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HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

Matter No S75/2016

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR — APPELLANTS

AND

SZSSJ & ANOR — RESPONDENTS

Matter No S76/2016

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ORS — APPELLANTS

AND

SZTZI — RESPONDENT

Minister for Immigration and Border Protection v SZSSJ
Minister for Immigration and Border Protection v SZTZI
[2016] HCA 29
27 July 2016
S75/2016 & S76/2016

ORDER

Matter No S75/2016

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 made by the Full Court of the Federal Court of Australia on 25 September 2015, and in their place order that:*

   (a) *order 2 made by the Federal Circuit Court of Australia on 28 April 2015 be set aside and in its place order that the first respondent pay the applicant's costs; and*

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(b) *the appeal from the orders made by the Federal Circuit Court on 28 April 2015 be otherwise dismissed.*

Matter No S76/2016

1. *Appeal allowed.*

2. *Set aside orders 1, 2 and 3 made by the Full Court of the Federal Court of Australia on 25 September 2015, and in their place order that:*

   (a) *order 2 made by the Federal Circuit Court of Australia on 12 May 2015 be set aside; and*

   (b) *the appeal from the orders made by the Federal Circuit Court on 12 May 2015 be otherwise dismissed.*

On appeal from the Federal Court of Australia

Representation

S B Lloyd SC with J E Davidson for the appellants in each matter (instructed by Australian Government Solicitor)

N L Sharp and A M Hochroth with D P Hume for the first respondent in S75/2016 (instructed by N L Sharp)

Submitting appearance for the second respondent in S75/2016

M J Finnane QC with S E J Prince and P W Bodisco for the respondent in S76/2016 (instructed by Michaela Byers, Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

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CATCHWORDS

Minister for Immigration and Border Protection v SZSSJ
Minister for Immigration and Border Protection v SZTZI

Migration – Refugees – Protection visas – Procedural fairness – Where SZSSJ and SZTZI ("respondents") applied for protection visas – Where respondents' personal information published on Department of Immigration and Border Protection website and accessed from 104 unique IP addresses – Where IP addresses known to Department – Where Department conducted International Treaties Obligations Assessments ("ITOAs") to determine impact of publication on non-refoulement obligations – Where ITOAs conducted in accordance with publicly available "Procedures Advice Manual" – Where Department notified respondents of ITOAs and instructed officers conducting ITOAs to assume personal information may have been accessed by authorities in countries where respondents feared persecution or other relevant harm – Where Department neither disclosed IP addresses nor provided unabridged report relating to disclosure of personal information – Whether obligation to afford procedural fairness applied to ITOA processes – Whether ITOA processes procedurally fair.

Courts and judges – Jurisdiction – Federal Circuit Court of Australia – Whether respondents' claims to relief engaged jurisdiction of Court – Whether jurisdiction excluded by s 476(2)(d) of *Migration Act* 1958 (Cth).

Words and phrases – "conduct preparatory to the making of a decision", "International Treaties Obligations Assessment", "privative clause decision", "procedural decision to consider whether to grant a visa or to lift the bar", "substantive decision to grant a visa or to lift the bar".

Migration Act 1958 (Cth), ss 48B, 195A, 417, 474, 476.

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1 FRENCH CJ, KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ. These two appeals are from a decision of the Full Court of the Federal Court[1] on appeal from decisions of the Federal Circuit Court. They arise from separate proceedings commenced in the Federal Circuit Court by two former visa applicants. The relief sought in those proceedings included declarations that the former visa applicants had been denied procedural fairness in the implementation of procedures undertaken by officers of the Department of Immigration and Border Protection to assess the consequences to them of an incident that has become known as "the Data Breach".

2 For reasons which follow, the Full Court of the Federal Court was right to conclude that the Federal Circuit Court had jurisdiction to entertain the proceedings, and was right to conclude that the applicants were owed procedural fairness, but was wrong to conclude that the applicants have been denied procedural fairness. Each appeal must be allowed.

The Data Breach and the administrative response

3 The Data Breach occurred on 10 February 2014. The Department routinely publishes statistics on its website. This time the particular electronic form of the document in which the statistics were published included embedded information which disclosed the identities of 9,258 applicants for protection visas who were then in immigration detention. The document containing the embedded information remained on the website until 24 February 2014.

4 On any view, the Data Breach was very serious. The information disclosing the identities of the applicants for protection visas embedded in the document published by the Department was information protected from unauthorised access and disclosure by criminal prohibitions in Pt 4A of the *Migration Act* 1958 (Cth).

5 Having been alerted to the Data Breach, the Department retained external consultants, KPMG, to investigate. KPMG prepared a report for the Department. An abridged version of the KPMG report was later made available to affected applicants. The abridged version of the report recorded that, during the 14 days in which the document disclosing the identities of the visa applicants had

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1 *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1.

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remained on the website, the document had been accessed 123 times and that the access had originated from 104 unique internet protocol ("IP") addresses.

6 The abridged version of the KPMG report did not record those IP addresses or give the precise time of access. Rather, the abridged version stated:

> "It is not in the interests of detainees affected by this incident to disclose further information in respect of entities [who] have accessed the Document, other than to acknowledge that access originated from a range of sources, including media organisations, various Australian Government agencies, internet proxies, TOR network and web crawlers".

The abridged version went on to record that its authors had "not identified any indications that the disclosure of the underlying data was intentional or malicious".

7 Irrespective of the cause of the disclosure there was obviously a risk that those in other countries from whom applicants for protection visas claimed to fear persecution or other relevant harm might have gained access to the document containing the embedded information so as to become aware of the identities of applicants for protection visas in Australia. The question for the Department was what to do about that risk.

8 In early March 2014, the Secretary of the Department sent a standard form letter to each of the affected applicants. The letter informed those applicants of the Data Breach and expressed deep regret. The letter continued:

> "The information that it was possible to access was your name, date of birth, nationality, gender, details about your detention (when you were detained, reason and where) and if you have other family members in detention.
>
> The information did not include your address (or any former address), phone numbers or any other contact information. It also did not include any information about protection claims that you or any other person may have made, and did not include any other information such as health information.
>
> The department will assess any implications for you personally as part of its normal processes. You may also raise any concerns you have during those processes."

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9 Beyond showing that the Department sent follow-up letters to applicants in June 2014, the record in the appeals does not reveal what was being done by the Department about the Data Breach at a systematic level before the end of September 2014. The departmental response appears by then to have been channelled into processes known as "International Treaties Obligations Assessments" ("ITOAs") conducted in accordance with standardised procedures set out in the Department's publicly available Procedures Advice Manual. The purpose of conducting these particular ITOAs was to assess the effect of the Data Breach on Australia's international obligations with respect to affected applicants. The particular international obligations to which the ITOAs were directed were Australia's non-refoulement obligations under the Refugees Convention[2], the Torture Convention[3] and the International Covenant on Civil and Political Rights[4].

10 Departmental officers conducting the ITOAs were specifically instructed to assess the effect of the Data Breach on Australia's non-refoulement obligations adopting the assumption that an applicant's personal information may have been accessed by authorities in the country in which the applicant feared persecution or other relevant harm.

11 Standard departmental instructions in the Procedures Advice Manual for the conduct of an ITOA indicated that a finding by an officer that a non-refoulement obligation was engaged in respect of a particular applicant might result in referral of that applicant's case to the Minister for decision by the Minister whether or not to exercise a power conferred by specified sections of the Act. Relevantly to an applicant in respect of whom a non-refoulement obligation might be found to be engaged as a consequence of the Data Breach, the sections specified included ss 48B, 195A and 417.

12 Common features of those sections are that they confer "non-compellable" powers on the Minister to grant a visa in the cases of ss 195A and 417 or to lift a

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2 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

4 International Covenant on Civil and Political Rights (1966).

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statutory bar to the making of an application for a visa in the case of s 48B. Each is a power: which the Minister "may" exercise if "the Minister thinks that it is in the public interest to do so"; which can only be exercised by the Minister personally; and of which the Minister has no duty to consider the exercise. Another common feature of the sections is that the powers they confer can (and, in the case of the power conferred by s 195A, can only) be exercised in respect of unlawful non-citizens who are in immigration detention under s 189 of the Act for the duration provided by s 196.

13 One of the possible end-points of immigration detention for which s 196 provides is removal from Australia under s 198. Section 198 relevantly provides:

> "(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.
>
> ...
>
> (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
>
> (a) the non-citizen is a detainee; and
>
> (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
>
> (c) one of the following applies:
>
> (i) the grant of the visa has been refused and the application has been finally determined;
>
> (iii) the visa cannot be granted; and
>
> (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone."

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14 Section 197C of the Act, which was inserted into the Act with effect from 16 December 2014[5], provides:

> "(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
>
> (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen."

15 The view was taken in the Full Court of the Federal Court that s 197C has no application in relation to the removal of an unlawful non-citizen who had commenced a proceeding for an injunction against an officer before 16 December 2014. That view was mistaken. A transitional provision applied the section in relation to the removal of an unlawful non-citizen on or after 16 December 2014[6].

16 Other standard departmental instructions set out in the Procedures Advice Manual concern removal of unlawful non-citizens in immigration detention. One of those instructions is that a person who is the subject of an ongoing ITOA is not to be considered available for removal from Australia until the ITOA process is complete unless the person requests removal. No party to either appeal suggests that s 197C prevents an officer from giving effect to that instruction. For the purposes of the appeals, no further consideration need be given to the operation of that section.

<u>The circumstances of the two former applicants</u>

17 Applicant SZSSJ is a Bangladeshi national. He arrived in Australia on a student visa in 2005. He was taken into immigration detention when his student

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5 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth), Sched 5, Item 2.

6 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth), Sched 5, Item 27.

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visa expired in 2012. Shortly afterwards, he applied for a protection visa. At the time of the Data Breach, his application for the protection visa had been refused and he had exhausted his rights to merits and judicial review under Pts 7 and 8 of the Act. He was in immigration detention awaiting removal under s 198 of the Act. There he has remained.

18 On 7 March 2014, SZSSJ commenced a proceeding in the Federal Circuit Court seeking declaratory and injunctive relief against the Minister and the Secretary arising from the Data Breach. The relief sought was ill-defined and the Federal Circuit Court initially dismissed that application for want of jurisdiction[7]. On appeal, the Full Court of the Federal Court held that the Federal Circuit Court did have jurisdiction, and remitted to the Federal Circuit Court for determination on the merits the claim as was by then proposed to be reformulated[8].

19 In the meantime, an officer of the Department had written to SZSSJ on 1 October 2014. The letter informed SZSSJ that an ITOA had been commenced the previous day to assess the effect of the Data Breach on Australia's non-refoulement obligations with respect to him. After referring to previous correspondence and stating that information SZSSJ had already provided would be taken into account in the ITOA, the letter went on to invite SZSSJ to provide any further information which he wished to have taken into account in the assessment within 14 days of receiving the letter.

20 On 23 December 2014, another officer of the Department wrote to SZSSJ enclosing country information proposed to be taken into account in the ITOA. The country information was said to indicate "that Bangladesh accepts involuntary and voluntary returnees; that people who return to Bangladesh from abroad, either voluntarily or involuntarily, are unlikely to face adverse attention on their return; and that the return of failed asylum seekers is unlikely to be reported by Bangladeshi airport authorities to other Bangladeshi government agencies". The letter invited a response within a further 14 days.

21 By that time, communications between the Department and SZSSJ were overlapping with communications between the solicitors for the parties in the proceeding which remained pending in the Federal Circuit Court. On

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7 *SZSSJ v Minister for Immigration* [2014] FCCA 1379.

8 *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285.

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1 December 2014, SZSSJ's solicitors had written to the Australian Government Solicitor asserting that procedural fairness required that SZSSJ at least be provided with the full unabridged version of the KPMG report and "all information about the IP addresses used to access the data".

22 The Australian Government Solicitor responded on 12 February 2015, refusing to accept the assertion made on behalf of SZSSJ as to what procedural fairness required. The Australian Government Solicitor's letter annexed pages from the Procedures Advice Manual explaining the ITOA procedures and set out the terms of the instruction given to officers conducting the ITOAs to assume that an applicant's personal information may have been accessed by authorities in the country in which the applicant feared persecution or other relevant harm. The letter continued:

> "Once the assessing officer has completed the ITOA, your client will be notified of the outcome. If your client remains in immigration detention when the ITOA is completed, he will be handed a notification letter. If he is not in detention at that time, the notification letter will be sent to the most recent postal address provided to the Department and to any authorised recipient if one has been appointed. If the ITOA concludes that Australia's non-refoulement obligations are not engaged (that is, it is a negative outcome), your client will be given a copy of the ITOA. If your client receives a positive outcome, he will not receive a copy of the ITOA.
>
> If the ITOA concludes that Australia's non-refoulement obligations are engaged (that is, it is a positive outcome), your client's case will be referred to the Minister for consideration under the Minister's intervention powers under the *Migration Act 1958* (the Act).
>
> If the ITOA concludes that Australia's non-refoulement obligations are not engaged (that is, it is a negative outcome), subject to any other proceedings challenging the ITOA or any other impediments to removal, removal planning will commence and your client will be expected to depart Australia."

23 The Federal Circuit Court heard and determined SZSSJ's claim for relief on the merits on 28 April 2015. The ITOA process in relation to him had then still not been completed and his claim as then reformulated was focused on the fairness of the process that had been conducted up until that time. Concerned that the relief was premature, the Federal Circuit Court dismissed the proceeding

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on the basis that the Court was not satisfied that SZSSJ had then been denied procedural fairness and not satisfied that SZSSJ faced a realistic threat of sudden removal while the ITOA process was continuing[9]. SZSSJ appealed to the Federal Court.

24 Applicant SZTZI's circumstances are more straightforward. She is a Chinese national who arrived in Australia as an authorised air arrival on a visitor's visa of three months' duration. That visa expired and she was taken into immigration detention in September 2013. Her application for a protection visa, made the following month, was refused in November 2013. That refusal was affirmed on merits review under Pt 7 of the Act in January 2014. Like SZSSJ, she was in immigration detention at the time of the Data Breach. There she too has remained.

25 On 13 January 2015, an officer of the Department sent a letter to SZTZI in similar terms to the letter sent to SZSSJ on 1 October 2014. The letter informed SZTZI that an ITOA had been commenced on 13 January 2015 with respect to her and invited her to provide any further information she wished to have taken into account within 14 days of receiving the letter.

26 On 5 February 2015, the officer wrote again to SZTZI and to her migration agent. The letter explained, in response to a claim by the migration agent that SZTZI would be denied procedural fairness unless the Department disclosed "all relevant information related to" the Data Breach, that she and other officers conducting ITOAs in relation to the Data Breach had been instructed to assume that an applicant's personal information had been accessed by authorities in the country in which the applicant feared persecution or other relevant harm. The letter went on to refer in detail to SZTZI's personal circumstances and to country information from which the letter suggested that an inference was available to be drawn that SZTZI did not have an adverse profile with Chinese authorities and would not be exposed to a real chance of serious harm or real risk of significant harm on returning to China even assuming that it was known to Chinese authorities that she had applied for a protection visa in Australia. The letter invited a response within a further 14 days.

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9 *SZSSJ v Minister for Immigration (No 2)* [2015] FCCA 1148.

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27 The migration agent argued in response to that invitation that the assumption that an applicant's personal information had been accessed by authorities in another country was too narrow in that the assumption did not deal with the scenario of republication and fear of persecution by non-State actors. The migration agent went on to argue that, because the Department had been responsible for the Data Breach, an officer of the Department "cannot effectively assess the real chance of serious or significant harm that it has placed the applicant in and should find that the applicant is now a refugee *sur place*".

28 The officer completed the ITOA with respect to SZTZI on 23 March 2015, concluding that non-refoulement obligations were not engaged. Detailed written reasons sent to SZTZI and the migration agent on that day concluded with the finding foreshadowed in the letter of 5 February 2015.

29 SZTZI commenced a proceeding in the Federal Circuit Court seeking declaratory and injunctive relief against the Minister and the officer who had conducted the ITOA. The Federal Circuit Court dismissed the proceeding on 12 May 2015, holding that it lacked jurisdiction and that SZTZI had in any event been neither owed nor denied procedural fairness in the ITOA process[10]. SZTZI appealed to the Federal Court.

30 The appeals by SZSSJ and SZTZI were heard together by the Full Court of the Federal Court comprising Rares, Perram and Griffiths JJ and determined by that Court unanimously in joint reasons for judgment delivered on 2 September 2015. The Full Court went on to make orders disposing of each appeal on 25 September 2015.

31 Allowing each appeal, the Full Court set aside the orders of the Federal Circuit Court. The Full Court substituted declarations that the process conducted from 12 March 2014 to 25 September 2015 to assess the implications of the Data Breach for each of SZSSJ and SZTZI had been procedurally unfair. In the appeal by SZSSJ, the Full Court also granted an injunction restraining the Minister and the Secretary from removing SZSSJ until after the determination of the process.

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10 *SZTZI v Secretary of the Department of Immigration* [2015] FCCA 1271.

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The Full Court's reasons

32 Of the issues identified and addressed by the Full Court, it is sufficient for the purpose of the appeals to this Court to focus on three. One was whether the jurisdiction of the Federal Circuit Court was excluded by s 476(2)(d) of the Act: the Full Court concluded that it was not. Another was whether procedural fairness was required in the process undertaken to assess the implications of the Data Breach: the Full Court concluded that the ITOA process was a statutory process in which procedural fairness was required. Another concerned whether the process afforded procedural fairness: the Full Court concluded that procedural fairness had not been afforded to SZSSJ and SZTZI.

33 As a step in reasoning to the conclusion that the ITOA process was a statutory process in which procedural fairness was required, the Full Court made an important factual finding which is not challenged in this Court. That finding was to the effect that the inference to be drawn from the totality of the evidence before it was that the Minister had personally decided to consider whether to exercise the powers conferred by ss 48B, 195A and 417 of the Act in respect of applicants for visas affected by the Data Breach.

34 The Full Court referred to the evidence supporting that finding as having "lifted the shroud" on the process being undertaken to assess the effects of the Data Breach, allowing the Full Court to state[11]:

> "That process is as follows:
>
> (a) the Minister has decided to consider the exercise of his dispensing powers under s 48B, s 195A or s 417;
>
> (b) departmental officials acting under the ultimate direction of the Minister have commenced an ITOA process to assist him in making that decision, which process is directed to gauging Australia's non-refoulement obligations; and
>
> (c) the relevant criteria for the Minister's decision under each provision is the public interest."

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11 *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 28 [98].

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35 Turning to whether the ITOA process afforded procedural fairness, the Full Court found the process to have been unfair on two bases. The first was that the process itself had not been adequately explained. Referring to SZSSJ, the Full Court said[12]:

> "Although by 12 February 2015 he was aware that what was sought were his views on any non-refoulement obligations arising from the Data Breach, he still did not know the identity of his decision-maker, the function being exercised by that decision-maker, the relevance of the ITOA process to that function or the criteria by which it would be decided."

Whether or not the Full Court considered the ITOA process to have been procedurally unfair to SZTZI on that first basis is not entirely clear from its reasons.

36 The second basis on which the Full Court considered the process to have been unfair to both SZSSJ and SZTZI was in the refusal of the Department to provide the unabridged KPMG report. The Full Court inferred from the abridged version of the report, which SZSSJ and SZTZI had been given, that there was "further information" in the unabridged version which they had not been given. What was contained in that further information was unknown to SZSSJ and SZTZI just as it was unknown to the Full Court.

37 The Full Court took the view that fairness in the circumstances of the Data Breach required that the Department reveal "all that it knows about its own disclosures"[13]. The Full Court said[14]:

> "Rare is the case where a decision-maker asks a claimant to make submissions about what should happen in consequence of a failure to

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12 *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 29 [105].

13 *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 31 [118].

14 *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 32 [121].

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adhere to statutory safeguards of confidentiality committed by the decision-maker affecting the claimant. In such a case, it is inevitable that the decision-maker must show its full hand subject to any proper (and curially supervisable) consideration of confidentiality."

Continuing in the same vein, the Full Court said:

"No argument was addressed to us that the bias rule had the effect of wholly barring the Department from addressing that issue, but at the very least, in a practical way, it undermines fairness to suggest that in such an unusual situation the Department does not have to reveal the full circumstances so that the person affected can assess, with full information, whether some adverse impact occurred or may have occurred on which he or she wishes to be heard (absent some good reason not to do so, such as confidentiality)."

38 The want of procedural fairness in failing to provide whatever further information was contained in the unabridged KPMG report, according to the Full Court, was not ameliorated by the assumption that SZSSJ's and SZTZI's personal information may have been accessed by authorities in Bangladesh and China. That assumption, the Full Court thought, only made things worse. The assumption was so vague and generic as effectively to impose on SZSSJ and SZTZI the burden of showing that their own personal information "was accessed and by whom and why access by those people poses such a significant risk"[15]. The assumption also ignored the possibility of "gradations in the risk" associated with those who actually had access to the information. There was, the Full Court pointed out, "a world of difference between access by the tax authorities … and access by … security services"[16].

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15 *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 33 [123].

16 *SZSSJ v Minister for Immigration and Border Protection (No 2)* (2015) 234 FCR 1 at 33 [124].

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The issues in the appeals to this Court

39 The three dispositive issues in the appeals to this Court are:

(1) Did the Federal Circuit Court have jurisdiction?

(2) Was procedural fairness required in the ITOA process?

(3) If so, was procedural fairness afforded?

40 To address each of those issues, it is necessary to be clear from the outset about how the ITOA process is to be characterised in terms of the Act.

Characterisation of the ITOA process

41 *Plaintiff M61/2010E v The Commonwealth*[17] and *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[18] show that characterisation of an administrative process undertaken with a view to informing the Minister as to the possible exercise of non-compellable powers requires close attention both to the structure of those powers and to the facts.

42 *Plaintiff M61/2010E* raised questions as to the characterisation of Refugee Status Assessment ("RSA") and Independent Merits Review ("IMR") processes implemented by the Department with a view to informing the Minister as to the possible exercise of the non-compellable powers conferred by ss 46A and 195A in respect of offshore entry persons in immigration detention on Christmas Island who claimed to be persons to whom Australia owed protection obligations. The Department implemented the processes following an announcement of the Minister.

43 As to the structure of those powers, the Court stated that "[e]xercise of the powers given by ss 46A and 195A is constituted by two distinct steps: first, the decision to *consider* exercising the power to lift the bar or grant a visa and

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17 (2010) 243 CLR 319; [2010] HCA 41.

18 (2012) 246 CLR 636; [2012] HCA 31.

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secondly, the decision whether to lift the bar or grant a visa". The Court noted that the Minister "is not obliged to take either step"[19].

44 As to the facts, the Court made three critical findings. The first was that the Minister, in the announcement, had taken the first of those two distinct statutory steps: the Minister had decided to consider the exercise of one or other of the powers to lift the bar or to grant the visa in respect of every offshore entry person on Christmas Island who claimed to be a person to whom Australia owed protection obligations[20]. The second was that, although "the Minister did not seek to (and did not) delegate any power"[21], the RSA and IMR processes "were inquiries made after a decision to consider exercising the relevant powers and for the purposes of informing the Minister of matters that were relevant to the decision whether to exercise one of those powers in favour of a claimant"[22]. The third was that the RSA and IMR processes had the practical effect of prolonging the detention of the offshore entry persons for so long as those processes continued[23].

45 The relevant conclusion was that the RSA and IMR processes were themselves steps taken under and for the purposes of ss 46A and 195A and, as such, were conditioned by an implied statutory requirement for those conducting the processes to afford procedural fairness[24]. As the Court put it by way of summary[25]:

> "(a) Because the Minister has decided to consider exercising power under either s 46A or s 195A of the *Migration Act* in every case

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19 (2010) 243 CLR 319 at 350 [70].

20 (2010) 243 CLR 319 at 351 [70].

21 (2010) 243 CLR 319 at 350 [69].

22 (2010) 243 CLR 319 at 351 [73].

23 (2010) 243 CLR 319 at 353 [76].

24 (2010) 243 CLR 319 at 353-354 [78].

25 (2010) 243 CLR 319 at 334-335 [9].

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where an offshore entry person claims to be a person to whom Australia owes protection obligations, the RSA and IMR processes taken in respect of each plaintiff were steps taken under and for the purposes of the *Migration Act*.

(b) Because making the inquiries prolonged the plaintiffs' detention, the rights and interests of the plaintiffs to freedom from detention at the behest of the Australian Executive were directly affected, and those who made the inquiries were bound to act according to law, affording procedural fairness to the plaintiffs whose liberty was thus constrained."

46 *Plaintiff S10/2011* raised questions as to the characterisation of processes undertaken by the Department by reference to guidelines issued by the Minister setting out circumstances in which cases were in the ordinary course to be referred to the Minister for consideration of the possible exercise of one or more of the non-compellable powers conferred by ss 48B, 195A, 351 and 417. Two of the four plaintiffs were in immigration detention. The Department had not referred the cases of some plaintiffs to the Minister. The Department had referred the cases of other plaintiffs to the Minister following which the Minister had indicated that he would "not intervene".

47 Members of the Court, with the possible exception only of Heydon J, interpreted the guidelines as directed to when the Department was to refer cases to the Minister in order to allow the Minister to decide whether or not to consider exercising a non-compellable power: where the Department had not referred a case to the Minister, no statutory power had been engaged; where the Department had referred a case to the Minister and the Minister had indicated that he would "not intervene", the Minister had made a personal decision that he would not consider exercising any of the non-compellable powers[26].

48 The unanimous conclusion of the Court was that in none of the cases was the process undertaken by the Department or the decision of the Minister conditioned by any requirement to afford procedural fairness.

26 (2012) 246 CLR 636 at 653 [46], 655 [52], 665 [91].

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49 Gummow, Hayne, Crennan and Bell JJ, having listed supporting statutory indicia[27], stated that conclusion in terms that "[u]pon their proper construction and in their application to the present cases", the provisions conferring the relevant non-compellable powers were "not conditioned on observance of the principles of procedural fairness" for the reason that the Act revealed a "necessary intendment" that "the provisions are not attended by a requirement for the observance of procedural fairness"[28].

50 French CJ and Kiefel J said[29]:

> "With no statutory duty to consider the exercise of the Minister's powers being enlivened by a request or by the occurrence of a case to which the power might apply, no question of procedural fairness arises when the Minister declines to embark upon such a consideration. If, on ministerial instructions, certain classes of request or case are not even to be submitted to him or her for consideration, the position in law is unchanged. There is no exercise of a statutory power under the Act conditioned upon compliance with the requirements of procedural fairness."

51 Heydon J said[30]:

> "The structure of the Act suggests that the powers which the empowering provisions confer on the Minister need not be exercised in compliance with the rules of procedural fairness. It would be strange if the activities of officials of the Minister's Department preparatory to the Minister either deciding whether to consider exercising those powers or deciding to exercise them would have to comply with the rules of procedural fairness."

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27 (2012) 246 CLR 636 at 667-668 [99].

28 (2012) 246 CLR 636 at 668 [100].

29 (2012) 246 CLR 636 at 654-655 [50].

30 (2012) 246 CLR 636 at 673 [119].

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52 Three principles are to be drawn from *Plaintiff M61/2010E* and *Plaintiff S10/2011* concerning the construction and relevant application of ss 48B, 195A and 417 of the Act.

53 First, each section confers a non-compellable power that is exercised by the Minister personally making two distinct decisions: a procedural decision, to consider whether to make a substantive decision; and a substantive decision, to grant a visa or to lift the bar. The Minister has no obligation to make either decision, and neither the procedural decision nor the substantive decision of the Minister is conditioned by any requirement that the Minister afford procedural fairness.

54 Second, processes undertaken by the Department to assist in the Minister's consideration of the possible exercise of a non-compellable power derive their character from what the Minister personally has or has not done. If the Minister has made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the Department to assist the Minister's consideration has a statutory basis in that prior procedural decision of the Minister. Having that statutory basis, the process attracts an implied statutory requirement to afford procedural fairness where the process has the effect of prolonging immigration detention. If the Minister has not made a personal procedural decision to consider whether to make a substantive decision, a process undertaken by the Department on the Minister's instructions to assist the Minister to make the procedural decision has no statutory basis and does not attract a requirement to afford procedural fairness.

55 Third, the question whether the Minister personally has made a procedural decision to consider whether to grant a visa or to lift a bar in a particular case or class of cases is a question of fact.

56 Here, on the unchallenged finding of the Full Court, the Minister has made a personal procedural decision to consider whether to grant a visa under s 195A and s 417 of the Act or to lift the bar under s 48B in the case of each applicant for a protection visa affected by the Data Breach. The ITOA processes have been undertaken by officers of the Department to assist the Minister in that consideration. An ITOA is accordingly properly characterised as a process undertaken by an officer of the Department under and for the purposes of ss 48B, 195A and 417 of the Act.

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57 That characterisation of an ITOA, as a process undertaken by an officer of the Department under and for the purposes of ss 48B, 195A and 417, informs the resolution of the issue whether procedural fairness was required in the process. The same characterisation also informs the resolution of the issue whether the Federal Circuit Court had jurisdiction.

The Federal Circuit Court had jurisdiction

58 Section 476 of the Act relevantly provides:

> "(1) Subject to this section, the Federal Circuit Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution.
>
> (2) The Federal Circuit Court has no jurisdiction in relation to the following decisions:
>
> ...
>
> (d) a privative clause decision or purported privative clause decision mentioned in subsection 474(7)."

59 The jurisdiction conferred on the Federal Circuit Court by s 476(1), by reference to the jurisdiction conferred on this Court by s 75(v) of the Constitution, is jurisdiction in matters in which the relief sought is or includes a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth.

60 Conferral of that statutory jurisdiction on the Federal Circuit Court "in relation to migration decisions" is in a statutory context in which "migration decision" is defined to include a "privative clause decision" and a "purported privative clause decision"[31] and in which s 474(1) operates to render a privative clause decision incapable of being called into question in any court other than for jurisdictional error[32]. Understood within that statutory context, the words "in relation to" are not words of expansion. They are words which connect the

31 Section 5(1) of the Act.

32 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

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particular relief sought in a matter to a particular migration decision which is relevantly either a privative clause decision (because it is unaffected by jurisdictional error) or a purported privative clause decision (because it is affected by jurisdictional error).

61 The jurisdiction conferred on the Federal Circuit Court by s 476(1), subject to s 476(2), is jurisdiction in any matter in which relief being or including a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth is sought on a ground that a migration decision is affected by jurisdictional error. That is to say, the jurisdiction is in a matter in which the basis for the claim to relief is that the migration decision is in truth no more than a purported privative clause decision.

62 Excluded from that conferral of jurisdiction by s 476(2) is correspondingly jurisdiction in a matter in which relief being or including a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth is sought on a ground that a particular migration decision is affected by jurisdictional error where that particular migration decision answers a description in s 476(2).

63 The issue in the appeals about whether the Federal Circuit Court had jurisdiction to hear and determine the matters in which SZSSJ and SZTZI claimed relief is confined to an issue about whether jurisdiction in those matters was excluded by s 476(2)(d). The issue is whether an ITOA conducted by an officer of the Department answers the description in s 476(2)(d) of a privative clause decision or purported privative clause decision mentioned in s 474(7).

64 To put that narrow issue in context, however, it is important to be clear about the identification of the migration decisions which SZSSJ and SZTZI claimed to be affected by jurisdictional error so as affirmatively to engage the jurisdiction of the Federal Circuit Court under s 476(1).

65 The expression "privative clause decision" is defined in s 474(2) to mean "a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act". Section 474 goes on relevantly to provide:

> "(3) A reference in this section to a decision includes a reference to the following:

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(a) granting, making, varying, suspending, cancelling, revoking or refusing to make an order or determination;

(b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);

(c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;

(d) imposing, or refusing to remove, a condition or restriction;

(e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article;

(g) doing or refusing to do any other act or thing;

(h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;

(j) a failure or refusal to make a decision.

...

(7) To avoid doubt, the following decisions are ***privative clause decisions*** within the meaning of subsection 474(2):

(a) a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under ... section 48B ... section ... 195A ... or [s] 417 ...;

…"

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66 Subject to s 476(2)(d), the claims to declaratory and injunctive relief made by SZSSJ and SZTZI engaged the jurisdiction of the Federal Circuit Court under s 476(1). That was because, the Minister having made a procedural decision to consider whether to grant a visa or to lift the bar in the exercise of one or other of the powers conferred by ss 48B, 195A and 417 of the Act, the conduct of an ITOA by an officer of the Department met the definition of a "privative clause decision" in s 474(2). The conduct of the officer met that definition by reason of the extended definition of "decision" in s 474(3)(h). The conduct of an ITOA by an officer of the Department is conduct under the Act preparatory to the making of a substantive decision by the Minister – specifically, it is the holding of an inquiry or investigation.

67 To conclude that the jurisdiction so engaged is excluded by s 476(2)(d), it would be necessary to read the same extended definition of "decision" in s 474(3)(h) into the reference in s 474(7) to "a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power", relevantly under s 48B, s 195A or s 417.

68 The structure of s 474 is against that reading. The section is more naturally read sequentially: s 474(3) serving to spell out an extended meaning of the generic term "decision" for the purpose of the operative expression "privative clause decision", and s 474(7) serving the distinct and specific function of clarifying that operative expression to include specified statutory decisions of the Minister. None of the other paragraphs of s 474(3) can sensibly be read into s 474(7), and s 474(3)(h) should be treated no differently. Section 474(3)(h) for that textual reason should not be read into s 474(7). But even if it could, s 474(3)(h) as read into s 474(7) could not sensibly be read as encompassing conduct other than that of the Minister.

69 The reference in s 474(7) to a decision of the Minister not to exercise the Minister's power is properly read as limited to a substantive decision made by the Minister personally not to exercise one or more non-compellable powers. The reference to a decision of the Minister not to consider the exercise of the Minister's power is limited to a procedural decision made by the Minister personally not to consider whether to make a substantive decision. Neither reference is apt to encompass conduct of an officer of the Department preparatory to the making of a decision by the Minister.

70 Operating by reference to s 474(7) so construed, s 476(2)(d) excludes the jurisdiction of the Federal Circuit Court in a matter in which the relief sought is

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founded in a claim that a decision made by the Minister personally not to exercise or not to consider whether to exercise a non-compellable power is affected by jurisdictional error. Section 476(2)(d) does not exclude the jurisdiction of the Federal Circuit Court in a matter in which the relief sought is founded in a claim that an officer of the Department has failed to observe an implied limitation on his or her statutory power in holding an inquiry or conducting an investigation to inform the Minister as to the making of a substantive decision after the Minister has made a procedural decision.

71 Together, ss 474(7) and 476(2)(d) can be seen to implement a comprehensible legislative policy. A challenge to conduct undertaken by an officer of the Department under the Act and for the purpose of assisting the Minister's consideration of the exercise of a non-compellable power can be heard and determined by the Federal Circuit Court. A challenge to a decision made by the Minister personally not to exercise a non-compellable power can only be heard and determined by this Court under s 75(v) of the Constitution.

72 Three earlier decisions of the Federal Court on which the appellants rely do not support a contrary construction. The first two[33] concerned an earlier and materially different form of the Act. The third is consistent with the construction explained: the only decision that was found in fact to have been made was a decision of the Minister personally not to consider the exercise of a non-compellable power[34].

73 The resolution of the jurisdictional issue is therefore that the jurisdiction of the Federal Circuit Court to hear and determine the matters in which SZSSJ and SZTZI sought declaratory and injunctive relief on the ground that the ITOA process was procedurally unfair was not excluded by s 476(2)(d) of the Act.

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33 *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 and *S1083/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1455.

34 See *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510 at 522 [62]-[64].

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Procedural fairness was required

74 Characterisation of an ITOA as a process undertaken by an officer of the Department under and for the purposes of ss 48B, 195A and 417 of the Act leads directly to the conclusion that procedural fairness is required in the undertaking of that process.

75 Why that conclusion follows is that it must now be taken to be settled that procedural fairness is implied as a condition of the exercise of a statutory power through the application of a common law principle of statutory interpretation. The common law principle, sufficiently stated for present purposes, is that a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual. The presumption operates unless clearly displaced by the particular statutory scheme.

76 *Plaintiff M61/2010E* and *Plaintiff S10/2011* show that the powers conferred by ss 48B, 195A and 417 of the Act have the potential to attract the presumption in two distinct ways. In the case of the Minister personally making a procedural decision to consider whether to make a substantive decision or of the Minister personally making a substantive decision to grant a visa or to lift the bar, the exercise of the power is apt to affect the interest of an applicant in the actual or potential relaxation of a legal prohibition on his or her continued presence in Australia[35]. In the case of an officer of the Department engaging in a process of assessment after the Minister has made a procedural decision, the exercise of power is apt to affect the interest in liberty of an applicant whose immigration detention is prolonged by that process[36].

77 What *Plaintiff M61/2010E* and *Plaintiff S10/2011* critically hold is that, while the presumption is displaced by the scheme of the Act in its application to the personal exercise of power by the Minister[37], the presumption is not displaced

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35 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 659 [69].

36 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 353 [76]-[77].

37 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 667-668 [99]-[100].

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in relation to the exercise of power by an officer of the Department[38]. Procedural fairness is required as an implied condition of the exercise by the officer of statutory power to engage in the process of assessment where the exercise of that power is apt to prolong immigration detention.

78 SZSSJ and SZTZI having been in immigration detention at the time of the Data Breach and having remained there, the inference to be drawn is that the ITOA process has contributed to the length of their detention. That being its practical effect, characterisation of the ITOA process as a statutory process undertaken consequent on the making of a procedural decision by the Minister to consider the exercise of one or other of the powers conferred by ss 48B, 195A and 417 leads to the conclusion that the process is conditioned by procedural fairness.

79 Procedural fairness is required in the ongoing process of assessment of SZSSJ and was required in the now completed process of assessment of SZTZI. The issue remaining is whether they have been afforded procedural fairness.

Procedural fairness has been afforded

80 Engaging with the Full Court's conclusion, that procedural fairness was denied because the ITOA process was inadequately explained and because the unabridged KPMG report was not provided, involves returning to some basic principles.

81 First, it is axiomatic that a court exercising its own curial jurisdiction to review administrative action on a ground of jurisdictional error – including a jurisdictional error constituted by a failure to exercise a statutory power in a manner that complies with an implied condition of procedural fairness – does not "go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power". That is not to say that the court must proceed in a normative vacuum; but it is to say that the court can proceed only for that purpose. "If, in so doing, the court avoids administrative

38 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 353-354 [78].

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injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error."[39]

82 Second, compliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power. The implied condition of procedural fairness is breached, and jurisdictional error thereby occurs, if the procedure adopted so constrains the opportunity of the person to propound his or her case for a favourable exercise of the power as to amount to a "practical injustice"[40].

83 Ordinarily, affording a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry requires that a person whose interest is apt to be affected be put on notice of: the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person[41]. Ordinarily, there is no requirement that the person be notified of information which is in the possession of, or accessible to, the repository but which the repository has chosen not to take into account at all in the conduct of the inquiry.

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39 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; [1990] HCA 21 quoted with approval in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160 [25]; [2006] HCA 63.

40 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]; [2003] HCA 6 as explained in *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25 at 33 [36], 36 [57]; 326 ALR 1 at 9, 12-13; [2015] HCA 40.

41 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32] quoting *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 95-96 [14]-[17]; [2005] HCA 72 explaining *Kioa v West* (1985) 159 CLR 550 at 629; [1985] HCA 81.

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84 Extraordinary as they are, the circumstances of the Data Breach do not warrant a departure from those ordinary requirements. That the Department was responsible for its occurrence is regrettable. That the Department was responsible for its occurrence nevertheless provides no foundation for apprehending that an officer of the Department tasked with assessing the consequences of the Data Breach for an individual applicant would not bring an impartial and unprejudiced mind to the conduct of an assessment. Nor does that circumstance provide a principled foundation for converting the ordinary requirement of procedural fairness that an affected person be given notice into a duty that the Department reveal "all that it knows" about the Data Breach.

85 Neither of the two bases on which the Full Court found the notice given to SZSSJ and SZTZI to have been inadequate to afford procedural fairness can be sustained.

86 Whatever the inadequacy of the standard letter sent to them and to other applicants in March 2014, there could be no doubt that SZSSJ and SZTZI were put squarely on notice of the nature and purpose of the assessment and of the issues to be considered in conducting the assessment from the time of the formal notification of the commencement of the ITOA process with respect to each of them. In the case of SZSSJ, that occurred in the letter of 1 October 2014. In the case of SZTZI, it occurred in the letter of 13 January 2015.

87 SZSSJ and SZTZI were each then told that an assessment was to be conducted. They were told that the assessment to be conducted was an ITOA in accordance with procedures set out in the Procedures Advice Manual. They were told that the purpose of conducting the ITOA was to assess the effect of the Data Breach on Australia's non-refoulement obligations under the Refugees Convention, the Torture Convention and the International Covenant on Civil and Political Rights with respect to them.

88 The Procedures Advice Manual was available to them and to their representatives. The Procedures Advice Manual made clear that the consequence of an officer conducting an ITOA finding that a non-refoulement obligation was engaged might be referral to the Minister to decide whether or not to exercise a relevant non-compellable power in the particular case. That was again made clear in relation to SZSSJ in the subsequent letter from the Australian Government Solicitor.

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89 Unclear until the decision of the Full Court was the characterisation of the ITOA process in each of their cases as having a statutory basis arising from a prior personal procedural decision of the Minister to consider whether to exercise the powers conferred by ss 48B, 195A and 417 of the Act in respect of applicants for visas affected by the Data Breach. But while the fact of the Minister's decision affected the legal characterisation of the ITOA process, neither that fact nor that characterisation had any effect on what was in fact to occur in the ITOA process or on the possibility of that process leading ultimately to the making of a substantive decision by the Minister to grant a visa or to lift the bar. While the Minister's power to make such a substantive decision was conferred in terms of what the Minister thought to be in the public interest, the ITOA process was concerned only to inquire into a particular aspect of the public interest: compliance with Australia's non-refoulement obligations. The absence of notification of the fact of the Minister's decision and the correct legal characterisation of the ITOA process deprived neither SZSSJ nor SZTZI of any opportunity to submit evidence or to make submissions bearing on the subject-matter of their respective ITOAs.

90 The assumption made in the ITOA process that their personal information may have been accessed by authorities in Bangladesh and China removed from the scope of factual inquiry any question of precisely who accessed their personal information as a result of the Data Breach. The assumption was sensible because the true extent of access to the personal information of each affected applicant must in practical terms have been unknowable. Once downloaded from the Department's website, the document containing the personal information of the 9,258 visa applicants could have been forwarded to and interrogated by anyone, anywhere and at any time. Attempting to make a finding about precisely who had obtained access to the personal information of any one of them, and when, might be expected to have been a hopeless endeavour.

91 Sensibly interpreted and applied in the context of making an assessment of whether the Data Breach engaged Australia's non-refoulement obligations with respect to them, the assumption was not simply that some of their personal information might have been accessed by some authorities. The assumption was rather that all of their personal information had been accessed by all of the persons or entities from whom they feared persecution or other relevant harm. That is how the assumption was in fact interpreted and applied by the officer who conducted SZTZI's ITOA and how it could reasonably be expected to be interpreted and applied in the conduct of SZSSJ's ITOA.

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92 SZSSJ and SZTZI were not deprived of any opportunity to submit evidence or to make submissions relevant to the subject-matter of the ITOA process as a result of not having such further information as might be inferred to have been contained in the unabridged version of the KPMG report. Exactly how and why the Data Breach occurred was simply not relevant to the question of whether one or more of Australia's non-refoulement obligations were engaged in respect of them. And irrespective of what the unabridged KPMG report might have to say about the identities of the 104 IP addresses from which the document had been accessed during the 14 day period of the Data Breach, the fact would remain that once the document was downloaded the personal information of SZSSJ and SZTZI could have been accessed by anyone. Even if the unabridged KPMG report might have allowed SZSSJ and SZTZI to prove by reference to the report that one or more of those IP addresses were associated with persons or entities from whom they feared harm, that proof would advance their cases for engagement of Australia's non-refoulement obligations no further than the assumption already made in their favour.

Orders

93 Each appeal is to be allowed. The consequential orders to be made will reflect undertakings as to costs given by the Minister as a condition of the grant of special leave to appeal.

94 In the appeal concerning SZSSJ, the orders to be made are:

(1) Appeal allowed.

(2) Set aside orders 1 and 2 made by the Full Court of the Federal Court on 25 September 2015, and in their place order that:

(a) order 2 made by the Federal Circuit Court on 28 April 2015 be set aside and in its place order that the first respondent pay the applicant's costs; and

(b) the appeal from the orders made by the Federal Circuit Court on 28 April 2015 be otherwise dismissed.

95 In the appeal concerning SZTZI, the orders to be made are:

(1) Appeal allowed.

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(2) Set aside orders 1, 2 and 3 made by the Full Court of the Federal Court on 25 September 2015, and in their place order that:

(a) order 2 made by the Federal Circuit Court on 12 May 2015 be set aside; and

(b) the appeal from the orders made by the Federal Circuit Court on 12 May 2015 be otherwise dismissed.

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