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PROCEDURAL FAIRNESS AND S375A/S438 CERTIFICATES

In the course of proceedings before the Administrative Appeals Tribunal, the delegate of the Minister may issue a certificate pursuant to s375A or s438 of the Migration Act, the effect of which is to place limits on what the Tribunal can disclose to the Applicant. In some cases, the information or document the subject matter of these certificates will be adverse to the Applicant's case.

The question that comes to the fore include – (i) Is the certificate valid? (ii) Does the Applicant have sufficient interest or legitimate expectation to give rise to an obligation of procedural fairness requiring the disclosure of the existence of a certificate or the certificate itself? (ii) If yes, what is the scope of the Tribunal's procedural fairness obligations?

The decision of the Federal Court in ***Minister for Immigration and Border Protection v Singh [2016] FCAFC 183*** (“**Singh**”) Singh provides guidance with respect to s375A certificates. In Singh, the principal issue on appeal was whether the Tribunal was required to disclose the existence of the s375A certificate to Mr Singh. The Court found that the Tribunal was obliged to disclose the existence of the certificate to the Applicant.

On the other hand, the decision of the Federal Court in ***MZAFZ v Minister for Immigration and Border Protection [2016] FCA 1081 (“MZAFZ”)*** shed more light on the operation of s438. In ***MZAFZ*** the Federal Court found that the certificate issued by the delegate of the Minister pursuant to s438 was invalid. Consequently, proceeding on an invalid certificate had the effect 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.

A major difference between s375A and s438 is that s438 permits what s375A prohibits, being disclosure (*subject to the exercise of discretion*) to an applicant, the material subject to the certificate.

Below are the notable points from the two cases.

1. Considering that the effect of a certificate issued pursuant to s375A require the Tribunal to conduct the proceeding without disclosing the document or information to the Applicant, the Applicant’s participation in the proceeding is undermined by the denial of access to relevant material – this is the practical injustice that enlivens the obligation of procedural fairness.¹
2. The requirements of procedural fairness will vary with the circumstances: ***Russell v Duke of Norfolk [1949] 1 All E.R. 109 at 118 per Tucker LJ.***
3. **Validity of the Certificate:** The validity of the certificate can be challenged if the certificate does not comply with s375A or s438. Furthermore, the decision to issue the certificate is not immune from judicial review².
 - a. Section 375A(1)(a) contemplates that a certificate will specify a reason to justify the non-disclosure of the material. Hence, certificates issued pursuant to 375A require (i) specification of a reason why the disclosure of any matter contained in the document or of the information (*otherwise than to the Tribunal*) would be contrary to the public interest (ii) the

¹ *Singh at Para 42*

² *Singh at Para 48*

certificate to state that the document or information must only be disclosed to the Tribunal.

- b. Certificates issued pursuant to s438 require that (i) the Minister certify in writing that the disclosure of any matter contained in the document – would be contrary to the public interest for reasons specified in the certificate. However, the reasons specified in the certificate must be reasons 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. The underlined refers to Public Interest Immunity or Crown Privilege.³
- c. 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 in **MZAFZ** that procedural fairness required the Tribunal to give the applicant at least an opportunity to seek a favourable exercise of discretion under s 438(3)(b)⁴.

4. **Consequences of an Invalid Certificate:** If the Tribunal acts on an invalid certificate it means it followed a procedure contrary to law. The issue of an invalid certificate by the delegate of the Minister will affect the process or procedure adopted by the Tribunal in relation to such documents. In acting on the invalid certificate, it can reasonably be inferred that the Tribunal may not have properly turned its mind to whether it ought to have made disclosure under s 424AA or s 424A⁵. If the Tribunal acts or proceeds on an invalid certificate, then it is not a process according to law and of itself will constitute a jurisdictional error⁶.

³ MZAFZ at 36

⁴ MZAFZ at 50

⁵ MZAFZ at 40 & 41

⁶ MZAFZ at 44

5. **The existence of the Certificate:** Procedural Fairness requires the Tribunal to disclose the existence of the certificate to the Applicant⁷. Hence, the fundamental question is whether the Applicant has sufficient interest or legitimate expectation to enliven an obligation of procedural fairness requiring the disclosure of the existence of the certificate.
6. **The Certified Matter, Document or Information, the subject matter of the Certificate.** In *Singh*, the court considered the effect of the exhaustive statement on natural justice rule (pursuant to s357A (2)) on the existence of a procedural fairness obligation. The court found that procedural fairness does not require the disclosure of the certified matter. However, s357A (2) is no impediment to general law notions of procedural fairness requiring the disclosure of the Certificate⁸. In *MZAFZ*, the court found that (i) there was no necessity for the applicant to be given a copy of the relevant underlying email.⁹ (ii) the application of s422B(2) on s438 was such the applicant cannot get the documents covered by a s 438(1)(a) certificate any other way from the Tribunal than through a favourable exercise of discretion under s 438(3)(b)¹⁰.
7. **The Certificate.** The question whether affording the Applicant procedural fairness would require disclosure of the certificate will depend on the circumstances of the case. If the circumstance is such that the disclosure of the certificate will lead to the disclosure of the protected information, then the certificate cannot be disclosed but that will not preclude disclosing the existence of the certificate¹¹. However, in *Singh*, the court observed that there is real utility in disclosing the certificate from an applicant's point of view.¹² The Full Federal Court in *Singh* was of the view that whether or not the Tribunal was required to disclose the certificate depended, at least in some

⁷ *MZAFZ* at 50; *Singh* at 3

⁸ *Singh* at Para 40

⁹ *MZAFZ* at 25

¹⁰ *MZAFZ* at 62

¹¹ *Singh* at 53 & 54

¹² *Singh* at 49

circumstances, on whether the Tribunal had provided to the applicant any particulars of the information that is covered by the certificate issued under s.375A of the Act: **CKG15 v MINISTER FOR IMMIGRATION & ANOR [2017] FCCA 938 at 100 (“CKG15”)**. Furthermore, the Full Federal Court in **Singh** appears to have been of the view that to discharge the duty to accord procedural fairness in relation to a certificate issued under 375A of the Act ,does not necessarily require the Tribunal to disclose the certificate¹³.

8. **Particulars of the Information covered by the Certificate AND Relationship between 375A and 359A of the Migration Act.** – Here the test is whether carefully drafted particulars of the protected information can be provided to the Applicant without usurping the secrecy requirements of s375A. In **Singh** the court acknowledged that there was tension between the two provisions (s 359A and s375A) but found that they were not completely at loggerheads. The tension lies in the fact that if the Tribunal proposes to use a document or information which is subject to a s375A certificate as part of its reasons for affirming a decision under review, s 359A appears to require the Tribunal to give an applicant particulars of that document or information which, at the same time, s375A requires not to be disclosed.
9. The court was of the view that in many cases it may be possible to serve the procedural fairness aims of s 359A without compromising the secrecy requirements of s 375A. This can be achieved by carefully drafted particulars, which will have the effect of providing a fair hearing without disclosing the confidential information. However, if this cannot be achieved in a particular case, it will be necessary to identify which of the two provisions is the leading provision and to give it primacy. It opined that 375A was the leading provision and in cases of true conflict, it will prevail¹⁴.

¹³ *CKG at 103*

¹⁴ *Singh at 55 & 56*

10. **Conclusion.** The key is to examine the factual matrix of each case and determine the practical injustice that the applicant has suffered as a result of the relevant non-disclosure. Also, it is pertinent to examine the validity of the reasons provided on the certificate and ensure that they give rise to to privacy and confidentiality obligations as contemplated pursuant to s375A and 438 of the Act. On this note, it is imperative that Registered Migration Agents and legal representatives, who represent applicants at the AAT, go through the issued certificate carefully for the purpose of deciding whether or not to challenge its validity.

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