FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v BJN16 and Another*

[2017] FCAFC 197

Kenny, Tracey and Griffiths JJ

14 September, 29 November 2017

Immigration — Natural justice — Review of decision to refuse protection visa — Certification that disclosure of information or document not in public interest or that received in confidence — Administrative Appeals Tribunal vested with discretion to act on the material, with or without disclosure — Where non-disclosure may constitute procedural unfairness — Whether no procedural unfairness because document or information not acted upon — Whether document or information admissible to prove non-disclosure did not constitute procedural unfairness — Migration Act 1958 (Cth), s 438.

Evidence — Admissibility — Judicial review proceeding — Denial of procedural fairness or natural justice — Where Tribunal vested with discretion to disclose document or information to applicant for review — Where non-disclosure — Whether document or information admissible to prove non-disclosure did not constitute procedural unfairness — Migration Act 1958 (Cth), s 438.

Section 418 of the *Migration Act 1958* (Cth) (the Act), relevantly provided that, where an application was made to the Administrative Appeals Tribunal (the Tribunal) for a review of a protection visa decision, the Secretary of the Department had to provide the Tribunal with a statement of reasons for the delegate's decision and with each document in the Secretary's possession or control which the Secretary considered relevant to the review.

Section 438 further relevantly provided that if the Minister certified in writing that the disclosure of any matter contained in a document, or the disclosure of any information, would be contrary to the public interest, or that the document or information had been given to the Minister or the Department in confidence (subs (1)), the Secretary had to notify the Tribunal that the section applied (subs (2)).

By subs (3) of that section, the Tribunal could nevertheless have regard to any matter contained in the document, or to the information, and if it thought it appropriate to do so (having regard to any advice given to it by the Secretary), disclose any matter contained in the document, or the information, to the applicant.

*[EDITOR'S NOTE: See also associated cases of *CQZ15* (2017) 253 FCR 1 and *BEG15* (2017) 253 FCR 36.]

In an application for judicial review, in which the applicant contended that he had been denied procedural fairness by reason of the Tribunal's failure to disclose to him certain information covered by a certification made pursuant to s 438(1), the Minister sought to tender the notification given to the Tribunal, and the documents said to be subject to it. The primary judge rejected the tender.

Held: The non-disclosure by the Tribunal of the existence of a notification under s 438(2) of the Act may or may not give rise to a denial of procedural fairness, depending on all the circumstances and the consequences for the visa applicant of the non-disclosure. The contents of a document or information covered by a notification issued pursuant to s 438(2) of the Act, and the notification itself, are admissible for the purposes of showing that the document or information covered by the certification, or the notification itself, were incapable of having had any bearing on the decision of the Tribunal (such that the non-disclosure could not have deprived the applicant before the Tribunal of an opportunity to advance his or her case), or that relief should be refused in the exercise of the Court's discretion. [63], [67]-[70]

Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, applied.

AVO15 v Minister for Immigration and Border Protection [2017] FCA 566; *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305; *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1, considered.

Appeal against decision of Judge A Kelly, (2017) 321 FLR 469, allowed.

Cases Cited

ALP15 v Minister for Immigration and Border Protection [2017] FCCA 1418.

Attorney-General (NT) v Minister for Aboriginal Affairs (1989) 23 FCR 536.

AVO15 v Minister for Immigration and Border Protection [2017] FCA 566.

BEG15 v Minister for Immigration and Border Protection (2017) 253 FCR 36.

BEG15 v Minister for Immigration and Border Protection (2016) 315 FLR 196.

BIE15 v Minister for Immigration and Border Protection (2016) 314 FLR 392.

BJD16 v Minister for Immigration and Border Protection [2016] FCCA 2537.

BJN16 v Minister for Immigration and Border Protection [2017] FCCA 511.

BJN16 v Minister for Immigration and Border Protection (No 2) (2017) 321 FLR 469.

BZV15 v Minister for Immigration and Border Protection [2017] FCCA 981.

CQH16 v Minister for Immigration and Border Protection [2017] FCCA 1498.

DBF16 v Minister for Immigration and Border Protection [2016] FCCA 3291.

Decor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397.

Immigration and Border Protection, Minister for v Singh [2017] HCATrans 107.

Immigration and Border Protection, Minister for v Singh (2016) 244 FCR 305.

Immigration and Border Protection, Minister for v WZARH (2015) 256 CLR 326.

Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd (2008) 167 FCR 372.

Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (2000) 104 FCR 564.

Luck, Re (2003) 78 ALJR 177.

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

NAFQ v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 473.

Refugee Review Tribunal, Re; Ex parte Aala (2000) 204 CLR 82.

Spencer v Commonwealth (2010) 241 CLR 118.

Stead v State Government Insurance Commission (1986) 161 CLR 141.

SZMJM v Minister for Immigration and Border Protection [2016] FCCA 2884.

SZVCP v Minister for Immigration and Border Protection (No 3) [2016] FCCA 3333.

SZWBH v Minister for Immigration and Border Protection (2015) 229 FCR 317.

Appeal

C Horan QC with *M Hosking*, for the appellant.

L De Ferrari with *CL Symons*, for the first respondent.

29 November 2017

The Court

1 In *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 (*Singh*) a Full Court of this Court held that, if the Minister for Immigration and Border Protection ("the Minister") (or a delegate of the Minister) had issued a confidential certificate under Pt 5 of the *Migration Act 1958* (Cth) ("the Act"), procedural fairness required any decision-maker affected by the certificate to advise a visa applicant who was affected by the certificate of its existence. A "confidential certificate" certifies that disclosure of certain relevant information, identified in the certificate, would not be in the public interest. Once issued statutory constraints are placed on the publication of the information.

2 This application for leave to appeal from the Federal Circuit Court ("the FCC") raises questions relating to the admissibility of documents, containing information which is subject to a confidential certificate under Pt 7 of the Act, as evidence in judicial review proceedings in order to establish that there has been no denial of procedural fairness or that relief should be denied in the exercise of the Court's discretion.

Procedural background

3 In 2015 the first respondent, BJN16, applied for a protection visa.

4 A delegate of the Minister refused the application on 28 January 2016.

5 On the same day and, apparently, in anticipation that BJN16 would apply to the Administrative Appeals Tribunal ("the Tribunal") for review of the decision, another delegate issued a certificate (or, perhaps more correctly, a "notification") under s 438(1)(b) of the Act which expressed the view that certain information, contained on the file of the Department of Immigration and Border Protection ("the Department"), should not be disclosed to BJN16 or his representatives because it had been given to the Department in confidence. That information was identified by reference to six folio numbers in the file. Section 438 is in Pt 7 of the Act.

6 On 5 February 2016 BJN16 lodged an application in the Tribunal to review the delegate's decision to refuse his application for a protection visa.

7 A hearing of BJN16's application took place in the Tribunal on 26 February 2016.

8 On 4 May 2016 the Tribunal decided to affirm the decision under review. BJN16 was so advised on the following day and he was provided with reasons for the decision.

9 BJN16 lodged an application for judicial review of the Tribunal's decision in the FCC on 6 June 2016. The only ground for the application was that the Tribunal "had made a mistake".

10 A hearing of the application was fixed for 1 August 2016 but was later relisted for 28 April 2017.

11 On 19 December 2016 the Full Court's judgment in *Singh* was delivered.

12 On 25 January 2017 a delegate of the Minister wrote to BJN16 providing a copy of the notice given under s 438 of the Act. The Minister requested the applicant's consent to a further adjournment of the hearing pending the outcome of an application to the High Court for special leave to appeal from the Full Court's decision.

13 BJN16 did not agree to the Minister's proposal.

14 Having considered the parties' submissions on the opposed adjournment application, the FCC made an order in chambers on 22 March 2017 vacating the hearing date: see *BJN16 v Minister for Immigration and Border Protection* [2017] FCCA 511.

15 On 12 May 2017 the High Court dismissed the Minister's application for special leave to appeal: see *Minister for Immigration and Border Protection v Singh* [2017] HCATrans 107.

16 BJN16 then filed an amended application in the FCC on 30 May 2017. The new ground was that the Tribunal's decision had been vitiated by jurisdictional error. That error was said to be the failure by the Tribunal to disclose to BJN16 "the existence of the s 438 certificate", of which the Minister's delegate had notified the Tribunal on 28 January 2016. BJN16 sought summary judgment on his amended application on the ground that the Minister had no reasonable prospect of successfully defending the claim. The application was made under s 17A of the *Federal Circuit Court of Australia Act 1999* (Cth) and was listed for hearing on 5 June 2017.

17 In an effort to resist the application for summary judgment the Minister sought to tender the folios in the departmental file which were the subject of the certificate under s 438. The Minister submitted that the evidence was relevant to two issues in the proceeding. They were:

- whether, in the circumstances of the case, the Tribunal's common law obligation to afford procedural fairness required that it disclose to BJN16 the existence of the certificate; and
- if the Tribunal was under such an obligation, whether the FCC should exercise its discretion to refuse relief on the ground that the denial of procedural fairness by the Tribunal did not deprive BJN16 of the possibility of a successful outcome of his application.

18 The application to tender the documents was supported by an affidavit, affirmed by a solicitor acting on behalf of the Minister. The deponent exhibited the notification, given to the Tribunal under s 438 of the Act, and the six folios. In accordance with the Full Court's guidance in *Singh* (at [67]), these folios were placed in a sealed envelope. The solicitor further deposed that the Minister made no claim for privilege over the material in the documents and did not

contend (despite the contrary being asserted in the notification) that any confidentiality inhered in their contents. He deposed that the documents had not been provided to BJN16.

19 BJN16 objected to the tender of the documents and the trial judge upheld that objection.

20 Summary judgment was granted by the FCC: see *BJN16 v Minister for Immigration and Border Protection (No 2)* (2017) 321 FLR 469. It is from this decision that the Minister now seeks leave to appeal. The FCC ordered that the Tribunal's decision be quashed and directed that it consider and determine the application for review according to law. It did not, in terms, give judgment for the applicant under s 17A. The Minister did not seek leave to appeal from the subsequent costs order made against him on 24 July 2017.

21 Before turning to the FCC's reasons and the Minister's grounds it will be convenient to refer to the relevant legislation and to the principal decisions of this Court which informed the primary judge's decision.

The legislation

22 Review of decisions relating to protection visas is dealt with under Pt 7 of the Act. A person whose application for a protection visa has been refused may apply to the Tribunal for review of that decision: see s 412. The Tribunal is required to review such decisions if a valid application is made: see s 414. The Tribunal has the same powers as the original decision-maker and may affirm, vary or set aside the decision under review: see s 415.

23 When an application for review is made to the Tribunal the Secretary of the Department is notified and is required to provide the Tribunal with a statement of reasons for the delegate's decision and with each document in the Secretary's possession or control which the Secretary considers to be relevant to the review: see s 418.

24 The manner in which reviews are conducted by the Tribunal is governed by Div 4 of Pt 7. Section 422B provides that:

> 422B Exhaustive statement of natural justice hearing rule
>
> (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.
>
> (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.

25 Other sections in Div 4 deal with matters such as invitations to applicants to appear at hearings (s 425), the consequences of a failure by an applicant to appear (s 426A) and the powers of the Tribunal when conducting a hearing. One of those powers is to give information to the applicant or the Secretary "subject to ss 438 and 440": s 427(1)(c).

26 In Div 7 provision is made for "miscellaneous" matters, commencing with s 437.

27 Section 437 provides that the Secretary must not give a document or information to the Tribunal if the Minister has certified that the disclosure of any matter would, for various reasons, be contrary to the public interest.

28 Section 438, which is of present relevance, provides that:

438 Tribunal's discretion in relation to disclosure of certain information etc.

(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.

29 Division 7 concludes with s 440. That section empowers the Tribunal to direct that any information given to it, in the course of a review, not be published or otherwise disclosed subject to any exceptions which it prescribes. Such directions may be given on public interest grounds.

Decided cases

30 At the time that the FCC made its decision there were two decisions of this Court which had given careful consideration to the operation of s 438 or its counterpart in Pt 5 of the Act and the associated requirements of procedural fairness.

31 The first was *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 (*MZAFZ*). This was an appeal (by leave) from a decision of the FCC which had dismissed summarily an application for judicial review of a decision made by the Tribunal. MZAFZ had been refused a protection visa. The Tribunal affirmed the delegate's decision. A certificate had been issued under s 438(1)(a) of the Act in respect of some of the information provided to the Tribunal pursuant to s 418. The existence of that certificate and the material to which it related were not disclosed to MZAFZ by the Tribunal before it made its decision.

32 Once she became aware of the existence of the certificate MZAFZ alleged that she had been denied procedural fairness by the Tribunal. This had occurred,

she contended, because the certificate was invalid and that, in any event, she should have been given notice of the existence of the certificate. Her appeal was upheld by Beach J.

33 His Honour found (at [37]) that the certificate which had been given to the Tribunal was invalid because it did not identify any reason for the assertion that disclosure of any relevant material would be contrary to the public interest "that could form the basis of a claim" by the Commonwealth for non-disclosure. He held that "[i]n the absence of evidence to the contrary", he was entitled to assume that the Tribunal had acted "in some unspecified way" on the certificate and had, as a result, not followed the prescribed legal process. This gave rise to jurisdictional error: see *MZAFZ* at [40] and [44].

34 His Honour also dealt with MZAFZ's contention that, even if the certificate was valid, the Tribunal's failure to advise her of its existence gave rise to a denial of procedural fairness. It was clear from the Tribunal's reasons that the Tribunal had had before it and considered the documents covered by the certificate. What was less clear was whether the Tribunal had had regard to any (and, if so, which) of that material in reaching its decision.

35 His Honour held (at [50]-[53]) that:

> 50 Procedural fairness required that the Tribunal ought to have (but did not in the present case):
>
> (a) disclosed the existence of the certificate to the applicant …;
>
> (b) given the applicant the opportunity to make submissions on the validity of the certificate if she so chose …;
>
> (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).
>
> 51 Putting to one side for the moment s 422B, given that the Tribunal ex hypothesi would have relevant documents covered by the certificate, for the applicant not even to have knowledge of the existence of the certificate is antithetical to her interests. Only with knowledge of the certificate would she then be able to:
>
> (a) challenge its validity;
>
> (b) enquire of the Tribunal how it was going to use the material; and
>
> (c) seek an exercise of power under s 438(3)(b).
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> 52 To deny her knowledge of the existence of the certificate would effectively preclude her from taking any one or more of steps [51] (a) to (c). Moreover, the fact that s 438 does not itself contain an express statutory obligation to disclose the certificate does not foreclose any procedural fairness requirement, subject of course to the operation of s 422B.
>
> 53 Further, if the applicant was told of the existence of the certificate, it would be a denial of procedural fairness for the applicant not to be given the opportunity to take steps [51] (a) to (c) (cf *NAFQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 473 at [35] to [43] per Moore J). The applicant may be seen as a beneficiary of any exercise of power under s 438(3)(b). It is counter-intuitive to suggest that as such a beneficiary she should be denied the opportunity to take any one or more of steps [51] (a) to (c).

36 The Minister sought to persuade Beach J that he should examine the

documents to which the certificate applied for the purposes of establishing that the certificate had properly been issued and that there was nothing advantageous or disadvantageous to MZAFZ in the material which had not been disclosed to her. There is nothing to indicate that the Minister contended that the documents were also relevant to the question whether relief should be denied.

37 His Honour refused to examine the documents. He explained his reasons (at [55]) as follows:

> 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 [the purposes for which the Minister invited the judge to read the documents] 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.

38 His Honour went on to hold that the requirements of procedural fairness which he had held should have been, but were not, afforded to MZAFZ had to be satisfied notwithstanding the provisions of s 422B of the Act. This finding has not been challenged in the present proceeding.

39 The second case was *Singh*. The Full Court there considered the construction and operation of ss 375A and 357A of the Act. These provisions were substantially similar to ss 438 and 422B respectively.

40 The Full Court held that Beach J was correct to hold that s 422B(2) did not displace the general laws of procedural fairness where a certificate had been issued under s 438: see [39]. As a result and in the context of comparable provisions in Pt 5, the Tribunal was bound to disclose the existence of the certificate to Mr Singh and its failure to do so, in the circumstances of that case, gave rise to jurisdictional error: at [52].

41 In the FCC there had been an issue as to the adequacy of the particulars provided in the certificate issued under s 375A of the Act. The Full Court in *Singh* (at [18]) made the passing observation that it would "have been difficult to assess the adequacy of the particulars without examining the underlying material the subject of the certificate."

42 The Full Court was not called upon to consider the approach taken by Beach J to the Minister's request that the Court consider the documents covered by the certificate. This was because:

> No submission was made to [the] Court that the material subject to the certificate was irrelevant to the issues under review (as its contents might be read potentially as suggesting). Such a submission would have required, for its assessment, that the Court examine the material itself. As we have said, ultimately that material was not put before us.

See *Singh* at [16].

43 It appears that the Minister had sought, at an earlier stage of the proceeding, to tender the documents which were identified in the certificate. For whatever reason that application was not pressed. In anticipation that such an issue might arise in future cases the Full Court in *Singh* said (at [67]) that:

> First, the Minister initially sought to put before the Court the confidential information which was the subject of the certificate. For future cases, so that this material is not inadvertently seen by the Court prior to any debate as to whether it

> should be received, it should be provided manually in a sealed envelope with a clear statement on the front of it as to its contents. This will ensure that there is no premature disclosure of the material to the Court.

44 The material, the subject of the s 438 certificate in the present case, was not included in the court book and was not considered by this Court.

The FCC's decision

45 The only aspect of the FCC's decision which the Minister seeks to impugn on this application for leave to appeal arises from the trial judge's refusal to admit and have regard to the folios covered by the s 438 certificate.

46 The trial judge provided a carefully reasoned decision for acceding to BJN16's application for summary judgment on the ground that the Minister had no reasonable prospect of successfully defending the proceeding. He paid particular attention to the principles expounded by the High Court in *Spencer v Commonwealth* (2010) 241 CLR 118 and by a Full Court of this Court in *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* (2008) 167 FCR 372.

47 The Minister has not suggested that the trial judge erred when he essayed the principles upon which it is appropriate for a court to grant summary judgment but, as will be seen, he does take issue with the manner in which they were applied.

48 The trial judge held that he was bound by *MZAFZ* to hold that the evidence provided by the documents which were subject to the s 438 certificate was irrelevant and inadmissible in the proceeding before him, that the Tribunal's failure to advise BJN16 that the certificate had been given to the Tribunal constituted a denial of procedural fairness and that, as a result, a reviewable error had occurred.

49 His Honour was conscious that the denial of procedural fairness finding was strictly obiter in *MZAFZ* because Beach J had already held that the certificate was invalid. He was, nonetheless, persuaded that *MZAFZ* had been "seriously considered" and that the relevant dicta had subsequently been endorsed by the Full Court in *Singh*.

50 The trial judge upheld BJN16's objection to the tender of the documentary evidence on the ground that it was not relevant. His Honour held (at [108]) that:

> In light of the conclusions I have reached respecting s 438 and how it engaged an obligation of procedural fairness in the Tribunal to inform the applicant of that Certificate, nothing in the documents comprising the sealed exhibit could be relevant to whether that obligation arose or whether and how it was breached. The Minister's submission amounted, in substance, to an attempt to demonstrate that irrespective of any use of information in the documents there would have been no different outcome to the hearing before the Tribunal. In my opinion, that is not the point. The matter is not to be assessed in terms of possible outcomes but by reference to the procedure that was to be observed and upon consideration that such procedure was not observed in this case. That, in my view, was essentially a matter of statutory construction as applied to uncontested facts. Speculation that the information in the documents would have made no difference to the outcome is not relevant.

He added (at [112]) that:

> No purpose would be served by examining the documents in the sealed exhibit. That was because I considered that non-disclosure of the Certificate affected the applicant's opportunities to prepare for and participate in the hearing. As a result,

the assessment of relevance fell to be considered at the level of the procedure adopted (and not followed) in relation to the hearing and not whether the outcome of the application before the Tribunal would have been any different.

Is leave to appeal necessary?

51 It is well established that orders for summary dismissal are interlocutory in nature: see, for example, *Re Luck* (2003) 78 ALJR 177; 203 ALR 1 at [9] (McHugh ACJ, Gummow and Heydon JJ); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at [43] (Beaumont, French and Finkelstein JJ); *SZWBH v Minister for Immigration and Border Protection* (2015) 229 FCR 317 at [18] (Mansfield, Tracey and Mortimer JJ). A judgment of the FCC, such as the present, given under s 17A of the *Federal Circuit Court of Australia Act*, is deemed, by s 24(1D)(ca) of the *Federal Court of Australia Act 1976* (Cth), to be an interlocutory judgment. Leave to appeal from such judgments is required by s 24(1A) of the *Federal Court of Australia Act*.

52 As a result the Minister requires leave to appeal. He seeks that leave if necessary.

53 In order to obtain leave he must satisfy the Court that, in all the circumstances, the FCC's decision is attended by sufficient doubt as to warrant it being reconsidered by this Court and that substantial injustice would result if leave were refused, supposing the decision to be wrong: see *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399 (Sheppard, Burchett and Heerey JJ).

54 For the reasons which follow we consider that the FCC's decision is, in part, errant. That error relates to the basis upon which the proposed tender of the documents was refused. There are numerous conflicting decisions in the FCC as to the admissibility of such material. It is necessary, in the interests of justice, that this Court should deal with the issues which the Minister seeks to raise.

55 Leave to appeal should be granted to the Minister.

The Minister's case

56 The Minister challenged the FCC's findings that the documents covered by the certificate were not or could never be relevant in determining whether the non-disclosure of the certificate amounted to a denial of procedural fairness and whether the Court should exercise its discretion to grant or refuse relief and the ultimate finding that the Minister had no reasonable prospect of successfully defending the proceeding.

57 As he had done in the FCC the Minister contended that the disputed documents were relevant to two issues. The first was whether BJN16 had been denied procedural fairness when the Tribunal failed to advise him of the existence of the certificate and of the documents, to which it related, and which had been given to the Tribunal. The second issue was whether, if procedural fairness had been denied, it was appropriate, in its discretion, for the FCC to grant relief.

58 The Minister submitted that neither *Singh* nor *MZAFZ* supported the proposition that, in cases such as the present, such material can never be relevant.

BJN16's case

59 BJN16 sought to uphold the FCC's decision for the reasons which it had given. He contended that *MZAFZ* and *Singh* "established that it is the

non-disclosure by the Tribunal of the certificate (valid or invalid, issued under ss 438 or 375A) that constitutes a denial of procedural fairness … and, thus, jurisdictional error."

60 He further contended that the contents of the documents covered by the certificate could have no relevance in deciding whether procedural fairness had been denied or in determining whether relief should be granted.

61 He submitted that leave to appeal should be refused or, alternatively, be granted but the appeal dismissed.

Consideration

62 The documents which the Minister sought to tender before the FCC had been provided to the Tribunal by the Secretary prior to the hearing of BJN16's case. They were, therefore, documents which the Secretary considered to be relevant to the review: see s 418. It may be assumed, as did Beach J in *MZAFZ*, in the absence of evidence to the contrary, that the Tribunal had had regard to the documents when coming to its decision. As a general rule, such material is treated as being relevant for the purposes of judicial review: see *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 539-540 (Lockhart J).

63 It may be accepted that the non-disclosure by the Tribunal of the existence of a certificate, given under s 438 of the Act, may give rise to a denial of procedural fairness. It does not follow that this will always be the case. It will be necessary, in each case, for all the circumstances and the consequences for the applicant of the omission to be examined.

64 Both parties relied on the dictum of Gageler and Gordon JJ in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 (*WZARH*) at [60] that:

> 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.

65 BJN16 relied on this passage to support the proposition that a reviewing court will not be concerned to enquire as to what the person prejudiced by the breach might have said or done, had there been no such breach.

66 The Minister, on the other hand, placed emphasis on the qualification that relief will be forthcoming "unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome." Whilst acknowledging that he might confront considerable forensic difficulties in establishing that the exception applied in a given case, the Minister argued that their Honours had left open the possibility that it could be established, in a case such as the present, that the documents contained material that, on no view, could be thought to have prejudiced the interests of an applicant and could not and did not, even possibly, undermine the applicant's prospects of a favourable decision by the Tribunal. Such might be the case, so the Minister said, if the documents dealt with procedural matters such as the means by which the Department obtained information or were documents which it was established were already in the possession of the applicant at the time of the Tribunal hearing. It would not be necessary, in such cases, for the reviewing court to speculate as to what the applicant might or might not have done had he or she

known about the contents of the documents before appearing at the Tribunal. What it would have to determine was whether the documents contained material which negatived the suggestion that the non-disclosure deprived the applicant of the possibility of a successful outcome: see *Stead v State Government Insurance Commission* (1986) 161 CLR 141 (*Stead*) at 147 (Mason, Wilson, Brennan, Deane and Dawson JJ).

67 It was common ground that a reviewing court might withhold relief on discretionary grounds despite finding that an administrative tribunal had made a jurisdictional error in coming to a decision. Although rare, the possibility that circumstances might arise which would justify such a course has been acknowledged in cases such as *Stead* at 145 and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (*Ex parte Aala*) at [53]-[60] (Gaudron and Gummow JJ), [104], [122] (McHugh J), [149]-[150] (Kirby J), [217] (Callinan J).

68 If a party wishes to rely on the material to establish that relief should be refused that party should not be prevented from tendering material which he or she claims supports such a submission.

69 Even if, as BJN16 submitted, there was a relevant analytical difference between breaches of procedural fairness obligations and other kinds of jurisdictional error, the material remains relevant to relief. In *Ex parte Aala* at [59], Gaudron and Gummow JJ identified the rationale for procedural fairness in the exercise of statutory power as "the concern … with observance of fair decision-making procedures rather than with the character of the decision" and stated that this rationale differed from "that which generally underpins the doctrine of excess of power or jurisdiction". Their Honours nonetheless recognised that relief might not be secured for "trivial" breaches on the basis that "where the obligation to afford procedural fairness exists, its precise or practical content" is to be determined by reference to the controlling legal framework and the particular circumstances of the case (at [60]). Although expressed from a different analytical perspective, the same essential concern informs the statements by Gageler and Gordon JJ in *WZARH* at [60], to the effect that, where there is a denial of procedural fairness because of the denial of a fair opportunity to be heard, "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."

70 We do not consider that the decisions in *MZAFZ* and *Singh* compel the conclusion that material contained in documents covered by s 438 certificates can never be relevant in the course of judicial review proceedings in which the Tribunal has made a decision without disclosing to an applicant that the Minister has issued a certificate and that the documents identified in the certificate had been provided to it.

71 In *MZAFZ* the Minister sought to tender the documents covered by the certificate for limited purposes. These have been identified above at [36]. Two of those purposes related to aspects of procedural fairness. Neither went so far as to suggest that an examination of the documents would establish that MZAFZ had not been deprived of the opportunity of obtaining a favourable decision. The Minister, in *MZAFZ*, did not submit that the documents were relevant to the exercise of the Court's discretion to grant relief and the Court

was not invited to withhold relief on any discretionary ground. Accordingly, we do not consider that *MZAFZ* stands for the broad proposition contended for by BJN16.

72 In *Singh* the Full Court was not called on to deal with the rejection of an attempt, by the Minister, in the FCC, to tender documents covered by a s 375A notification. The Court clearly left open the possibility that it will be appropriate, in some cases, at least, for documents covered by s 375A notifications (and, by analogy, s 438 notifications) to be tendered.

73 There are numerous cases in which FCC judges have received evidence and examined such documents and gone on to hold that the failure to disclose the existence of the notification did not give rise to a denial of procedural fairness. Many of them preceded the trial judge's decision in the present proceeding: see, for example, *BZV15 v Minister for Immigration and Border Protection* [2017] FCCA 981 (*BZV15*); *ALP15 v Minister for Immigration and Border Protection* [2017] FCCA 1418; *SZMJM v Minister for Immigration and Border Protection* [2016] FCCA 2884; *SZVCP v Minister for Immigration and Border Protection (No 3)* [2016] FCCA 3333; *DBF16 v Minister for Immigration and Border Protection* [2016] FCCA 3291 (*DBF16*); *BIE15 v Minister for Immigration and Border Protection* (2016) 314 FLR 392; *BEG15 v Minister for Immigration and Border Protection* (2016) 315 FLR 196 (*BEG15*); and *BJD16 v Minister for Immigration and Border Protection* [2016] FCCA 2537. In each of these cases the FCC received the documents, covered by the relevant s 438(1) notification, into evidence. In most cases the documents had been exhibited to a solicitor's affidavit and had been read without objection by the applicant. In one case the Minister had simply incorporated the documents in the court book prepared prior to trial: see *DBF16* at [36]. In each of these cases *MZAFZ* was distinguished. In those cases which post-dated delivery of judgment in *Singh*, that judgment too was held not to prevent the FCC from examining the documents and taking them into account for the purpose of determining whether the fact that the documents had been before the Tribunal without the knowledge of the applicant had given rise to any practical injustice to the applicant.

74 For the most part this conclusion was reached in these cases because the material in the documents was found to be completely irrelevant to the issues which fell for the Tribunal's decision. In *BZV15*, for example, the material was found to be of a "most mundane character" (at [48]) and was "of the most anodyne nature and did not contain any information adverse to the applicant or [which was] otherwise relevant to the issues that the Tribunal was required to consider" (at [50]). In *BEG15*, the documents covered by the certificate recorded legal advice about errors in an earlier Tribunal decision which had led the Minister to agree to orders setting aside that Tribunal's decision. In another judgment, delivered today, we have dismissed an appeal from this decision: *BEG15 v Minister for Immigration and Border Protection* (2017) 253 FCR 36. In another case (*CQH16 v Minister for Immigration and Border Protection* [2017] FCCA 1498), decided on the same day as the FCC's decision in this case, the documents covered by the certificate revealed that the Minister's delegate had utilised an incorrect template when making her decision. Because the Tribunal had conducted a full re-hearing and made a fresh decision on the merits, it was found that the applicant had been in no way prejudiced by the failure of the Tribunal to disclose the existence of the certificate or the contents of the document covered by it.

75 To these examples may be added the decision of Barker J, in this Court, in *AVO15 v Minister for Immigration and Border Protection* [2017] FCA 566 (*AVO15*). In that case a certificate had been issued under s 438(1)(a) in respect of five documents. The existence of the certificate and the documents covered by it was not disclosed to the applicant by the Tribunal. The applicant sought judicial review of the Tribunal's decision. He did not rely on this failure in seeking review in the FCC. The FCC dismissed his application and he then sought leave to appeal from that decision in this Court. Again, he did not raise the issue. Nonetheless, the Minister, as a model litigant, drew the Court's attention to *MZAFZ* and *Singh* and tendered the certificate and the related documents to the Court. The applicant, who was not legally represented, did not object to the Court receiving the documents. Barker J examined them. Two were departmental internal working documents which, his Honour found, could have had no or only passing contextual relevance to the application. Two other documents dealt with the granting of a bridging visa to the applicant. The fifth document was what was described (at [89]) as "an outcome notification which resulted in [a] reconstituted Tribunal hearing." In these circumstances his Honour found (at [90]) that "the jurisdictional error principles and outcomes disclosed in *MZAFZ* and *Singh* have no practical application in this case." He also held that, even if there may have been some technical breach of disclosure obligations arising under the Act, it did not deprive the applicant of any opportunity to advance his case. No practical injustice arose: see *AVO15* at [87]-[91]. In the circumstances, his Honour dismissed the application for leave to appeal the judgment of the FCC.

76 These decisions, of course, all turned on their own facts. In most, the decision to issue a notification under s 438 may be open to question. They do, however, gainsay the proposition that the reviewing court should never receive in evidence and consider documents covered by s 438 notifications.

77 None of these authorities was referred to by the trial judge in the present proceeding.

78 It is also to be borne in mind that, in some cases, an applicant may wish to have access to such documents for the purpose of bolstering his or her case on judicial review. The documents might, for example, contain material which is prejudicial to the applicant's interests. Despite this the applicant may not have been advised of the substance of the prejudicial information and afforded the opportunity to deal with it. Depending on the particular circumstances, this may give rise to complaints of procedural unfairness under either or both limbs of that concept, ie, fair hearing and apprehended bias.

79 It will, perhaps, be an unusual case in which the reviewing court will be satisfied that the material in the documents, although relevant, can have had no bearing on the outcome of the Tribunal's decision. Nevertheless the possibility that such cases may exist may not be foreclosed. It is more likely that such material may be relevant if the reviewing court is invited to withhold relief on discretionary grounds.

80 In the present proceeding the Minister's primary purpose in seeking to tender the documents was to counter BJN16's contention that he (the Minister) had no reasonable prospect of defending the application in the FCC. In order to do this the Minister sought to tender and rely on the documents in order to persuade the Court that he had an arguable case that no denial of procedural fairness had

occurred or that, if it had, there existed discretionary grounds which would justify the FCC in withholding relief. The FCC should have admitted the material and considered whether it supported the Minister's case.

81 The trial judge refused to admit the evidence because of what we consider, with respect, to be a mistaken view of the decisions of this Court in *MZAFZ* and *Singh*. A consequence was that the Minister was unable to rely on potentially relevant documents when seeking to resist the summary judgment application.

Disposition

82 We would grant leave to appeal, allow the appeal and order that the trial judge's orders be set aside. We would remit the proceeding to the FCC to be heard and determined according to law. Upon such reconsideration it will be for the FCC to determine what, if any, bearing the contents of the documents have on the question of whether the Minister would have reasonable prospects of defending BJN16's claim and the related contentions. BJN16 may also wish to tender admissible evidence supporting his summary judgment application.

83 The appeal is one of a number which serve as test cases for pending appeals from a significant number of decisions made by the FCC. In these circumstances the Minister, properly in our view, advised the Court that, in the event that he succeeded, he would bear BJN16's costs of the application for leave to appeal and the appeal.

Orders accordingly

Solicitors for the appellant: *Clayton Utz*.

Solicitors for the first respondent: *Victoria Legal Aid*.

NICHOLAS DERRINGTON