they had been considered by the Secretary to be relevant to the review.

[15] An example of where this occurred is the case of *CCM15 v Minister for Immigration and Border Protection* [2017] FCCA 304.

the Full Court erred in upholding the Minister's appeal. The error (if any) in the ruling of Judge Riley so far as the ground of review for invalidity of the certificate was concerned, could not have affected the final order made by Her Honour, quashing the decision of the AAT and remitting the matter for determination according to law.

30. It follows that the Minister's contention at paragraph 24 of his submissions is wrong.

31. On the other hand, his submission at paragraph 29 correctly summarises the Full Court's reasons, but reasons for decision are beside the point. The Minister fails to deal with: what were the orders in respect of which the appeal was brought; and what orders did the Full Court make in upholding his appeal.

10 32. Finally, it is not part of the Appellant's appeal that 'acting on' an invalid certificate will result in jurisdictional error. Further and in any event, the Appellant refers to and repeats paragraph 17 above.

Discretionary refusal of relief

33. The Minister now only contends for a backward-looking test. If the submissions of the Appellant at paragraph 57 are accepted, that is the end of any argument by the Minister that the first Murano affidavit had any relevance.

34. With regards to that backward-looking test:

34.1 the cases cited at footnote 39 are not ones involving a denial of procedural fairness by an administrative decision-maker, and in respect of which the Ch III court's
20 jurisdiction that is invoked is the same as that found in s 75(v) of the Constitution;

34.2 accepting that a function or power **conferred by statute** can, in some cases, take its character (executive or judicial) by reference to the body that exercises it,[16] the Minister fails to explain why the level of speculative re-doing by the court of the hearing which the AAT ought to have afforded, is part of the judicial power of the Commonwealth and within the jurisdiction conferred on this Court by s 75(v) of the *Constitution* (or within an equivalent jurisdiction that is statutorily conferred on some other Ch III court).

Dated: 13 August 2018

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16 A function or power may have '*a chameleon-like nature*': *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 552 (Gummow J). For use of the expression '*chameleon like*', see also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 18 (Aickin J).