IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S36 of 2018

BETWEEN:

Minister for Immigration and Border Protection
Appellant

and

SZMTA
First Respondent

Administrative Appeals Tribunal
Second Respondent

APPELLANT'S REPLY

Part I: Internet publication

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

Part II: Reply to the argument of the respondent on the appeal

2. The arguments of the first respondent (**SZMTA**) as set out in his submissions (**RS**) appear to entirely rely upon the new arguments advanced in support of his Notice of Contention (CAB 86). Accordingly, this reply is in two parts:

   (a) corrections as to some of the propositions as to the findings made and available below; and

   (b) responding to the new arguments advanced in support of the Notice of Contention.

A. Corrections

3. First, as to the assertion that there was "no dispute" that the Notification (as defined in the submissions in chief) was "invalid" (RS [4]), the reasons of the appeal judge indicate that his Honour did not resolve this issue and was not acting on any concession by the Minister in this respect (except an equivocal position in relation to the last of documents covered by the Notification (CAB, 69 [53] – [54])).

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4. Secondly, there was no "finding" below that the Tribunal "proceeded with the review on the basis that the notification was valid", let alone one that is "unchallenged" (RS [5]). Neither the inference that "the Tribunal did act in some unspecified in way on the invalid notification" (CAB 70 [56]) nor the observation that the Tribunal "may … have chosen not to have regard to the identified documents" (at [59]) amounts to a finding that the Tribunal took any step in its review on the basis of the Notification. In any event this reasoning is the subject of the Minister's appeal and issue was taken with it in chief.

5. Thirdly, it is wrong to suggest that the Tribunal received the fifteen folios covered by the Notification in some special or secret way (RS [14], [20]). Section 438(2) and (3) of the *Migration Act 1958* (Cth) (**Act**) only apply when documents are given to the Tribunal by the Secretary in compliance with a requirement under the Act – relevantly s 418(3). The documents in question were part of the contents of departmental files relating to SZMTA, which evidently (and unsurprisingly) were considered potentially relevant and therefore required to be sent to the Tribunal. Thus, SZMTA (who was assisted by an adviser: see eg CAB 10 [27]) had both the relevant documents themselves and the means of inferring that the Tribunal had them. This is part of the reason why (as submitted below and in chief) non-disclosure of the documents did not give involve any denial of procedural fairness.

B. Notice of Contention

6. The Notice of Contention (CAB 86) relies on "findings" that: (a) the Tribunal "relied in some unspecified way" on the notification; and, (b) the notification was "invalid". Neither finding was made by White J and neither finds a proper basis in the evidence (cf CAB 50-51). Even if such findings were made, they would not establish any jurisdictional error.

The "invalidity" of the notification

7. For reasons outlined in chief, the Minister's primary position in the appeal is that the legal effect of the Notification does not need to be determined.

8. If that issue requires determination, there is no basis to find that the Notification "did not meet the criteria" in s 438 (RS [17]). Presumably that is intended to mean that the author of the notice was wrong to say that the information contained in certain identified folios had been given to the Minister or the Department in confidence.

This was not a point that SZMTA attempted to prove below, and evidence might have been led if it had been raised.

9. In any case, the only evidence of the circumstances in which these documents were provided – other than the marking "DIAC-in-confidence" on some of them – is the Notification itself. White J expressed reservations about its correctness but there was no evidence to the contrary. Such evidence would be needed at the level of individual documents or items of information, since it is at that level that s 438(1)(b) and (3) operate.

10. Further:

(a) as to RS [17.i], s 438(1)(b) requires only that the document or information was *given* to the Minister or the Department in confidence. Subsequent waiver of legal or equitable rights is not relevant to that issue; and

(b) as to RS [17.iii], the Notification (AFM 11) referred to "internal working documents" in the course of giving the advice permitted by s 438(2)(b). That does not indicate any error in analysis of whether the section applied for the purposes of s 438(2)(a).

What the Tribunal did with the Notification

11. The attempt to establish that the Tribunal "acted in a way consistent with the non-disclosure obligations under section 438" (RS [19]), and wrongfully "applied" s 438(3) (RS [31], [32], [60]), fails at an evidentiary level. As to non-disclosure, it has not been suggested that anything in the documents covered by the Notification was of a nature that would, but for s 438(3)(b), have been required to be disclosed by the Tribunal under s 424A or 425 of the Act. The only identified basis for the suggestion that the Tribunal applied or acted on the Notification is that it did not include the letter of support of 13 August 2010 in a list of such documents that it said it had considered (RS [36]). This does not take the matter anywhere.

(a) RS [36] omits the critical word "including" from the relevant sentence of the Tribunal's reasons (CAB 19-20 [84]). It was not an exhaustive list of the letters or other documents considered.

(b) The document at AFM 20 includes a list of letters of support that had been received by July 2010 in connection with an application for ministerial

intervention. None of these was covered by the Notification. Some are listed in the Tribunal's reasons at [84]; others are not. There is no reason to infer that the letter of 13 August 2010 was omitted from the list – let alone that it was excluded from consideration – because it was covered by the Notification.

(c) The letter in question (AFM 25) was half a page long and expressed in very general terms. Its author did not claim to be able to corroborate SZMTA's claims or assert any particular expertise relating to the treatment of religious minorities in Bangladesh. The most likely explanation for its not being mentioned is that the Tribunal did not think it worthy of any weight.

12. Thus, whether or not the Tribunal "believed" or "presumed" that it had a "valid" notification before it (RS [45], [46]) – one can only speculate – there is no basis to find that the Tribunal acted on such a belief in any way that affected its conduct of the review. Even if the Notification was flawed, it did not lead to the Tribunal failing to comply with any of its obligations.

No error in any event

13. The RS also refer to what is termed "the *statutory* consequences of a breach of s 438" (RS [60]), but leave it unclear whether the argument being advanced is:

(a) that the Tribunal is presumed or assumed to have been influenced by the invalid notification in carrying out its review;

(b) that to "act on" an invalid notification (in any way) constitutes a "procedure contrary to law" and thus necessarily a jurisdictional error; or

(c) the invalid notification itself vitiates the Tribunal's review.

14. If the argument is as stated in [13(a)] above, it corresponds with the terms of the Notice of Contention and faces the objections outlined above. Further, as emphasised in chief at [25], it is not sufficient (even if it is correct) to say that the Tribunal acted "in some unspecified way" on an invalid notification. Jurisdictional error is not established unless it can be found, on the balance of probabilities, that the Tribunal exceeded its powers or failed to comply with its duties in some identified way.

15. If the argument is as stated in [13(b)], it also faces the threshold problems of (i) showing the Notification to be "invalid" and (ii) demonstrating that the Tribunal

"acted on" it. Further, the nebulous concept of a "procedure contrary to law" (cf RS [66]) is not sufficient to identify an error going to jurisdiction. To act on the understanding that powers exist under s 438(3) is not a "breach" of s 438 (cf RS [62]), which imposes no duty on the Tribunal; it is to proceed on a footing that might or might not cause procedural obligations arising under other provisions to be breached. An argument of this kind was correctly rejected by the Full Court of the Federal Court in *BEG15 v Minister for Immigration and Border Protection* [2017] FCAFC 198 at [20], [30].

16. If the argument is as stated in [13(c)], the issue of invalidity of the Notification still arises at the threshold. If that could be overcome, a *Project Blue Sky* question would arise: was it the intention of the legislature that provision of an invalid notification to the Tribunal, purportedly under s 438(2), would invalidate the decision of the Tribunal? The answer is obviously "no".

    (a) The effect of such invalidity is that the purported notification has no legal effect. But a notification under s 438 is not in any sense a prerequisite to a decision by the Tribunal: in many cases there will be no notification under s 438 at all. Something more (such as the wrongful assumption of power to do something) is needed.

    (b) The Tribunal cannot remedy an invalid notification or compel its withdrawal. Hence, if the argument were correct, receipt of an invalid notification would permanently disable the Tribunal from making a decision on the review. That would fly in the face of s 414(1) and would be a bizarre outcome.

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