IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S76 of 2016**

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Appellant

SECRETARY OF THE DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION
Second Appellant

KATHY BACKHOUSE
Third Appellant

and

SZTZI
Respondent

APPELLANTS' REPLY (ANNOTATED)

Filed on behalf of the Appellants by:

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Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

Facts and issues

2. The Data Breach involved the disclosure of certain personal information of those persons held in immigration detention as at 31 January 2014.[1] Not all such persons were prospective or failed applicants for protection visas: cf Respondent's Submissions (**RS**) at [7].[2]

3. To the extent SZTZI suggests that the Full Court found as a fact that the Data Breach generated a risk that persons from the countries from which protection visa applicants had come might have become aware of the content of protection claims made in Australia (RS at [8]), this is inaccurate. The Full Court said only that the release of the information carried a risk "*that authorities and others in countries from which the protection visa applicants had come might have become aware of the fact that they had sought protection in Australia*".[3]

4. SZTZI mistakenly presumes that the appellants ask this Court to "overrule" the decisions in *Plaintiff M61/2010E v Commonwealth*[4] and *Plaintiff M70/2011 v Minister for Immigration and Citizenship.*[5] The appellants do not seek to reopen either of those cases.

Jurisdiction (ground 3)

5. No "*fundamental error*" is involved in the proposition that the conclusion of the ITOA that SZTZI did not engage Australia's non-refoulement obligations affects the Federal Circuit Court (**FCC**)'s jurisdiction by operation of ss 474(7)(a) and 476(2)(d) of the *Migration Act 1958* (**the Act**): cf RS at [23(1)]. Justice Lindgren in *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs*[6] properly rejected an argument that s 474, as interpreted in *Plaintiff S157/2002 v Commonwealth*,[7] has the effect that the jurisdiction-denying provision of s 476(2) is not attracted where jurisdictional error exists, because that which would otherwise be "*a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power*", is not such a decision at all.[8] His Honour held that the "*Minister does not, in any circumstances, have a duty to consider whether to exercise the power under s 417(1)*", by reason of the express provision in s 417(7).[9]

6. The Minister is likewise under no duty to consider the exercise of the powers under ss 48B(1) and 195A(2): see ss 48B(6) and 195A(4). It is permissible for him to take the decision not to further consider exercising his power under ss 48B, 195A or 417 by the statement in the PAM3 that consideration should be given to removal if an ITOA finds that

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1 *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285 at 286 [4]; see also Appellants' Submissions (**AS**) at [2], [6], [15]

2 Cf (2015) 234 FCR 1 at 5 [1], Appeal Book (**AB**) at 246, characterising the disclosure as relating to "9,258 asylum seekers"

3 Ibid at 5 [1] (AB at 246)

4 (2010) 243 CLR 319 (***M61***)

5 (2011) 244 CLR 144 (***M70***): see RS at [2(b)(ii)], [3(e)]

6 (2007) 158 FCR 510 (***Raikua***)

7 (2003) 211 CLR 476 (***S157***)

8 ***Raikua*** (2007) 158 FCR 510 at 521 [51], 522-523 [60]-[64]

9 Ibid at 522 [61]

non-refoulement obligations are not engaged.[10] The notion of jurisdictional error does not enable avoidance of s 476(2)(d).

7. There was no basis in the relevant section of the PAM3, or elsewhere in the evidence, for the respondent's suggestion (RS at [23(2)]) that her case would or could be referred to the Minister for further consideration despite the negative finding in the ITOA. The letter from the Department accompanying the concluded ITOA stated that "*the department has concluded that you have no entitlements to remain in Australia ... if you do not commence making your own arrangements the department will make arrangements to remove you from Australia*".[11] Section 10.1 of the PAM3's discussion of referral to the Minister for the possible exercise of ministerial intervention powers is premised on a person having been found to engage Australia's non-refoulement obligations in the ITOA process.[12] SZTZI's case is not assisted by the Full Court's remark that the PAM3 should not be viewed in isolation, in circumstances where she cannot point to any other evidence of ministerial intention to further consider her case: cf RS at [23(4)].

8. SZTZI's submission that s 476(2)(d) could only operate if the Minister had personally decided not to exercise his dispensing powers, or to cease consideration of them (RS at [23(5)], [24], [25]) is inconsistent with the line of Federal Court authorities relied on by the Minister[13] as well as with the position in respect of the processes considered in *M61*, under which if an assessor or reviewer concluded that Australia did not owe protection obligations to a person at the conclusion of the RSA and IMR processes, no submission would be made to the Minister.[14] This Court did not suggest in *M61* that there was anything unlawful about that outcome, notwithstanding the finding that the Minister had decided to consider exercising his powers under ss 46A and 195A in every case in which an offshore entry person claimed to be owed protection obligations.[15] The Federal Court authorities relied on by the Minister are consistent with *M61* in this respect: cf RS at [29]. The plurality in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[16] confirmed that it was within the competence of the Minister to issue directions which had the effect of determining in advance "*the circumstances in which he or she wishes to be put in a position to consider exercise of the discretionary powers by the advice of department officers*".[17]

9. The Full Court noted that "*the ITOA process is something which it is intended may start outside the Minister's office and about which he may never be personally aware if the conclusion of the ITOA is that non-refoulement obligations are not owed*".[18] Contrary to SZTZI's assumption (RS at [25]-[28]), the Full Court's factual finding that the Minister had decided to consider the exercise of his dispensing powers in respect of persons affected by the data breach and that ITOAs were prepared to assist him in that process did not alter or diminish the Minister's capacity to decide, in advance via the PAM3, that the only cases that should be referred to him for further consideration of the exercise of his dispensing powers at the conclusion of the ITOA process were those in which the officer conducting

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10 *Bedlington v Chong* (1998) 87 FCR 75; see also *Raikua* at 522 [64]
11 Letter, 23 March 2015, AB at 145
12 Section 10.1, extracted (2015) 234 FCR 1 at 23 [77] (AB at 269-270)
13 See AS at [24]-[28]
14 (2010) 243 CLR 319 at 343 [44], 344 [49]
15 Ibid at 351 [70]
16 (2012) 246 CLR 636 (***S10***)
17 Ibid at 665 [91]
18 (2015) 234 FCR 1 at 24 [78] (AB at 271)

the ITOA concluded that Australia's non-refoulement obligations were engaged. The capacity of a Minister to make such a decision in advance is well established.[19]

10. There is no "tension" in the appellants' submissions (AS at [30]-[31]) as to the characterisation of the relevant "*migration decision*" in this matter. Any relevant future migration decision would be a decision by the Minister adopting the third appellant's finding in the ITOA that Australia's non-refoulement obligations were not engaged by SZTZI, as suggested by the orders sought in SZTZI's own Amended Application in the FCC.[20]

11. None of SZTZI's submissions attempting to overcome the effect of not having sought an injunction against removal on the inapplicability of the first limb of the Full Court's reasoning on the jurisdictional objection in relation to SZSSJ (RS at [35]) assist her case. SZTZI was legally represented throughout the proceedings. No injunction against removal was sought in SZTZI's Amended Application, which was filed four days before the FCC hearing.[21] It is irrelevant whether such an injunction application would have been colourable.[22] The FCC in determining its jurisdiction was obliged to consider the Amended Application before it, and was not entitled to have regard to relief sought when the proceedings were commenced but subsequently abandoned by amendment of the initiating process. This was not in any sense an instance of a party "*declining to pursue particular relief at final hearing*": an injunction against removal was nowhere included in the Amended Application. The FCC's power to make a declaration only applies where the FCC has jurisdiction from a source independent of that grant of power.[23] The utility or otherwise of declaratory relief in SZTZI's case is irrelevant to the question of the FCC's jurisdiction.

Application and content of the rules of procedural fairness (grounds 2, 4-7)

12. Ground 2: It is difficult to understand the basis for the appellant's submission that ground 2 lacks utility in the absence of a challenge to the Full Court's construction of s 197C: RS at [46], [48]. The Full Court held that s 197C did not apply to SZTZI because of s 7 of the *Acts Interpretation Act 1901* (**AIA**)[24] and that SZSSJ had "*a right not to be removed until a procedurally fair assessment of his non-refoulement claims was conducted*" arising under s 198,[25] upon which SZTZI relies: RS at [52]. The appellants contend that the Full Court erred in making those findings, which concern the application of s 197C to SZSSJ and STZTI's cases, not the proper construction of that section: AS at [36]-[46].

13. The relevant question is not at what point an officer of the Department first considered the possible application of s 198 and concluded that the duty to remove was not enlivened, as SZTZI suggests by referring to when s 198 was "*first engaged*": RS at [49]. The fact that s 198(2) in conjunction with s 196 permits continued detention under s 189 of a person barred from making a valid visa application while steps are taken to determine whether the person should be permitted to make such an application[26] illustrates that an officer's duty of removal is not enlivened while such steps are ongoing. That supports the appellants'

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19 *Bedlington v Chong* (1998) 87 FCR 75; *S10* at 665 [91]; see also *QAAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 309 at [12]-[17] (Spender, Kiefel and Emmett JJ); *VYFT v Minister for Immigration and Citizenship* [2009] FCA 937 at [7]-[9] (Ryan J)

20 Amended Application dated 8 May 2015, AB at 21.

21 See Notice of Filing and Hearing dated 8 May 2015, AB at 17. The Amended Application was filed pursuant to an order of Street FCCJ on 1 May 2015.

22 As to the effect if the claim for an injunction was colourable, see (2015) 234 FCR 1 at 37 [147] (AB at 288)

23 *Federal Circuit Court of Australia Act 1999*, s 16(1).

24 (2015) 234 FCR 1 at 37 [145] (AB at 287)

25 Ibid at 18 [54] (AB at 263)

26 *M61* (2010) 243 CLR 319 at 338 [25]

point: no duty to remove SZSSJ or SZTZI had been enlivened as at 15 December 2014, for the reasons set out in AS at [42].

14. To the extent SZTZI adopts SZSSJ's submissions on ground 2 (RS at [52]), the appellants repeat and rely on their reply to those submissions in SZSSJ's case.

15. Ground 4: The appellants' submissions on ground 4 do not urge the adoption of any "*immutable rule*" about procedural fairness as an "*abstract concept*" as SZTZI contends (RS at [39]), but rather rely on the ratio of *S10*, namely that the dispensing powers in ss 48B, 195A, 351 and 417 are not conditioned on observance of the principles of procedural fairness.[27] The factors mentioned in the respondent's example (RS at [40]) of a statutory power to make a decision in the public interest would go to the content of an obligation to accord procedural fairness; the power itself would be conditioned by a duty to accord procedural fairness, implied from the conferral of power in accordance with the principle in *Annetts v McCann*,[28] unless excluded by plain words of necessary intendment. As the appellants have submitted (AS at [62]), the test for whether there is a duty to accord procedural fairness does not turn upon its content.

16. The appellants accept the Full Court's factual finding as to the Minister's decision to consider the exercise of his dispensing powers. The appellants also accept that the Full Court regarded this factual finding as critical to distinguishing *S10*, but contrary to SZTZI's submission (RS at [42], [44]), the Full Court's view as to the importance of its factual finding does not establish anything about the correctness of the Full Court's approach.

17. SZTZI's implicit submission that all of the *S10* plaintiffs' protection claims had been considered in the visa application process and had been the subject of merits review (RS at [45]) is not borne out by the facts of *S10*. The Act at the relevant time did not make provision for the consideration of complementary protection claims, which were instead considered pursuant to the ministerial guidelines with respect to the exercise of the dispensing powers including ss 351 and 417.[29] Plaintiff S10 submitted that in his request under ss 48B and 417, he made a protection claim that had not previously been considered, based on a certificate issued significantly after the Refugee Review Tribunal's decision: that the Taliban had killed three of his close relatives and were still searching for him.[30] Plaintiff S43 submitted that she had made a new claim based on findings in her judicial review applications that a letter from the Department was confusing.[31] *S10* could not be distinguished on the basis that each of the protection claims made by each of the four plaintiffs had been the subject of previous consideration in their visa application or merits review.

18. Ground 5: The appellant's submissions on ground 5 raise different issues to those addressing ground 4, consistent with the Full Court's finding that the Department's conduct supplied an "*independent basis*" for the conclusion that procedural fairness applied to the ITOA process.[32] The appellants accept that they need to succeed on both grounds 4 and 5 in order for the appeal to be upheld but that does not mean that their submissions on ground 5 are contingent on the reasoning in *S10*: cf RS at [54], [55].

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27 AS at [47]-[52]; (2012) 246 CLR 636 at 667-668 [99]-[100]

28 (1990) 170 CLR 596 at 598

29 See *S10* (2012) 246 CLR 636 at 649-650 [34]-[35]

30 See [2012] HCATrans 17 at p 40; [2012] HCATrans 18 at p 57; the Minister contested that this was a new claim [2012] HCATrans 18 at p 32; the Court did not determine the issue

31 See [2012] HCATrans 17 at p 56; the Minister denied that this involved a change in circumstances [2012] HCATrans 18 at p 34

32 (2015) 234 FCR 1 at 26 [88] (AB at 273)

19. Ground 6: SZTZI does not explain the basis on which she claims she could have made "*forceful submissions*" had she been provided with the unabridged KPMG report: RS at [61]. It is somewhat surprising that she maintains this argument in the face of the failure to call on the notice to produce seeking the unredacted KPMG report in her FCC proceedings.[33]

20. The passage of the Full Court's reasons on which SZTZI relies on this ground (RS at [64]) contains the Full Court's critique of the FCC's reasons as to the extent of disclosure and the alleged denial of procedural fairness in her case.[34] The respondent's submission that the Full Court in this passage considered the third appellant's reasons to assess whether a different result might have followed if SZTZI had been provided with additional information is inaccurate. SZTZI was in a different position to SZSSJ on this issue, because the ITOA in her case had been completed and the reasons were available to the Full Court, yet were not considered: see AS at [64]; cf RS at [64].

21. Ground 7: SZTZI was not "*unaware of the criteria*" which would be applied in the ITOA in relation to which she was invited to make submissions: cf RS at [57]. She was informed that the ITOA would consider Australia's non-refoulement obligations under the relevant treaties and assess any protection claims she may have in relation to the Data Breach. She was also informed that the ITOA would consider "*new information, changes in your circumstances, or your country of nationality ... since your previous protection claims were assessed*".[35] Unsurprisingly, in light of the Full Court's findings as to the process currently being conducted that had been "*flushed out in this appeal*",[36] their Honours' findings as to the disclosure of process required as a matter of procedural fairness did not include a requirement to inform SZSSJ or SZTZI about what the Department's "*normal processes*" were. The "context" of the ITOA relied upon by the respondent (RS at [58]) is not an answer to the appellants' submissions on ground 7(a).

22. The Full Court's finding that procedural fairness required disclosure of the "*full circumstances*" of the data breach was not simply a finding of fact, as asserted by the respondent: RS at [60]. The Full Court expressly identified the basis in principle for the disclosure required (a conflict in the Department's role), having declined to apply case law concerning the disclosure required if information held by a decision-maker either adverse or corroborative.[37] This reasoning involved error, for the reasons set out in AS at [72]-[77].

Dated: 20 May 2016

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33 Ibid at 37-38 [151] (AB at 288-289)
34 (2015) 234 FCR 1 at 37-38 [149]-[152] (AB at 288-289)
35 Letter dated 13 January 2015, AB at 128, 129; see also letter dated 5 February 2015, AB at 133; AS at [69]
36 (2015) 234 FCR 1 at 29 [100] (AB at 277)
37 Ibid at 32 [121] (AB at 281-282)