Procedural fairness and international treaty obligations

Emily Graham reports on *Minister for Immigration and Border Protection & Anor v SZSSJ* (S75/2016); *Minister for Immigration and Border Protection & Ors v SZTZI* (S76/2016) [2016] HCA 29; (2016) 333 ALR 653 (27 July 2016).

The High Court in a joint judgment of all seven members held that two former protection visa applicants had not been denied procedural fairness in an International Treaties Obligations Assessment (ITOA) process conducted by officers of the Department of Immigration and Border Protection (the department) under the *Migration Act 1958* (Cth) (the Act). The ITOA process was undertaken to assess the consequences of the publication of a document on the department's website that disclosed the identities of protection visa applicants (the data breach).

The respondents, in separate claims, sought declaratory and injunctive relief in the Federal Circuit Court (FCC) on the basis that they had been denied procedural fairness in the ITOA process. The Full Federal Court allowed each appeal, finding that the FCC had jurisdiction, that procedural fairness was required, and that the process was procedurally unfair. The minister appealed each decision to the High Court.

Issues for the High Court

The court identified three issues for determination in each appeal:[1]

- Did the FCC have jurisdiction?
- Was procedural fairness required in the ITOA process?
- If so, was procedural fairness afforded?

Further, the court indicated that, to determine the questions posed it was necessary to characterise the ITOA process within the statutory framework.[2]

Factual background

SZSSJ and SZTZI arrived in Australia lawfully. SZSSJ, a Bangladeshi national, arrived under a student visa and SZTZI, a Chinese national, under a visitor's visa. They overstayed their visas and were in immigration detention when they applied for protection visas. At the time of the data breach, their respective applications had been refused. SZSSJ was awaiting removal from Australia, having exhausted avenues of review. Refusal of SZTZI's application for a protection visa had been affirmed on merits review.

Data breach and ITOA process

9,258 protection visa applicants in immigration detention had their identities disclosed by the data breach on 10 February 2014. The document remained online for 14 days.

The department informed those affected in early March 2014 and engaged KPMG to prepare a report on access to the document. The department later provided an abridged version of the report that disclosed the number of times the document had been accessed and the number of Internet protocol (IP) addresses from which that access had originated. It did not disclose the IP addresses or give precise time of access.

The department conducted an ITOA process to assess the consequences of the data breach on Australia's international obligations – in particular, non-refoulement obligations – with respect to those affected.

The information disclosed was 'identifying information' that was protected from unauthorised access and disclosure under Pt 4A of the Act.

The data breach was serious.[3] There was a risk that the document may have been accessed by 'those in other countries from whom applicants for protection visas claimed to fear persecution or other relevant harm' who may have 'become aware of the identities of applicants for protection visas in Australia'.[4]

Departmental officers conducting the ITOAs were instructed 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'.[5]

Following the ITOA process, if the officer found that a non-refoulement obligation was engaged, the individual's case may be referred to the minister for a decision whether to exercise a non-compellable power to grant a visa (ss 195A and 417 of the Act) or to lift a bar to the making of an application for a visa (s 48B of the Act).

The ITOA process commenced on 30 September 2014 for SZSSJ and on 13 January 2015 for SZTZI.

SZSSJ and SZTZI claimed that procedural fairness required that they be provided 'all relevant information related to' the data breach, including the full KPMG report.

The court applied *Plaintiff M61/2010E*[6] and *Plaintiff S10/2011*[7] in considering the two-step decision-making process for exercising the non-compellable powers of the minister:

i) a procedural decision of the minister to consider an exercise of the powers and

ii) the substantive decision to exercise the power to grant the visa or lift the bar.

Based on the Full Federal Court's unchallenged factual finding that the minister had personally made a procedural decision to 'consider whether to exercise the powers conferred by ss 48B, 195A and 417 of the Act in respect of [those affected]'[8], the

court characterised the 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 [to assist the minister in making the substantive decision]'.[9]

The High Court

The court allowed each appeal. The court upheld the Full Federal Court's findings that:

i) the FCC had jurisdiction to hear the matters, finding that s 476(2)(d) of the Act did not exclude jurisdiction and identifying the precise 'decision' alleged to be affected by jurisdictional error; and

ii) the ITOA process was a process undertaken for the purpose of assisting the minister in considering an exercise of statutory powers, such that SZSSJ and SZTZI were owed procedural fairness because of an implied condition of procedural fairness in such an exercise of statutory power (considering and applying the court's decisions in *Plaintiff M61/2010E*[10] and *Plaintiff S10/2011*[11]), in circumstances where the conduct of the ITOA was apt to affect their interests in liberty by prolonging their immigration detention.

The Full Federal Court had held that the process was procedurally unfair on two bases:

i) the process was not adequately explained to SZSSJ and SZTZI; and

ii) the refusal to provide the unabridged KPMG report.

The Full Federal Court said that procedural fairness required the department to reveal 'all that it knows about its own disclosures'. However, the High Court ultimately held that the Full Federal Court had erred in finding that SZSSJ and SZTIZ were denied procedural fairness in the ITOA process.

Jurisdiction of the FCC

Section 476(2)(d) of the Act removes the jurisdiction conferred on the FCC in respect of migration decisions that are 'privative clause decisions' or 'purported privative clause decisions', except those affected by jurisdictional error.[12]

The court considered in detail the operation of ss 474 and 476 of the Act. It held that s 474(3)(h) (which extends the meaning of 'decision') should not be read into s 474(7) and that, even if it could, it could not encompass conduct other than that of the minister.

Accordingly, the court held that the FCC's jurisdiction to hear a challenge to a departmental officer's conduct was not excluded by s 476(2)(d) of the Act.[13]

Procedural fairness owed

The court held that procedural fairness was required because the ITOA was a process undertaken by an officer of the department under and for the purposes of ss 48B, 195A and 417 of the Act. The court referred to the settled principle[14] that statutes conferring an exercise of executive power that is apt to affect an interest of an individual is presumed to confer that power on condition that it is exercised in a manner that affords procedural fairness, unless clearly displaced in the statutory scheme. The court held that the interests of SZSSJ and SZTZI were affected by the ITOA process because it prolonged their detention, affecting their rights and interests to freedom from detention, so it was necessary to afford procedural fairness to those whose liberty was thus constrained.

Procedural fairness afforded

The court considered[15] what is usually required to ensure an affected person has a reasonable opportunity to be heard as follows:[16]

> 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. 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. [footnotes omitted]

The court held that 'the circumstances of the data breach [did] not warrant a departure from those ordinary requirements'.[17] In respect of giving an affected person reasonable opportunity to be heard, the court found that there is no requirement that the affected party be notified of information that is not taken into account nor that the department reveal 'all it knows' about the data breach.

The court examined the information that was provided to SZSSJ and SZTZI.[18] The court found that they had been provided adequate information and opportunity to make submissions in respect of the ITOA process and to understand the nature of it. Further, the court found that procedural fairness did not require the department to provide the full unabridged report in circumstances where additional information would not 'advance their cases for engagement of Australia's non-

refoulement obligations any further than the assumption already made in their favour [that personal information may have been accessed by authorities in Bangladesh and China]'.[19] Accordingly, the court found that there had been no breach of procedural fairness in the ITOA process in respect of SZSSJ or SZTZI.

In *obiter*, the court also considered the application of s 197C of the Act[20] which was inserted into the Act after the data breach that relates to the powers of removal of an 'unlawful non-citizen' pursuant to s 198 of the Act.

Endnotes

1. At [39].
2. At [40] and [57].
3. At [5].
4. At [7].
5. At [10]. See also at [22] with regards to SZSSJ and at [26] in respect of SZTZI.
6. (2010) 243 CLR 319; [2010] HCA 41.
7. (2012) 246 CLR 636; [2012] HCA 31.
8. At [33]–[34] and see also [56]–[57].
9. At [56].
10. *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; [2010] HCA 41.
11. *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; [2012] HCA 31.
12. Citing *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.
13. At [71]–[73].
14. At [75].
15. Citing *Lam – Re Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32].
16. At [83].
17. At [84].
18. See [86]–[92].
19. At [92].
20. At [14]–[16].

Substituted verdicts and admissibility of evidence from an unavailable witness

Helen Roberts reports on *Sio v The Queen* [2016] HCA 32; 90 ALJR 963.

Introduction

This appeal raised two issues:

- Whether the appellant's conviction for armed robbery with wounding was inconsistent with his acquittal on the charge of murder, and if so, whether a substitute verdict should be entered; and
- The proper application of s 65(2)(d) of the *Evidence Act 1995* (NSW) in the circumstances of the case.

The facts and course of the trial

The appellant, Daniel Sio, drove Mr Filihia to a brothel in Clyde, Sydney. Also present in the front seat was a Ms Coffison. Mr Filihia entered the brothel alone, armed with a knife, intending to commit robbery. During an altercation Mr Filihia stabbed Mr Gaudry, who later died from his wounds. Mr Filihia stole cash from Mr Gaudry and left the brothel, running past Mr Sio's car. Mr Sio caught up with and collected Mr Filihia, and accelerated away from the scene. Both offenders were apprehended by police shortly afterwards.

Mr Sio was charged with the murder of Mr Gaudry[1] and, in the alternative, with armed robbery with wounding.[2] The Crown case was one of constructive murder by way of a joint criminal enterprise to commit armed robbery with foresight of the possibility of wounding by use of the knife by Mr Filihia.[3] The Crown case of armed robbery with wounding was put on the basis of joint criminal enterprise to commit armed robbery with foresight of the possibility of the use of the knife. Following a trial by jury, Mr Sio was acquitted of the murder but convicted of armed robbery with wounding.

The admissibility of out-of-court representations of an unavailable accomplice

Mr Filihia participated in an Electronically Recorded Interview with Suspected Person (ERISP). He said that there was another man driving the car, who had provided the knife. Initially he referred to him as 'Jacob' but also 'Dan'. In a later statement, Mr Filihia said the other man's real name was 'Dan' or 'Danny'; that 'Dan' had 'put him up to' robbing the brothel; that 'Dan' had provided the knife; and that 'Dan' had driven him to the brothel. Mr Filihia omitted any reference to Ms Coffison's presence in the car. He selected a photograph of the appellant from a photo array procedure, which was also electronically recorded.

At the trial Mr Filihia was called to give evidence but refused to answer any questions. The Crown then sought to tender his statements pursuant to s 65(2)(d) of the *Evidence Act 1995* (NSW) ('the Evidence Act'), which provides for the admission