MINISTER FOR IMMIGRATION AND BORDER PROTECTION ..... APPELLANT;
RESPONDENT,

AND

SZMTA AND ANOTHER ..... RESPONDENTS.
APPLICANT AND RESPONDENT,

CQZ15 ..... APPELLANT;
APPLICANT,

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOTHER ..... RESPONDENTS.
RESPONDENTS,

BEG15 ..... APPELLANT;
APPLICANT,

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOTHER ..... RESPONDENTS.
RESPONDENTS,

[2019] HCA 3

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

Administrative Law (Cth) — Procedural fairness — Notification to Administrative Appeals Tribunal by Secretary of Department that a document or information provided to Tribunal was a document or information to which s 438 of Migration Act applied — Whether procedural fairness obliged Tribunal to disclose fact of notification to applicant — Whether obligations of procedural fairness excluded by s 422B of Migration Act — Whether failure to disclose fact of notification to applicant constituted jurisdictional error — Whether incorrect and invalid notification constituted jurisdictional error — Migration Act 1958 (Cth), Pt 7, ss 418(3), 422B, 423, 424AA, 424A, 425, 427(1)(c), 438, 440.

HC of A 2018-2019

Sept 10 2018

Feb 13 2019

Bell, Gageler, Keane, Nettle and Gordon JJ

Administrative Law (Cth) — Judicial review — Jurisdictional error — Materiality of error — Whether error must operate to deprive applicant of possibility of successful outcome to constitute jurisdictional error — Whether evidence of contents of documents or information subject to notification under s 438 of Migration Act admissible to determine materiality — Migration Act 1958 (Cth), s 438.

Section 418(3) of the *Migration Act 1958* (Cth) required the Secretary of the Department of Immigration and Border Protection, upon being notified of a valid application to the Administrative Appeals Tribunal for review of a decision to refuse or cancel a protection visa, to give to the Registrar of the Tribunal all documents in the Secretary's possession or control that were considered by the Secretary to be relevant to the review of the decision. Section 438(1) provided that the section applied to a document or information if one of two preconditions was met: (a) if the Minister had certified in writing that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in s 437(a) or (b)) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed; or (b) if the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence. Section 438(2) provided that, if the Secretary gives to the Tribunal a document or information to which s 438 applies, the Secretary must notify the Tribunal in writing that s 438 applies to the document or information and may give the Tribunal any written advice that the Secretary thinks relevant about the significance of the document or information. If the Tribunal was given a document or information and was notified that s 438 applied in relation to it, s 438(3) conferred on the Tribunal a discretion to have regard to any matter contained in the document or the information and, if the Tribunal thought it appropriate to do so having regard to any evidence given by the Secretary under s 438(2), a discretion to disclose any matter contained in the document, or the information, to the applicant.

Section 422B(1) of the *Migration Act* provided that Div 4 of Pt 7 of the Act "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". Section 422B(2) provided that ss 416, 437 and 438 and Div 7A, in so far as they relate to Div 4 of Pt 7, "are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with". Section 422B(3) provided that, in applying Div 4 of Pt 7, the Tribunal must act in a way that is fair and just.

Three non-citizens applied to the Tribunal, or to its predecessor, the Refugee Review Tribunal, for review of decisions by a delegate of the Minister refusing their applications for a protection visa. In the course of each application for review, the Secretary notified the Tribunal that s 438 of the *Migration Act* applied to certain information or documents which

had been given to the Tribunal by the Secretary pursuant to s 418(3). In each case, the Tribunal did not disclose to the applicant the fact of the notification.

Held, (1) that a notification by the Secretary that s 438 applies to a document or information given to the Tribunal triggers an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification to the applicant for review. The notification alters the procedural context within which the Tribunal's duty of review is to be conducted.

Per Bell, Gageler and Keane JJ. The obligation of procedural fairness to disclose the fact of notification to an applicant for review is not excluded by s 422B(2).

(2) That an incorrect and therefore invalid notification under s 438(2) amounts, without more, to an unauthorised act in breach of a limitation within the statutory procedures which condition the performance of the overarching duty of the Tribunal to conduct a review.

(3) By Bell, Gageler and Keane JJ, Nettle and Gordon JJ *contra*, that a breach of the obligation of procedural fairness to disclose the fact of notification to the applicant, or a breach of an inviolable limitation governing the conduct of the review in the case of an incorrect and invalid notification, can give rise to jurisdictional error if, and only if, the breach is material in the sense that compliance could realistically have resulted in a different decision.

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; and *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, referred to.

Per Nettle and Gordon JJ. Where jurisdictional error is established, there is a further question of whether the court should exercise its discretion to refuse relief because the applicant was not deprived of a successful outcome.

CQZ15

In CQZ15's case, in judicial review proceedings in the Federal Circuit Court, the Minister conceded that the certificate under s 438 was invalid, but submitted that the information which was the subject of the notification under s 438(2) could have had no bearing on the Tribunal's decision and sought to tender an affidavit exhibiting the documents the subject of the notification in support of that submission. The Court rejected the tender and held that the failure to disclose the fact of notification resulted in jurisdictional error. The Full Court of the Federal Court allowed an appeal by the Minister.

Held, that the evidence sought to be adduced by the Minister was at least potentially admissible, by Bell, Gageler and Keane JJ, as relevant to a determination of the materiality of the denial of procedural fairness constituted by the failure to disclose the fact of notification, and by Nettle

and Gordon JJ, as relevant to whether, in the exercise of discretion, relief should be refused.

BEG15

In BEG15's case, the Minister conceded that the certificate issued under s 438(1)(a) and the notification by the Secretary under s 438(2)(a) were invalid. The certificate covered three documents which related to the disposition, by consent, of an application for judicial review of an earlier decision of the Refugee Review Tribunal. The information in the documents was largely known to the applicant, was not relevant to the decision to be made by the Tribunal, and had not been taken into account by the Tribunal.

Held, that the non-disclosure of the fact of notification and the invalid notification could not have made any difference to the outcome.

SZMTA

In SZMTA's case, the documents the subject of the notification under s 438(2) had previously been provided to the applicant in response to a request under the *Freedom of Information Act 1982* (Cth). The Tribunal did not refer to the documents or the information contained in them.

Held, that having regard to the contents of the documents the subject of the notification and the reasons of the Tribunal, the non-disclosure of the fact of notification could not realistically have made any difference to the Tribunal's decision.

Decision of the Federal Court of Australia (Full Court): *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1, affirmed.

Decision of the Federal Court of Australia (Full Court): *BEG15 v Minister for Immigration and Border Protection* (2017) 253 FCR 36, affirmed.

Decision of the Federal Court of Australia (White J): *SZMTA v Minister for Immigration and Border Protection* (2017) 255 FCR 215, reversed.

APPEALS from the Federal Court of Australia.

CQZ15 was an Iranian citizen whose application for a protection visa was refused by a delegate of the Minister. Another delegate of the Minister issued a certificate under s 438(1)(a) of the *Migration Act 1958* (Cth) in relation to certain information contained in certain documents on the Departmental file. On an application to the Administrative Appeals Tribunal for review of the first delegate's decision, the Secretary of the Department notified the Tribunal that s 438(1)(b) of the *Migration Act* applied to certain information contained in the documents which had been given to the Tribunal by the Secretary. The fact of the notification was not disclosed to CQZ15 by the Tribunal. The Tribunal affirmed the delegate's decision. On an application to the Federal Circuit Court for judicial review of the Tribunal's decision, the Minister conceded that the certificate was invalid but submitted that the notification was valid. The Minister

further submitted that the information which was the subject of the notification could have had no bearing on the Tribunal's decision and sought to tender an affidavit exhibiting the documents the subject of the notification in support of that submission. The Court (Judge Riley) rejected the tender (1). In a subsequent decision, Judge Riley held that the failure to disclose the fact of notification constituted jurisdictional error, set aside the Tribunal's decision and remitted the matter to Tribunal to be determined according to law (2). On an appeal by the Minister, a Full Court of the Federal Court (Kenny, Tracey and Griffiths JJ) held that the evidence sought to be adduced by the Minister was at least potentially admissible as relevant to the exercise of the Court's discretion to refuse relief and allowed the Minister's appeal (3). CQZ15 appealed to the High Court from the judgment of the Federal Court by special leave granted by Gageler and Keane JJ on 10 May 2018. The Minister filed a summons seeking special leave to cross-appeal on the ground that the obligation of procedural fairness to disclose the fact of notification under s 438 of the *Migration Act* was excluded by s 422B. At the commencement of the hearing in the High Court, counsel for the Minister indicated that the summons was not pressed.

BEG15 was a Sri Lankan citizen whose application for a protection visa was refused by a delegate of the Minister. The Refugee Review Tribunal (before its amalgamation with the Administrative Appeals Tribunal) affirmed the decision of the delegate. On an application to the Federal Circuit Court for judicial review of the Tribunal's decision, the Court, by consent, quashed the Tribunal's decision. On a further hearing by a differently constituted Tribunal, the Secretary of the Department notified the Tribunal under s 438(2)(a) of the *Migration Act* that a certificate had been issued by a delegate of the Minister under s 438(1)(a) of the Act in relation to three documents which had been given to the Tribunal by the Secretary. Each of the documents related to the disposition of the earlier application for judicial review. The fact of the notification was not disclosed to the applicant by the Tribunal. The Tribunal affirmed the decision of the delegate. On an application to the Federal Circuit Court for judicial review of the Tribunal's second decision, the Minister conceded that the certificate and the notification were invalid. The Federal Circuit Court (Judge Smith) dismissed the application, finding that the information in the documents the subject of the notification was largely known to the applicant, was not relevant to the decision made by the Tribunal, had

(1) *CQZ15 v Minister for Immigration and Border Protection* (2016) 315 FLR 127.
(2) *CQZ15 v Minister for Immigration and Border Protection* [2017] FCCA 130.
(3) *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1.

not been taken into account by the Tribunal and could have made no difference to the outcome of the review (4). An appeal from the decision of the Federal Circuit Court was dismissed by a Full Court of the Federal Court (Kenny, Tracey and Griffiths JJ) (5). BEG15 appealed to the High Court from the judgment of the Federal Court by special leave granted by Gageler, Keane and Edelman JJ on 10 May 2018. The Minister filed a notice of contention contending that the obligation of procedural fairness to disclose the fact of notification under s 438 of the *Migration Act* was excluded by s 422B.

SZMTA was a citizen of Bangladesh whose second application for a protection visa was refused by a delegate of the Minister. On an application to the Administrative Appeals Tribunal for review of the delegate's decision, the Secretary of the Department notified the Tribunal that s 438 of the *Migration Act* applied to certain documents, which had been given to the Tribunal by the Secretary, on the basis that they were given to the Minister or an officer of the Department in confidence. The fact of the notification was not disclosed to the applicant by the Tribunal. The Tribunal affirmed the delegate's decision. Its reasons did not refer to the documents or the information contained in them. An application for judicial review of the Tribunal's decision was dismissed by the Federal Circuit Court (Judge Street) (6). The applicant appealed to the Federal Court. Evidence before the Federal Court established that the applicant had previously been provided with copies of all of the documents the subject of the notification in response to a request under the *Freedom of Information Act 1982* (Cth). The Federal Court (White J) allowed the appeal, holding that the notification was defective and that the decision of the Tribunal was affected by jurisdictional error because there was a prospect that, by reason of the notification, the Tribunal did not have regard to information in the documents which may have assisted the applicant (7). SZMTA appealed to the High Court from the judgment of the Federal Court by special leave granted by Kiefel CJ and Gageler J on 16 February 2018.

[THE COURT requested to hear first from counsel for the first respondent in *BEG15 v Minister for Immigration and Border Protection* in relation to the notice of contention.]

G R Kennett SC (with him *B D Kaplan*), for the first respondent in *BEG15 v Minister for Immigration and Border Protection*. Section

(4) *BEG15 v Minister for Immigration and Border Protection* (2016) 315 FLR 196.
(5) *BEG15 v Minister for Immigration and Border Protection* (2017) 253 FCR 36.
(6) *SZMTA v Minister for Immigration and Border Protection* [2016] FCCA 1329.
(7) *SZMTA v Minister for Immigration and Border Protection* (2017) 255 FCR 215.

422B of the *Migration Act 1958* (Cth) displaces the procedural fairness obligations that would otherwise apply in relation to a certificate or notification under s 438. Section 422B(1) establishes that Div 4 of Pt 7 is an exhaustive statement of the hearing rule in relation to the matters with which it deals. Section 422B(2) makes s 438 itself an exhaustive statement of the hearing rule in relation to the matters with which it deals. There is no room for the implication of further procedural fairness obligations. [GAGELER J. Is the existence of a certificate information that would come within s 424A?] No. It is not information that the Tribunal considers would be the reason for affirming the decision under review. [He referred to *SZBYR v Minister for Immigration and Citizenship* (8).]

S E J Prince, for the appellant in *BEG15 v Minister for Immigration and Border Protection*. Section 422B does not exclude procedural fairness. Rather, it limits the application of the rules of procedural fairness to specified provisions of the *Migration Act*, including s 438. Section 422B, particularly s 422B(3), establishes a statutory process which accords procedural fairness by the operation of the specified provisions in a procedurally fair way. The disclosure of a certificate is an inherent part of s 438 operating in a procedurally fair way. In relation to the appeal, there is no dispute that the certificate issued under s 438 was invalid on its face. The correct approach to the consequence of the invalidity of the certificate was that taken by Beach J in *MZAFZ v Minister for Immigration and Border Protection* (9): first, the purported issue of an invalid certificate infected the procedure adopted by the Tribunal; second, in acting on the invalid certificate, the Tribunal's process of consideration of whether to make disclosure under s 424AA or s 424A would necessarily be influenced by the incorrect belief of the applicability of s 438; and third, the Tribunal's consideration of its own obligations and functions under s 438 must have been affected by the false premise of the validity of the certificate. The Tribunal has not conducted the review in accordance with the statutory processes which it was obliged to apply. The decision was thereby attended by jurisdictional error. [He referred to *Project Blue Sky Inc v Australian Broadcasting Authority* (10).] Even where a certificate is validly given under s 438, the application of the statutory pathway in s 438 without notice to the applicant is procedurally unfair. The applicant is denied an opportunity to know of the existence of the certificate and make submissions about

(8) (2007) 81 ALJR 1190; 235 ALR 609.
(9) (2016) 243 FCR 1 at 11 [40]-[44].
(10) (1998) 194 CLR 355 at 390 [93].

its validity (11). The approach adopted by the Full Court of determining the validity of the Tribunal's decision by reference to the effect of the invalid certificate on the applicant's prospects of success on the review application introduces an impermissible consideration of the merits of the visa application rather than the legality of the decision-making process undertaken by the Tribunal (12). The documents covered by the certificate included a summary of the reasons of the first Tribunal decision in relation to the applicant, which suggested that the Tribunal found against the applicant because of inconsistent evidence and a lack of credibility. It is impossible to say that the document could not have poisoned the well against the applicant.

G R Kennett SC. The fact that an invalid certificate has been given to the Tribunal does not in itself, result in jurisdictional error. To the extent that *MZAFZ* (13) suggests otherwise, it is wrong. Section 438 confers discretions on the Tribunal. If procedural fairness obligations arose, they did so as a condition of the valid exercise of discretion under or in relation to the certificate. There is no basis to find that the Tribunal placed any reliance on the certificate or that it did anything, or refrained from doing anything, on the strength of the certificate. Materiality to the exercise of power is an element of jurisdictional error (14). Procedural fairness operates only as a condition of the validity of exercises of power that adversely affect a person's rights or interests (15). There is no denial of procedural fairness if the failure to provide a hearing does not deny the review applicant a chance of a successful outcome (16). That will be the case if the documents or information covered by a certificate are incapable of having any bearing on the decision of the Tribunal. In those circumstances, the review applicant will not have lost any opportunity to advance his or

(11) *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 at 316 [49], 317 [51]-[52], 317-318 [55]; *MZAFZ* (2016) 243 FCR 1 at 13 [51]-[53], 13-14 [55].

(12) *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 321-322 [77]-[78], 323 [83], 345-346 [173], 353-354 [205], 354-355 [208]-[209].

(13) (2016) 243 FCR 1.

(14) *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 [24], 135 [31].

(15) *Annetts v McCann* (1990) 170 CLR 596 at 598; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [11]; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 352 [74]; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 652 [497]; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 335 [30].

(16) *WZARH* (2015) 256 CLR 326 at 341 [56].

her case (17). Alternatively, in those circumstances, the court should refuse relief in the exercise of discretion. The documents covered by the certificate had no bearing on the issues in the review.

S E J Prince, in reply.

G R Kennett SC (with him *R S Francois*), for the appellant in *Minister for Immigration and Border Protection v SZMTA*. The reasoning of the Federal Court is unclear. The better understanding is that the Court did not hold the certificate to be invalid but that it held that the Tribunal might have exercised the discretion in s 438(3), and decided not to have regard to material that might have assisted the first respondent, without affording him a hearing. That reasoning does not identify any error by the Tribunal because it does not involve a finding that the Tribunal exercised the discretion in the manner suggested. In any event, the first respondent bore the onus of showing that the suggested exercise of discretion occurred (18). Any such finding must be based on evidence or an inference based on evidence. It was not open to the Court to speculate about the manner in which the Tribunal might have dealt with the documents the subject of the notification. It is essential to any claim of denial of procedural fairness that the applicant demonstrates that the impugned procedure deprived him or her of a fair opportunity to be heard (19). There is no evidence that the Tribunal exercised the discretion in some way adverse to the first respondent. An inference that the Tribunal chose to ignore relevant material supportive of the applicant for review should lightly be drawn. Alternatively, if the Court is to be understood to have held that the notification under s 438 was invalid, it was not open to the Court to infer that the Tribunal acted on the notification in some unspecified way (20). Rather, it was necessary for the first respondent to show that a misunderstanding about the effectiveness of the notification had led the Tribunal to exceed a power or fail to perform a duty (21). There is no proper basis to find that the Tribunal acted on it in any relevant way. Nor could the invalidity of a certificate ipso facto stultify the Tribunal's review.

(17) *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [38]; *WZARH* (2015) 256 CLR 326 at 342-343 [57], [60].

(18) *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 616 [67].

(19) *WZARH* (2015) 256 CLR 326 at 342-343 [60]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122 [104].

(20) cf *MZAFZ* (2016) 243 FCR 1 at 11 [40].

(21) *Hossain* (2018) 264 CLR 123 at 133 [24], 135 [31].

S E J Prince (with him *S Blount* and *P W Bodisco*) for the first respondent in *Minister for Immigration and Border Protection v SZMTA*. The Federal Court found that the notification under s 438 of the *Migration Act* was invalid. The invalid notification resulted in a mistaken understanding of the statutory procedures that the Tribunal was required to apply to the conduct of the review. The Tribunal misconceived its duty in conducting the review because it erroneously held the view that it had to maintain secrecy in the documents the subject of the notification unless it exercised a discretion in favour of the first respondent. By not correctly applying the statutory process to the review, the Tribunal misapplied the Act and misapprehended its jurisdiction in the way described by Beach J in *MZAFZ* (22). The terms of s 438, particularly when combined with ss 422B and 430, have a "rule like quality" which can be easily identified and applied (23). Because the invalidity of the notification goes to the process of review, not the outcome of the review, it does not matter whether or not the underlying documents were relied on by the Tribunal. The effect on invalidity on the statutory review process undertaken by the Tribunal leaves no room for consideration of the potential effect of the breach on the prospects of the particular applicant (24). The first respondent was denied an opportunity to make submissions on the validity of the notification, which in turn affected the procedure that should have governed the Tribunal's decision. The very nature of the wrongful application of s 438 means that the applicant could not know, much less prove, how the Tribunal used the documents or information the subject of the notification. The Court was entitled to infer that the Tribunal acted in some unspecified way on the invalid notification (25). *MZAFZ* was considered and followed in *Singh* (26).

G R Kennett SC, in reply.

L G De Ferrari SC (with her *C L Symons*), for the appellant in *CQZ15 v Minister for Immigration and Border Protection*. [Counsel for the Minister indicated at the commencement of the hearing that the first respondent did not press the summons for special leave to cross-appeal.] Procedural fairness requires the tribunal to disclose to an applicant for review that it has received a notification under s 438 of the *Migration Act* from the Secretary. The Full Court of the Federal

(22) (2016) 243 FCR 1 at 11 [40].
(23) *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 391 [95], 392 [98].
(24) *SAAP v Minister for Immigration and Citizenship* (2005) 228 CLR 294 at 321-322 [77]-[78], 323 [83], 345-346 [173], 353-354 [205], 354-355 [208]-[209].
(25) *MZAFZ* (2016) 243 FCR 1 at 11 [40].
(26) (2016) 244 FCR 305.

Court in *Minister for Immigration and Border Protection v Singh* (27) was correct to hold that non-disclosure of the existence of a certificate under s 375A of the *Migration Act* is, without more, an error of sufficient gravity (28) as to constitute jurisdictional error. *Singh* cannot be distinguished. Procedural fairness requires disclosure of the fact of notification under s 438(2). Non-disclosure of the fact of notification deprives the applicant of the opportunity to make submissions as to the validity of the notification or as to the exercise of the discretion in s 438(3) and results in the adoption of a procedure which, in and of itself, causes unfairness (29). An applicant is not required to demonstrate what would have occurred if procedural fairness had been observed (30). A finding of jurisdictional error ipso facto establishes the materiality of the error (31). The fair application of s 427(1)(c) would require the Tribunal to disclose the information that there exists a certificate issued under s 438. The documents which the first respondent sought to put into evidence in the Federal Circuit Court were not relevant to disprove the existence of jurisdictional error or to whether, given the existence of jurisdictional error, relief might have been refused by the Court on the basis of futility. The proper test for refusal of relief on the basis of futility is forward-looking (32). The applicant is not to be deprived of a hearing according to law (33). It is not for a Ch III court to speculate as to how the exercise of possible functions and powers conferred on the tribunal by the *Migration Act* might have played out.

G R Kennett SC (with him *B D Kaplan*), for the first respondent in *CQZ15 v Minister for Immigration and Border Protection*. The Full Court of the Federal Court in *Singh* (34) recognised that the content of the obligation to afford procedural fairness will vary from case to case (35) and expressly left open the possibility that it would be appropriate in some cases for a court to receive evidence of the documents the subject of a certificate issued or notification given under

(27) (2016) 244 FCR 305.
(28) *Hossain* (2018) 264 CLR 123 at 131 [19], 135 [31]; *Ex parte Aala* (2000) 204 CLR 82 at 109 [59].
(29) *WZARH* (2015) 256 CLR 326 at 338 [38], 339-340 [45]-[46], 342-343 [60], 343 [62], 344 [64], [67].
(30) *WZARH* (2015) 256 CLR 326 at 342 [58].
(31) *Ex parte Aala* (2000) 204 CLR 82 at 91 [17].
(32) *Lee v Minister for Immigration and Citizenship* (2007) 159 FCR 181 at 183 [1], 194 [51], 198 [69].
(33) *Ex parte Aala* (2000) 204 CLR 82 at 107-109 [55]-[59].
(34) (2016) 244 FCR 305.
(35) (2016) 244 FCR 305 at 317 [52].

s 438 of the *Migration Act* (36). Assuming that principles of procedural fairness required disclosure of the certificates, the materials sought to be put in evidence by the Minister were at least potentially relevant in that they could have supported findings as to: (a) whether the Tribunal had made any decision adverse to the appellant's interests in reliance on the certificates (37); (b) whether the appellant had been denied the possibility of a successful outcome by anything done in connection with the certificates (38); or (c) alternatively to (b), whether there was a reason to refuse relief on discretionary grounds because the grant of relief would be futile (39). Any apparent overlap with the issues decided by the decision-maker would not mean that the court was trespassing on the decision-maker's function or exceeding its proper role under Ch III (40).

L G De Ferrari SC, in reply.

In each matter, the Administrative Appeals Tribunal filed a submitting appearance.

Cur adv vult

13 February 2019

The following written judgments were delivered: —

1 BELL, GAGELER AND KEANE JJ. Three appeals from judgments of the Federal Court of Australia, each on appeal from a judgment of the Federal Circuit Court of Australia, raise issues concerning the effect on a review by the Administrative Appeals Tribunal under Pt 7 of the *Migration Act 1958* (Cth) ("the Act") of a notification to the Tribunal from the Secretary of the Department of Immigration and Border Protection that s 438 of the Act applies in relation to a document or information. Two of the judgments under appeal, *CQZ15* (41) and *BEG15* (42), were delivered on the same day by a Full Court constituted by Kenny, Tracey and Griffiths JJ. The other judgment

(36) (2016) 244 FCR 305 at 310 [16], 319 [67].
(37) *Ex parte Aala* (2000) 204 CLR 82 at 122 [104].
(38) *WZARH* (2015) 256 CLR 326 at 341 [56], 342-343 [60]; *Hossain* (2018) 264 CLR 123 at 134-135 [30]-[31], 147-148 [72].
(39) *Hossain* (2018) 264 CLR 123 at 148 [74]; *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1197-1198 [27]-[28]; 235 ALR 609 at 618.
(40) *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 566 [230]; *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-255 [12]-[18], 267 [59]; *Thomas v Mowbray* (2007) 233 CLR 307 at 413 [303].
(41) *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1.
(42) *BEG15 v Minister for Immigration and Border Protection* (2017) 253 FCR 36.

under appeal, *SZMTA* (43), was delivered two months earlier by White J exercising alone the appellate jurisdiction of the Federal Court.

2 The Full Court was correct to take the view that the fact of notification triggers an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification to the applicant for review. Breach of that obligation of procedural fairness constitutes jurisdictional error on the part of the Tribunal if, and only if, the breach is material. The breach is material if it operates to deny the applicant an opportunity to give evidence or make arguments to the Tribunal and thereby to deprive the applicant of the possibility of a successful outcome.

3 The Full Court was also correct to take the view that an incorrect notification results in jurisdictional error if, and only if, the incorrect notification is material, again in the sense that it operates to deprive the applicant of the possibility of a successful outcome.

4 Where materiality is put in issue in an application for judicial review of a decision of the Tribunal, it is a question of fact in respect of which the applicant for judicial review bears the onus of proof. The Full Court was correct to hold in *CQZ15* that evidence of the content of notified information can be relevant to the determination of materiality and can on that basis be admissible in such an application. The Full Court was also correct to find on the evidence adduced in *BEG15* that the undisclosed and incorrect notification in that case was immaterial. The undisclosed and incorrect notification in *SZMTA* was similarly immaterial and did not result in jurisdictional error.

5 To explain those conclusions, it is necessary to commence by surveying the general scheme of Pt 7 of the Act and by noting the statutory consequences for the operation of that scheme which result from the Secretary correctly notifying the Tribunal that s 438 applies in relation to a document or information. Next, it is appropriate to explain at the level of principle why the fact of notification triggers an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification, why an incorrect notification results in jurisdictional error if the incorrect notification is found to be material, and how materiality is to be determined. Finally, in light of those explanations of principle, it is appropriate to turn to the circumstances of the individual cases.

The general scheme of Pt 7

6 Part 7 of the Act makes provision for review by the Tribunal, in its Migration and Refugee Division, of certain decisions of a delegate of

(43) *SZMTA v Minister for Immigration and Border Protection* (2017) 255 FCR 215.

the Minister for Immigration and Border Protection to refuse or to cancel a protection visa (44).

7 Making a valid application for review of a delegate's decision enlivens an overarching duty on the part of the Tribunal to review the decision under s 414. Performance of that duty is completed on the Tribunal making a valid decision of its own (45), ordinarily either to affirm the delegate's decision (46) or to set the delegate's decision aside and substitute a new decision (47).

8 Making a valid application for review also enlivens a procedural obligation on the part of the Secretary under s 418(3) to give to the Registrar of the Tribunal all documents in the Secretary's possession or control that are considered by the Secretary to be relevant to the review. The documents need not be confined to those considered by the Secretary to relate specifically to the issues arising in the review and can include, for example, "a reference library of background country information" (48). The documents given to the Registrar are then available to be taken into account by the Tribunal if and to the extent that the Tribunal itself considers them to be relevant to the review.

9 In performing its overarching duty to review the decision of the delegate, the Tribunal "is not bound by technicalities, legal forms or rules of evidence" (49) and is exhorted, as distinct from compelled (50), to "act according to substantial justice and the merits of the case" (51). Performance of the overarching duty is nevertheless conditioned on material observance of obligations imposed by Pt 7, some of which are expressed, some of which are implicit in the statutory scheme, and some of which are implied through the operation of common law principles of interpretation (52).

10 Amongst the procedural obligations to be observed by the Tribunal in the conduct of the review are those expressly imposed on the Tribunal by provisions within Div 4 of Pt 7. Those procedural obligations include an obligation imposed by s 425 to invite the

(44) Section 411(1)(c) and (d) of the Act.
(45) Section 415(1) and (2) of the Act.
(46) Section 415(2)(a) of the Act.
(47) Section 415(2)(d) of the Act.
(48) *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 974 [24]; 190 ALR 601 at 609.
(49) Section 420 of the Act.
(50) *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49]-[50], 642-644 [108]-[109], 664-668 [176]-[179]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 372 [96].
(51) Section 420 of the Act.
(52) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97].

applicant to a hearing "to give evidence and present arguments relating to the issues arising in relation to the decision under review". Those procedural obligations also include obligations imposed by ss 424AA and 424A to give the applicant "clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". The Tribunal is not obliged by those or other provisions to provide to the applicant all of the information which the Tribunal might ultimately take into account in making its decision on the review (53), much less all of the information contained within the documents given by the Secretary to the Registrar under s 418(3).

11 Amongst the obligations to be observed by the Tribunal in the conduct of the review which are implied through the operation of common law principles of interpretation, however, is an obligation to act reasonably in considering and exercising procedural powers expressly conferred on the Tribunal by other provisions within Div 4 of Pt 7 (54). Those procedural powers of the Tribunal include a power conferred by s 427(1)(c) to "give information to the applicant", which is expressed to be subject to ss 438 and 440, as well as powers conferred by s 427(1)(a) to "take evidence on oath or affirmation" and by s 427(1)(d) to "require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination".

12 In addition, the applicant for review has an entitlement under s 423 to give to the Registrar, for transmission to the Tribunal, "a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider" as well as "written arguments relating to the issues arising in relation to the decision under review". That entitlement is sufficiently broad to encompass an entitlement to make written arguments about how the Tribunal should exercise any one or more of its procedural powers for the purpose of determining the issues arising in relation to the decision under review.

13 Amongst the obligations to be observed by the Tribunal in the conduct of the review which are implicit in the scheme of Pt 7 is the obligation to reconsider the merits of the decision under review "in light of the information, evidence and arguments which are relevant to the application and which are provided to it or which it obtains for

(53) *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1195-1196 [17]; 235 ALR 609 at 615. See also *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 223 [9].

(54) *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351-352 [29]-[30], 362 [63], 373-374 [98]-[100].

itself" (55). That obligation is fundamental to the nature of the review for which Pt 7 provides. Whilst it is for the Tribunal to assess the relevance of, and the weight to be attributed to, any item of evidence, the Federal Court has properly recognised that the Tribunal would fail to perform its duty of review if it failed to take account of cogent evidence providing substantial support to the applicant's case (56), including any such evidence contained in a document or report provided to it by the Secretary, in the same way that the Tribunal would fail to perform that duty if it failed to take account of a substantial and clearly articulated argument advanced by the applicant in support of that case (57).

14 The Tribunal's decision on completion of the review is ordinarily required by s 430 to be recorded in a written statement (58) which, amongst other things, "sets out the reasons for the decision" (59), "sets out the findings on any material questions of fact" (60), and "refers to the evidence or any other material on which the findings of fact were based" (61). The section "entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material" (62).

The operation of s 438

15 Together with s 437, s 438 operates against the background of the general obligation of the Secretary under s 418(3) to give to the Registrar of the Tribunal all documents in the Secretary's possession or control that are considered by the Secretary to be relevant to the review and the general obligation of the Secretary under s 427(1)(d) to investigate and report where so requested by the Tribunal.

16 Section 437 creates an exception to those obligations. It prohibits the Secretary from giving a document or information to the Tribunal if the Minister certifies in writing that the disclosure of any matter contained in the document or of the information would be contrary to the public interest. Certification by the Minister can be for either of two reasons. One, set out in para (a) of s 437, is that disclosure "would prejudice the

(55) *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at 604 [44].

(56) *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 130-131 [111]-[112].

(57) *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24]-[25]; 197 ALR 389 at 394.

(58) Section 430(1)(a) of the Act.

(59) Section 430(1)(b) of the Act.

(60) Section 430(1)(c) of the Act.

(61) Section 430(1)(d) of the Act.

(62) *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69].

security, defence or international relations of Australia". The other, set out in para (b) of s 437, is that disclosure "would involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet".

17 Unlike s 437, s 438 is expressed not to prohibit the Secretary from giving information or a document to the Tribunal, but rather to impose a procedural duty on the Secretary and confer procedural powers on the Tribunal in the event of the Secretary giving the Tribunal information or a document to which the section applies. Section 438 provides:

"(1) This section applies to a document or information if:

(a) the Minister has certified, in writing, that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 437(a) or (b)) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed; or

(b) the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence.

(2) If, in compliance with a requirement of or under this Act, the Secretary gives to the Tribunal a document or information to which this section applies, the Secretary:

(a) must notify the Tribunal in writing that this section applies in relation to the document or information; and

(b) may give the Tribunal any written advice that the Secretary thinks relevant about the significance of the document or information.

(3) If the Tribunal is given a document or information and is notified that this section applies in relation to it, the Tribunal:

(a) may, for the purpose of the exercise of its powers, have regard to any matter contained in the document, or to the information; and

(b) may, if the Tribunal thinks it appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the applicant.

(4) If the Tribunal discloses any matter to the applicant, under subsection (3), the Tribunal must give a direction under section 440 in relation to the information."

18 Section 438, it will be observed, operates at the level of a particular document or particular information. Whether or not the section applies in respect of a particular document or particular information depends on whether one or other of the preconditions set out in either s 438(1)(a) or s 438(1)(b) is met in respect of that document or information. Whether or not such a precondition is met in respect of a document or information is in turn a question of jurisdictional fact as to which the Secretary and the Tribunal must each in practice form a view in order to attempt to comply with the section but which can be authoritatively determined only by a court (subject to appeal), including by the Federal Circuit Court on judicial review of a decision of the Tribunal.

19 The precondition in s 438(1)(a) is met if the Minister, acting within the bounds of reasonableness and on a correct understanding of the law, has certified that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for a reason specified in the certificate. The reason so specified must be a reason (other than a reason which would permit certification under s 437) that could form the basis for a claim by the Executive Government of the Commonwealth in a court proceeding that the matter contained in the document, or the information, should not be disclosed. Where no ground of privilege or statutory immunity from disclosure is engaged, the reason specified in the certificate must therefore be a reason capable of grounding a claim for public interest immunity from disclosure at common law or under s 130 of the *Evidence Act 1995* (Cth).

20 The precondition in s 438(1)(b) is met if the document, the matter contained in the document, or the information in question was given to the Minister, or to an officer of the Department, in confidence. The circumstances in which the document, matter or information was given need not be such as would give rise to an equitable obligation on the part of the recipient to keep the document, matter or information confidential (63).

21 If one or other of those preconditions is met in relation to a document or information, including in relation to a document or part of a document which the Secretary has provided to the Registrar in fulfilment of the general obligation under s 418(3), the Secretary has a

(63) Compare para (c) of the definition of "non-disclosable information" in s 5(1) of the Act, considered in *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448 at 454-455 [17]-[21].

power and a duty under s 438(2)(a) to notify the Tribunal in writing that the section applies in relation to the document or information, coupled with a power under s 438(2)(b) to give the Tribunal such written advice as the Secretary might think relevant about the significance of the document or information.

22 Being notified by the Secretary that a document or information is a document or information to which s 438 applies then has consequences for how the document or information can be dealt with by the Tribunal if the notified document or information is in fact a document or information to which the section applies.

23 First, the Tribunal has a discretion under s 438(3)(a) to have regard to the information or to any matter contained in the document for the purpose of exercising its powers, including for the purpose of making a decision on the review. Implicit in the conferral of that discretion is that the Tribunal has no power to have regard to the information or to any matter contained in the document for the purpose of making a decision on the review unless the discretion is affirmatively exercised.

24 Second, the Tribunal has a discretion under s 438(3)(b), after taking account of such advice as the Secretary may have given to the Tribunal under s 438(2)(b), to disclose to the applicant the information or any matter contained in the document. Implicit in the conferral of that discretion and in the hierarchy of provisions within Pt 7 is that the Tribunal has no power under s 427(1)(c) and no obligation under s 424AA, s 424A or s 425 to disclose to the applicant the information or any matter contained in the document unless the discretion is affirmatively exercised. No doubt, the discretion under s 438(3)(b) must be exercised within the bounds of reasonableness and the obligations imposed by ss 424AA, 424A and 425, where engaged, must be performed to the maximum extent permitted by the reasonable exercise of that discretion.

25 If the Tribunal exercises the discretion under s 438(3)(b) to disclose to the applicant the information or any matter, s 438(4) operates to require the Tribunal to give a direction under s 440. Section 440, to which reference is also made in s 427(1)(c), confers power on the Tribunal to give a direction that evidence or information or the contents of a document given to the Tribunal not be published or otherwise disclosed, either generally or except in a particular manner and to particular persons, if the Tribunal is satisfied that the non-publication or non-disclosure is in the public interest (64). Contravention of such a direction is an offence (65).

(64) Section 440(1) of the Act.
(65) Section 440(3) of the Act.

26 Section 440(2)(a) makes clear that giving a direction under s 440 does not "excuse the Tribunal from its obligations" under s 430. Neither the application of s 438 to a document or information nor the making of an order under s 440 in relation to that document or information relieves the Tribunal of its general obligation under s 430 to provide a statement of the reasons for its decision setting out its findings on material questions of fact and referring to the evidence or any other material on which the findings of fact were based. However, there appears to be no reason why a direction under s 440 cannot direct non-disclosure or non-publication of the whole or some part of a statement of reasons or of evidence or information or the contents of any other document, to the extent that such evidence, information or the contents of a document are referred to in a statement of reasons.

Procedural fairness

27 The Minister concedes that the consequences for a review under Pt 7 of the Secretary notifying the Tribunal that s 438 applies in relation to a document or information are sufficient for the common law to imply an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification to the applicant for review unless such an obligation is specifically excluded by the statutory scheme. The concession is rightly made.

28 For completeness it is to be recorded that, contrary to an argument of the appellant in *CQZ15*, a notification to the Tribunal from the Secretary that s 438 of the Act applies in relation to a document or information is not itself "information" which the Tribunal is empowered and, acting reasonably, obliged to give to the applicant under s 427(1)(c). The term "information" in the context of Div 4 cannot sensibly be read as extending beyond knowledge of facts or circumstances relating to material or documentation of an evidentiary nature (66).

29 The reason why the Minister's concession is correct is that procedural fairness ordinarily requires that an applicant for an exercise of administrative power have an opportunity to tailor the presentation of evidence and the making of submissions to the procedure to be adopted by the decision-maker. Accordingly, procedural fairness ordinarily requires that an applicant be apprised of an event which

(66) See *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [18]; 235 ALR 609 at 616, citing *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 236 FCR 549 at 555 [24].

results in an alteration to the procedural context in which an opportunity to present evidence and make submissions is routinely afforded (67).

30 A notification by the Secretary to the Tribunal that a document or information given by the Secretary to the Tribunal is a document or information to which s 438 applies is an event which alters the procedural context within which the Tribunal's duty of review is to be conducted. If valid, the notification erects a procedural impediment to the otherwise unfettered ability of the Tribunal to take into account the document or information if the Tribunal considers it to be relevant to an issue to be determined in the review, constrains the power of the Tribunal under s 427(1)(c), and truncates the specific obligations of the Tribunal under ss 424AA, 424A and 425. The very fact of notification also changes the context in which the entitlement of the applicant under s 423 – to give the Tribunal a written statement in relation to any matter of fact that the applicant wishes the Tribunal to consider and written arguments relating to the issues arising in relation to the decision under review – falls to be exercised.

31 The entitlement under s 423 extends to allowing the applicant to present a legal or factual argument in writing either to contest the assertion of the Secretary that s 438 applies to a document or information, or to argue for a favourable exercise of one or both of the discretions conferred by s 438(3). This entitlement, at least in those specific applications, is capable of meaningful exercise only if the applicant is aware of the fact of a notification having been given to the Tribunal.

32 The submission of the Minister, made in a notice of contention in *BEG15* and in a summons seeking special leave to cross-appeal in *CQZ15*, is that an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification is excluded by the requirement of s 422B(2) that, in so far as s 438 relates to Div 4 of Pt 7, s 438 must be taken to be an exhaustive statement of the requirements of procedural fairness in relation to the matter with which that section deals. To evaluate that submission, it is necessary to consider s 422B as a whole.

33 Appearing at the commencement of Div 4 of Pt 7, s 422B provides:

> "(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

(67) *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 339 [43]-[44], 343-344 [62]-[67].

(2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

(3) In applying this Division, the Tribunal must act in a way that is fair and just."

34 Importantly, s 422B is not framed in a way that excludes procedural fairness, which it refers to as "the natural justice hearing rule" (68), from the conduct of the review. Rather, the section is framed in a way that is consistent with the implication of an obligation to afford procedural fairness through the operation of a common law principle of interpretation as a condition of the performance by the Tribunal of its duty to conduct the review. The section is also framed in a way which recognises that the precise content of that obligation to afford procedural fairness depends on "the particular statutory framework" (69).

35 By providing that specified provisions and groups of provisions are taken to be an exhaustive statement of the requirements of procedural fairness in relation to the "matters" with which they deal, s 422B(1) and s 422B(2) operate to ensure that compliance by the Tribunal with the procedures prescribed by those specified provisions and groups of provisions constitutes compliance with the obligation of the Tribunal to afford procedural fairness in so far as each provision gives specific content to that obligation. The "matters" to which the sub-sections refer are the discrete subject matters of the provisions. The discrete subject matter of each provision is indicated by, but not limited to, the terms of each provision (70).

36 Section 422B(3) reinforces this operation of s 422B(1) and s 422B(2), and complements the general exhortation to the Tribunal to act according to substantial justice and the merits of the case, by requiring the Tribunal's performance of the procedural obligations imposed on it by Div 4 and the Tribunal's exercise of the procedural powers conferred on it by Div 4 to be informed by the same considerations of fairness and justice as those that inform the common law's implication into the statutory scheme of the Tribunal's overall obligation to afford procedural fairness. The design of the sub-section in that way guards against "rigidity" in the application of procedures

(68) cf *Kioa v West* (1985) 159 CLR 550 at 585.

(69) *Kioa v West* (1985) 159 CLR 550 at 584, quoting *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504.

(70) *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 267 [41]-[42], 279-280 [78].

themselves designed to facilitate partial compliance with the overall obligation of the Tribunal to afford procedural fairness (71).

37 Section 422B(2) requires s 416 (the subject matter of which is the ability of the Tribunal to have regard to information considered and findings made in earlier proceedings), each provision of Div 7A (the subject matter of which is the manner of giving and receiving documents) and ss 437 and 438 to be treated as an exhaustive statement of the Tribunal's obligation to afford procedural fairness in so far as the subject matter of those provisions relates to the conduct of the Tribunal's review under Div 4. But in so far as the subject matter of s 438 relates to the conduct of the Tribunal's review under Div 4, that subject matter is confined to how the Tribunal is to treat documents and information to which s 438 applies. The section's subject matter does not extend to the prescription of any consequences, for procedural fairness, of the Secretary providing a notification to the Tribunal under the section. In other words, s 438 is not self-referential. The Minister's submission is for that reason to be rejected.

38 Because procedural fairness requires disclosure of the fact of notification, non-disclosure of the fact of notification constitutes, without more, a breach of the Tribunal's implied obligation of procedural fairness. For such a breach to constitute jurisdictional error on the part of the Tribunal, however, the breach must give rise to a "practical injustice" (72): the breach must result in a denial of an opportunity to make submissions and that denial must be material to the Tribunal's decision (73).

Incorrect notification

39 If neither of the preconditions in s 438(1) is met in relation to a document or information, the section has no application to that document or information. The Secretary has no duty and no authority under s 438(2)(a) to notify the Tribunal that s 438 applies in relation to it. And the Tribunal has no need and no authority to exercise either of the powers conferred by s 438(3) in relation to it.

40 Thus, an incorrect notification by the Secretary that s 438 applies in relation to a document or information is invalid: the notification is a purported exercise of statutory authority that is devoid of legal effect in relation to that document or information.

(71) cf *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 337 [137]. See Australia, Senate, *Migration Amendment (Review Provisions) Bill 2006*, Explanatory Memorandum, pp 1-3.

(72) *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37].

(73) *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 341-342 [56]-[57].

41 There is no dispute between the parties that an incorrect, and therefore invalid, notification by the Secretary that s 438 applies in relation to a document or information can give rise to jurisdictional error in the conduct of a review. There is also no dispute between the parties that it is the applicant for judicial review of the decision of the Tribunal who bears the onus of proving that a jurisdictional error has occurred (74).

42 There is a dispute between the parties as to what the applicant for judicial review must prove to establish jurisdictional error. The applicant parties (the appellants in *CQZ15* and *BEG15* and the first respondent in *SZMTA*) submit that an invalid notification is sufficient of itself to render the conduct of the review unauthorised. They rely alternatively on the reasoning in *MZAFZ v Minister for Immigration and Border Protection* (75) to submit that the Tribunal can in each case be assumed to have acted on the invalid notification in a manner that is contrary to law.

43 The Minister submits that an invalid notification gives rise to jurisdictional error only if the notification causes the Tribunal to fail to comply with some distinct obligation imposed on the Tribunal. Examples might be where the notification causes the Tribunal to fail to take account of some item of evidence of such significance that the Tribunal is obliged to take it into account, or to fail to give the applicant adequate particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision under review, as required by s 424AA or s 424A.

44 None of these submissions can be accepted. The Secretary's provision of an incorrect, and therefore invalid, notification that s 438 applies in relation to a document or information amounts, without more, to an unauthorised act in breach of a limitation within the statutory procedures which condition the performance of the overarching duty of the Tribunal to conduct a review (76). Applying the principle of construction recently explained in *Hossain v Minister for Immigration and Border Protection* (77), however, the Act is not to be interpreted to deny legal force to a decision made on a review in the conduct of which there has been a breach of that limitation unless that breach is material.

(74) *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 616 [67], 623 [91]-[92].

(75) (2016) 243 FCR 1 at 11 [40]-[44], 15 [65].

(76) cf *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 32-33 [23]-[24], 35 [32]-[33].

(77) (2018) 264 CLR 123 at 134-135 [29]-[31].

Materiality

45 Materiality, whether of a breach of procedural fairness in the case of an undisclosed notification or of a breach of an inviolable limitation governing the conduct of the review in the case of an incorrect and invalid notification, is thus in each case essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision.

46 Where materiality is in issue in an application for judicial review, and except in a case where the decision made was the only decision legally available to be made, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application.

47 The drawing of inferences can be assisted by reference to what can be expected to occur in the course of the regular administration of the Act. Although it is open to the Tribunal to form and act on its own view as to whether a precondition to the application of s 438 is met, the Tribunal can be expected in the ordinary course to treat a notification by the Secretary that the section applies as a sufficient basis for accepting that the section does in fact apply to a document or information to which the notification refers. Treating the section as applicable to a document or information, the Tribunal can then be expected in the ordinary course to leave that document or information out of account in reaching its decision in the absence of the Tribunal giving active consideration to an exercise of discretion under s 438(3). Absent some contrary indication in the statement of the Tribunal's reasons for decision or elsewhere in the evidence, a court on judicial review of a decision of the Tribunal can therefore be justified in inferring that the Tribunal paid no regard to the notified document or information in reaching its decision.

48 In the case of an invalid notification, where the court on judicial review of a decision of the Tribunal can infer that the Tribunal left the notified document or notified information out of account in reaching its decision, the question that still remains is whether there is a realistic possibility that the Tribunal's decision could have been different if it had taken the document or information into account. The court must be careful not to intrude into the fact-finding function of the Tribunal. Yet the court must be alive to the potential for a document or information, objectively evaluated, to have been of such marginal significance to the issues which arose in the review that the Tribunal's failure to take it into account could not realistically have affected the result.

49 Where non-disclosure of a notification has resulted in a denial of procedural fairness, the similar question that remains for the court on

judicial review of a decision of the Tribunal is whether there is a realistic possibility that the Tribunal's decision could have been different if the notification had been disclosed so as to allow the applicant a full opportunity to make submissions. Whilst "[i]t is no easy task for a court … to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome" (78), the task is not impossible (79) and can be done in these appeals.

50 In order to inform curial determination both of how the Tribunal in fact acted in relation to the notified document or notified information and of whether its decision could realistically have been different if the relevant breach had not occurred, evidence of the content of the document or information is relevant and admissible.

51 Against the background of those principles, the particular circumstances of the three appeals can now be addressed.

CQZ15

52 The appellant, a citizen of Iran, applied for a protection visa which was refused by an officer of the Department acting as a delegate of the Minister. On the same day, another officer of the Department acting as a delegate of the Minister purported to issue a certificate under s 438(1)(a) stating that disclosure of specified information contained in specified parts of the departmental file would be contrary to the public interest.

53 The appellant applied to the Tribunal for review of the first delegate's decision to refuse the visa, following which the Secretary under s 418(3) gave to the Registrar the documents in the Secretary's possession or control considered by the Secretary to be relevant to the review. Subsequently, yet another officer of the Department, acting as a delegate of the Secretary, notified the Tribunal that s 438(1)(b) applied in relation to certain information contained in the documents which had been provided. Not apparent from the appellate record, but of no moment, is the extent if at all to which that information had been the subject of the prior purported certification under s 438(1)(a). Neither the certificate nor the notification was disclosed to the appellant.

54 The Tribunal affirmed the decision of the delegate, following which the appellant applied to the Federal Circuit Court for judicial review of the decision of the Tribunal on grounds which were amended shortly after the decision in *MZAFZ* to include invalidity of the certificate and want of procedural fairness on the part of the Tribunal in failing to

(78) *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

(79) cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122 [104], 128 [122].

disclose the fact of the certificate and the fact of the notification. The Minister conceded that the certificate was invalid but sought to argue that the notification was valid, and that the information which was the subject of the certificate and the information which was the subject of the notification had no bearing and could have had no bearing on the Tribunal's decision.

55 To support that argument, the Minister sought to tender an affidavit exhibiting the documents which had been the subject of the certificate and the notification. The Federal Circuit Court rejected the tender (80). The Federal Circuit Court went on to hold that the invalidity and non-disclosure had resulted in jurisdictional error and to make orders in the nature of certiorari and mandamus directed to the Tribunal (81).

56 The Full Court of the Federal Court allowed an appeal by the Minister, set aside the orders of the Federal Circuit Court and remitted the matter for redetermination by the Federal Circuit Court, holding that the evidence sought to be adduced by the Minister was at least potentially admissible as relevant to a determination by the Federal Circuit Court of the materiality of the denial of procedural fairness constituted by the failure to disclose the fact of notification (82). For reasons already elaborated, the Full Court was correct to so hold.

57 Contrary to the argument of the appellant, the result is not in tension with the earlier decision of a differently constituted Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh* (83). There, for reasons broadly consistent with those stated in these reasons for judgment in relation to notification under s 438, notification under s 375A was held to enliven an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification to the applicant for review under Pt 5 of the Act. Conspicuously, no issue of materiality was raised in that case. The Full Court recorded the absence of any submission that the information subject to the certificate was irrelevant to the issues in the review and was careful to add that "[s]uch a submission would have required, for its assessment, that the Court examine the material [for] itself" (84).

(80) *CQZ15 v Minister for Immigration and Border Protection* (2016) 315 FLR 127 at 132-133 [26]-[29].

(81) *CQZ15 v Minister for Immigration and Border Protection* [2017] FCCA 130 at [11]-[13].

(82) *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1 at 18-19 [87]-[90].

(83) (2016) 244 FCR 305.

(84) (2016) 244 FCR 305 at 310 [16].

BEG15

58 The appellant, a Sri Lankan national, applied for a protection visa which was refused by a delegate of the Minister. The appellant applied to the Refugee Review Tribunal (before its amalgamation with the Administrative Appeals Tribunal) for review of the decision of the delegate. After a hearing, the Tribunal affirmed the decision of the delegate. An application by the appellant to the Federal Circuit Court for judicial review of that initial decision of the Tribunal resulted in it being quashed by an order in the nature of certiorari made by consent.

59 The Tribunal, differently constituted, after another hearing, again affirmed the decision of the delegate. On an application by the appellant to the Federal Circuit Court for judicial review of that further decision of the Tribunal, the Minister drew to the attention of that Court the existence of a certificate which had been purportedly issued by a delegate of the Minister under s 438(1)(a) in the period between the quashing of the initial decision and the conduct of the second hearing. The certificate had been notified to the Tribunal in purported compliance with s 438(2)(a) but had not been disclosed to the appellant. The Minister conceded that the certificate was invalid, from which it followed that the notification was also invalid.

60 The certificate covered three documents on the departmental file, all of which were in evidence before the Federal Circuit Court. All three documents related to the disposition of the application for judicial review of the initial decision of the Tribunal. The first document recorded that the consent order had been made after a review by the Department of the decision record, confirmed by advice from counsel, revealed "a probable error of law". The second document briefly summarised the initial decision of the Tribunal and went on to explain that the Tribunal in the initial decision had "failed to apply the correct test for complementary protection". The third document noted that the subject matter of the review would in consequence be referred to the Tribunal for reconsideration.

61 The Federal Circuit Court dismissed the application for judicial review of the further decision of the Tribunal, finding that the information in the documents covered by the certificate was largely known to the appellant, was not relevant to the decision to be made by the Tribunal, had not in fact been taken into account by the Tribunal and could have made no difference to the outcome of the review (85).

(85) *BEG15 v Minister for Immigration and Border Protection* (2016) 315 FLR 196 at 210-211 [63].

The Full Court of the Federal Court found the decision of the Federal Circuit Court to contain no appealable error (86). That conclusion was correct.

62 Apart from making arguments at the level of principle which have already been addressed, the appellant draws attention to a sentence within the summary of the initial decision of the Tribunal contained in the second of the documents which stated that the Tribunal in the initial decision did not accept the appellant's claims "[i]n light of inconsistent evidence" (87). The appellant seeks to characterise the statement as in the nature of a confidential submission to the Tribunal by an officer of the Department, adverse to the appellant's credit and capable of influencing the Tribunal in its further decision, to which in fairness he ought to have been given an opportunity to respond. The appellant seeks to draw an analogy to the facts in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, where jurisdictional error was found to have resulted from non-disclosure of an unsolicited letter containing an allegation that the applicant had committed murder in his country of origin, in circumstances where the Tribunal's statement of reasons for affirming the delegate's decision to refuse to grant the applicant a protection visa indicated that the Tribunal had read the letter and chose to give "no weight" to the allegation (88).

63 That characterisation cannot be accepted and the analogy is inapt. The statement was no more than a short accurate description of the Tribunal's reasons for the initial decision which were already known to the appellant and which, under s 416 when read with s 422B(2), were available to be taken into account by the Tribunal in reaching the further decision without notice to the appellant and without thereby breaching an obligation of procedural fairness (89). The task of the Tribunal as differently constituted was obviously to make an independent assessment of the merits of the appellant's claims, including by reference to its own independent assessment of his credit, and there is no basis for considering that the Tribunal was, or was susceptible of being, influenced in that assessment by anything that had gone before. The Tribunal's reasons for the subsequent decision refer to the existence of the initial decision as an historical fact and to the fact of it having been quashed, but contain nothing to suggest that the

(86) *BEG15 v Minister for Immigration and Border Protection* (2017) 253 FCR 36 at 44 [33]-[36].

(87) See *BEG15 v Minister for Immigration and Border Protection* (2016) 315 FLR 196 at 210 [61].

(88) (2005) 225 CLR 88 at 92 [5], 96-98 [18]-[21], 99 [27].

(89) *MZZZW v Minister for Immigration and Border Protection* (2015) 234 FCR 154 at 176 [84], 177 [88].

Tribunal in reaching that further decision had relevant regard to the reasons for the initial decision.

SZMTA

64 The first respondent, a citizen of Bangladesh, made an application for a protection visa which was refused by a delegate of the Minister in a decision which was affirmed by the Refugee Review Tribunal. After the Act was amended to provide for a protection visa to be granted on complementary protection grounds (90), the first respondent exercised a judicially recognised entitlement under the Act (91) to make a second application for a protection visa. The second application was refused by another delegate of the Minister in a decision which was affirmed by the Administrative Appeals Tribunal.

65 An application by the first respondent for judicial review of the decision of the Administrative Appeals Tribunal was dismissed by the Federal Circuit Court (92). The first respondent then appealed to the Federal Court which was constituted for the purpose of the appeal by White J alone.

66 Not raised before the Federal Circuit Court, but permitted to be raised by an amended notice of appeal before the Federal Court, was the effect on the Tribunal's decision of a notification purportedly made under s 438 of the Act (93). It was common ground that the Tribunal had not disclosed the fact of the notification to the first respondent. The evidence before the Federal Court nevertheless established that the first respondent had previously been provided with copies of all of the documents the subject of the notification in response to a request under the *Freedom of Information Act 1982* (Cth) (94).

67 White J found that "[t]he notification 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'" so as to meet the precondition in s 438(1)(b) (95). His Honour did not specify the documents and information to which the finding related but indicated that they included "documents which may have assisted the [first respondent], for example, [a] letter of support … from the [first respondent's] colleague [and] documents containing summaries of the

(90) *Migration Amendment (Complementary Protection) Act 2011* (Cth).

(91) *SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235 at 245 [47], 247 [55].

(92) *SZMTA v Minister for Immigration and Border Protection* [2016] FCCA 1329.

(93) *SZMTA v Minister for Immigration and Border Protection* (2017) 255 FCR 215 at 223 [37]-[38].

(94) (2017) 255 FCR 215 at 224 [42].

(95) (2017) 255 FCR 215 at 226 [54].

[first respondent's] claims" (96). Nor did his Honour reach a firm conclusion about the legal consequences of the finding, stating that it was not necessary to decide whether the notification was invalid and that it was sufficient to act on the basis that the notification was at least "misleading" (97).

68 Noting that jurisdictional error was "not to be determined by reference only to whether the [first respondent] had the opportunity to make submissions about the matters in the identified documents which were adverse to him", his Honour speculated as to how the Tribunal "may" have treated information in the identified documents in reaching the decision under review and ultimately found jurisdictional error by virtue of "the prospect that, by reason of the presence of the delegate's notification, the Tribunal did not have regard to information in the identified documents which may have assisted the [first respondent]" (98).

69 His Honour's approach was erroneous in four respects. First, his Honour failed to find on the evidence before the Court whether, and if so what, documents and information covered by the certificate had in fact not been given to the Minister or to an officer of the Department in confidence. Second, his Honour failed to hold that the notification was invalid in its application to documents and information which had not in fact been given in confidence. Third, his Honour failed to make a finding as to whether the Tribunal had in fact failed to take such documents and information into account in reaching its decision. Finally, in the event of finding that the Tribunal had failed to take such documents and information into account, his Honour erred in not going on to determine whether the Tribunal's decision could have been different if the Tribunal had taken the documents and information into account.

70 Treating the finding that the notification applied to at least some documents and information which could not reasonably be regarded as documents and information which met the precondition in s 438(1)(b) as encompassing a finding that those documents and that information did not meet the precondition, the legal consequence was that those documents and that information were not documents and information to which s 438 applied and that the notification was invalid in its application to them. In the absence of any reference to the documents or information in the Tribunal's statement of reasons, the appropriate inference to be drawn is that the Tribunal accepted on the basis of the notification that s 438 applied to the documents and information and

(96) (2017) 255 FCR 215 at 227 [59].
(97) (2017) 255 FCR 215 at 226 [54], 227 [59].
(98) (2017) 255 FCR 215 at 227 [60].

accordingly took no account of the documents or information in reaching its decision. Having regard to the contents of the documents before the Tribunal, however, the appropriate further inference to be drawn was that taking them into account could not realistically have made any difference to the Tribunal's decision.

71 To illustrate that conclusion, it is sufficient to refer to the letter of support to which his Honour made reference and which was the focus of submissions in this appeal. The significance of the Tribunal's failure to take the letter into account is to be evaluated in the context of the Tribunal's rejection on credibility grounds of the factual basis of the first respondent's central claim to fear harm, were he to return to Bangladesh, by reason of having been an active member of the Buddhist community. The Tribunal's statement of reasons explained in detail, with reference to his evidence given at the hearing before it, why it could not accept critical elements of his story of having experienced violence and discrimination. The Tribunal went on to record in its statement of reasons that it had formed its adverse view of the first respondent's credibility taking into account a considerable number of documents and letters of support for him including from senior identified members of the Buddhist community in Australia. The Tribunal explained that it had given those documents little weight in assessing the first respondent's credibility because of their generality and because it was clear that none of the writers had witnessed any of the specific incidents which the first respondent claimed to have occurred. The particular letter of support which it can be inferred was not taken into account by the Tribunal by reason of the notification was of the same nature: it was a single-paragraph letter to a Senator from a member of the Buddhist community in Australia referring generally to the adverse treatment of religious minorities in Bangladesh and urging "on the grounds of humanity and compassion" that the first respondent and his family be given "asylum in Australia". It is simply not realistic to conclude that yet another communication of that nature could have made any difference to the Tribunal's evaluation of the first respondent's credibility.

72 To the extent that the first respondent seeks to support the conclusion of jurisdictional error on the basis that non-disclosure of the fact of notification was in breach of the Tribunal's obligation of procedural fairness, the same answer applies. Accepting that the breach denied the first respondent an opportunity to make submissions on the validity of the notification and to present his evidence and make submissions in the knowledge that the documents and information which were the subject of the notification might not be taken into account by the Tribunal, the critical fact remains that the documents and information

were of such marginal significance that the denial could not realistically have made any difference to the result.

Orders

73 In *CQZ15* the appeal is to be dismissed with costs and the application for special leave to cross-appeal is also to be dismissed with costs. In *BEG15* the appeal is to be dismissed with costs. In *SZMTA* the appeal is to be allowed with costs, the orders of the Federal Court are to be set aside and, in their place, the appeal to that Court from the Federal Circuit Court is to be dismissed with costs.

74 NETTLE AND GORDON JJ. These appeals concern the review by a Tribunal, under Pt 7 of the *Migration Act 1958* (Cth) (99), of a refusal to grant a protection visa where a notification was issued, or purportedly issued, under s 438(2) of the *Migration Act* by the Secretary of the Department of Immigration and Border Protection to the Tribunal, and neither the existence of the notification, its contents, nor the documents covered by the notification, were disclosed to the applicant for review. In those circumstances, what is "required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made" (100)? The legal framework is to be found in Pt 7 of the *Migration Act*.

75 Section 438 (101) confers discretions on the Tribunal, in the context of a review under Pt 7 of the *Migration Act*, in relation to a document or information given to the Tribunal to which the section applies, to "have regard to any matter contained in the document, or to the information" (102) and to "disclose any matter contained in the document, or the information, to the applicant" (103). Relevantly, s 438 applies to a document or information only if one of two pre-conditions is met: first, if the Minister "has certified, in writing, that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate … that could form the basis for a claim by

(99) Where a distinction must be made in these reasons between versions of the *Migration Act*, dates will be provided. For *BEG15*, the applicable version of the Act is that compiled 18 April 2015. For *CQZ15* and *SZMTA*, the applicable version of the Act is that compiled 1 July 2015.

(100) *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 335 [30].

(101) Inserted into the *Migration Act* by the *Migration Reform Act 1992* (Cth) as part of a suite of reforms to the migration legislation: Australia, House of Representatives, *Migration Reform Bill 1992*, Explanatory Memorandum, p 2 [1]-[5].

(102) *Migration Act*, s 438(3)(a).

(103) *Migration Act*, s 438(3)(b).

the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed" (104) or, second, if the document, the matter contained in the document, or the information "was given to the Minister, or to an officer of the Department, in confidence" (105).

76 Here, the Secretary's provision of an incorrect, and therefore invalid, notification that s 438 applied to a document or information, without more, amounted to an unauthorised act in breach of a limitation within the statutory procedures which conditioned the performance of the overarching duty of the Tribunal to conduct a review.

77 As was said in *Minister for Immigration and Border Protection v WZARH* (106):

> "*Where … the procedure adopted by an administrator can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome*. The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given." (Citation omitted.) (Emphasis added.)

78 As will be explained later in these reasons, that was the position here. The procedure adopted by the decision-maker, the Tribunal, failed to afford each applicant a fair opportunity to be heard. As the Full Court of the Federal Court of Australia correctly concluded in *BEG15 v Minister for Immigration and Border Protection* (107) and *Minister for Immigration and Border Protection v CQZ15* (108), notification under s 438(2) triggers an obligation of procedural fairness on the part of the Tribunal to disclose the fact of the notification to the applicant. A breach of that obligation of procedural fairness constitutes jurisdictional error.

79 There is then the question of whether the court should exercise its discretion to refuse relief because the breach of obligation did not deprive the person of the possibility of a successful outcome. In *BEG15* and *SZMTA*, relief would have been futile because the contents of the undisclosed and incorrect notification did not deprive the person of the possibility of a successful outcome. In *CQZ15*, the position is different. The Full Court were correct to hold (109) that evidence of the

(104) *Migration Act*, s 438(1)(a).
(105) *Migration Act*, s 438(1)(b).
(106) (2015) 256 CLR 326 at 342-343 [60].
(107) (2017) 253 FCR 36.
(108) (2017) 253 FCR 1.
(109) *CQZ15* (2017) 253 FCR 1 at 18-19 [87].

documents subject to a s 438 certificate may be relevant for the purpose of establishing that, if there were a denial of procedural fairness, the Court should nonetheless have refused relief in the exercise of its discretion.

80 First, however, it is necessary to say something more about the nature of jurisdictional error and, then, why the Tribunal's failure to inform an applicant that it has received notification that s 438 applies in relation to a document or information, without more, constitutes a jurisdictional error.

Jurisdictional error

81 The categories of jurisdictional error are not closed (110). Jurisdictional error by a statutory decision-maker includes identifying a wrong issue; asking the wrong question; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; and failing to observe some applicable requirement of procedural fairness (111). As McHugh, Gummow and Hayne JJ said in *Minister for Immigration and Multicultural Affairs v Yusuf* (112):

> "What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material *in a way that affects the exercise of power* is to make an error of law. Further, doing so results in the decision-maker *exceeding the authority or powers given by the relevant statute.* In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it." (Emphasis added.)

82 In the context of the exercise of statutory powers, the question is whether the decision-maker has exercised, or not exceeded, the jurisdiction conferred by the *statute*. This is because the central premise of jurisdictional error is as articulated by Brennan J in *Attorney-General (NSW) v Quin* (113):

> "The duty and jurisdiction of the court to review administrative action *do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power*. If, in so doing, the court avoids administrative

(110) *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [71], 574 [73].

(111) *Craig v South Australia* (1995) 184 CLR 163 at 179; *Kirk* (2010) 239 CLR 531 at 572 [67]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 147-148 [70]-[72].

(112) (2001) 206 CLR 323 at 351 [82].

(113) (1990) 170 CLR 1 at 35-36.

injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that *the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise*." (Emphasis added.)

83 The question, and the answer, as to whether jurisdictional error is made out is thus to be found in the statute (114). It is by construing the statute that conferred the power, so as to understand the limits of the power, that it is possible to determine whether a decision-maker has made an error, and whether any error is jurisdictional (115). Of course, that process of construction does not occur in a vacuum but is shaped by reference to principles and traditions of the common law. But for present purposes it is unnecessary to enter the debate as to whether the rules underpinning grounds of review are better understood as statutory implications or as arising from the common law (116). A finding of jurisdictional error is a conclusion that the decision-maker has failed to comply with an essential pre-condition to, or limit on, the valid exercise of the particular statutory power. It reflects a distinction between acts unauthorised by law, and acts that are authorised (117).

84 What then are the consequences of a finding that a decision is affected by jurisdictional error? The decision is properly to be regarded as no decision at all (118). However, *after* jurisdictional error has been

(114) See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 372-375 [34]-[41], 389-391 [92]-[93]; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-154 [43]-[44]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 140 [160]. See also Gageler, "The Legitimate Scope of Judicial Review" (2001) 21 *Australian Bar Review* 279 at 287; Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues" (2002) 30 *Federal Law Review* 217 at 227.

(115) See *Project Blue Sky* (1998) 194 CLR 355 at 372-373 [34], quoting *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410; *Hossain* (2018) 264 CLR 123 at 145-146 [66]-[67]. See also *Kioa v West* (1985) 159 CLR 550 at 609, 614.

(116) See Gageler, "The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?" (2000) 28 *Federal Law Review* 303 at 305-306, 312-313. See also Gageler, "The Legitimate Scope of Judicial Review" (2001) 21 *Australian Bar Review* 279 at 287.

(117) See Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues" (2002) 30 *Federal Law Review* 217 at 234.

(118) *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR

established, there are two possible further enquiries. The first is whether, as a matter of statutory construction, a purported decision affected by jurisdictional error *may* be treated as having had some legal effect until set aside (119). That, again, is an exercise in statutory construction. The question is whether the decision, although infected with error, has some legal consequence. The legal and factual consequences of the decision, if any, will depend upon the statute. That issue does not arise in these appeals.

85 The second is whether to exercise the residual discretion to refuse relief, *after* jurisdictional error has been established, if no useful result could ensue (120). The residual discretion to refuse relief entails a different and separate exercise from the identification of jurisdictional error. It looks to the utility of another hearing (121), although it is not confined to being "forward-looking".

86 These two enquiries should not be confused with the anterior issue of whether breaches of a provision of a statute, expressly or impliedly, are to be treated as depriving the decision-maker of power (122) – or, put in different terms, asking whether it "was a purpose of the legislation that an act done in breach of the provision should be invalid" (123). The division in approach between finding whether there was jurisdictional error, and, separately, considering the consequences that flow from a finding of jurisdictional error, is important.

87 As the plurality explained in *Plaintiff S157/2002 v The Commonwealth* (124):

> "The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is *a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them*. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. *Such jurisdiction exists to maintain the*

(cont)
597 at 614-615 [51], 616 [53]. See also *Craig* (1995) 184 CLR 163 at 179, quoted in *Kirk* (2010) 239 CLR 531 at 572 [67].

(119) See *Bhardwaj* (2002) 209 CLR 597 at 614 [50].

(120) See *Hossain* (2018) 264 CLR 123 at 148 [74], quoting *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400. See also *Hossain* (2018) 264 CLR 123 at 138 [43].

(121) *Hossain* (2018) 264 CLR 123 at 138 [43], 148 [74].

(122) *Hossain* (2018) 264 CLR 123 at 146 [67].

(123) *Project Blue Sky* (1998) 194 CLR 355 at 390 [93].

(124) (2003) 211 CLR 476 at 513-514 [104].

federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function." (Emphasis added.)

88 That passage recognises that people affected directly or indirectly by administrative decisions must know where they stand (125). A statutory power is to be exercised under, and according to, the terms of the statute. If the power is exercised in excess of jurisdiction, the invalidity cannot be unwound or cured by a court exercising its discretion to refuse to grant relief. The question of whether jurisdictional error is made out, and the separate question of what consequences flow from a finding of jurisdictional error, are and must remain distinct; because ultimately they are governed by different enquiries and imperatives.

89 In particular, in relation to jurisdictional error, decision-makers and those affected by the decisions of decision-makers are entitled to expect that decisions will be valid and enforceable under and according to the statute and not under a statute subject to some margin of error or principle of construction described as "materiality". As just explained, jurisdictional error involves a distinction between acts authorised by law and acts that are not authorised by law. And this distinction requires working out what acts the relevant law authorises. That is a question of statutory construction.

90 Certainly, courts make assumptions in relation to statutory power. Courts assume, for example, that Parliament intends that statutory powers be exercised subject to certain implied requirements, including that of procedural fairness (126). Further, courts accept that Parliament intends that some acts done in breach of certain statutory provisions should not result in invalidity (127). But acknowledging and accepting those assumptions does not mean that the exercise of statutory powers in accordance with the laws which underpin them is subject to some general implied requirement of "materiality". Parliament cannot be taken to intend that a decision-maker need only comply with laws to the extent that failure to comply would not bring about a different result. Any such conception would be contrary to the notion, central to the conceptual foundations of judicial review, that everyone (including

(125) *Bhardwaj* (2002) 209 CLR 597 at 603 [8].
(126) See *Kioa* (1985) 159 CLR 550 at 609, 612.
(127) See *Project Blue Sky* (1998) 194 CLR 355 at 388-389 [92].

a decision-maker) is bound by the law (128). The only place for that kind of analysis (about the materiality of the error to the applicant) is in the exercise of the court's discretion whether to grant relief *after* jurisdictional error is made out.

91 Further, whilst the concept of "materiality" has been a focus in certain decisions in England (129), the approach there must be understood against a backdrop where the distinction between jurisdictional and non-jurisdictional error has been reduced to a "vanishing point" (130). It would be wholly inappropriate to import such a concept into this country, where the distinction between jurisdictional error and non-jurisdictional error is the essence of judicial review.

92 Making materiality of error a criterion of jurisdictional error should be rejected for two further reasons.

93 First, it would impose the onus of establishing "materiality" on the applicant. That is reason in itself to reject it. As noted above, a finding of jurisdictional error means that the decision is to be regarded as a nullity. Thereafter, it is for the decision-maker, if seeking to have the court exercise its discretion to refuse to grant the relief that would otherwise follow, to establish that the relief would be futile in the applicant's circumstances. To shift the onus of proof of materiality to the applicant would put in doubt the fundamental principle that a statutory power is to be exercised under, and according to, the terms of the statute. To repeat, a person affected by a decision made by an exercise of statutory power is entitled to apply for a decision and have a decision made by a decision-maker under, and in accordance with,

(128) See *Quin* (1990) 170 CLR 1 at 35: "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government."

(129) See, eg, *Glynn v Keele University* [1971] 1 WLR 487; [1971] 2 All ER 89; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1582, 1594-1595, 1600; [1971] 2 All ER 1278 at 1283, 1293-1294, 1298; *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180; cf *R v Chief Constable of Thames Valley Police; Ex parte Cotton* [1990] IRLR 344 at 350, 351; Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017), p 484 [7.380]. See also *Hossain* (2018) 264 CLR 123 at 144-145 [65], citing *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 at 1314 [31], [33], 1325 [69]; [2011] 4 All ER 975 at 993, 1004, *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 275 [68], 312 [207] and *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at 702 [110].

(130) *Hossain* (2018) 264 CLR 123 at 144-145 [65], citing *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 701-702 and *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at 683 [39], 702 [110].

the terms of the statute, not the terms of the statute subject to some level of materiality that the person is obliged to identify *after* the decision has been made. The playing field is set by the statute, not the decision-maker or the court on review.

94 Of course, an applicant must demonstrate that there was error and that the error was jurisdictional. For any claim of denial of procedural fairness, an applicant must demonstrate that the impugned procedure deprived them of a fair opportunity to be heard (131). But that involves demonstrating that there was a purported exercise of some statutory power (of which the exercise is conditioned by obligations of procedural fairness) that was not within power and that it was adverse to the applicant. The concern is to ascertain whether the decision was within power. If the decision was not within power, then it is invalid (132). It cannot be a little bit invalid or a little bit beyond power. There is only one answer – yes or no.

95 Second, to shift the onus of proof would fundamentally change the nature of judicial review. Instead of a court concluding that an act or omission constitutes an error going to jurisdiction – meaning that the decision is invalid and that relief should be granted subject to the exercise of the court's discretion to refuse relief – it would become a form of merits review where jurisdictional error is found only if the breach is material to the applicant for review because it has denied that applicant the possibility of a successful outcome. That would have very large consequences for courts of review.

Part 7 of the Migration Act

96 Part 7 of the *Migration Act* provided, in the case of BEG15, for the review of "RRT-reviewable decisions" by the Refugee Review Tribunal (as it then was) (133), and provided (and continues to provide), in the cases of CQZ15 and SZMTA, for the review of "Part 7 reviewable decisions" by the Administrative Appeals Tribunal (134). Part 7-reviewable decisions include decisions to refuse or to cancel a protection visa (135).

97 Once a valid application for review (136) is made, the Tribunal must review the decision (137). The Registrar of the Tribunal must give the

(131) *WZARH* (2015) 256 CLR 326 at 342-343 [60]. See also *Ex parte Aala* (2000) 204 CLR 82 at 122 [103]-[104].

(132) *Project Blue Sky* (1998) 194 CLR 355 at 372-373 [34]-[36].

(133) *Migration Act* compiled 18 April 2015, s 411.

(134) *Migration Act* compiled 1 July 2015, s 411.

(135) *Migration Act*, s 411(1)(c)-(d).

(136) *Migration Act*, s 412.

(137) *Migration Act*, s 414(1).

Secretary written notice of the application (138). The Secretary then has ten working days to give to the Registrar a statement about the decision under review that sets out the findings of fact made by the person who made the decision, refers to the evidence on which those findings were based and gives reasons for the decision (139). The Secretary must also, "as soon as is practicable after being notified of the application", give to the Registrar "each other document … that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision" (140).

98 The way the Tribunal is to operate is addressed in Div 3 of Pt 7. The Tribunal is to pursue an objective of providing a mechanism of review that is "fair, just, economical, informal and quick" (141). It is not bound by technicalities, legal forms or rules of evidence (142). It "must act according to substantial justice and the merits of the case" (143). The way the Tribunal is to operate is the product of the interaction between the three branches of government established by the *Constitution* (144): as a matter of statutory construction, the common law usually will imply a condition that a power conferred by a statute on the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power (145).

99 Here, the conduct of a review under Pt 7 is addressed in Div 4. The Tribunal must invite an applicant to appear before it to give evidence and present arguments relating to the *issues arising in relation to the*

(138) *Migration Act*, s 418(1).

(139) *Migration Act*, s 418(2).

(140) *Migration Act*, s 418(3). See also *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 973 [18]-[20], 985-988 [100]-[112]; 190 ALR 601 at 608-609, 626-629.

(141) s 420(1) of the *Migration Act* compiled 18 April 2015. Section 420(1) was deleted by the *Tribunals Amalgamation Act 2015* (Cth), with effect from 1 July 2015. The objective remains applicable to the Tribunal as a result of the substitution of a new s 2A to the *Administrative Appeals Tribunal Act 1975* (Cth). See also Australia, Senate, *Tribunals Amalgamation Bill 2014*, Explanatory Memorandum, pp 2-3 [14], 18 [107].

(142) s 420(2)(a) of the *Migration Act* compiled 18 April 2015; s 420(a) of the *Migration Act* compiled 1 July 2015.

(143) s 420(2)(b) of the *Migration Act* compiled 18 April 2015; s 420(b) of the *Migration Act* compiled 1 July 2015. See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49]-[50], 642-644 [108]-[109], 664-668 [176]-[179]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 372 [96].

(144) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97], citing *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28].

(145) *Plaintiff S10/2011* (2012) 246 CLR 636 at 666 [97], citing *Ex parte Aala* (2000) 204 CLR 82 at 100-101 [39]-[41].

decision under review (146). That obligation sets the boundaries of the playing field. The phrase "the issues arising in relation to the decision under review" is central to the operation of Pt 7. An applicant is entitled to know of, and therefore be in a position to respond to, the issues arising in relation to the decision under review. An applicant is entitled to know what is in play. Otherwise it is difficult to see how a Tribunal could be said to be pursuing an objective of providing a mechanism of review that is fair and just (147).

100 Consistent with, and building on, the premise that an applicant is entitled to know of the issues arising in relation to the decision under review, other provisions in Pt 7 expressly provide for notification to the applicant of, and for the applicant to respond to, those issues.

101 First, the applicant for review is entitled to give to the Registrar a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider and written arguments relating to the issues arising in relation to the decision under review (148).

102 Second, the Tribunal must: give an applicant "clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review"; ensure so far as is reasonably practicable that the applicant understands why it is relevant to the review and the consequences of it being relied on in affirming the decision that is under review; and invite the applicant to comment on or respond to it (149). Of course, that obligation does not extend to providing an applicant with all of the information which the Tribunal might ultimately take into account in making its decision on the review (150). And the obligation does not arise if the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it (151).

103 Third, for the purpose of the review, the Tribunal may take sworn evidence (152), summon a person to appear before the Tribunal (153), "require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that

(146) *Migration Act*, s 425(1).
(147) *Migration Act*, s 422B(3).
(148) *Migration Act*, s 423(1).
(149) *Migration Act*, s 424A(1).
(150) See *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1195-1196 [15]-[17]; 235 ALR 609 at 615. See also *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 223 [9].
(151) *Migration Act*, s 425(2)(a). See also *Migration Act*, s 425(2)(b)-(c).
(152) *Migration Act*, s 427(1)(a).
(153) *Migration Act*, s 427(3)(a).

investigation or examination" (154) and, subject to ss 438 and 440, give information to the applicant and to the Secretary (155).

104 Fourth, the Tribunal in the conduct of the review must consider the merits of the decision under review "in light of the information, evidence and arguments which are relevant to the application and which are provided to it or which it obtains for itself" (156).

105 Fifth, the Tribunal in the conduct of the review must take account of any substantial, clearly articulated argument advanced by an applicant in support of their case (157).

106 Sixth, the Tribunal is required to make a written statement that, among other things, sets out the decision on the review, the reasons for the decision, and the findings on any material questions of fact, and refers to the evidence or any other material on which the findings of fact were based (158). And if a matter is not mentioned by the Tribunal in that written statement, a court is entitled to infer that the matter was not considered by the Tribunal to be material (159).

107 That list is not exhaustive but it is sufficient to set the scene for the proper construction of the Tribunal's powers, "subject to sections 438 and 440, [to] give information to the applicant …" (160).

108 Division 7 of Pt 7 is relevantly headed "Miscellaneous". Section 437 contains a prohibition: in spite of anything else in the *Migration Act*, the Secretary must not give to the Tribunal a document or information if the Minister *certifies in writing* that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest because it would prejudice the security, defence or international relations of Australia or because it would involve the disclosure of deliberations or decisions of the Cabinet or a committee of the Cabinet. The Tribunal does not know of the Minister's certificate and does not know of, or see, the document or information the subject of the certificate.

109 Section 438, with which these appeals are concerned, does not contain a prohibition. It provides:

(154) *Migration Act*, s 427(1)(d).
(155) *Migration Act*, s 427(1)(c).
(156) *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at 604 [44].
(157) *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24]-[25]; 197 ALR 389 at 394.
(158) *Migration Act*, s 430(1).
(159) *Yusuf* (2001) 206 CLR 323 at 346 [69], citing *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 446 and *Sullivan v Department of Transport* (1978) 20 ALR 323 at 348-349, 353.
(160) *Migration Act*, s 427(1)(c).

"(1) This section applies to a document or information if:

(a) the Minister has certified, in writing, that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 437(a) or (b)) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed; or

(b) the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence.

(2) If, in compliance with a requirement of or under this Act, the Secretary gives to the Tribunal a document or information to which this section applies, the Secretary:

(a) must notify the Tribunal in writing that this section applies in relation to the document or information; and

(b) may give the Tribunal any written advice that the Secretary thinks relevant about the significance of the document or information.

(3) If the Tribunal is given a document or information and is notified that this section applies in relation to it, the Tribunal:

(a) may, for the purpose of the exercise of its powers, have regard to any matter contained in the document, or to the information; and

(b) may, if the Tribunal thinks it appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the applicant.

(4) If the Tribunal discloses any matter to the applicant, under subsection (3), the Tribunal must give a direction under section 440 in relation to the information."

110 Section 440(1), to which reference is made in s 427(1)(c), confers power on the Tribunal to give a written direction that evidence, information or the contents of any document given to the Tribunal should not be published or otherwise disclosed except in a particular manner and to particular persons if the Tribunal is satisfied that the non-publication or non-disclosure is in the public interest. A direction

under s 440(1) does not excuse the Tribunal from its obligation under s 430 to provide a written statement of its reasons (161).

111 In aggregate, those provisions inform the proper construction of s 438.

112 As has been noticed, the section applies to a document, a matter contained in a document or information in two specified circumstances. The first is if the Minister has certified in writing that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for a reason specified in the certificate (162). The Minister must act within the bounds of reasonableness and according to law (163). The reason specified in the certificate must be one (other than a reason set out in s 437) that could form the basis of a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed (164). It was common ground that the reason must be capable of grounding a claim for public interest immunity from disclosure at common law.

113 The second specified circumstance is if the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence (165). If the Secretary gives to the Tribunal a document or information which is the subject of written certification under s 438(1)(a) or to which 438(1)(b) applies, then s 438(2) provides that the Secretary must notify the Tribunal that s 438 applies in relation to the document or information and may give to the Tribunal any written advice that the Secretary thinks relevant about the significance of the document or information. As is evident, s 438 sits alongside and operates in conjunction with the Secretary's obligation under s 418(3) to give to the Registrar of the Tribunal any document or part of a document that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision.

114 Once the Tribunal has been given a document or part of a document (which, under s 418, the Secretary must have considered was relevant to the review), or information, by the Secretary, and notification that s 438 applies to the document or information, s 438(3) provides that the Tribunal is to deal with that document or information in a particular

(161) *Migration Act*, s 440(2)(a).

(162) *Migration Act*, s 438(1)(a).

(163) See *Li* (2013) 249 CLR 332 at 363 [65]-[66]; *Plaintiff M174/2016* (2018) 264 CLR 217 at 227 [21]. See also *Eshetu* (1999) 197 CLR 611 at 652 [133], quoting *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430.

(164) *Migration Act*, s 438(1)(a).

(165) *Migration Act*, s 438(1)(b).

way. The Tribunal *may* have regard to any matter contained in the document or to the information and the Tribunal *may*, after taking into account any advice given by the Secretary under s 438(2), disclose any matter contained in the document, or the information, to the applicant (166). Both discretions must be exercised within the bounds of reasonableness and consistently with the obligations imposed on the Tribunal by ss 424A and 425. In relation to the second discretion – disclosure to the applicant of the matter contained in the document, or the information – s 438(4) requires the Tribunal to give a direction under s 440.

115 Where the Secretary notifies the Tribunal that s 438 applies to a document or information, the common law implies an obligation of procedural fairness on the Tribunal to disclose the fact of the notification to the applicant for review. That obligation of disclosure arises because a notification under s 438 is an essential aspect of the playing field. The notification must be disclosed so that an applicant seeking the exercise of an administrative power has an opportunity to choose, as the applicant may, to give evidence and present arguments relating to the *issues arising in relation to the decision under review*. It is impossible for an applicant to do so if the issues are not disclosed. Put in different terms, procedural fairness requires that an applicant be told of an event which alters the procedural context in which the review is to be conducted. As Bell, Gageler and Keane JJ observe, a notification by the Secretary under s 438 alters that procedural context (167).

116 Lest that be doubted, it may be tested this way: had the notification been disclosed at the outset, it would be difficult to conclude that an applicant had not been given a reasonable opportunity to be heard (168). The extent to which the applicant would seek an opportunity to be heard is limited to issues arising in relation to the decision under review. On being told of the notification, those issues might include seeking to contest the basis of the Secretary's notification to the Tribunal that s 438 applies to a document or information; submitting that the Tribunal should exercise one or both of the discretions conferred by s 438(3); and subject to the contents of the notification, seeking to obtain access to the information through, for example, an application under the *Freedom of Information Act 1982* (Cth).

117 Procedural fairness requires disclosure of the fact of notification by the Secretary. Non-disclosure of the fact of notification constitutes a

(166) *Migration Act*, s 438(3).
(167) Reasons of Bell, Gageler and Keane JJ at [29]-[30].
(168) *WZARH* (2015) 256 CLR 326 at 343-344 [62]-[67].

breach of the Tribunal's implied obligation of procedural fairness. It is an unauthorised act in breach of a statutory procedure which conditions the performance of the duty of the Tribunal to conduct a review in the manner outlined above. A breach of that obligation of procedural fairness constitutes jurisdictional error. An incorrect and therefore invalid notification by the Secretary that s 438 applies in relation to a document or information also gives rise to jurisdictional error in the conduct of a review.

Appeals

118 The facts and procedural history are set out in the judgment of Bell, Gageler and Keane JJ and need not be repeated.

CQZ15

119 Written certification was made by the Minister under s 438(1)(a). Written notification was given by the Secretary to the Tribunal under s 438(2) in relation to s 438(1)(b). Neither the certification nor the notification was disclosed to CQZ15.

120 The Tribunal affirmed the decision of the delegate to refuse to grant a protection visa to CQZ15. CQZ15 sought review of the Tribunal's decision in the Federal Circuit Court. CQZ15 asserted that the certificate was invalid and that there was a want of procedural fairness because the Tribunal failed to disclose the fact of the certificate and the fact of the notification. The Minister conceded the certificate was invalid. The Minister contended the notification was valid and that the information which was the subject of both the certificate and the notification had no bearing and could have had no bearing on the Tribunal's decision. In the Federal Circuit Court, the Minister unsuccessfully sought to tender an affidavit exhibiting the documents the subject of the certification and the notification. The Court held that the failure to disclose the certificate and the notification resulted in jurisdictional error, set aside the decision of the Tribunal, and remitted the matter to the Tribunal for determination according to law.

121 The Full Court of the Federal Court allowed the Minister's appeal, set aside the orders of the Federal Circuit Court and remitted the matter for redetermination by the Federal Circuit Court. The Federal Circuit Court was correct that the failure to disclose the certificate and notification resulted in jurisdictional error. However, as the Full Court found, the evidence sought to be adduced by the Minister was at least potentially admissible as relevant to whether the Court should, in the exercise of its discretion, refuse relief. That is the issue to be considered and determined by the Federal Circuit Court.

BEG15

122 The decision of the delegate to refuse BEG15 a protection visa was affirmed on two separate occasions by two differently constituted

Tribunals. On the hearing of the second application for review to the Federal Circuit Court, the Minister disclosed the existence of a certificate purportedly issued by a delegate of the Minister under s 438(1)(a). The certificate had been issued after the initial decision was quashed but before the second hearing was conducted. The certificate had been notified to the Tribunal under s 438(2)(a) but not disclosed to BEG15. The Minister conceded that the certificate and the notification were invalid.

123 The invalid certificate and the non-disclosure of the fact of the notification resulted in jurisdictional error. But as the Federal Circuit Court found, that error made no difference to the outcome of the review. The information in the documents covered by the certificate was largely known to BEG15, was not relevant to the decision to be made by the Tribunal and had not been taken into account by the Tribunal. Thus, relief was rightly refused. The Full Court of the Federal Court correctly found that the decision of the Federal Circuit Court contained no appealable error.

SZMTA

124 The first respondent, SZMTA, applied for judicial review of a decision of the Tribunal to affirm the decision of a delegate of the Minister to refuse SZMTA's application for a protection visa. The application was dismissed by the Federal Circuit Court.

125 On appeal to the Federal Court, SZMTA was permitted to raise that the Tribunal had not disclosed the fact of a notification purportedly made under s 438(1)(b) and s 438(2). The Tribunal had failed to comply with an essential pre-condition to or limit on the valid exercise of the particular statutory power. The non-disclosure of the notification resulted in jurisdictional error.

126 The Tribunal did not refer to the notification, or the documents or information the subject of the notification, in its reasons. There was no dispute that the notification was not disclosed to SZMTA and that the Tribunal had not disclosed the documents the subject of the notification to SZMTA. However, the documents were in SZMTA's possession as a result of a prior freedom of information request.

127 The question is whether the orders of the Federal Court should be set aside on the basis that, because the documents underlying the notification were already in SZMTA's possession, disclosure of the fact of the notification would not have deprived SZMTA of the possibility of a successful outcome on remittal to the Tribunal. The appeal by the Minister should be allowed.

128 The documents covered by the notification, and thus the information in those documents, were known to and in the possession of SZMTA at the time that the matter was considered by the Tribunal. There is no

reference in the Tribunal's reasons for decision to the notification or the documents and information the subject of the notification, and there is no reason to suppose that the Tribunal took them into account (169). To the contrary, the Tribunal's reasons show clearly that its analysis was in no way affected by them. In those circumstances, the failure of disclosure could not have deprived SZMTA of the possibility of a successful outcome on remittal to the Tribunal, and thus it is appropriate that relief should be refused in the exercise of discretion.

Matter No S36/2018

1. *Appeal allowed.*
2. *Set aside the orders made by the Federal Court of Australia on 5 September 2017 and, in their place, order that the appeal to that Court from the Federal Circuit Court of Australia be dismissed with costs.*
3. *The first respondent pay the appellant's costs of the appeal to this Court.*

Matter No M75/2018

1. *Appeal dismissed with costs.*
2. *Application for special leave to cross-appeal dismissed with costs.*

Matter No S135/2018

Appeal dismissed with costs.

Solicitors for the appellant in Minister for Immigration and Border Protection v SZMTA, *Clayton Utz*.

Solicitors for the first respondent, SZMTA, *Shelly Legal*.

Solicitor for the appellant, BEG15, *Victoria Legal Aid*.

Solicitor the appellant, CQZ15, *Michaela Byers*.

Solicitors for the first respondent in BEG15 v Minister for Immigration and Border Protection and CQZ15 v Minister for Immigration and Border Protection, *Australian Government Solicitor*.

ADP

(169) cf *MZZZW v Minister for Immigration and Border Protection* (2015) 234 FCR 154 at 178 [90]-[92].