IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S 135 of 2018

BETWEEN:

BEG15
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. Whether jurisdictional error is established by the Tribunal acting on a certificate invalidly issued under s438 of the *Migration Act 1958* ("**the Act**") because it followed a procedure contrary to law[1].

[1] See formulation in *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 at 11 [40]

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3. If the Tribunal acts on an invalid certificate under s 438, is the applicant also required to prove that the Tribunal also denied to the applicant procedural fairness by withholding the substance of the documents purportedly covered by the certificate?

4. Whether the question of invalidity of the Tribunal's decision, arising from a failure to comply with s438 of the Act, should be determined by reference to:

    a. the practical consequences of the breach to the outcome of the decision[2]; or
    b. the purpose of the Tribunal's compliance with s438 in the statutory framework[3]

5. Whether, if "practical injustice" is required to be established, it is to be done by reference to the content of the underlying documents; or by reference to the failure to disclose the existence of the certificate itself.

Part III: Section 78B of the Judiciary Act 1903 (Cth)

6. The appellant considers that no notice need be given in compliance with this provision.

Part IV: Citation of judgments of primary and intermediate court.

7. The reasons of the primary judge are reported at *BEG15 v Minister for Immigration and Border Protection* [2016] FCCA 2778; 315 FLR 196. The reasons of the intermediate court constituted by Kenny, Tracey and Griffiths JJ are reported at *BEG15 v Minister for Immigration and Border Protection* [2017] FCAFC 198; 253 FCR 36.

Part V: Facts

8. The appellant is a Sri Lankan national who arrived in Australia by boat on 11 April 2012.

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[2] As found by the Full Court at [2017] FCAFC 198 at [33] and [34] (CAB 76:1-15)
[3] See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 [93]

9. On 5 July 2012 the appellant applied for a protection visa and on 28 August 2012 the delegate refused to grant a protection visa (CAB 7:10)

10. On 25 September 2012 the appellant applied for review of the refusal decision to the Refugee Review Tribunal. The appellant attended the Tribunal for a hearing on 15 February 2013 and on 2 August 2013 the Tribunal affirmed the decision not to grant a protection visa (CAB 7:12). The appellant applied to the Federal Circuit Court which quashed the fist Tribunal decision and remitted the matter to the Tribunal to determine according to law (CAB 7:15).

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11. On 27 November 2014, a delegate for the Minister wrote to the District Registrar of the Tribunal providing certification under s438(1)(a) of the Act in respect of folios 142-144 solely on the basis that they 'contain information relating to an internal working document and business affairs'[4]. There is no dispute that this was not a valid basis for certification of material under the Act.

12. The documents to which the certificate related included an email from a Senior Legal Officer within the Department of Immigration, Mr. Adam Cunynghame, to an officer of the RRT, Mr. Jason Cabarrus, headed "Consultation with MRT/RRT"[5] The document
20 provided a summary of the findings of the quashed decision of the first Tribunal which were identified by Mr Cunyngham as those he considered relevant to the second Tribunal including that: 'In light of inconsistent evidence the Tribunal did not accept the appellant's claims, and relied on independent country information to find that he would not be harmed upon return as an asylum seeker'; and 'The Tribunal made reference to specific items of country information but did not make any express reference to the DFAT Country Information Report on Sri Lanka'[6]

13. On 28 April 2015 the appellant attended the Tribunal for a hearing (CAB 7:16).

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[4] **AFM, Annexure DE-1 page 4.**
[5] **AFM, Annexure DE-1 page 8-9**
[6] [2017] FCAFC 198 at [14] (CAB 71:18-30), [22] (CAB 73:34-38) (and **AFM, Annexure DE-1 page 8**

14. On 28 May 2015 the Tribunal affirmed the decision not to grant a protection visa (CAB 6:24) principally on a view that the appellant's evidence 'lacked credibility, that the appellant had fabricated most of his claims and was not a witness of truth", echoing the findings of the quashed First Tribunal, which had been emphasised by Mr. Cunynghame in his letter to the Second Tribunal which had been the subject of the invalid s438 certificate.

15. On 26 June 2015 the appellant filed an application in the Federal Circuit Court.

16. On 7 September 2016 the judgment in *MZAFZ v Minister for Immigration and Border Protection* [2016] FCA 1081 (*MZAFZ*) was handed down.

17. On 6 October 2016 the Minister filed, in the Federal Circuit Court, an affidavit annexing the purported s 438 certificate and its documents, two working days before the hearing.

18. On 11 October 2016 the appellant attended the hearing unrepresented. At the hearing the Minister's legal representative raised the possible application of the judgment in *MZAFZ* The Court did not give leave for the appellant to seek legal advice on the effect of *MZAFZ* and make post-hearing submissions.

19. On 4 November 2016 the Federal Circuit Court dismissed the application (CAB 30-58).

20. On 15 November 2016 the appellant filed a notice of appeal (CAB 60-62).

21. On 29 November 2017, the Full Court dismissed the appeal with costs: *BEG15 v Minister for Immigration and Border Protection* [2017] FCAFC 198 (CAB 64-80).

22. On 10 May 2018, this court granted the appellant special leave to appeal (CAB 84).

Part VI: Argument

23. There was no dispute, in either the court at first instance or on appeal, that the certificate was invalid on its face.[7] [8] It was purportedly only made under s438 (1)(a) (a) and the reasons advanced on the face of the notification of the certificate clearly do not address the requirements of that section.

24. At no time did the Tribunal raise the invalidity of the certificate with the appellant nor aver to it in its reasons for decision.

25. The Tribunal never disclosed the existence of the certificate nor the documents to which it related to the appellant. The appellant first saw the documents in an affidavit filed in the Federal Circuit Court[9]

26. Further, the Tribunal acted consistently with a mistaken acceptance as to the validity of the certificate notwithstanding that it was invalid on its face.

27. The Full Court correctly accepted that the s 438 certificate was invalid and had not been disclosed to the appellant by the Tribunal. Nor had the documents purportedly covered by the certificate been provided[10].

28. The Full Court's reasoning in dismissing the appeal was that:

> "neither the invalidity of the certificate nor the failure by the Tribunal to provide BEG15 with a copy of it or the documents referred to in it gave rise to any practical injustice to him for the reasons given by the primary judge"[11]

29. This passage followed the Full Court's reasoning[12] that

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[7] [2016] FCCA 2778 at [58] (CAB 50:37-51:8).
[8] [2017] FCAFC 198 at [2] (CAB 67:21-37)
[9] [2017] FCAFC 198 at [2] (CAB 67:21-37)
[10] [2017] FCAFC 198 at [31] (CAB 75:38-39)
[11] [2017] FCAFC 198 at [33] (CAB 76:9-13)
[12] [2017] FCAFC 198 at [30] (CAB 75:17-37)

"In particular we found[13] nothing to support the view that it was always a jurisdictional error for the Tribunal to act upon an invalid s 438 certificate *and that, in doing so, the Tribunal would invariably deny procedural fairness to the appellant.*" (Emphasis added)

...

"We accepted that document covered by a s s438 certificate might be relevant in determining whether or not an appellant had received procedural fairness before the Tribunal and as to the Court's discretion to grant relief. *This was so whether the certificate was invalid.* (emphasis added)

30. In the first emphasised passage extracted immediately above, the Full Court appears to have incorrectly taken the view that the appellant had accepted that it must demonstrate a denial of procedural fairness even where the certificate was invalid in order to establish jurisdictional error. Although the appellant made submissions, on an alternative basis, that there could also be jurisdictional error by reason of a denial of procedural fairness, the appellant always asserted that the invalid certificate independently meant that the Tribunal failed to conduct the review in accordance with the correct statutory scheme by incorrectly applying s438 to the review. The decision was thereby attended by jurisdictional error[14].

31. It should also be noted that the Full Court found (at CAB 76:1-15) that it was open to the primary judge to have found that 'the documents did not contain any material which was prejudicial to BEG15's interests, that the Tribunal had not acted *on the material* and that in the circumstances he would have, in any event, exercised his discretion to refuse relief'. Significantly, the Full Court's reasoning was not based on a view that, in conducting the review, the Tribunal did not have the certificate or the underlying documents before it, nor

[13] A reference to *Minister for Immigration and Border Protection v BJN16* [2017] FCAFC 197 at [62]- which was heard by the same Full Bench and delivered on the same day as BEG15 but was not heard concurrently with BEG15.

[14] It may be that it is this submission which is referred to by the Full Court as 'rigid and unsupported propositions of the kind advanced by BEG15 on this appeal': [2017] FCAFC 198 at [30] (CAB 75:17-37)

on a view that the certificate had no effect on the Tribunal's performance of the statutory review process.

32. The Full Court in this regard correctly rejected the approach of the primary judge that there was no evidence that the certificate or the documents were before the Tribunal [2016] FCCA 2778 at [66] (CAB 54:10-21). There could be no question that the certificate and documents were before the Tribunal. This fact was adduced in evidence before the FCCA (and in the appeal book to the Full Court) by the First Respondent in an affidavit that stated "*a copy of [the certificate and underlying documents] was provided by the Department to the Second Respondent [the Tribunal]* ***for the purpose of the Second Respondent conducting its review of the decision of a delegate of the First Respondent relating to the Appellants*** *(sic) in these proceedings*": (emphasis added).[15] Further, the fact that the documents behind the Statement were the means by which the Second Tribunal was notified of the outcome of the earlier judicial review proceedings to which it made reference at paragraph [3] of its decision[16].

Appeal Grounds 1-3

33. The error with the approach by the Full Court was to conflate jurisdictional error based on the *invalidity* of the certificate with the nature of the jurisdictional error which could be relevant where a *valid* certificate was issued.

34. In the case of an *invalid notice*, it is the invalidity of the certificate and the failure by the Tribunal to correctly apply the provisions of s 438 of the Act which is the jurisdictional error. In the case of a *valid* certificate the basis of jurisdictional error could only be a denial of procedural fairness where the certificate was validly issued but the documents were not disclosed.

[15] AFM - Affidavit of Dominic Eberl affirmed 6 October 2016 [5]
[16] See reference to that submission by the appellant at [2017] FCAFC [20]

35. In *MZAFZ*, by contrast to the Full Court's conflation of these two quite different bases for jurisdictional error, Beach J[17] clearly (and correctly) differentiated between the nature of the jurisdictional error where:

a. the certificate was *invalid* (namely failure of the Tribunal to comply with s438 of the Act)[18]; and

b. where the certificate was in fact *valid* (in which case there could be a denial of procedural fairness if the underlying documents could have been but were not put to the appellant)[19].

36. It was only on the assumption that the certificate was valid, but had not been provided to the appellant, that issues may arise as to whether the documents covered by the certificate would otherwise have been required to have been provided to the appellant for the purposes of procedural fairness (see further submissions on appeal ground 4 and 5 below).

37. The correct approach to the consequence of the invalidity of the certificate issued for the purposes of s 438 of the Act was taken by Beach J in *MZAFZ* at [40] to [44][20]. That approach is to focus on the place of s 438 within the Tribunal's functions under the statutory scheme of review to ascertain if a failure to comply with that section gave rise to jurisdictional error.

38. That is, Beach J correctly found that the *statutory* consequences of the Tribunal proceeding on an invalid notice under s 438 were as follows: first, the purported issue of an invalid certificate by the delegate of the Minister infected the process or procedure adopted by the Tribunal in relation to such documents; second, in acting on the invalid certificate, the Tribunal's process of consideration of whether to make disclosure under s424AA or s424A would necessarily be influenced by the incorrect belief of the

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[17] *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1
[18] (2016) 243 FCR 1 at 11 [40]-[44]
[19] (2016) 243 FCR 1 at 12 [45]-[66]
[20] (2016) 243 FCR 1 at 11

applicability of s438; and third, the Tribunals' consideration of its own obligations and functions under s438, which it is required to consider, must have been effected by the false premise of the validity of the certificate. To this could also be added the interference with the Tribunal's obligations to give open and transparent reasons under s 430 of the Act which must necessarily be circumscribed by s438 of the Act (when validly applied).

39. The obligations and requirements imposed on the Tribunal under s438 cannot be excised from the overall statutory framework of its review function.

10 40. Indeed, the primary judge had correctly accepted[21] that if there was an invalidity in the certificate, then for the purposes of the first limb of *MZAFZ*, the issue of denial of procedural fairness (which was only relevant to the second limb) did not separately arise and the decision would simply be invalid because of the breach of the Act.

41. The primary judge, however, incorrectly viewed the question of 'acting on' the invalid s 438 certificate by reference only to whether the information was referenced in the Tribunal's decision[22], rather than the real question which is whether the Tribunal engaged in its statutory review *processes* by applying s 438 on the erroneous assumption of the validity of the certificate.

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42. In *MZAFZ*, the correct focus was on the effect of the invalidity of the certificate on the statutory processes of review in light of the role s438 plays in that statutory framework[23]. This approach was consistent with the test for invalidity and jurisdictional error explained in *Project Blue Sky*[24] which asks whether it was a purpose *of the legislation* that an act done in breach of s438 should be invalid.

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[21] [2016] FCCA 2778 at [68] (CAB 54:26-37).
[22] Of course, if the Tribunal wrongly assumed that s438 applied it would not make reference to that material in the decision because of the very secrecy
[23] (2016) 243 FCR 1 at [39] to [44]
[24] (1998) 194 CLR 355 at 390 [93] per McHugh, Gummow, Kirby and Hayne JJ.

43. The Full Court's approach, in contrast, introduces impermissible considerations into the question of the effects of an invalid application of s 438 of the Act by a decision maker[25]. The false issue injected by the Full Court was whether the validity of the Tribunal's act is determined by reference to the *effect of the breach* on the particular prospects of the particular appellant in succeeding on the merits of the review.

44. Beach J's approach in *MZAFZ* was endorsed by a Full Court in *Singh v Minister for Immigration and Border Protection* (2016) 244 FCR 305, although it only had to deal with the second limb of MZAFZ, namely a situation where the certificate was *valid* and the issue became one of a denial of procedural fairness[26].

45. In the present appeal the real question is whether the Tribunal was engaged in jurisdictional error by departing from the statutory processes to which it was subject under the Migration Act, by having before it an invalid certificate and misapplying s 438 of the Act.

46. The Tribunal clearly believed itself to have a valid section 438 certificate before it. There is nothing to indicate that the Tribunal considered the certificate to be invalid or that it did not believe the processes in section 438 of the Act were applicable and binding upon it.

47. The Tribunal had no choice but to apply the processes in section 438 of the Act once it wrongly presumed the section 438 certificate issued by the Minister was valid.

48. Accordingly, the Tribunal has applied a statutory process or followed a statutory provision which it was not authorized to apply as part of its statutory review process.

49. Conversely, the Tribunal has not conducted the review in accordance with the statutory processes which it was obliged to apply, namely the process of review under s 430 of the

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[25] *SAAP v Minister for Immigration and Citizenship* (2005) 228 CLR 294 at [77], [78] and [83] per McHugh; [173] per Kirby J; [205]; [208]-[209] per Hayne J

[26] See *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 315 [42] where the Full Court qualified the procedural fairness obligation as being an "the effect of the certificate, *if valid* (emphasis added). In Singh, the Full Court noted that there was no issue before it that the certificate was invalid: at [68].

Act, unaffected by consideration of a section 438 certificate. It is a requirement of section 430(1)(d) of the Act that the Tribunal must refer to documents and other material that formed a basis for findings of fact. However, section 438(3)(b), when validly engaged, turns the obligation to disclose such documents into a discretion to do so.

50. In determining the validity of a decision affected by a breach of the legislation, there is no place to conduct a backward-looking analysis of what may have happened in the Tribunal had it observed the law by reference to a test of 'practical injustice'. The primary issue is whether 'if the Tribunal acted on the invalid certificate it followed *a procedure contrary to law*'. There is a related issue, which is whether 'the purported issue of an invalid certificate by the Delegate of the Minister, is whether in either case infected *the process or procedure* adopted by the Tribunal in relation to such documents'[27].

51. The Full Court erred by finding that there was no jurisdictional error by reason of the invalidity of the certificate.

Appeal Grounds 4 and 5

52. The Full Court incorrectly found (at CAB 75:15-38) that its approach in the present case and *BJN16* was consistent with the approach in *MZAFZ* and *Singh*. That is because, neither *MZAFZ* nor *Singh* requires or permits a review of the withheld documents to ascertain whether the provision of those documents to the appellant would have made a difference to the outcome of the merits of the case before the Tribunal.

53. Even where the s438 question relates to a *valid* certificate that was not given to an appellant, the real issue is whether the appellant was thereby denied an opportunity to know of the existence of the certificate and make submissions about the validity *of the certificate*[28]. In *Singh*, it was correctly accepted that not knowing of the existence of a

[27] [2016] FCA 1081 at [40]
[28] *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 315 at [49], [51], [52] and [58]; *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 at 13 [51] to [53] and [55].

certificate (even if valid) necessarily limits an applicant's right to participate in the hearing on that issue. The issue is the loss of the opportunity to participate in the hearing.

54. As Beach J correctly held[29] the only issue for the court in relation to the underlying documents would be whether they are irrelevant to the review. In this case there can be no question that the documents were relevant to the review and were about the appellant. But that is a different question to whether their disclosure would have given the appellant a forensic advantage in his application or made a difference to the outcome.

10 55. An assessment beyond establishing that level of relevance as to whether the documents are favourable, neutral or unfavourable to the appellant's visa application would involve an impermissible consideration of the merits of the visa application rather than the legality of the decision making process undertaken by the Tribunal.

56. In this sense, the Appellant's submissions are consistent with the reasoning of Justice White in *SZMTA v Minister for Immigration and Border Protection* [2017] FCA 1055 at [52]-[53] (the appeal from which decision is being heard concurrently with this appeal).

57. The effect of the Full Court's approach in this case is to substitute a notion of 'practical
20 injustice' by reference to an assessment by the court as to the likely impact that the underlying documents would have had on the Tribunal – in the absence of any reference to the material in the Tribunal's decision (the absence of any discussion of those documents in the reasons is consistent with the Tribunal erroneously observing the secrecy it believed attached to the documents under s 438).

58. The court's task is one of ensuring the observance of a fair process by which the decision is to be reached, not in ensuring that a correct and preferable result was reached on all of the material available to it.

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[29] *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 at 13 [55]

59. The approach of the primary judge and the Full Court failed to properly apply *MZAFZ* as endorsed by *Singh,* by speculating on the impact that the revelation of the certificate and the documents underlying it may have had on the outcome of the Tribunal decision having regard to the Tribunal's consideration of the merits of the application[30].

60. Likewise, the Full Court erred by finding (at (CAB 76:1-15) that it was open to the primary judge to find that as a matter of discretion relief could be withheld even if the decision of the Tribunal was attended by jurisdictional error in circumstances where invalidity of the decision would mean there was no lawful authority for the decision and there was clearly utility in granting relief to permit the appellant to be heard by the Tribunal according to law[31].

Part VII: Orders Sought

61. Appeal allowed

62. The orders of the Full Court of the Federal court of Australia made on 29 November 2017 be set aside and in lieu thereof orders that:

a. The appeal be allowed.

b. The decision of the second respondent made on 28 May 2015 be quashed.

c. The application to the second respondent be remitted for determination according to law.

d. The first respondent pay the appellant's costs of the appeal and the proceedings at first instance.

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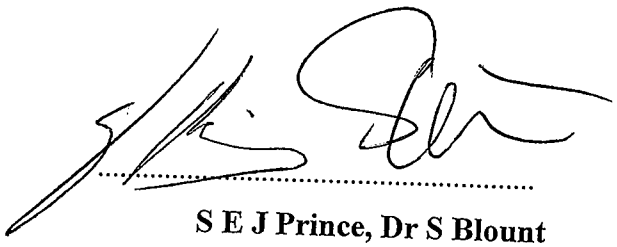
[30] [2016] FCCA 2778 at [68] (CAB 54:26-37)
[31] *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82 at [104]

61 The first respondent pay the appellant's costs of these proceedings.

Part VIII: Estimated time for oral argument

62 The appellant estimates he will require 60 minutes for oral argument.

10 Dated: 28 June 2018



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