FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v CQZ15 and Another*

[2017] FCAFC 194

Kenny, Tracey and Griffiths JJ

12 September, 29 November 2017

Immigration — Natural justice — Review of decision to refuse protection visa — Certification that information or document received in confidence or that disclosure not in public interest — 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 — Whether invalid certificate taints Tribunal's decision with jurisdictional error — 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 — Evidence Act 1995 (Cth), ss 55, 56.

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 *BJN16* (2017) 253 FCR 21 and *BEG15* (2017) 253 FCR 36.]

It was accepted in this proceeding that a certificate purportedly issued under s 438(1) of the Act, that was not given to the applicant by the Tribunal, was invalid.

On an application for review of the Tribunal's decision, the Minister sought to tender the notification under subs (2), and the documents said to be subject to it, to show that the applicant had not been denied procedural fairness because the Tribunal had not considered the material. The primary judge rejected the tender.

Held: (1) 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 covered by a notification, and the notification itself, are admissible for the purposes of showing that the documents covered by the certificate, or the notification, 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. [68]-[69], [72], [77]

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

AVO15 v Minister for Immigration and Border Protection [2017] FCA 566; *SZMTA v Minister for Immigration and Border Protection* [2017] FCA 1055; *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.

Obiter: The contents of a document covered by a notification, and the notification itself, may also be relevant to the withholding of relief on discretionary grounds. [88]

(2) The fact that the Tribunal is given notification of an invalid certificate under s 438(1)(a) does not always result in jurisdictional error. The effect of a departure from the requirements of s 438(1)(a) will depend on the circumstances in each case, particularly the effect of the departure on the decision under review, including whether or not the documents said to be covered by the certificate could be regarded as material to the decision under review. [74]-[76]

Minister for Immigration and Citizenship v SZIZO (2009) 238 CLR 627, applied.

Appeal against decision of Judge Riley, [2017] FCCA 130, 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 (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.

Dagli v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 133 FCR 541.

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

Immigration and Border Protection, Minister for v Hossain (2017) 252 FCR 31.

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

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

Immigration and Citizenship, Minister for v Li (2013) 249 CLR 332.

Immigration and Citizenship, Minister for v SZIZO (2009) 238 CLR 627.

Immigration and Multicultural and Indigenous Affairs, Re Minister for; Ex parte Lam (2003) 214 CLR 1.

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.

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

SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190.

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

SZMTA v Minister for Immigration and Border Protection [2017] FCA 1055.

SZQGA v Minister for Immigration and Citizenship (2012) 204 FCR 557.

SZRCI v Minister for Immigration and Citizenship (No 2) [2012] FCA 1291.

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

University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481.

Appeal

C Horan QC with *L Brown*, for the appellant.

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

29 November 2017

The Court

1 The first respondent, CQZ15, applied for a protection visa on 21 November 2012, which was refused by a delegate of the appellant Minister on 7 October 2013. CQZ15 applied to the Refugee Review Tribunal, now the Administrative Appeals Tribunal (Tribunal), on 10 October 2013, for review of the delegate's decision. On 15 October 2015 the Tribunal affirmed the delegate's decision, on the basis that CQZ15 did not satisfy the criterion in either s 36(2)(a) or s 36(2)(aa) of the *Migration Act 1958* (Cth) (Act). In substance, the Tribunal found that, having regard to country information and its findings of fact, there was not a real chance, or real risk, that CQZ15 would suffer serious, or significant, harm in the future if he returned to his country of nationality and that it was not satisfied that CQZ15 was a person in respect of whom Australia had protection obligations.

2 This is an appeal from a judgment of the Federal Circuit Court of Australia (FCC), which set aside the decision of the Tribunal, after extending the time for filing the relevant judicial review application. In the FCC, the learned primary judge made her decision on the basis of the decisions in *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1 (*MZAFZ*) and *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 (*Singh*).

Her Honour considered that the decisions were relevant because in the case of CQZ15, as in *MZAFZ* and *Singh*, issues arose concerning a "confidential certificate" and "confidential notifications" issued by the Minister under the provisions of the Act. Once a certificate or notification of this kind is issued, the Act constrains the disclosure of the information subject to it.

Procedural background

3 On the same day that the delegate refused CQZ15's protection visa application, another delegate purported to issue a certificate under s 438(1)(a) of the Act and a notification under s 438(2) (collectively, "the certificate") stating that the disclosure of certain information (in specified folios) on an identified file of the Department of Immigration and Citizenship, now the Department of Immigration and Border Protection (Department), would be contrary to the public interest because the specified folios contained specific information relating to the Department's "document examination process and internal workings".

4 Sometime after CQZ15 had applied to the Tribunal for review, the Secretary of the Department gave the Registrar of the Tribunal the documents in his possession or control considered relevant to the review of the decision, including the certificate: see s 418.

5 On 24 December 2014, the Tribunal invited CQZ15 to appear before it on 9 April 2015, "to give evidence and present arguments relating to the issues arising in relation to the decision under review": see s 425.

6 On 12 February 2015, another delegate notified the Tribunal that s 438(1)(b) of the Act applied in relation to "information provided to [the Department] as an allegation relevant to [an identified file]" because it was given to the Minister in confidence: see s 438(1)(b) and (2) (the notification). The notification expressed the view that the information should not be disclosed to CQZ15 or his representative because: "information provided in the attached allegation was provided in confidence. As a result this information should not be disclosed to parties before the tribunal without appropriate consideration". The notification also stated that the Tribunal's "use and disclosure of this information [was] subject to the provisions of subsections 438(3) and (4) of the [Act]".

7 On 9 April 2015 the Tribunal conducted a hearing of CQZ15's matter. It is undisputed that neither the certificate nor the notification was disclosed to CQZ15 by the Tribunal. The information the subject of the certificate and the notification was also not disclosed by the Tribunal to CQZ15.

8 As already indicated, following his unsuccessful application to the Tribunal, CQZ15 applied, out of time, to the FCC for judicial review. On 20 May 2016, pursuant to orders made by the FCC on 11 May 2016, the Minister filed a Court Book, with an Index (Index). Entry 13 in the Index stated:

> DIAC "Client Identity Assessment Form" [comprising folios 146 to 151 subject to a Certificate and Notification Regarding the Disclosure of Certain Information under s 438 of the *Migration Act 1958*]

The document was not reproduced.

9 Entry 16 in the Index stated:

> Certificate and Notification Regarding the Disclosure of Certain Information under s 438 of the *Migration Act 1958*

The certificate was reproduced in the Court Book.

10 Entry 25 in the Index stated:

> Notification Regarding the Disclosure of Certain Information under s 438 of the *Migration Act 1958*, attaching:
>
> (a) Information provided to DIAC [subject to the Notification Regarding the Disclosure of Certain Information under s 438 of the *Migration Act 1958*]

The notification was also reproduced in the Court Book, although the information subject to it was not.

11 Following the delivery of judgment in *MZAFZ* on 7 September 2016, CQZ15 filed an amended judicial review application, including an application for an extension of time and draft review grounds challenging the validity of the certificate, and raising issues of procedural fairness in consequence of the Tribunal's failure to disclose the existence of the certificate and the notification to CQZ15 prior to its decision.

How the issue for decision arose

12 CQZ15 filed written submissions in support of his application in the FCC on 22 September 2016. The Minister filed a written response on 6 October 2016. Subsequently, on 12 October 2016, the Minister filed, without leave, an affidavit affirmed by Vincenzo Murano (first Murano affidavit). Exhibited to this affidavit were the certificate *and* the documents said to be subject to it, and the notification *and* the documents said to be subject to it. CQZ15's legal representatives objected to the filing of the first Murano affidavit and sought its removal from the Court file. The Minister declined to seek leave to remove the affidavit from the file. Subsequently, an affidavit of 17 October 2016 was affirmed by a lawyer (Amy Faram) acting for CQZ15, which set out matters relating to the procedural background of the matter and CQZ15's concerns regarding the filing of the first Murano affidavit.

13 Before turning to the FCC's reasons and the Minister's grounds of appeal, it may be helpful to refer to the relevant legislation and to the principal decisions of this Court that informed the primary judge's decision.

The legislation

14 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 a decision if a valid application is made: see s 414. The Tribunal has the same powers as the delegate and may affirm, vary or set aside the decision under review: see s 415.

15 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.

16 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.

17 Other sections in Div 4 deal with matters such as invitations to applicants to appear at hearings, the consequences of a failure by an applicant to appear 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 sections 438 and 440": s 427(1)(c).

18 Provision is made for "miscellaneous" matters in Div 7 of Pt 7, which includes ss 437 to 440. 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 specified reasons, be contrary to the public interest.

19 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.

20 Section 440 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

21 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.

22 The first was *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.

23 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.

24 His Honour found 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 for 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].

25 His Honour also dealt with MZAFZ's contention that, even if the certificate were 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.

26 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).

> 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).

27 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.

28 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.

29 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 s 422B of the Act. This finding has not been challenged in the present proceeding.

30 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.

31 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. 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].

32 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."

33 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].

34 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:

> 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.

The Court directed that this course be adopted in the present proceeding. As a result the relevant material had been placed in a sealed envelope prior to the hearing.

The FCC's decision

35 At a hearing in the FCC on 20 October 2016, the Minister conceded that the certificate was invalid because it depended on a claim of non-disclosure of information about a departmental process and internal workings that, as explained by Beach J in *MZAFZ*, could not support a claim for public interest immunity as s 438(1)(a) of the Act required.

36 Also at that hearing, however, the Minister sought to read the first Murano affidavit to support his contention that the Tribunal had not acted on either the certificate or the notification, and that it had not considered that the information covered by them was material to the review. CQZ15 maintained an objection to that affidavit being read, contending that it was an abuse of process to file the affidavit without first obtaining leave to do so and that, in any event, having regard to *MZAFZ*, the affidavit was irrelevant and inadmissible. The Minister responded that *MZAFZ* was distinguishable; and that the documents exhibited to the first Murano affidavit showed that the Tribunal had not in CQZ15's case acted on either the certificate or the notification; and nor had it acted on the information to which they applied.

37 On 20 October 2016, the primary judge upheld CQZ15's objection to the admissibility of the first Murano affidavit, on the basis that *MZAFZ* "dealt squarely with th[e] point" and was binding on her. Her Honour rejected CQZ15's abuse of process argument, and held that the contested affidavit should be marked as not read and not removed from the Court file.

38 On 30 January 2017, the primary judge delivered judgment, setting aside the Tribunal's decision. Her Honour considered that *MZAFZ* and *Singh* were binding on her; that these decisions required her to hold that, in the case of CQZ15, the Tribunal had erred by failing to disclose to CQZ15 the certificate and the notification; that such an error constituted a breach of procedural fairness and jurisdictional error; and that the decision of the Tribunal ought therefore to be set aside and the matter remitted to the Tribunal for determination according to law.

39 Her Honour also considered and rejected CQZ15's submission that the

Tribunal's rejection of his claim that his brother was being held in Evin Prison as a political prisoner was objectively unreasonable, citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (*Li*).

The appeal

40 This appeal raises the question whether her Honour erred in ruling, in effect, that the first Murano affidavit was inadmissible and that she could not have regard to the information covered by the certificate and the notification in the judicial review proceeding; and, in this circumstance, finding that the Tribunal's decision was made in breach of procedural fairness and was to be set aside for jurisdictional error.

41 Prior to the hearing of the appeal, the Minister filed an affidavit affirmed on 29 August 2017, again by Mr Murano, in which Mr Murano deposed that he had exhibited a copy of the first Murano affidavit as "VM-1" to this, the "second Murano affidavit". The Court directed that exhibit "VM-1" to the second Murano affidavit be placed in a sealed envelope prior to the hearing of the appeal, in accordance with *Singh*.

42 Further, prior to the hearing of the appeal, CQZ15 filed an affidavit affirmed on 4 September 2017, again by Ms Faram, in which Ms Faram deposed that she was instructing in court on behalf of CQZ15 at the hearing in the FCC on 20 October 2016; that she then had with her "copies of a Further Amended Application, neither filed with the Court nor provided to the Minister, which included new grounds arising from the contents of the documents behind the two certificates under s 438(1) of the Act"; and that "[h]ad [the primary judge] determined that she would read the [first] Murano affidavit, the instructions of CQZ15 were to seek leave to file … the Further Amended Application". Prior to the hearing of the appeal, the Court further directed that this "Further Amended Application" "be provided to the Court at the hearing of the appeal in a sealed envelope with a clear statement on the front of it as to its contents".

43 As will appear, the Court is not of the opinion that it should open the envelopes containing exhibit "VM-1" and the Further Amended Application, and view their contents.

The notice of contention

44 CQZ15 relied on a notice of contention that, in grounds 1 and 2, claimed that there was error on the primary judge's part in failing to order that the first Murano affidavit be removed from the Court file. By ground 3, CQZ15 raised a different issue, namely, whether her Honour erred in rejecting CQZ15's submission that the Tribunal's decision was "objectively unreasonable".

The Minister's case

45 The Minister challenged the FCC's conclusion that the case of CQZ15 was relevantly indistinguishable from *MZAFZ* and *Singh* on the basis that no attempt had been made in those two cases to adduce evidence to show that the Tribunal did not act on the certificate or notification, and that the information to which they applied was not material to the Tribunal's decision. The first Murano affidavit, if admitted, would, so the Minister contended, have established that CQZ15 had not lost an opportunity to advance his case as a consequence of the non-disclosures. This was because the information to which the certificate and the notification applied was not material to the review. The Minister contended

that the first Murano affidavit contained relevant and admissible evidence: see *Evidence Act 1995* (Cth), ss 55 and 56. Accordingly, so the Minister said, the primary judge erred in ruling that the affidavit was inadmissible.

46 In the event that this primary submission was rejected, then the Minister submitted that the reasons advanced by Beach J in *MZAFZ* for not receiving evidence of the documents covered by a s 438 certificate should not be accepted.

47 The Minister further submitted that, if the Court were to hold that the first Murano affidavit was admissible, then the Court should admit the second Murano affidavit in the appeal, in order that the Court "can determine for itself whether the present case is distinguishable from *MZAFZ* and *Singh*, and whether the invalidity or non-disclosure of the certificate and the notification amount[s] to a denial of procedural fairness which gives rise to jurisdictional error and attracts the grant of relief". At the hearing of the appeal, however, the Minister acknowledged that, if the Court accepted that the first Murano affidavit was admissible, it would be open to the Court, having set aside the judgment under appeal, to remit the matter to the FCC for determination.

48 In response to grounds 1 and 2 of CQZ15's notice of contention, the Minister submitted that the primary judge was correct to reject CQZ15's submission that the filing of the first Murano affidavit was an abuse of process and that that affidavit ought to be removed from the Court file. The primary judge was correct in her view, so the Minister submitted, that the affidavit could have been admitted, "with the necessary leave being given retrospectively" had she been satisfied that the affidavit was otherwise relevant and admissible. The Minister submitted that there was no utility in the Court revisiting this aspect of the case.

49 At the hearing, the Minister did not address the final ground of CZQ15's notice of contention — that the decision of the Tribunal was "vitiated by fact-finding that is objectively unreasonable". The Court indicated that it would afford the Minister an opportunity to address on that issue if it should subsequently appear appropriate to do so.

CQZ15's case

50 CQZ15 submitted that the evidence sought to be adduced by the first Murano affidavit was inadmissible because it was not relevant to the issues before the Court in the judicial review proceeding. CQZ15 contended that *MZAFZ* and *Singh* established that it was the Tribunal's non-disclosure of the existence of the certificate and the notification that constituted the denial of procedural fairness and, therefore, jurisdictional error. CQZ15 contended that neither *MZAFZ* nor *Singh* was distinguishable from his own case.

51 CQZ15 contended that the information to which the certificate and the notification applied could have no relevance to deciding whether procedural fairness was denied or in determining whether relief should be granted. CQZ15 submitted that the circumstances in which relief is denied once a breach of procedural fairness is established are "exceptional", citing *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541 at [97] and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [131] (Kirby J), as well as *Stead v State Government Insurance Commission* (1986) 161 CLR 141 (*Stead*) at 147, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 (*WZARH*) at [60], and *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31 at [72].

52 CQZ15 submitted that, for the purposes of withholding relief on discretionary grounds, the Court would need to engage with the counterfactual of what would have happened at the Tribunal hearing had the breach of procedural fairness not occurred; and that this was not an inquiry that the Court could or should make, citing *SZQGA v Minister for Immigration and Citizenship* (2012) 204 FCR 557 at [157]. CQZ15 added that the only appropriate course was to remit the matter to the Tribunal for re-hearing and determination, in circumstances where the Tribunal was given an invalid certificate and the Tribunal failed to disclose both the certificate and the notification.

53 CQZ15 contended that it was "disingenuous for the Minister" to deny that the Minister's attempt to rely on the second Murano affidavit was "not a case of seeking to adduce new evidence on appeal". CQZ15 submitted that the filing of the second Murano affidavit was an abuse of process and that, for the reasons advanced in respect of the first Murano affidavit, that affidavit was not relevant to any issue before the Court.

54 In support of grounds 1 and 2 of his notice of contention, CQZ15 contended that it was, in the circumstances of the case, an abuse of process for the Minister to file the first Murano affidavit and that her Honour erred in not directing the removal of the affidavit from the Court file.

55 While CQZ15 also asserted in his notice of contention that the primary judge erred in rejecting his submission that the Tribunal's decision was "objectively unreasonable", he did not expand on this contention on the appeal. Instead, he relied on "the same submissions as were made … at first instance", adding that her Honour was "in error in concluding that the evidence about Evin Prison could not be relied upon" at this point, because evidence not before the decision-maker "may well be admissible" in support of this ground.

Consideration

56 The appeal raises questions relating to the admissibility of documents containing information subject to a notification under s 438(2) of Pt 7 of the Act as evidence in a judicial review proceeding, either to establish that there has been no denial of procedural fairness or to show that relief should be denied in the exercise of the Court's discretion.

57 As noted, there was a secondary question whether, if the documents were admitted into evidence, this Court should find, having regard to the second Murano affidavit, that there was no denial of procedural fairness or that relief should be denied in the exercise of the Court's discretion. As stated below, we do not consider it appropriate to embark on this inquiry.

58 Further, as our summary of the parties' submissions indicates, the notice of contention raised a related issue as to whether the Minister's filing of the first Murano affidavit constituted an abuse of process, as well as a non-related issue as to whether an aspect of the Tribunal's decision was "objectively unreasonable" in the sense used in *Li*. We touch on the first matter below. We have not found it necessary to consider the second matter.

Were the documents subject to the certificate and the notification admissible in the judicial review proceeding?

59 Before we turn to the primary question, it is convenient to note here that counsel for CQZ15 submitted at the hearing of the appeal that the argument advanced before the primary judge to justify the reading of the first Murano affidavit was more limited than the argument advanced by the Minister on

appeal. This may be accepted. Before the primary judge, the Minister made a formal submission that *MZAFZ* had been wrongly decided. It was also said that:

> Jurisdictional error does not follow from the Tribunal acting on an invalid certificate unless by doing so the Tribunal's jurisdiction to review the delegate's decision miscarries or by so doing the applicant is denied procedural fairness.

60 The balance of the Minister's submissions were, as counsel for CQZ15 submitted, directed to supporting the proposition that the Tribunal should not be taken to have acted on the certificate or the notification, and to refuting CQZ15's contentions that the filing of the first Murano affidavit was an abuse of process and that a finding made by the Tribunal about his brother was objectively unreasonable. The Minister's argument on the appeal, like that in the FCC, sought to justify the judicial examination of the documents covered by the certificate and the notification on the ground that they were relevant in the judicial review proceeding, because the contents of those documents would show that the Tribunal's decision did not involve jurisdictional error as alleged and CQZ15 was not entitled to the relief he sought.

61 It may be accepted that, speaking generally (and subject to limited exception), it is not open to a party, "after a case had been decided against him, to raise a new argument which … he failed to put during the hearing when he had an opportunity to do so": see, for example, *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71. The Minister's argument was not, however, a new argument in the sense discussed in that case and the other relevant authorities. The Minister's argument was essentially the same as that made in the FCC, although more developed in the appeal than that in the FCC. In this circumstance, we rejected the submission made by counsel for CQZ15 that the Minister should not be permitted to rely on his first ground of appeal.

62 It was common ground between the parties that the first Murano affidavit exhibited: (1) the certificate and the documents said to be subject to it; and (2) the notification and the documents said to be subject to it. The relevance and, in this case, the admissibility of the first Murano affidavit depended on whether the documents covered by the certificate and the notification (Documents) "could rationally affect … the assessment of the probability of the existence of a fact in issue" in the judicial review proceeding before the primary judge: see *Evidence Act*, ss 55 and 56. In substance, the primary judge accepted that she was bound by *MZAFZ* to hold that the first Murano affidavit was inadmissible because it contained nothing relevant to a fact in issue before her in that proceeding.

63 It may be accepted that the Documents exhibited to the first Murano affidavit had been provided to the Tribunal by the Secretary of the Department prior to the hearing by the Tribunal of CQZ15's case. They were, therefore, documents that the Secretary considered to be relevant to the Tribunal's review of the delegate's decision to refuse CQZ15 a protection visa. Of course, the Tribunal was not obliged to have the same view of the documents as the Secretary, although the Tribunal was obliged to familiarise itself with their contents.

64 It may be observed that, as a general rule, the documentary material before a decision-maker is treated as being relevant, in the broad sense, for the purposes of judicial review: see *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 539-540 (Lockhart J); compare also *SZRCI v Minister for Immigration and Citizenship (No 2)* [2012] FCA 1291 at [13]. We, therefore,

accept that, as the Minister submitted, the Documents (as exhibited to the first Murano affidavit) were prima facie relevant to the judicial review proceeding in the FCC.

65 Further, in the absence of evidence to the contrary, it may be assumed, as Beach J did in *MZAFZ*, that the Tribunal has had regard to (or, in his Honour's words "acted in some unspecified way on": *MZAFZ* at [40]) any document said to be covered by a s 438 certificate in coming to its decision. To say this, however, is to allow for the possibility that evidence may be led to show that the decision-maker could not in fact have had regard to such a document in coming to his or her decision. In this context, to say a decision-maker has had "regard" to or "acted on" a document is to say that the decision-maker has treated the document as material in some way to the decision on review.

66 The Minister relied on the judgment of Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (*Lam*), for the proposition that whether or not there has been a denial of procedural fairness depends on the circumstances of the particular case. *Lam* raised a different kind of procedural fairness question, arising from a failure to act in conformity with a departmental representation regarding the inquiries to be conducted before a visa cancellation decision was made. Nonetheless, as Gleeson CJ's reasons for judgment in that case show, and subsequent cases confirm, whether or not there has indeed been a breach of procedural fairness will almost always depend on the attendant circumstances. It was just such an inquiry into the circumstances of the case that led Gleeson CJ to reject the applicant's claim in *Lam* at [38], on the basis that:

> No practical injustice has been shown. The applicant lost no opportunity to advance his case. He did not rely to his disadvantage on the statement of intention. It has not been shown that there was procedural unfairness. And, as I have already indicated, there is no warrant for a conclusion that there was a failure properly to take into account the interests of the applicant's children.

67 Wherever there is an issue as to whether there has been a breach of procedural fairness of the kind alleged in *Lam* and in this case, the complainant must establish a loss of opportunity to advance his or her case, and whether he or she will succeed in this usually depends on the circumstances of the case.

68 It may be accepted that the non-disclosure by the Tribunal of the existence of a notification under s 438(2) of the Act may give rise to a denial of procedural fairness, as decided in *MZAFZ*. The Minister did not contend to the contrary. It does not, however, follow that the non-disclosure of such a notification will always give rise to a denial of procedural fairness. It will be necessary, in each case, for all the circumstances and the consequences for the applicant of the non-disclosure to be examined.

69 If, as the Minister contended, the contents of documents covered by the certificate or the notification in this case were found on inspection to be incapable of having any bearing on the decision of the Tribunal, then one would likely conclude that the non-disclosure of the certificate and the notification could not have deprived the applicant before the Tribunal of an opportunity to advance his or her case. This would be the case, whether or not the certificate or the notification was valid.

70 Reference was also made by CQZ15 at the hearing of the appeal to the comments of Gageler and Gordon JJ in *WZARH* at [55] that "[t]he concern of procedural fairness … is with procedures rather than outcomes" and to their

dictum 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."

71 CQZ15 relied on this passage to support the proposition that a failure to follow a process, which ought fairly to have been followed constituted "without more" a denial of procedural fairness and 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.

72 The Minister, on the other hand, placed emphasis on the need to show "a failure … to give the opportunity to be heard" referred to in [55] and on the qualification at [60] 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." The Minister emphasised that "the requirement of fairness is one of substance over form", which necessitates consideration of the relevant circumstances, including, in this case, the documents subject to the certificate and the notification, in order to determine whether or not there was unfairness in failing to disclose the certificate or the notification. 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 the applicant and could not and did not, even possibly, undermine the applicant's prospects of a favourable decision by the Tribunal. We accept the Minister's submissions in this regard.

73 It would not be necessary, in such a case, 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 the reviewing court 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* at 147 (Mason, Wilson, Brennan, Deane and Dawson JJ); see also *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190; 235 ALR 609 at [29], [85].

74 Furthermore, it may be accepted that jurisdictional error may arise in a case where a certificate has been invalidly issued under s 438(1)(a) of the Act, as decided in *MZAFZ*. The Minister rightly accepted that the s 438(1)(a) certificate in this case was invalid. This was because the reason stated in the certificate was that the specified folios contained "information relating to the [D]epartment's document examination process and internal workings" and, on no view, could this reason support a public interest immunity claim of the kind contemplated by s 438(1)(a). The fact that the Tribunal is given notification of an invalid certificate under s 438(1)(a) does not, however, always result in jurisdictional error.

75 In this connection, the Minister referred to *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (*SZIZO*) in which the High Court held that the Tribunal's failure to comply with the procedural steps, which were required by the Act and designed to ensure an applicant for review received "timely and effective notice of the hearing", did not in that case result in a denial of procedural fairness giving rise to invalidity: see *SZIZO* at [35]-[36].

Rather, notwithstanding the imperative terms of the relevant statutory provisions, to determine the effect of a departure from statutory requirements of this kind, it was necessary to consider "the extent and consequences of the departure", including whether the applicant had lost an opportunity to advance his or her case.

76 Although the provisions under consideration here are different in nature and purpose to those in *SZIZO*, we accept that the effect of a departure from the requirements of s 438(1)(a) will depend on the circumstances in each case, particularly the effect of the departure on the decision under review, including whether or not the documents said to be covered by the certificate could be regarded as material to the decision under review.

77 We do not consider that the decisions in *MZAFZ* and *Singh* compel the conclusion that the contents of the documents covered by s 438 certificates can never be relevant in a judicial review proceeding in which the Tribunal has made a decision without disclosing to an applicant that the Minister has issued a certificate (or the Secretary has given a notification) that the documents identified in the certificate (or the notification) had been provided to it. This is equally so with respect to the non-disclosure of a notification under s 438(2) and the documents to which that notification is subject.

78 In *MZAFZ* the Minister sought to tender the documents covered by the certificate for limited purposes. These have been identified above at [27]. 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 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 that the contents of documents covered by a certificate under s 438(1)(a) and/or a notification under s 438(2) of the Act that the Tribunal failed to disclose to the applicant can never be relevant in a judicial review proceeding, especially when an issue of procedural fairness arises.

79 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 notification under s 375A (in like terms to s 438). The Court clearly left open the possibility that it will be appropriate, in some cases, at least, for documents covered by a notification to be tendered: see *Singh* at [16].

80 Since the primary judge declined in CQZ15's case to allow the first Murano affidavit to be read, there have been a number of instances in which FCC judges have taken a different course. They have received evidence of this kind and examined the documents to which notifications applied, and, in consequence, held that the failure to disclose the existence of the notification did not give rise to a denial of procedural fairness: 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; *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(2) 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. In each of these cases *MZAFZ* was distinguished. In those which post-dated delivery of judgment in *Singh*, it too was held not to prevent the FCC 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.

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

82 To these examples may be added the decisions of Barker J and White J, in this Court, in *AVO15 v Minister for Immigration and Border Protection* [2017] FCA 566 (*AVO15*) and *SZMTA v Minister for Immigration and Border Protection* [2017] FCA 1055 (*SZMTA*).

83 In *AVO15* 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 as "an outcome notification which resulted in [a] reconstituted Tribunal hearing." In these circumstances his Honour found

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 at [87]-[91]. In the circumstances, his Honour dismissed the application for leave to appeal the judgment of the FCC.

84 In *SZMTA* a notification had been issued under s 438(2) in accordance with s 438(1)(b), in respect of some 15 folios in a specified file on the basis that the "information was given to the Minister of the Department of Immigration and Border Protection [or to] an officer of the Department of Immigration and Border Protection in confidence". The notification further stated that in the delegate's view "this information should not be disclosed to the applicant or the applicant's representative because [the] folios … contain information relating to an internal working document and business affairs". In providing that notification, however, the delegate overlooked that the whole of the Department's file, including the identified folios, had earlier been provided to SZMTA in response to a request under the *Freedom of Information Act 1982* (Cth). White J (at [54]) examined the documents covered by the notification and held that the 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'". Whilst his Honour accepted that there was some force in the Minister's submission that there had been no denial of procedural fairness in a practical sense, he ultimately rejected it, because "the presence of the invalid certificate may have affected in other ways the process by which the Tribunal reached its decision" and "the effect of the jurisdictional error *in the present case* is not to be determined by reference only to whether the appellant had the opportunity to make submissions about the matters in the identified documents which were adverse to him" (emphasis added): see *SZMTA* at [58]-[60].

85 As the different outcomes in *AVO15* and *SZMTA* emphasise, the decisions in this Court and the FCC turn on their particular facts and circumstances. In most, the decision to issue a certificate or notification under s 438 may be open to question. They do, however, illustrate the utility in a reviewing court receiving in evidence the documents covered by s 438 notifications. The primary judge was not referred to any of the above-mentioned cases that had been decided at the time of her Honour's decision.

86 It may be borne in mind that, in some cases, an applicant may wish to have access to the documents covered by a s 438 notification for the purpose of further supporting his or her case on judicial review. The documents might, for example, contain material which is prejudicial to the applicant's interests and 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.

87 It will, perhaps, be an unusual case in which the reviewing court will be satisfied that the contents of the documents the subject of a s 438 notification, although relevant, can have had no bearing on the outcome of the Tribunal's

decision. Nevertheless the possibility that such cases may exist cannot be foreclosed. In any event, it is likely that such material may be relevant if the reviewing court is invited to withhold relief on discretionary grounds.

88 In the present proceeding, the Minister's primary purpose in seeking to read the first Murano affidavit was to show that, even though the Tribunal had not disclosed the existence of the certificate and the notification to CQZ15 (and thereby afforded him an opportunity to make submissions of the kind Beach J had in mind in *MZAFZ*) there was in fact no denial of procedural fairness; or that, if there was, relief should nonetheless be withheld as a matter of discretion. For the reasons we have stated, it was open to the Minister to read the affidavit for this purpose. The FCC should have admitted the first Murano affidavit with its accompanying exhibits, and considered and determined the case the Minister sought to make in the judicial review proceeding.

89 The primary judge declined to allow the first Murano affidavit to be read on the basis that its contents were not relevant to any fact in issue in the proceeding. Her Honour reached this view because she adopted what we consider, with respect, to be a mistaken view of the decisions in *MZAFZ* and *Singh*. A consequence was that the Minister was unable to rely on potentially relevant documents when seeking to answer the applicant's case on judicial review.

90 In this circumstance, we consider that the judgment of the FCC should be set aside and the matter remitted to that Court for hearing and determination in accordance with these reasons.

The second Murano affidavit

91 We do not consider it appropriate for this Court to enter into the inquiry adumbrated in the second ground of the Minister's notice of appeal, as to whether or not, having regard to the second Murano affidavit, there was in fact a denial of procedural fairness and an entitlement to relief in CQZ15's case. We consider that this inquiry is essentially a matter for the FCC in the judicial review proceeding to consider having regard to the first Murano affidavit and any other relevant evidence. We would not, therefore, receive the second Murano affidavit, which was only said to be relevant if this Court were persuaded to undertake the inquiry.

Notice of contention

92 In view of the conclusion we have reached, it is unnecessary to consider CQZ15's notice of contention.

93 In case there is any doubt about the matter, however, we would state that, in our opinion, the primary judge was correct to reject CQZ15's submission that the late filing, without leave, of the first Murano affidavit was an abuse of the process. It would have been open to her Honour, as she herself observed, to have granted leave to file the first Murano affidavit retrospectively if she had accepted its admissibility; and to make such other consequential orders, if any, as she considered appropriate in the circumstances of the case.

Conclusion

94 We would allow the appeal, order that the judgment under appeal be set aside, and remit the matter to the FCC to be heard and determined according to law. When the Minister again seeks to tender the documents which are the subject of the certificate and the notification, whether under cover of an affidavit or otherwise, then it will be for the FCC to determine their admissibility in

accordance with these reasons, as well as the significance, if any, of the contents of those documents for CQZ15's judicial review application, as made or further amended.

Orders accordingly

Solicitors for the appellant: *Clayton Utz*.

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

NICHOLAS DERRINGTON