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.