

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZMTA & ANOR (S36/2018)

Court appealed from: Federal Court of Australia
[2017] FCA 1055

Date of judgment: 5 September 2017

Special leave granted: 16 February 2018

In October 2012 SZMTA applied for a protection visa, on the ground provided in s 36(2)(aa) of the *Migration Act* 1958 (Cth) (“the Act”). He sought what is known as “complementary protection”, after being unsuccessful in applying for a protection visa (and also in pursuing administrative and judicial review) on the basis that he be recognised as a refugee. He claimed that, if returned to his native Bangladesh, he would be tortured and possibly be killed by Islamic fundamentalists because he was a practitioner and promoter of Buddhism.

After a delegate of the Appellant (“the Minister”) had refused SZMTA’s application, SZMTA lodged an application for a review by the Administrative Appeals Tribunal (“the Tribunal”). On the next day a delegate of the Minister gave written notice to the Tribunal under s 438(2)(a) of the Act (“the Notification”) that certain documents in the Minister’s file on SZMTA’s claim (“the Documents”) were confidential and that they should not be disclosed to SZMTA. The Documents were claimed to be confidential on the basis that they contained information, relating to internal working documents and business affairs, that had been given to the Minister or his Department in confidence. Section 438(3) of the Act provided that the Tribunal may have regard to such information and may disclose it to the applicant if the Tribunal thought such disclosure appropriate. In proceeding to deal with SZMTA’s application, the Tribunal made no such discretionary disclosure. The Tribunal then affirmed the delegate’s decision.

An application by SZMTA to the Federal Circuit Court was dismissed by Judge Street on 1 June 2016.

An appeal to the Federal Court was allowed by White J, upon a ground (not raised in the Federal Circuit Court) which essentially alleged that the Tribunal had erred in the procedure it had adopted in relation to the Notification. After examining the Documents, White J found that “[t]he [N]otification was defective because it purported to apply to at least some documents and information which could not reasonably be regarded as having been given to the Minister or to an officer of the Department ‘in confidence’.” His Honour also found no indication of whether the Tribunal had had regard to the Documents. White J found that although SZMTA was in possession of the Documents at the time his application was before the Tribunal, the Tribunal had likely assumed otherwise, given the recommendation of non-disclosure contained in the Notification. The Tribunal therefore may have chosen to disregard the Documents, causing it to fail to take into account certain information that would have assisted SZMTA. White J then remitted the matter to the Tribunal.

The grounds of appeal are:

- White J erred by relying upon the mere possibility that the Tribunal may not have had regard to certain information, because of the presence of a notification made to it under s 438(2) of the Act, to find that the Tribunal had denied SZMTA procedural fairness.
- White J erred by failing to hold that the Tribunal had not denied SZMTA procedural fairness because every document the subject of the notification under s 438(2) of the Act was in the possession of SZMTA prior to the Tribunal hearing.