FEDERAL COURT OF AUSTRALIA

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

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| Appeal from: | *SZMTA v Minister for Immigration* [2016] FCCA 1329 |
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| File number: |  |
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| Judge: | **WHITE J** |
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| Date of judgment: | 5 September 2017 |
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| Catchwords: | **MIGRATION** – visa – application for complementary protection under *Migration Act* *1958* (Cth) s 36(2)(aa) – application refused by Minister – refusal affirmed by Administrative Appeals Tribunal – unsuccessful judicial review of Tribunal decision in Federal Circuit Court (FCC) – appeal from FCC decision – whether Tribunal decision affected by jurisdictional error because of failure to take into account the appellant’s health and mental state – Tribunal member accepted and relied upon evidence of health and mental state – no jurisdictional error established.  **MIGRATION** – whether inconsistency in Tribunal’s regard to appellant’s mental state when assessing credibility issues – the Tribunal’s reasons not unreasonable, irrational, nor illogical  **MIGRATION** – Minister’s delegate gave a notification to Refugee Review Tribunal under *Migration Act* s 438(1)(b) that certain materials should not be disclosed to the appellant because they had been given to the Minister or the Department in confidence– in fact all the materials listed in the notification had previously been disclosed to appellant’s then solicitors – whether jurisdictional error in procedure adopted in relation to notification – notification mistaken as it referred to documents and information which could not reasonably be regarded to have been given in confidence – inference that Tribunal relied on the mistaken notification and thereby committed jurisdictional error – appeal allowed. |
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| Legislation: | *Freedom of Information Act 1982* (Cth)  *Migration Act 1958* (Cth) ss 36(2), 48B, 375A, 417, 438, 476 |
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| Cases cited: | *Minister for Aboriginal Affairs v Peko‑Wallsend Ltd* (1986) 162 CLR 24  *Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183; (2016) 244 FCR 305  *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332  *MZAFZ v Minister for Immigration and Border Protection* [2016] FCA 1081; (2016) 243 FCR 1  *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1  *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235  *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534; (2015) 232 FCR 262  *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 |
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| Date of hearing: | 15 August 2017 |
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| Registry: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Solicitor for the First Respondent: | Clayton Utz |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | | NSD 978 of 2016 |
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| BETWEEN: | SZMTA  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | WHITE J |
| DATE OF ORDER: | 5 SEPTEMBER 2017 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the Federal Circuit Court on 1 June 2016 are set aside.
3. In substitution for Order 1 of the Federal Circuit Court, the decision of the Second Respondent made on 17 September 2015 be quashed and the matter be remitted to the Second Respondent for hearing and determination according to law.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WHITE J:

1. The appellant is a national of Bangladesh who arrived in Australia on 26 January 2008 on a Business Short Stay Visa.
2. On 6 March 2008, he applied, unsuccessfully, for a protection visa. The appellant sought review of that decision in the Refugee Review Tribunal (the RRT), judicial review of the RRT’s decision in this Court, and review by way of appeal to the Full Court of this Court and to the High Court of Australia. He failed on every occasion. The appellant’s subsequent application pursuant to ss 48B(1) and 417(1) of the *Migration Act 1958* (Cth) for ministerial intervention also failed.
3. However, s 36(2)(aa) (providing for complementary protection) was inserted into the Migration Act with effect from 24 March 2012. The appellant then exercised the entitlement recognised by *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235 to apply again for a protection visa, this time making a claim for complementary protection. That application was refused by a delegate of the Minister, and that refusal was affirmed on review by the Administrative Appeal Tribunal (the Tribunal).
4. The appellant sought judicial review of the Tribunal decision in the Federal Circuit Court (the FCC) pursuant to s 476 of the Migration Act. That application failed: *SZMTA v Minister for Immigration* [2016] FCCA 1329. The appellant now appeals to this Court against that decision.
5. Section 36(2)(aa) provides:

(aa) a non‑citizen in Australia (other than a non‑citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non‑citizen being removed from Australia to a receiving country, there is a real risk that the non‑citizen will suffer significant harm …

1. The appellant claimed to come within this provision on the following basis. He is now 49 years old, a practising Buddhist and a Buddhist teacher. He claims that Buddhism is a minority religion in Bangladesh; that adherents face discrimination and harassment at the hands of Islamic fundamentalists in Bangladesh; and that he fears that, not only will he not be able to practice his religion if he returns to Bangladesh, but that he will be targeted, tortured and possibly killed.
2. The appellant lived in Bangladesh until April 2004 and then for three years in a Buddhist community in South Korea, before coming to Australia in January 2008. He claims that after the election in Bangladesh in 2001, adherents of minority religions such as Buddhists were targeted and that he himself had been harassed and intimidated. The appellant claims to have a profile in Bangladesh as a Buddhist activist, arising from his having been a member, and later General Secretary of the Buddhist Student Union (the BSU) while at college. Later still, he became a member of the Chattra League, the student forum of the Awami League, at his college. The appellant referred to a number of incidents and occurrences which he said were manifestations of the harassment, intimidation and violence to which he and other Buddhists had been subject. In particular, he referred to incidents in August 1992 in which he had been physically attacked and injured, in September 2009 in which his uncle had been seriously injured, and on 3 December 2003 in which he had been attacked and stabbed in the stomach. The appellant was seriously injured and hospitalised in the latter incident. It was this event especially which prompted his departure from Bangladesh in April 2004 for South Korea, where he had lived in a Buddhist temple. The appellant also relied on incidents occurring in a dispute about some land (the Land Dispute). That dispute has some significance in the present appeal and it will be necessary to return to it.
3. The appellant submitted a significant amount of documentary material to the Tribunal in support of his application for review, as well as giving oral evidence.
4. The Tribunal member accepted the appellant’s evidence on a number of matters: that he had been a Buddhist all his life; that his father had died in 1975; that the appellant’s family suspects that his death occurred by reason of the actions of a jealous business competitor who was of the Muslim faith; that he had been involved in the BSU at college, including being the General Secretary of the Union in 1987; that he had been a member of the Chattra League within the Awami League; that he had been well‑known at college; that he may have campaigned for Awami League candidates in the 1991 elections in Bangladesh; and that he had suffered injuries in the incidents to which he referred (in particular in the stabbing incident in December 2003).
5. However, despite these matters, the AAT considered that the appellant was not a witness of truth. In particular, the member was not satisfied that the appellant had told the truth concerning critical aspects of his claims. He identified five topics giving rise to his concerns in this respect, the last of which was the appellant’s claims and evidence concerning the Land Dispute.
6. The Tribunal member then rejected significant aspects of the appellant’s claim. In particular, the member did not accept that a number of matters upon which the appellant relied would have the effect that he would face a real risk of significant harm if returned to Bangladesh. Those matters included:

(a) the nature of the appellant’s father’s death in 1975 and the fact that no one had been brought to justice for that death;

(b) the appellant’s political involvement and activities while a student more than 20 years ago;

(c) the appellant’s claim that he had been unable to find employment in Bangladesh because of his Buddhism, with the Tribunal noting in this respect that the appellant had been employed in Bangladesh between 1996 and 2001;

(d) the Tribunal did not accept the appellant’s claim that he had been individually targeted in 1998 during a religious festival;

(e) the Tribunal considered that the stabbing in December 2003 was a random criminal act unrelated to the appellant’s religion;

(f) the Tribunal did not accept that the appellant had been in hiding after December 2003 or that his family had been threatened;

(g) the Tribunal member considered that the attack on the appellant’s uncle in September 2009 had not been motivated by religion, and the appellant’s relationship with his uncle did not give rise to a real risk of harm.

1. The Tribunal member regarded it as significant that the appellant had not sought a protection visa during his three years in South Korea. The member also regarded the appellant’s claims about the Land Dispute as being unsatisfactory.

## Ground 1

1. At the conclusion of his oral submissions, counsel for the appellant said that Ground 1 was not pursued. However, he did rely on matters advanced in support of Ground 1 in relation to other grounds, so that it is appropriate to address it.
2. By Ground 1, the appellant complained that the FCC Judge should have found that the Tribunal decision was affected by jurisdictional error by reason of the member’s failure to take a relevant consideration into account when finding that the appellant’s evidence concerning the Land Dispute gave rise to concerns that he was not telling the truth. The identified relevant consideration was that the appellant’s medical condition (more particularly his mental state) may have accounted for the inconsistencies in his account which gave rise to the Tribunal member’s concerns about the appellant’s credibility.
3. The evidence before the Tribunal concerning the appellant’s mental state included a letter from a general practitioner (Dr Kyrillos) dated 12 April 2010 stating that the appellant suffered from “severe anxiety‑depression” for which he was being treated with counselling and anti‑depressant medication; a letter from another general practitioner (Dr Hossain) dated 4 April 2010 stating that the appellant met the criteria for a diagnosis of “adjustment disorder with mixed symptoms of anxiety and depression” which, while not having a severe impact on his day to day functioning, meant that his “ability to concentrate is impaired and [he] is very forgetful”; and a letter from a psychiatrist (Dr Ryan) dated 20 May 2015 which confirmed the diagnosis of Dr Hossain and said that the appellant’s mental state would be “manifest [in] memory, attentional and sequencing problems”.
4. As indicated earlier, the appellant’s claims and evidence concerning the Land Dispute comprised the fifth matter giving rise to the Tribunal’s concerns about the reliability of his evidence. The Tribunal addressed these matters in [68]‑[75] of the reasons. The appellant did not contend that the Tribunal’s summary of the matters concerning the Land Dispute was inaccurate and, accordingly, the following summary is drawn from the Tribunal’s reasons.
5. The appellant claimed that he feared returning to Bangladesh because of the Land Dispute (among other reasons). He told the Tribunal initially that Islamic fundamentalists had captured his mother’s land in 2009; that she had raised this capture with the sub‑district Municipal Office, and that she had paid money for the return of the land but to no avail. His mother had attended the land in early 2010 where she was attacked by fundamentalists and her leg broken.
6. The appellant also told the Tribunal that he himself had bought land in 2001, at the same time as he had bought the land for his mother. He told the Tribunal that this land had also been “captured” with a claim having been fabricated that he had been occupying the land illegally. The appellant attributed these events to the influence of a local identity. The appellant said that he was afraid to pursue the rights of his mother and himself in the courts in Bangladesh because of the prospect that he or his family members would be harmed or killed.
7. The Tribunal member was concerned that the claim that the mother’s leg had been injured on her visit to the land in dispute in 2010 had not previously been mentioned by the appellant in his written claims or in several of the documents he had supplied in support of his claims. However, reference to an injury to the mother’s leg had been made on two occasions. Despite the appellant not having mentioned the injury on several occasions, the Tribunal said that it had “taken into account the post‑hearing submission and the applicant’s medical conditions and Mr Ryan’s report” and made “no adverse credibility findings” because the appellant had not raised the claim consistently.
8. However, the Tribunal noted that documents which the appellant had provided concerning his own ownership of the land showed that it had been purchased in July 2003, this being inconsistent with the appellant’s oral evidence that he had bought the land in 2001 at the same time as he (or his mother) had bought her land. When the Tribunal member drew this to the appellant’s attention, he responded by saying that the documents were correct and that he had made an error in his oral evidence. However, in a statutory declaration provided to the Tribunal after the hearing, the appellant declared:

The deed documents are correct. There are 3 pieces of land involved. One land that was purchased in my mother[’s] name in 2001 and other land was purchased in 2003 in my name and there are more lands that my mother bought. Due to that confusion and stress, I made mistake when mentioning about the year the land was purchased in my name.

1. The Tribunal member noted that the appellant had not mentioned the three pieces of land at the hearing; and that the appellant’s claim that he had bought the land in his name in 2003 was inconsistent with his earlier evidence that he had bought it at the same time as buying the land for his mother (in 2001). It also evident that the Tribunal member had concerns about whether the appellant had had the means in 2003 of buying land given his evidence that, from 2001, he had been a Buddhist monk living in a temple. Ultimately, the Tribunal accepted that the documents provided by the appellant concerning the land ownership were genuine but, nevertheless, considered that the changes in the appellant’s account over time regarding the purchase and ownership of the land reflected poorly on his credibility and, in turn, on the reliability of his claims.
2. The Tribunal’s conclusion on the appellant’s claim to fear harm in Bangladesh because of the Land Dispute was as follows:

[88] As noted above the Tribunal has considerable concerns in relation to the applicant’s credibility. While the Tribunal has taken into consideration the documents in relation to land ownership and disputes over land ownership, the Tribunal is concerned that the applicant’s evidence about the purchase and ownership of land has changed considerably. While the Tribunal accepts the documents provided by the applicant indicate he owns land and that he has been named as one of a number of defendants in relation to an action based on illegal occupation of land, given the credibility concerns and changes in the applicant’s evidence mentioned above, the Tribunal is not satisfied the applicant has told the truth in relation to any disputes over his and his family’s land. While the Tribunal accepts the applicant’s mother injured her leg, the Tribunal is not satisfied that that injury was suffered in a physical assault or attack in relation to a dispute over land. While the Tribunal accepts the applicant has been named as one of a number of defendants in an action of illegal occupation of land, the Tribunal does not accept this is a false case, or that it relates to the applicant’s own land. The Tribunal does not accept the applicant would pursue any action about illegal occupation of his own land if he returned to Bangladesh. The Tribunal does not accept there is an ongoing dispute about the applicant’s own land, or that there is a real risk the applicant would suffer significant harm due to a land dispute if the applicant returned to Bangladesh.

1. In the FCC, the appellant contended that, in reaching the adverse finding concerning his credibility based on his evidence and claims concerning the Land Dispute, the Tribunal had failed to consider whether the appellant’s medical condition was a possible explanation for the inconsistencies in his account. This was said to constitute jurisdictional error.
2. The FCC Judge did not accept this contention, holding that it was apparent from the Tribunal’s reasons that it had taken account of the appellant’s alleged psychiatric condition and the reports on which the appellant relied. The FCC Judge also considered that this was a case in which the Tribunal’s reasons were “not to be read with a keen eye for error” and were “to be read as a whole”, at [29].
3. On the appeal, counsel for the appellant noted that it is commonly the case that the Tribunal must make an assessment of an applicant’s credibility when considering a claim for a protection visa. The discharge of this function requires the Tribunal, counsel submitted, to consider all material advanced by an applicant which is rationally and clearly connected to the assessment of credit. In the appellant’s case, this made it incumbent on the Tribunal to consider the evidence of the appellant’s medical condition which may bear upon the inconsistencies in the claims and evidence he gave concerning the Land Dispute.
4. In my opinion, this ground of appeal fails at a factual level, so that it is not necessary to consider the issues of principle raised by Ground 1. Contrary to the appellant’s submissions, it is evident that the Tribunal member did have regard to the evidence concerning the appellant’s medical condition, including the report from Dr Ryan. The Tribunal member recorded that the appellant had been diagnosed as suffering from an adjustment disorder with anxiety and depressive symptoms as well as hypertension and noted Dr Ryan’s opinion that the appellant was suffering from “psychological stress” which had been escalating over recent years. The member referred expressly to Dr Ryan’s opinion that these conditions gave rise to “memory and attentional problems with difficulty consistently giving adequate account of himself”.
5. The Tribunal member did not only note Dr Ryan’s evidence. He accepted it and relied on it in deciding not to draw conclusions adverse to the appellant’s credibility on a number of topics. More particularly, the Tribunal relied upon the appellant’s medical condition and Dr Ryan’s report in the findings concerning some of the issues arising from the Land Dispute. In [71], the Tribunal said that it had taken into account these matters and made “no adverse credibility findings because the applicant [had] not consistently raised [the claim concerning the injury to his mother’s leg]”. Further still, the Tribunal member said that he taken into account in the findings concerning the appellant’s claim that he had made a mistake about the year in which the land had been purchased because of “confusion and stress”.
6. In these circumstances, the fact that the Tribunal member did not refer explicitly to the appellant’s medical conditions and to Dr Ryan’s report in relation to other aspects of the adverse credibility findings cannot reasonably be regarded as an indication that the Tribunal did not have regard to these matters. No jurisdictional error in this respect is established.

## Grounds 2 and 3

1. These two grounds can be considered together. Ground 2 rested on what was said to be an inconsistency in the Tribunal’s willingness to have regard to the appellant’s mental state when assessing some credibility issues and its refusal or failure to do so in relation to other credibility issues. The contention was that the FCC Judge should have found that, in relation to the Tribunal’s assessment of the Land Dispute, it had been unreasonable in the sense discussed in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 because it lacked “an evident and intelligible justification”.
2. Ground 3 rested on the same considerations but was to the effect that the FCC Judge should have found that the Tribunal’s assessment of the appellant’s credibility in relation to the evidence and submissions concerning the Land Dispute was so unreasonable that no reasonable tribunal could have reached the decision.
3. The distinction between the two grounds is that Ground 3 focuses on the conclusion of the Tribunal whereas Ground 2 focuses on the manner in which the Tribunal had reasoned to that conclusion. The appellant submitted that a decision may be held to be unreasonable in the *Li* sense because of the manner in which the decision‑making power was exercised or because of the unreasonableness of the end result.
4. Counsel for the appellant referred in this respect to *Minister for Aboriginal Affairs v Peko‑Wallsend Ltd* (1986) 162 CLR 24 at 41; *Li* at [72] (Hayne, Keifel and Bell JJ) and at [98] (Gageler J); *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16, (2010) 240 CLR 611 at [113]‑[131] (Crennan and Bell JJ); *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534, (2015) 232 FCR 262 (Logan J); and *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 at [61]‑[64] (Wigney J).
5. In the view I take of the matter, it is not necessary to refer to these authorities in detail.
6. The particular matters which the Tribunal member considered gave rise to the inconsistencies were:

(a) in a support letter to the Department dated 26 April 2014, the appellant’s representative claimed that the appellant’s mother’s leg was broken by Muslim fundamentalists when she visited the apparently appropriated land. However, it was not mentioned in letters and witness statements dated 28 October 2009, 23 November 2009, 8 December 2009 and 6 April 2010. Nor was it mentioned in statutory declarations made by the appellant on 28 April 2014 and 5 May 2015 and, further (despite the appellant’s claims to the contrary), was not mentioned by him when he was interviewed by the Minister’s delegate on 1 and 2 May 2014. The Tribunal did not rely on these inconsistencies for the adverse credit findings;

(b) the appellant’s claims that he and his mother owned three pieces of land in Bangladesh. Initially, the appellant said that he and his mother each owned a block of land, with both having been bought at the same time in 2001. That was the evidence before the Tribunal at the time of its hearing on 8 May 2015. However, in post‑hearing statutory declaration made on 22 May 2015, the appellant said for the first time, when explaining inconsistencies in his evidence and in the documents as to when the land had been bought, that there were more than two blocks of land: one purchased in his mother’s name in 2001, one purchased by the appellant in his own name in 2003 and “more lands” that his mother had bought. He attributed his confusion in the dates he had given as to when the land had bought to the fact that there had been multiple purchases. It was the changes in the account as to the number of pieces of land which caused the Tribunal to doubt the appellant’s credibility;

(c) when it was pointed out to the appellant that documents he had provided showed his purchase of land in 2003 and not in 2001 (as he had claimed) and not at the same time as the purchase of the mother’s land (as he had claimed), the appellant had not mentioned his ownership of further land, but attributed it to a mistake about the purchase date. It is evident that the Tribunal member considered this surprising even making allowance for the evidence concerning the appellant’s mental state.

1. I consider that, on a fair reading of his reasons, it is apparent that the Tribunal member drew a distinction between inconsistencies in the recounting by the appellant of events which had occurred in the past which may have been due to his failure to advert to matters of detail, on the one hand, and inconsistencies in his description of matters to which he did in fact advert. The Tribunal member was prepared to accept that the former may be attributable to the appellant’s mental state but not the latter. The appellant’s evidence concerning the number of pieces of land he had bought, and the time at which he had done so in relation to the time of the purchases by his mother were in the latter category, whereas the injury to the mother’s leg was in the former. In my opinion, this cannot be said to have been unreasonable in the *Li* sense, nor irrational nor illogical. The FCC Judge was accordingly correct to conclude that these grounds of the application for judicial review were not made out.
2. I conclude therefore that neither Ground 2 nor Ground 3 is made out. Ground 4 was not pursued.

## Ground 5

1. At the hearing of the appeal on Grounds 1, 2 and 3 on 2 November 2016, the Court granted the appellant leave to add a new Ground 5. This ground had its basis in a notification which a delegate of the Minister had provided to the former RRT under s 438(2) on 17 June 2014 (the day after the appellant had lodged his application with the RRT).
2. The ground was to the effect that the FCC should have found jurisdictional error by the Tribunal in the procedure it had adopted in relation to the notification and, in particular, should have applied the approach adopted by Beach J in *MZAFZ v Minister for Immigration and Border Protection* [2016] FCA 1081; (2016) 243 FCR 1. It was common ground that this ground had not been agitated in the FCC but counsel for the Minister made no objection to the issue being advanced on the appeal.
3. At the request of the parties, the Court adjourned the hearing of the submissions on Ground 5 until the hearing and determination of the appeal by the Full Court in *Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183; (2016) 244 FCR 305. Later, the Court deferred the hearing of the submissions still further to await the outcome of the Minister’s application for special leave to appeal to the High Court of Australia in *Singh* (which was refused on 12 May 2017).
4. After listing the matter for further hearing on 15 August 2017, the Court alerted the parties to the test cases concerning the circumstances in which *Singh* and *MZAFZ* may be distinguished, and enquired whether the parties wished to have the hearing further adjourned. Neither party sought such a deferral. Accordingly, the further hearing proceeded.
5. The terms of the delegate’s notification of 17 June 2014 were:

I notify the Refugee Review Tribunal that paragraph 438(1)(b) of the *Migration Act 1958* applies to the information in folio/s 38‑40, 212‑223 of File Number: CLF2008/43937. This 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.

In my view, this information should not be disclosed to the applicant or the applicant’s representative because folios 38‑40, 212‑223 contain information relating to an internal working document and business affairs.

The Refugee Review Tribunal’s use and disclosure of this information is subject to the provisions of subsections 438(3) and (4) of the *Migration Act 1958*.

1. As can be seen, the delegate identified a total of 15 folios in the Department’s file which should not be disclosed to the appellant. In providing that notification, the delegate overlooked that the whole of the Department’s file, including the identified 15 folios, had earlier (on 19 April 2011) been provided to the appellant’s solicitors in response to a request under the *Freedom of Information Act 1982* (Cth) (the FOI Act). Those solicitors were the same solicitors who represented the appellant in the proceedings in the Tribunal. Accordingly, the delegate’s notification did not have the effect that the appellant was in fact denied access to any document in relation to the proceedings in the Tribunal. It was common ground that the only document not disclosed to the appellant was the delegate’s s 438 notification.
2. Counsel for the appellant submitted that the Court should nevertheless apply the reasoning in *MZAFZ* and in *Singh*.
3. Section 438 provides:

**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.

1. In *MZAFZ*, a delegate had provided the RRT with a certificate purportedly under s 438(1)(a) that the disclosure of the information in specified folios in the Departmental file would be contrary to the public interest “because it contains internal working documents”. In finding that the Tribunal proceedings had been affected by jurisdictional error, Beach J held:

(a) The certificate was invalid because the claim to which s 438(1)(a) refers is a claim for public interest immunity and the fact that the folios were “internal working documents” was not sufficient for such a claim, whether at common law or under statute, at [37];

(b) for the Tribunal to have proceeded on an invalid certificate was not a process according to law and so constituted jurisdictional error, at [44];

(c) even if the certificate had been valid, there had been a denial of procedural fairness because the Tribunal had not disclosed the existence of the certificate to the appellant; nor given the appellant the opportunity to make submissions on the validity of the certificate; nor disclosed the extent, if at all, to which the Tribunal was going to take into account the information covered by the certificate, and had not given the appellant an opportunity to seek a favourable exercise of the discretion under s 438(3)(b).

1. *Singh* concerned the analogous (but not identical) provisions in s 375A of the Migration Act. The Full Court found that the fact that the Tribunal had not disclosed the delegate’s certificate to Mr Singh constituted a denial of procedural fairness.
2. The first submission under Ground 5 of counsel for the present appellant was that the delegate’s certificate issued on 17 June 2014 was invalid. That was said to be so for the same reason given by Beach J in *MZAFZ*, namely, that the fact that the identified folios contain information “relating to an internal working document and business affairs” was not sufficient for a claim for public interest immunity.
3. That submission cannot be sustained because the notification in the present case was not given under s 438(1)(a) but instead under subs (1)(b). That subparagraph turns not on the existence of a certificate that public interest immunity applies to the document or information but instead on the circumstance that the document or information was given to the Minster or to an officer of the Department “in confidence”. This was the assertion which the Minister’s delegate made in [1] of the notification dated 17 June 2014.
4. Counsel then made a revised submission, namely, that the notification was invalid because the assertion that the folios contained information given to the Minister or to an officer of the Department in confidence was wrong. However, counsel did not develop this submission by reference to the particular folios identified by the delegate in the notification.
5. Counsel for the Minister later identified the folios to which the delegate had referred. Counsel for the appellant did not dispute that identification. The documents were included in a supplementary appeal book and both parties accepted that it was appropriate for the Court to have regard to them.
6. The submissions of the parties proceeded on the basis that documents are given in confidence within the meaning of s 438(1)(b) if they are given in circumstances imposing an obligation of confidence. I will proceed in these reasons on the same basis.
7. The Court did not receive submissions in any detail on the question of whether the documents contained information given in confidence either to the Minister or to an officer of the Department. That being so, I consider it inappropriate to make other than a generalised assessment of the documents in question. Some of them are marked with a stamp “In‑Confidence” and this may indicate the view of someone within the Department that they are regarded as confidential. That of course could be so without the documents containing information which had been “given” to the Minister or to an officer of the Department in confidence.
8. However, it is not easy to see that some of the documents could answer the statutory description in s 438(1)(b). I instance the email communications between Departmental officers relating to the response to the appellant’s FOI request, the Minister’s decision made on 27 July 2010 on the appellant’s then application under s 417 of the Migration Act, and a letter from a colleague of the appellant dated 13 August 2010 and addressed to the Minister in support of the appellant’s s 48B and s 417 applications. Counsel for the Minister accepted, quite fairly, that the last of these documents may cause the Court “some concern” and “may invalidate” the certificate.
9. It is not necessary to decide presently whether the mistaken claim that a document or documents had been provided in confidence has the effect of invalidating the notification. At the least, it made the notification misleading. I propose to act on that view of the matter. 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”.
10. There is no indication, one way or the other, that the Tribunal member had any regard to the documents identified in the 17 June 2014 notification. It was common ground, however, that the Tribunal member had not disclosed the documents to the appellant in the exercise of the discretion under s 438(3)(b).
11. Like Beach J in *MZAFZ* at [40], I consider that the Court is entitled to infer that the Tribunal did act in some unspecified way on the invalid notification and that this constituted jurisdictional error.
12. Counsel for the Minister contended, however, that the defect in the certificate had had no practical consequence. Counsel submitted that the appellant’s possession of the documents by reason of the FOI request meant that he and his representatives had been able to make all the submissions they wished in relation to the documents in the belief that they would be before the Tribunal. That being so, it was said that there had not been a denial procedural fairness to the appellant in any practical sense. In support of this submission, counsel referred to *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at [37].
13. There is some force in the submission but ultimately I have decided that it ought not to be accepted. That is because the presence of the invalid certificate may have affected in other ways the process by which the Tribunal reached its decision. There is no indication that the Tribunal member was aware that the identified documents were in the appellant’s possession in any event. It seems more likely that the member would have assumed that they were not. That would have been a natural inference from the delegate’s advice that the documents should not be disclosed to the appellant.
14. The Tribunal member may, in that circumstance, have chosen not to have regard to the identified documents, perhaps because of the perceived necessity then to consider whether the documents should be disclosed to the appellant or perhaps he wished to avoid referring to documents which he believed the appellant had not seen. If the member made that decision, he would not have had regard to matters in the documents which may have assisted the appellant, for example, the letter of support of 13 August 2010 from the appellant’s colleague or those documents containing summaries of the appellant’s claims.
15. In short, 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. Account should also be taken of the prospect that, by reason of the presence of the delegate’s notification, the Tribunal did not have regard to information in the identified documents which may have assisted the appellant.
16. In that circumstance, I consider that the appellant has established Ground 5, with the effect that the appeal should be allowed.

## Conclusion

1. For these reasons, I would allow the appeal, set aside the orders of the FCC and the determination of the Tribunal and remit the matter to the Tribunal for further consideration in accordance with law. I will hear the parties as to costs.

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| I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 5 September 2017