FEDERAL CIRCUIT COURT OF AUSTRALIA

CQZ15 v Minister for Immigration and Border Protection and Another

[2016] FCCA 2788

Judge Riley

20 October 2016

Immigration — Visas — Temporary protection visa — Application for — Refusal by Minister to grant — Merits review before Tribunal — Whether Tribunal erred in admitting affidavit annexing certificates given by Minister — Whether Tribunal acted on invalid certificate — Migration Act 1958 (Cth), s 438.

Section 438 of the *Migration Act 1958* (Cth) (the Act) relevantly provided that the Minister could give the Tribunal a document and certify that the disclosure of that document or its contents would be contrary to the public interest, or that the document was given to the Minister or department in confidence.

A delegate of the Minister refused the applicant a temporary protection visa. The Administrative Appeals Tribunal (the Tribunal) affirmed this decision.

The applicant sought judicial review of the Tribunal's decision on the basis that the Tribunal erred in admitting an affidavit annexing two certificates given by the Minister under s 438 of the Act. The Minister conceded upon review that one of the certificates was invalid but contended that the Tribunal did not err because it did not act on the invalid certificate.

Held: The Tribunal erred because it acted on the invalid certificate in reaching its decision. [28]-[29]

MZAFZ v Minister for Immigration and Border Protection and Another (2016) 243 FCR 1, applied.

Cases Cited

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175.

MZAFZ v Minister for Immigration and Border Protection (2016) 243 FCR 1.

Singh v Minister for Immigration and Border Protection and Another (2016) 313 FLR 1.

Application

Lisa De Ferrari, for the applicant.

Liam Brown, for the respondents.

Ex tempore

20 October 2016

Judge Riley.

1 There is an application before the court seeking an order that an affidavit which has been filed by the Minister be removed from the court file. The application arises in the context of an application to review a decision of the Administrative Appeals Tribunal.

2 The applicant applied for a protection visa. That application was refused by a delegate of the Minister. The Tribunal affirmed the delegate's refusal.

3 The applicant is represented by counsel, who submitted that an affidavit filed by the Minister on 12 October 2016 should not have been accepted for filing and should now be removed from the court file. The affidavit, I am told, has exhibited to it two certificates and the related documents that the Secretary of the Department of Immigration and Border Protection ("the Secretary") sent to the Tribunal under s 438 of the *Migration Act 1958* ("the Act"). That section provides:

> 438 Tribunal's discretion in relation to disclosure of certain information etc.
>
> (1) This section applies to a document or information if:
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> (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
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> (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.
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> (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:
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> (a) must notify the Tribunal in writing that this section applies in relation to the document or information; and
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> (b) may give the Tribunal any written advice that the Secretary thinks relevant about the significance of the document or information.
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> (3) If the Tribunal is given a document or information and is notified that this section applies in relation to it, the Tribunal:
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> (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
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> (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.
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> (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.

4 The Minister conceded that the first certificate under s 438 sent by the Secretary in the present proceeding was invalid. However, the Minister maintained that the second certificate sent by the Secretary, which concerned different documents, was valid. The applicant said both certificates were invalid.

5 The applicant relied on two broad arguments for the objection to the filing of the affidavit. The first was that it was an abuse of process to file the affidavit because it was filed without leave and without any application in a case being filed to seek leave. The second was that this court is bound by the decision of Beach J in *MZAFZ v Minister for Immigration and Border Protection and Another* (2016) 243 FCR 1, where his Honour declined to read an affidavit in similar circumstances.

6 The applicant noted that the object of the rules of this court is to assist the court to resolve matters in a manner that is "just, efficient and economical".[1] The applicant noted that the rule that was considered in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 was essentially the same. The applicant noted that, in AON, the High Court said that not only the needs of the current litigant but also the needs of other possible litigants had to be considered in determining whether an adjournment should be granted. The applicant said that, if the affidavit were allowed to remain on the court file, the applicant would need to further amend the application and that would impact on other litigants because the matter could not be resolved today but would have to take up a spot in the lists that another litigant could otherwise have used.

7 The respondent resisted that argument, saying that, although the Minister did seek to file the affidavit late, there are provisions in the rules that permit that to be done and, obviously, it is in the interests of the administration of justice that all relevant material be put before the court.

8 The Minister also noted the basic chronology of the case. It is as follows:

a) court books were filed on 20 May 2016;
b) the decision of Beach J in *MZAFZ* was handed down on 7 September 2016;
c) relying on that judgment, the applicant amended his application to this court on 15 September 2016;
d) submissions in support of that amendment were filed by the applicant on 22 September 2016;
e) the Minister filed submissions in response on 6 October 2016; and
f) to substantiate an aspect of those submissions, the Minister filed the disputed affidavit on 12 October 2016.

9 *MZAFZ* dealt with a certificate under s 438 of the Act. Beach J said that the certificate in that case was invalid because it purported to rely on s 438(1)(a) of the Act, which concerned public interest immunity, when the certificate in fact only alleged that the relevant documents were internal working documents. The bare fact of a document being an internal working document is, of course, insufficient to found a claim of public interest immunity.

10 His Honour also said in *MZAFZ* that he would not look at an affidavit that was sought to be submitted in circumstances described in paragraphs 54 and 55 of the decision, which are as follows:

> 54. Now the Minister submitted that I should look at the documents covered by the certificate, with the suggestion floated that once I looked at them I would be satisfied that:
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> (a) the certificate had properly been issued;
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> (b) there was nothing advantageous to the applicant not disclosed; and

1 *Federal Circuit Court Rules 2001*, r 1.03(1).

(c) there was nothing disadvantageous to the applicant not disclosed.

55. I declined that invitation for a number of reasons. First, I am entitled to proceed on the basis that the documents covered by the certificate had relevance to the applicant's visa application, whether favourable, unfavourable or neutral. If not, the s 438(1)(a) certificate would not have been necessary and the documents would not have been before the Tribunal. Second, it was the Tribunal's task to review the documents, not mine. Third, even if I accepted points [54] (a) to (c), it does not address the points set out at [50] above in terms of what procedural fairness required that the Tribunal ought to have done, save for any operation of s 422B.

11 The Minister submitted that the court should not follow Beach J in *MZAFZ* in relation to the admission of the affidavit. That was said to be because Beach J made a finding that the Tribunal, in that case, "acted on" the invalid certificate. The Minister stated that the Tribunal, in this case, did not "act on" the certificate or the documents described in that certificate and that is apparent from the documents exhibited to the affidavit that is sought to be admitted into evidence.

12 The decision of Beach J addressed why his Honour considered that the Tribunal "acted on" the invalid certificate. That is set out at paragraph 40 of his Honour's reasons, which is as follows:

> First, if the Tribunal acted on the invalid certificate it followed a procedure contrary to law. In the absence of evidence to the contrary, I am entitled to assume that the Tribunal acted in some unspecified way on the invalid certificate in relation to the documents the subject thereof in its possession. So much can be implied from the Tribunal's reasons at [19] (see my later discussion at [47] and [48]). Relatedly, the purported issue of an invalid certificate by the delegate of the Minister infected the process or procedure adopted by the Tribunal in relation to such documents.

13 The applicant relied on the decision of this court in the matter of *Singh v Minister for Immigration and Border Protection and Another* (2016) 313 FLR 1. That was a decision of Judge Jarrett where his Honour considered a certificate under s 357A of the Act. That provision is in somewhat different terms to s 438 of the Act. However, his Honour considered that the decision of Beach J in *MZAFZ* was analogous and applied it. His Honour considered that, although the certificate in *Singh* was valid, there was nevertheless a jurisdictional error by the Tribunal failing to disclose the existence of the certificate to the applicant.

14 In relation to the Minister's failure to comply with the rules, I am not persuaded that the court should not permit the affidavit to be admitted on the basis of the alleged abuse of process. It seems to me that the affidavit could have been admitted, with the necessary leave being given retrospectively. The matter could have proceeded either today or at another reasonable time without any undue interference with the lists. The argument today about the admission into evidence of the affidavit has, in fact, taken up all the time that was allocated to this matter as a final migration hearing.

15 The dispute about the admission into evidence was the substantial reason that the matter was not able to proceed today. At most, this type of case takes half a day. It does not seem to me that it is in any way comparable to the *AON* situation. The preferable course is almost always to have the appropriate evidence before the court to enable justice to be done between the parties. Obviously, there are cases where that principle has to give way to the overall

needs of the litigants before the court but this does not seem to me to be a case where those sorts of considerations would have had any particularly great weight.

16 The more substantive argument is the one based on *MZAFZ*. In this particular case, there were two certificates. The Minister accepts one of them was invalid. The invalid certificate was dated 7 October 2013. It purported to be in respect of internal working documents of the department. The certificate purported to be a certificate under s 438(1)(a) of the Act, which applied to documents subject to public interest immunity. As Beach J held in *MZAFZ*, internal working documents without more are not documents to which public interest immunity applies.

17 The second certificate under s 438 of the Act was dated 12 February 2015. It stated that certain documents, which I understand to be different documents to those covered by the first certificate, were provided in confidence. The certificate was said to be issued under s 438(1)(b) of the Act, which applies to documents provided in confidence. The Minister maintained that the second certificate was valid. The applicant argued that the second certificate was not valid. It is unnecessary to resolve that question.

18 The decision of Judge Jarrett in *Singh* applied in circumstances in which the certificate was valid. However, Judge Jarrett did not deal specifically with the question of whether an affidavit such as that filed by the Minister should be admitted into evidence.

19 The decision of Beach J in *MZAFZ* dealt squarely with that point. His Honour said in paragraph 55 of his reasons for decision that he declined to look at the affidavit for a number of reasons, which are set out above. Those reasons apply equally in this case. His Honour said firstly that he was entitled to proceed on the basis that the documents covered by the certificate had relevance to the applicant's visa application, whether favourable, unfavourable or neutral. His Honour said that, if not, the s 438(1)(a) certificate would not have been necessary and the documents would not have been before the Tribunal.

20 That is entirely obvious. Under s 418 of the Act, the Secretary was obliged to give to the Tribunal all documents that the Secretary considered to be relevant to the review. There would have been no need for a certificate at all if the documents had not been relevant to the review.

21 The Minister sought to argue that the Secretary might have been wrong in his view that the documents were relevant. However, the presumption of regularity would suggest that, without more, the court can be satisfied that they were relevant in some way.

22 The second reason given by Beach J was that it was the Tribunal's task to review the documents, not the court's. That reason also applies in this case.

23 The third reason given by Beach J was that, even if the court accepted that the certificate had been properly issued, and there was nothing advantageous to the applicant that had not been disclosed and nothing disadvantageous to the applicant that had not been disclosed, then it did not address the point set out at paragraph 50 of his reasons regarding procedural fairness. That paragraph is as follows:

> 50. Procedural fairness required that the Tribunal ought to have (but did not in the present case):
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> (a) disclosed the existence of the certificate to the applicant; on this aspect, I do not propose to follow what was said in Davis v

Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 686 at [29] per Dowsett J who was in any event discussing s 375A and was influenced by the strictures thereof that did not contain an equivalent to s 438(3) (his Honour was not discussing s 376);

(b) given the applicant the opportunity to make submissions on the validity of the certificate if she so chose; of course there is an air of unreality to affording such an opportunity to a self-represented litigant who requires an interpreter, but that does not deny the existence of any such requirement;

(c) disclosed to what extent, if any, the Tribunal was going to take into account information covered by the certificate and as a part thereof at least whether the information was favourable, unfavourable or neutral to the applicant;

(d) given the applicant at least an opportunity to seek a favourable exercise of discretion under s 438(3)(b).

24 That reasoning applies with equal force in this case. Under s 438(3)(b) of the Act, the applicant could have asked the Tribunal to release the documents to him, notwithstanding the existence of the certificate. Indeed, it seems now, from the filing and serving of the affidavit that is objected to in this proceeding, that the Minister has, in fact, divulged all of the documents to the applicant.

25 In any event, the Minister said that Beach J relied on the statements in paragraph 40 of the reasons for decision, which is set out above. Beach J stated in paragraph 40 that if the Tribunal acted on the invalid certificate, it followed a procedure contrary to law and the court was entitled to assume that the Tribunal had acted in some unspecified way on the invalid certificate. That is said to be something that can be implied from paragraph 19 of the Tribunal's reasons, which were set out at paragraph 47 of Beach J's reasons. That paragraph is as follows:

> What does one know? The Tribunal in its reasons said at [19]:
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> I have before me the Department's file relating to the applicants [sic]. I have also has [sic] had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources. This material includes:
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> - Application for protection visa;
> - Copy of applicant's passport;
> - Interviews with delegate dated 14 November 2013 and 11 December 2013;
> - Original family registration certificate;
> - A number of articles about honour killings, blasphemy laws, punishment for illegal relationships and women's rights.

26 Clearly, in *MZAFZ* the Tribunal said that it had before it the departmental file. In the present case, the Tribunal did not say that. However, it can be inferred from the requirement in s 418 of the Act that the Tribunal, in fact, did have that file before it.

27 It seems to me that his Honour's conclusion that he was entitled to assume that the Tribunal acted on the invalid certificate in relation to the documents the subject thereof is also a conclusion that I can draw in this proceeding. However, the Minister said that I should not make the finding that the Tribunal did, in fact, "act on" the invalid certificate. There must be some question as to what Beach J actually meant by "acted on the invalid certificate". The reliance on the certificate and the documents mentioned in it do not appear to have figured in the Tribunal's reasons in *MZAFZ*.

28 In the present case, the Minister submitted that there was nothing in the Tribunal's reasons that suggested that the Tribunal had "acted on" either the first or the second certificate in any relevant sense. However, as many authorities show, it is possible for the Tribunal to have regard to matters that are not disclosed in its reasons and thereby fall into jurisdictional error. It seems to me that the Tribunal, in this case, did "act on" both certificates, in the same sense as Beach J mentioned in *MZAFZ*.

29 Consequently, I am not satisfied that this case can be sensibly distinguished from *MZAFZ*. I am bound by that decision. Accordingly, I conclude that it is not appropriate for me to look at the affidavit filed by the Minister on 12 October 2016. There is no need to remove it from the court file. It will just be marked as not read.

Orders accordingly

Solicitors for the applicant: *Victoria Legal Aid*.

Solicitors for the respondents: *Clayton Utz*.

TIMOTHY CROSS