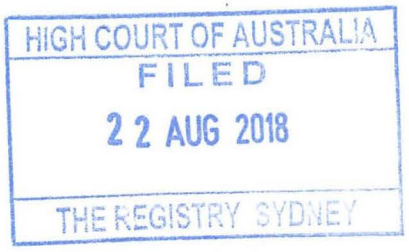
IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S 135 of 2018

BETWEEN:



BEG15

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

AMENDED APPELLANT'S REPLY

Part I: Internet publication

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

Part II: Concise reply to the argument of the respondent

Issues

2. The first respondent's (respondent's) submissions, which seek to immunise the process of the Tribunal from the invalidity of the Minister's certificate issued to it purportedly under s 438, turn on the assertion that there was no evidence that the tribunal "acted on" the certificate, or relied on the discretions provided in s 438(3) of the *Migration Act* 1958 ("Act"): at RS [11], [12], [20] and particularly [23]. Such submissions are misplaced for the reasons below. It is inconceivable that a Tribunal which had received a direction and certification from the Minister under s 438 would have no regard to that certificate in applying the statutory processes which expressly refers to

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such a certificate and directly impacts on the statutory scheme of review and the pathway that the Tribunal is required to apply under that statutory scheme of review.

3. As to the procedural fairness alternative argument, the respondent's description of the issue in RS [5] misstates the appellant's case below (and in this court). The question of procedural fairness is not about failing to disclose 'the extent to which [the Tribunal] was proposing to take the underlying material into account. The appellant's case (at least on the procedural fairness issue) is that the Tribunal did not disclose that it would apply the provisions of s438 to the review process, or the basis for it applying those statutory provisions (namely the certificate from the Minister which was invalid on its face).

4. The respondent's reliance on s 422B of the Act (so far as procedural fairness is an issue) at RS [6] is also misplaced because s438 is expressly included in the statutory code requiring the application of procedural fairness. The real question is not whether s422B codifies procedural fairness, but what s 438 (as part of that code) requires to be done consistently with s422B (3).

Tribunal acted on the Invalid Certificate

5. The tribunal has discretion in terms of the regard it may have for the documents under s 438(3) covered by the certificate, it does not have any such discretion in respect of the either the certificate or the notification of the certificate.

6. If the tribunal had simply ignored the notification of the certificate, for any reason, it would have been in breach of the Act for the reasons:

    a. Under s 425, the tribunal was obliged to invite the appellant to appear before it if, "on the material before it", it had formed the view that it may not decide the review in the appellant's favour.
    b. The notice of the certificate was part of the "material before it".
    c. Necessarily, because the tribunal invited the appellant to appear before it, it must have had regard to the material before it, including the notice of the certificate.

d. Further, the absence of any reference to the certificate tends to support the inference that the tribunal acted on the invalid certificate.

7. On being issued with a notice of a certificate, which following the argument above the tribunal must have had regard to, the tribunal had a discretion under s 438(3)(b) in respect of the disclosure. It may have disclosed any matter in a document, or information to the applicant and, pursuant to s 438(4) make a direction under s 440 of the Act, or not.

8. On the present facts, the tribunal has acted entirely consistently with its discretion under s 438(3)(b) and not disclosed any matter in a document, or information covered by the certificate.

9. At paragraph [19] the respondent states that breach or misapplication of s 438 does not assist the appellant because the section confers discretions on the tribunal. This submission misses the point. If the certificate is invalid, the tribunal has no discretion to exercise under s 438.

10. The content of the documents covered by the notice of the certificate also cannot be relevant to any argument that the tribunal had disregarded the notice. However, at [19], [20], [22] the respondent seeks to ameliorate the effect of error by arguing that it is "fact dependent" so that error is "within jurisdiction". But the submission directs attention to factual matters affecting the merits of the decision, rather than the process by which the decision was made.

11. Regardless of the merits, if the tribunal has acted on a notice of an invalid certificate it has followed the wrong statutory path and impermissibly circumvented protections for applicants prescribed by s 430 of the Act.

Procedural Fairness denied by failure to disclose certificate, its existence or the application of s438 to the Review

12. The respondent's submissions on procedural fairness at [21], [27], [28] and [29b] insist that there was no practical unfairness, as the content of the documents covered by the notification of the certificate were of "no, or peripheral" relevance to the review.

13. But the denial of procedural fairness is the absence of an opportunity for an applicant to advance his or her case by addressing the tribunal on the validity of the notified certificate. The practical

unfairness of the lost opportunity is that the applicant is not heard as to whether the tribunal should follow a decision process under s 430, under which the applicant is made aware of the material facts and evidence the tribunal took into account, or under s 438, under which the applicant may not be made aware of the material facts and evidence the tribunal took into account.

14. The respondent argues that in this case the underlying materials could have had no impact on the review (it says decision but the issue is impact on the review) because the Tribunal referred in its reasons to the previous Tribunal's reasons and so would not have had regard to the note from the Department drawing attention to the adverse credibility findings in previous Tribunal's reasons. This argument ignores that the Tribunal could not have regard to the terms of a decision which had been quashed given that its quashing made it a nullity. The Minister's reference to the adverse credit findings in the material under the invalid certificate must have had an impact on the course of the review, particularly given the preciousness of adverse credit findings.

Notice of contention

15. The notice of contention and the submissions in support of it are contrary to the respondent's position below on appeal.

16. At paragraphs [5] and [15] of its submissions to the Federal Court on appeal, the respondent cites and relies on the authority of *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305.

> [5] ... the reasoning of the Full Court in *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 (**Singh**) were predicated on acceptance that the documents in each case were relevant to the review. Where the documents are shown to be of no (or peripheral) relevance, the principles articulated in those cases have no application
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> [15] Secondly, as to procedural fairness, Beach J in MZAFZ described his alternative reasoning as "consequences of validity". However, in the light of Singh, the Minister does not submit that the invalidity of the certificate, in itself, affects the existence of procedural fairness obligations in relation to it [citations omitted]

17. The respondent's submissions were repeated by the Full Court at [24] (CAB .15-.20) as well as at [28].

18. The Full granted leave for the Minister to file in court a notice of contention. The notice contended:

> **Grounds relied on**
> The Federal circuit Court of Australia should have held that irrespective of whether the certificate issued pursuant to s 438(1)(a) of the *Migration Act 1958* (Cth) was invalid, no breach of procedural fairness arose.

19. The respondent relies on *Singh* to distinguish *BEG 15* and advance its own case. The notice of contention filed in court does not advance the case that *Singh* was wrong. There is nothing in the respondent's written submissions, or in the written reasons of the Full Court indicating that the respondent advanced the case that *Singh* was plainly wrong.

20. This Court should not permit the respondent to raise a notice of contention in this court that is contrary to the substantive position the respondent took before the Full Court[1].

21. In any event, the Notice of Contention is misconceived because s422B does not exclude procedural fairness from the Act, rather it limits the application of the rules of procedural fairness to specified provisions of the Act. Section 438 is clearly one of those specified sections that makes up part of the 'exhaustive statement of procedural fairness'.

22. Section 422B (2) must be read with s (3) and when the Tribunal applies the sections which comprise the exhaustive statement of procedural fairness they must do so in a procedurally fair way. Here, the application of the unique statutory pathway in s438 without any notice to the applicant that it was to be applied or the basis upon which its application rested was plainly procedurally unfair.

Dated: 20 August 2018

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S E J Prince, Dr S Blount, Counsel for the Appellant

[1] It should be noted that at the hearing of the appeal below (the Transcript of which was provided to the appellant on 20 August 2018), when Griffiths J raised with the Respondent that his written submissions did not suggest that the decision in Singh was plainly wrong, Senior Counsel for the Respondent said: "We certainly don't say it's [Singh] plainly wrong...**We don't ask your Honours to decline to follow it**...it is true it is not in our written submissions, but we would wish to submit purely formally that its wrong in case on some later occasion we're brave enough to want to submit to the High Court it ought to be revisited": T22.9.17 at 20.14-20 (emphasis added).