MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR v SZSSJ & ANOR (S75/2016);

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ORS v SZTZI (S76/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 125

Date of judgment: 2 September 2015

Special leave granted: 11 March 2016

SZSSJ and SZTZI (together, "the respondents") are unrelated foreign nationals who each applied for a protection visa after being placed in immigration detention. Both applications were refused, and those refusals were confirmed upon review by the Refugee Review Tribunal.

On 10 February 2014, a statistical document was published on the website of the Department of Immigration and Border Protection ("the Department"). That document mistakenly contained links to personal information about persons, including each of the respondents, who were in immigration detention on 31 January 2014. The incident came to be known as "the Data Breach".

SZSSJ applied to the Federal Circuit Court ("the FCCA"), seeking declarations and injunctions against the Minister for Immigration and Border Protection ("the Minister") in relation to the disclosure of SZSSJ's personal information through the Data Breach. The application was dismissed, on the basis that it did not impugn a decision made under the *Migration Act* 1958 (Cth) ("the Act") so as to enliven the jurisdiction of the FCCA. The Federal Court then allowed an appeal by SZSSJ and remitted the matter to the FCCA, holding that certain conduct by the Department was preparatory to a decision by the Minister as to whether SZSSJ would be removed from Australia under s 198(6) of the Act, and that the FCCA's jurisdiction was attracted under s 476 of the Act.

The relevant conduct was the Department's inviting SZSSJ, on three occasions in 2014, to communicate any concerns he had about the impact of the Data Breach on his ability to return to his home country. The third invitation, made in October 2014, also stated that the information provided by SZSSJ in his proceedings in the FCCA and the Federal Court would be considered by the Department as part of an International Treaties Obligations Assessment ("ITOA") it had commenced. The ITOA was to assess Australia's non-refoulement obligations under international law in respect of SZSSJ.

On 16 December 2014 s 197C of the Act commenced operation. Section 197C provides that Australia's non-refoulement obligations are irrelevant for the purposes of s 198 of the Act.

On 28 April 2015 Judge Cameron dismissed SZSSJ's remitted application. His Honour found that the Department was duly giving procedural fairness to SZSSJ in the ITOA process and that it was not obliged to provide information

about the Data Breach to the extent that SZSSJ had sought. Judge Cameron also held that by virtue of s 197C of the Act the Minister could not be restrained, on the basis that the ITOA had not been completed, from removing SZSSJ from Australia under s 198.

In the meantime, an ITOA was carried out in respect of SZTZI. It concluded that Australia's non-refoulement obligations were not engaged in respect of her.

SZTZI then applied to the FCCA, impugning the ITOA and seeking an injunction restraining the Minister from relying on it. On 12 May 2015 Judge Street dismissed the application. His Honour held that the report that resulted from the ITOA was not a decision made under the Act and that s 197C prevented any argument about the ITOA insofar as s 198 was concerned. Judge Street found that in any event SZTZI had been afforded procedural fairness during the ITOA.

The respondents each appealed. The Full Court of the Federal Court (Rares, Perram & Griffiths JJ) unanimously allowed both appeals. (The Full Court dealt with SZSSJ's appeal before briefly determining SZTZI's for similar reasons.) Their Honours held that s 197C of the Act did not apply to SZSSJ because at the time of its introduction a right had accrued to SZSSJ, under s 198, not to be removed from Australia until non-refoulement had been assessed in a procedurally fair manner. This was due to the operation of s 7(2) of the *Acts Interpretation Act* 1901 (Cth). The Full Court then found that the Minister had in effect decided to consider whether to exercise his discretionary powers under ss 48B, 195A and 417 of the Act in relation to SZSSJ and that the ITOA was conduct preparatory to decisions to be made by the Minister under those sections. Their Honours found that obligations of procedural fairness were owed to SZSSJ that had not been met by the ITOA or the Department's invitations to SZSSJ to communicate his concerns. In particular, SZSSJ had not been informed of the decision-maker, the powers being exercised or the full circumstances of the Data Breach. The Full Court held that s 197C of the Act did not prevent the Department from considering Australia's non-refoulement obligations where the Minister was considering whether to exercise his powers under ss 48B, 195A and 417 of the Act. Their Honours also held that s 476(2)(d) of the Act did not deprive the FCCA of jurisdiction over SZSSJ's claim, as the relief sought was in relation to an anticipated decision under s 198 and to the *process* that might lead to a decision under ss 48B, 195A or 417 rather than to a privative clause decision as described in s 474(7) of the Act.

In each appeal, the grounds of appeal include:

- The Full Court erred in finding that s 197C of the Act did not apply in the proceeding by operation of s 7(2) of the *Acts Interpretation Act* 1901 (Cth) on the basis that the Act prior to its amendment to insert s 197C gave the respondent a right arising under s 198 not to be removed until a procedurally fair assessment of his non-refoulement claims was conducted.

- The Full Court erred in finding the Federal Circuit Court had jurisdiction to hear and determine the respondent's claims for declaratory and injunctive relief.