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*.