

Deal With It: *MZAFZ*, *Avtar Singh* and procedural fairness in ‘certificate’ cases

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In September and December 2016, the Federal Court and the Full Court of the Federal Court handed down decisions in two cases involving certificates issued by the Minister preventing, or at least limiting, the disclosure of certain information and documents to the applicant.

Those decisions were *MZAFZ v Minister for Immigration and Border Protection* [2016] FCA 1081 and *Minister for Immigration and Border Protection v Avtar Singh* [2016] FCAFC 183.

In both cases, the court found there had been a denial of procedural fairness in the non-disclosure of the existence of the certificates to the applicants.

Both of these cases potentially have significance beyond the situation where certificates have been issued about non-disclosure of documents. That is because each case required the court to interpret the scope of provisions in the legislation that purport to give exhaustive statements of the natural justice hearing rule.

In both cases, the court interpreted the “exhaustive statements” narrowly, giving procedural fairness some work to do in a situation where it would have been excluded if a broad interpretation had been adopted.

MZAFZ

In *MZAFZ*, a refugee case, a certificate had been issued under s438 of the *Migration Act*. Section 438 is in the following terms:¹

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

¹ Note that s376 provides for a certificate in virtually identical terms in relation to part 5 decisions. However, the provision used to issue the certificate in *Singh* was s375A, rather than s376.

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.

Accordingly, there are effectively two bases for withholding information or documents pursuant to a certificate under this section: public interest immunity, or the fact that a document was provided in confidence. It is clear that that reason needs to be specified in the certificate itself.

If a certificate under s438 is validly issued, the Tribunal may have regard to the information or documents covered by the certificate. The Tribunal then has the discretion, under sub-s.(3)(b), to disclose the information to the applicant if the Tribunal thinks it is appropriate to do so, having regard to the advice given by the Secretary under sub-s.(2), or it may decide not to disclose the information to the applicant.

In *MZAFZ*, the delegate of the Minister had issued a certificate under s438 of the Act in the following terms.

CERTIFICATE AND NOTIFICATION REGARDING THE DISCLOSURE OF CERTAIN INFORMATION UNDER s 438 OF THE *MIGRATION ACT 1958*

I certify that paragraph 438(1)(a) of the *Migration Act 1958* applies to the information in folios 77-85 & 87-88 attached to file number CLF2013/87392. The disclosure of this information would be contrary to the public interest because it contains internal working documents.

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

On its face, that certificate is clearly invalid. Internal working documents are not a category that attracts public interest immunity. Nor is there anything in the reason specified in the certificate that indicates that the material was provided to the Minister in confidence.

Given that the certificate was invalid, the court then had to determine the consequences for the review that flow from the invalidity of the certificate. Beach J, not having inspected the documents that were covered by the certificate, found that he was entitled to assume that the Tribunal had acted on the certificate in some way.

It follows that the Tribunal might not have turned its mind to whether the material in the documents might form part of the reason for affirming the decision, and so had to be disclosed to the applicant under s424A or 424AA, which it would need to have done if there had been no certificate. It was also possible that the material might have been supportive of the applicant's application, and so should have been disclosed as part of the hearing obligation in s425.

Acting on an invalid certificate meant that the Tribunal did not properly undertake the review task that statute required of it, with the result that the Tribunal had made a jurisdictional error.

What if the certificate had been valid?

The more far-reaching aspects of *MZAFZ* in terms of the ramifications for procedural fairness appear where his Honour ponders the situation that would apply if the certificate had been valid. In that case, Beach J found that it would be necessary to disclose the existence of the certificate to the applicant.

That is partly because even if there is a valid certificate under s438, the Tribunal has the discretion to disclose the information to an applicant if it considers it appropriate to do so. Beach J held that an applicant needs to have an opportunity to make submissions in support of the exercise of that discretion. Withholding the relevant material clearly has an effect on the applicant's full participation in an open hearing, so common law principles of procedural fairness require an opportunity to be heard on that point.

Singh

Avtar Singh was an applicant for a skilled (s/c 487) visa as a mechanic. He submitted a skills assessment from Trades Recognition Australia, certifying he had done the requisite work experience, which had been based on a reference from Alway Automotive.

The Minister alleged that the assessment was a bogus document, as it was based on a reference that the Minister alleged was fraudulent. As a result, Mr Singh was found not to satisfy PIC 4020 and his application was rejected.

The Minister's delegate issued a certificate under s375A. Unlike *MZAFZ*, the certificate in Singh specified the documents that were covered by the certificate. They were electronic files related to a matter where another person had pleaded guilty to providing references that allegedly matched the reference relied on by Mr Singh.

Section 375A provides as follows:

375A Certain information only to be disclosed to Tribunal

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

(a) has certified, in writing, that the disclosure, otherwise than to the Tribunal, of any matter contained in the document, or 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 375(a) or (b)); and

(b) has included in the certificate a statement that the document or information must only be disclosed to the Tribunal.

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

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

(b) the Tribunal must do all things necessary to ensure that the document or information is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the particular review.

The certificate provision in s375A is somewhat broader than the one in s438. It applies where disclosure would be “contrary to the public interest” for a reason specified in the certificate. That is broader than the recognised grounds of public interest immunity or confidentiality.

In the certificate issued in *Singh*, the reason specified was that the files “contain third party details not relevant to this particular merits review.”

The validity of the certificate was not challenged in *Singh*, although perhaps it was open to be challenged.

The other area where s375A differs from s438 is that there is no discretion for the Tribunal to disclose the material to the applicant in an appropriate case. If a valid certificate has been issued, there is a statutory prohibition on providing the information covered by the certificate to anyone except the Tribunal.

Since the validity of the certificate was not challenged, the case hinged on what procedural fairness required of the Tribunal in the face of a valid certificate.

Scope of procedural fairness

Sections 357A and 422B each provide that the division of the Act in which they appear constitutes an exhaustive statement of the natural justice hearing rule. They also provides that certain provisions outside that division, including the s357A and s438 certificate provisions, are taken to be an exhaustive statement of the hearing rule, **in relation to the matters they deal with.**

So in both cases, we are left with the question: what does “in relation to the matters they deal with” mean? Does it mean that additional principles of procedural fairness will not apply in any way in relation to a process where one of these provisions is engaged? Or does it mean something less than that? Put in the certificate context, does it mean that procedural fairness principles have no role to play in relation to any documents that are purportedly covered by a certificate under s 375A or 438?

A relatively narrow approach to “the matters they deal with”, looking for the work to be done by each of the relevant sections, had previously been adopted by the High Court in *Saeed*² (but in relation to a different part of the Act – s51A) and by the Full Court in *MZZMG*,³ with general principles of procedural fairness continuing to apply to aspects of the review outside of those matters.

Beach J in *MZAFZ* found that the narrower view was the preferable one. The Full Court in *Singh* expressly approved of that conclusion. The Full Court said in *Singh* that the certificate provision in s375A:

“will then be taken to be an exhaustive statement of the natural justice hearing rule in relation to the matters with which it deals, where it is understood that this is a reference to the individual matters in s375A. What are these? All that s375A does in relation to the conduct of a review hearing is to prevent the information or documents subject to a certificate from being disclosed to the applicant. This is certainly a statement that procedural fairness does not require disclosure of the certified matter. ... But the provision says nothing about the processes leading to the issue of a certificate with which, analogously with the reasoning in *Saeed*, it may be said it does not therefore deal. Consequently, ... s375A(2) [the “exhaustive statement of natural justice” provision] is no impediment to Mr Singh’s argument that general law notions of procedural fairness might require the disclosure of a certificate.”⁴

In *MZAFZ*, procedural fairness was held to require that the Tribunal:

- (a) Disclose the existence of the certificate to the applicant
- (b) Give the applicant an opportunity to make submissions on the validity of the certificate
- (c) Disclose at least whether the information covered by the certificate was favourable, unfavourable or neutral to the applicant, and the extent to which the Tribunal was going to take into account that information; and
- (d) Give the applicant an opportunity to seek a favourable exercise of s438(3)(b).⁵

² *Saeed v Minister for Immigration and Citizenship* (2010) 241 CL 252, [35]-[42].

³ *MZZMG v Minister for Immigration and Border Protection* (2015) 234 FCR 180 [44].

⁴ *Minister v Singh*, [40].

⁵ *MZAFZ v Minister*, [50].

In *Singh*, the question before the court was much narrower. It effectively had to decide only whether procedural fairness required the existence of the certificate to be disclosed. The court decided that it did, so that an applicant could challenge the validity of the certificate, either in the course of the hearing before the Tribunal itself or by way of judicial review.

The court also found in *Singh* that a certificate under s375A will not automatically negate the procedural fairness obligation in s359A to give particulars of any information that might form part of the reason for affirming the decision. The court held that in cases of true conflict, where it is not possible to give particulars of the information without compromising the secrecy requirements of the s375A, the certificate will prevail. However, in most cases, it should be possible to give sufficient particulars to satisfy s359A without compromising the interests protected by the certificate.

Concluding observations

There are estimated to be almost 500 cases currently in the courts' pipeline in which a certificate under s375A, 376 or 438 has been issued but not disclosed to the applicant. That volume of cases alone makes the court's decisions in relation to certificates significant. Indeed, that is one of the grounds on which the Minister has sought special leave to appeal to the High Court in *Singh*.

Beyond the certificate issue, these cases may be significant for what they say about the scope of the exhaustive statement of the hearing rule in various parts of the Migration Act, and for restating the High Court's position that procedural fairness continues to apply to aspects of the review process that fall outside the ambit of those specific provisions.