FRAUD IN ADMINISTRATIVE LAW AND THE RIGHT TO A FAIR HEARING

Zac Chami*

Introduction

On 2 August 2007, the High Court of Australia handed down its decision in the case of *SZFDE v Minister for Immigration and Citizenship*.[1] In a unanimous judgment, the Court found that a decision of the Refugee Review Tribunal was not made within jurisdiction. However, *SZFDE* was very different to the previous migration cases which have occupied so much of the High Court's time in recent years. That is because, in this case, the appellants did not suggest that the Tribunal had done anything wrong.[2]

Instead, the appellants argued that the Tribunal's decision was affected by the fraud of a third party, to whom this paper will refer as Mr H. They alleged that Mr H had held himself out to them as being a solicitor and a migration agent who was entitled to represent them before the Tribunal, when in fact he had been struck off as a solicitor and deregistered as a migration agent. The first appellant paid Mr H $8,400 to act for her and her family. She trusted him and followed his advice, even against her better judgement. However, Mr H's advice was not beneficial to the appellants' application for review. In fact, by advising that the appellants decline to attend a hearing to which the Tribunal had invited them, his advice proved fatal to their application. The High Court inferred that Mr H's motive for providing this advice was to prevent the Tribunal from discovering that he had committed the criminal offence of receiving a fee for providing immigration assistance whilst not being registered as a migration agent.[3] Notwithstanding that the Tribunal was unaware of this advice, the appellants argued that Mr H's conduct constituted fraud on the Tribunal itself, with the consequence that the Tribunal's jurisdiction remained constructively unexercised. The High Court agreed.

This paper addresses three issues that arise from the High Court's decision. The first issue concerns the Court's importation of the concept of "red blooded" fraud into an administrative law context. Traditionally, the type of "fraud" which has attracted the attention of administrative law is bad faith on the part of an administrative decision maker. In this context, as the High Court observed, the words "bad faith" do not imply any deliberate wrongdoing. Instead, they designate only a conclusion that an administrator has not exercised his or her powers in adherence to the standards expected by the courts. In *SZFDE*, the High Court considered whether an administrative tribunal which had acted in good faith nevertheless erred by reason of the fraud of a person who was neither the decision maker nor the subject of the decision. In public law, the courts have dealt with fraud of this nature where a defrauded party has applied to a superior court for a writ of certiorari against an inferior court, on the basis that the inferior court's decision is affected by the fraud. In this case, the Court reviewed the authorities from various other areas of law and adapted the relevant principles to the context of judicial supervision of administrative action.

---

* *Partner, Clayton Utz, Sydney.* *This paper was presented to the 2008 AIAL National Administrative Law Forum, Melbourne, 8 August 2008. The author wishes to thank Richard Baird, John Sheehy and Colin Thorpe for their invaluable assistance in the preparation of this paper.*

This represents a small, but nevertheless significant new development in the field of Australian administrative law.

Second, *SZFDE* is notable for the insights it provides into the High Court's approach towards statutory interpretation. In particular, this decision illustrates the effect that judicial notions of fairness exert upon the process of applying statutory rules to novel circumstances. In the field of migration law, the federal Parliament has taken numerous steps to limit the power of the courts to determine whether the administrators who deal with visa and related issues have afforded a fair hearing to the subjects of their decisions. It introduced a privative clause into the governing legislation to limit the jurisdiction of the courts to review many of those decisions.[4] In several instances, it replaced the natural justice hearing rule at common law with statutory codes of procedure.[5] In the case of the Migration and Refugee Review Tribunals, those statutory codes, on a strict interpretation, require only that the Tribunal invite the review applicant to attend a hearing.[6] In spite of these statutory constraints, several comments in the High Court's judgment in *SZFDE* reveal how common law notions of the right to a fair hearing animate the justices' approach to the interpretation of such legislation. However, by using policy considerations to limit the types of unfairness which will lead to error, the Court undermined the coherency of the interpretative model it adopted.

The third issue engages with the theme of the Australian Institute of Administrative Law's 2008 National Administrative Law Forum, namely "Practising Administrative Law", by identifying the practical consequences which the High Court's decision engenders for administrators, courts, lawyers who act in judicial review proceedings and their clients. As *SZFDE* expands the range of circumstances in which the courts may quash an administrative decision without any fault on the part of the decision maker, the number of successful judicial review applications will probably increase. As a party who alleges fraud must prove the relevant facts to the requisite standard in the course of litigation, a judicial review applicant who raises such an allegation must adduce persuasive evidence. The amount of time and effort dedicated by applicants, respondents and judicial officers to this evidence will often be much greater than in other judicial review proceedings, where almost all of the evidence is usually contained within a single court book. This may cause potentially significant increases in legal costs and the utilisation of court resources.

"Red blooded" fraud in administrative law

After setting out the issues to be decided in *SZFDE*, the High Court reviewed various authorities on fraud from a range of legal fields, jurisdictions and historical periods.[7] In particular, the Court observed that, in the context of public law, the terms fraud, bad faith, abuse of power, unreasonableness and acting on improper grounds do not possess their usual, everyday meaning. Rather, they "*impute no moral obliquity*".[8] That is, the courts will attach these labels to the conduct of an administrator where that conduct falls short of the standards expected by the judiciary, even in the absence of any impropriety. As the Court noted, this species of "fraud" developed out of equitable notions concerning the due discharge of fiduciary and other powers.[9] This is significant because the nature of the fraud alleged in *SZFDE* was very different to the types of fraud with which administrative law is familiar. Mr H's alleged actions took the form of "material dishonesty", that is, deliberate misconduct involving some measure of moral turpitude.[10] Previously, this "red blooded" type of fraud was primarily the province of the common law and the courts generally considered it in the course of either criminal proceedings or civil litigation between the fraudulent and defrauded parties.[11] A second important distinction between these two categories of fraud is that bad faith only gives rise to error where the decision maker is at fault, whereas red blooded fraud may lead to error regardless of who is responsible.

Accordingly, the principles which determine the consequences that flow from a finding of red blooded fraud have developed in a range of legal contexts, some of which are very different

to administrative law. Yet some of those principles have also emerged from a legal field closely analogous to judicial review of administrative action, which in facts sits alongside administrative law under the public law umbrella, namely judicial supervision of inferior courts. In this field, a superior court may be called upon to issue a writ of certiorari against an inferior court, by reason of fraud perpetrated upon the inferior court. The issue of this writ is a distinct process from that of an appeal. It is also distinct from the process of a court exercising its inherent jurisdiction to set aside its own judgments or orders where they have been obtained by fraud, whether in accordance with Rules of Court or otherwise and even after those orders have been entered.[12] As the common law determines the circumstances in which red blooded fraud by a person other than the judge or magistrate will cause certiorari to issue against an inferior court, this field has close similarities as well as differences with administrative law. The Australian and English authorities which deal with these circumstances were the subject of much discussion in *SZFDE* by the High Court[13] and by French J in the Full Federal Court,[14] whose dissent agreed with the result of the High Court's decision. Two issues of note arise from those discussions.

The first issue is that, in Australia, the courts have only ever issued certiorari in their common law jurisdiction by reason of fraud on inferior courts, rather than on administrative tribunals. Where Australian courts have issued certiorari by reason of fraud on an administrative tribunal, they have done so only on statutory grounds.[15] In England, the common law courts appear to see no obstacle to their issue of certiorari against non-judicial public officials for the same reasons as they could issue the writ against inferior courts.[16] In *SZFDE*, French J held that the English common law proposition that "*fraud unravels everything*" applies equally in Australia.[17] His Honour would have issued certiorari on that basis. Though the High Court decided the matter on statutory grounds, it cited these English common law authorities approvingly.[18] Further, it expressly left open the possibility that a finding of fraud on the appellants, as parties to the review, might have been sufficient to vitiate the Tribunal's decision, even without a finding of fraud on the Tribunal itself or the accompanying statutory consequences.[19] Thus it remains the case that no Australian court has issued certiorari in its common law jurisdiction by reason of fraud on an administrative tribunal. Nevertheless, the judgments of French J and the High Court in *SZFDE* suggest very strongly that the Australian common law recognises that certiorari may issue on this basis.

The second issue which emerges from the analyses of French J and the High Court in *SZFDE* is that no Australian court has issued certiorari in its common law jurisdiction only by reason of fraud committed by a person who is neither the decision maker nor a party to the matter. The Federal Court has on two occasions quashed the decision of an administrative tribunal by reason of the fraud of a third party who knowingly gave false evidence as a witness before the tribunal.[20] However, the Court exercised its power pursuant to a statutory provision, namely the former section 476(1)(f) of the *Migration Act 1958* (Cth), which provided as a ground of judicial review "*that the decision was induced or affected by fraud*". In the absence of any textual reason to limit the circumstances in which a decision could be said to have been induced or affected by fraud, the Federal Court on each occasion interpreted this provision broadly. In England, the courts have extended the common law to allow certiorari to issue where neither party to the proceedings is privy to the perjured evidence of a witness.[21] Although the High Court did not invoke the common law in deciding *SZFDE*, its concerns with the "*due administration of justice*" and approval of the English authorities indicate that the Australian common law will also allow certiorari to issue where the sole basis is third party fraud.[22]

In view of the High Court's approval of the English common law position in relation to fraud on administrative decision makers and third party fraud, *SZFDE* has broken new ground in the expansion of Australian administrative law. However, this growth is hardly revolutionary. Rather, in these respects, *SZFDE* represents merely a small evolutionary step in the development of Australian jurisprudence, though one that could easily be extended in future

cases decided under the common law. The more far-reaching aspects of *SZFDE* lay in the High Court's approach to statutory interpretation, which led to a finding of fraud "on" the Tribunal where the third party acted at a distance from the Tribunal's operations, and the Court's ability to reach this conclusion despite the strictures of the statutory scheme which governed those operations.

Importance of a fair hearing

The statutory scheme which governed the procedural obligations of the Refugee Review Tribunal in *SZFDE* is set out in Division 4 of Part 7 of the Migration Act. That division commences with section 422B, which states that "*[t]his Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*" The legislative intent behind the introduction of section 422B was to relieve the Tribunal from any procedural fairness obligations which it would otherwise have under the common law, so that the statutory code of procedure in Division 4 of Part 7 will comprise the entirety of the Tribunal's fair hearing obligations.[23] At the centre of that code, section 425 provides that the Tribunal "*must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review*". That is, the Tribunal must invite the review applicant to a hearing. Exceptions to section 425 provide that the Tribunal is not required to issue a hearing invitation if it makes a decision favourably to the applicant "on the papers", if the applicant consents to the Tribunal making its decision without a hearing or if the applicant has failed to reply within time to a previous invitation by the Tribunal to provide or comment on or respond to information.[24]

Significantly, nothing in the text of section 425 contains any explicit requirement that the Tribunal hold a hearing. Nor is there any requirement that any such hearing be fair. Read strictly, that section provides only that the Tribunal must invite the review applicant to a hearing. Prior to the High Court's decision in *SZFDE*, there was a difference of opinion in the Federal Court whether the language of the statute implies that an invitation must be "real and meaningful" and whether any consequent hearing must be fair. There was also a related difference of opinion whether the sole time for compliance with section 425 is when the Tribunal issues the invitation, or whether subsequent events can lead to a breach of the provision, despite the Tribunal having sent an invitation that was valid as at the date of its issue.[25] The significance of these differences of opinion becomes apparent in circumstances such as those of the appellants in *SZFDE*. There, the Tribunal had sent a hearing invitation under section 425 to Mr H, in accordance with the appellants' appointment of him as their authorised recipient for correspondence. At the date of issue of the hearing invitation, it seems that the Tribunal had complied with section 425 and the related notification provisions set out in the Migration Act and *Migration Regulations 1994* (Cth).[26] Further, notwithstanding the presence of additional complicating factors concerning the appellants' change of address, it was not in dispute that the first appellant received a copy of the hearing invitation from Mr H, signed a form by which she informed the Tribunal that she did not wish to attend the hearing and made a conscious decision not to attend the hearing.[27]

SZFDE is the first case in which the High Court has considered the workings of section 425 in circumstances where section 422B had displaced the additional procedural fairness obligations that would otherwise apply at common law. By reason of the operation of section 422B and its clear legislative intent, it was not open to the Court to find that the appellants had been denied any right to procedural fairness or to a fair hearing at common law. Instead, the Court had to consider whether the events which transpired had led to any error located in Division 4 of Part 7. The way in which the Court construed these provisions and grounded an error in section 425 illustrates the powerful influence exerted by the Court's sense of justice and fairness on its approach to statutory interpretation.

The essence of the High Court's findings in relation to the legal consequences of Mr H's fraud is encapsulated in two words: "subversion" and "stultification". With regard to subversion, the Court said:[28]

> The importance of the requirement in s 425 that the Tribunal invite the applicant to appear to give evidence and present arguments is emphasised by s 422B.
>
> ... An effective subversion of the operation of s 425 also subverts the observance by the Tribunal of its obligation to accord procedural fairness to applicants for review. Given the significance of procedural fairness for the principles concerned with jurisdictional error, sourced in s 75(v) of the Constitution, the subversion of the processes of the Tribunal in the manner alleged by the present appellants is a matter of the first magnitude in the due administration of Pt 7 of the Act.

With regard to stultification, the High Court said:[29]

> The fraud of [Mr H] had the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants.
>
> ... No doubt [Mr H] was fraudulent in his dealings with the appellants. But the concomitant was the stultification of the operation of the critically important natural justice provisions made by Div 4 of Pt 7 of the Act. In short, while the Tribunal undoubtedly acted on an assumption of regularity, in truth, by reason of the fraud of [Mr H], it was disabled from the due discharge of its imperative statutory functions with respect to the conduct of the review. That state of affairs merits the description of the practice of fraud "on" the Tribunal.
>
> The consequence is that the decision made by the Tribunal is properly regarded, in law, as no decision at all. This is because, in the sense of the authorities, the jurisdiction remains constructively unexercised.

Ostensibly, *SZFDE* was not a case about the right to a fair hearing.[30] Yet, as these excerpts illustrate, the importance attached by the High Court to procedural fairness was central to its decision. The Court's references to the Tribunal's code of procedure as a "*legislative scheme to afford natural justice*" containing "*critically important natural justice provisions*" which provide an "*obligation to accord procedural fairness*" make this clear. If, on the other hand, the High Court had simply viewed Division 4 of Part 7 as setting out a series of procedural steps for the Tribunal to take, without drawing any inference that those steps were intended to culminate in an overall fair procedure, it is difficult to comprehend how the Court could have reached the same result. On such an interpretation, once the Tribunal had issued a valid hearing invitation, its obligations under section 425 would be at an end. Evidently, the Court was not inclined towards such a mechanical construction of the statute, which would leave no room for the incorporation of any requirement of fairness.

The High Court's interpretation of section 422B as emphasising the importance of the Tribunal's obligation under section 425 to invite a review applicant to a hearing is also revealing. Given that the federal Parliament introduced section 422B to limit the scope of the requirements imposed on the Tribunal by the common law, the Court's implication that this provision might enhance or magnify the content of the obligation created by section 425 is difficult to reconcile with the legislative intention. In this regard, though Parliament may have manifested a clear statutory intention to oust the Tribunal's common law duty to act fairly, it appears that this was not sufficient to oust the High Court's prerogative to imply a duty to act fairly into the statute.[31]

These excerpts from the High Court's judgment in *SZFDE* also disclose an interesting inversion of the concept of fraud "on" a decision making authority. The Minister had submitted that Mr H perpetrated any fraud only on the appellants, rather than on the Tribunal.[32] Without fraud either by or on the Tribunal itself, so the argument ran, there could be no breach of any of the provisions set out in Division 4 of Part 7. The High Court, in contrast, took the view that Mr H's fraud stultified the operation of those provisions and that this consequence attracted the designation of fraud "on" the Tribunal. That is, although Mr

H's fraudulent conduct operated at one level removed from the Tribunal's performance of its duties, the Court characterised the consequences of his actions as sufficient to amount to fraud "on" the Tribunal itself. This conclusion seems counter-intuitive, as it sits somewhat uneasily beside the factual premise that Mr H had not made any false statement to, or had any false dealings with the Tribunal. Nevertheless, regardless of the merits of this finding, the High Court's approach highlights its unease with the proposition that a person could be defrauded of an opportunity to attend a hearing, yet have no remedy before the courts.

In view of the importance placed by the High Court on procedural fairness and the centrality of stultification to the *ratio* in *SZFDE*, it is difficult to see why the fraud of a third party should give rise to a jurisdictional error, while mere negligence should not. Nevertheless, the Court said that:[33]

> there are sound reasons of policy why a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision made. The outcome in the present appeal stands apart from and above such considerations.

It is not clear why the policy considerations referred to by the Court should preclude the capacity of mere negligence to stultify the operation of the Tribunal's legislative scheme, when those considerations will not protect the integrity of the scheme against third party fraud. Different shades of fraudulent or negligent conduct by Mr H could, hypothetically, have caused adverse consequences for the appellants' application to the Tribunal and the fairness of the hearing to which it invited them. However, it does not follow that only fraudulent conduct could have led to the subversion of the operation of section 425 in the sense contemplated by the High Court. For instance, if Mr H had been merely negligent in advising the appellants not to attend the hearing, the consequences for section 425 and the conduct of the Tribunal's review would have been identical. Yet, in view of the High Court's comments, this would not have given rise to the stultification of the legislative scheme. This incongruity suggests that, as well as reading an implied obligation to act fairly into Division 4 of Part 7, the High Court has limited the scope of the Tribunal's statutory obligation by reference to considerations of judicial policy.

The incongruity between the capacity of fraud and the incapacity of negligence to cause the Tribunal to constructively fail to exercise its jurisdiction creates a situation whereby the validity of an administrative decision may depend upon the state of mind of a third party. The potential for surrealism which this engenders was borne out in *SZHVM v Minister for Immigration and Citizenship*.[34] In that case, the appellant gave evidence that the reason she had failed to attend a hearing to which the Refugee Review Tribunal had invited her was because her migration agent had employed her as a nanny and he had directed her to look after his daughter. Middleton J held that, as the migration agent "*was just concerned about his own interests and put them above those of the appellant*", his actions did not amount to fraud within the meaning of *SZFDE*.[35] His Honour cited the Full Federal Court's judgment in *Minister for Immigration and Citizenship v SZLIX*, where the Court took the view that "*SZFDE requires that the agent in question is fraudulent in a way that affects the Tribunal's Pt 7 decision-making process.*"[36] Given two identical scenarios, with the exception that in one scenario a third party has acted by reason of material dishonesty or moral turpitude, whereas in the other the third party has acted in the same way through negligence, it seems unsatisfactory that the third party's subjective motivation provides the determinative criterion for whether the operation of a statutory code of procedure has been stultified. Nevertheless, that appears to be the consequence of the High Court's election in *SZFDE* to construe the legislation by reference to principles of fairness, tempered by considerations of judicial policy.

Practical consequences of *SZFDE*

The High Court's decision in *SZFDE* raises several important practical implications for administrators, courts, lawyers who act in judicial review proceedings and their clients. For administrators, a greater range of circumstances can now give rise to a judicially reviewable error, even in the absence of any fault on the part of the decision maker. Sometimes, there will be little, if anything, that the decision maker can do to identify these circumstances. For instance, if an applicant before an administrative tribunal receives fraudulent advice from an advisor whose existence is unknown to the tribunal, there seems to be little that the tribunal could do to prevent this fraud from vitiating its decision. However, in other circumstances, there may be steps which a diligent decision maker could take to identify and remedy third party fraud. For instance, where a person declines an invitation to a hearing, it would be prudent for the decision maker to contact him or her by any means available and ensure that the consent not to appear is genuine. In *SZFDE*, the Tribunal had written to the appellants and Mr H upon learning of Mr H's deregistration, however the appellants no longer lived at the same address and the letter sent to them was returned to the Tribunal unopened. Subsequently, the first appellant informed the Tribunal of her new address and confirmed the address of "*My Solicitor [Mr H]*".[37] With the benefit of hindsight, when the first appellant declined the Tribunal's hearing invitation shortly afterwards, these events might have prompted an inquiry as to the appellants' reasons for not attending and whether Mr H was acting for them in a professional capacity. One can hardly be critical of the Tribunal in *SZFDE* for not taking these steps. However, in future, an awareness of the legal consequences of third party fraud and the ways in which it may arise could enable administrative decision makers to prevent the incursion of unnecessary time and expense and to avoid administrative injustice.

For lawyers who represent applicants in judicial review proceedings, the first practical implication of the High Court's decision in *SZFDE* concerns how to prove the existence of fraud. In this regard, the authorities cited approvingly by the High Court indicate that fraud must be "*distinctly pleaded and proved*",[38] "*on the balance of probabilities and with due regard to* Briginshaw v Briginshaw."[39] That is, the party who alleges fraud must particularise the facts of the conduct which is said to be fraudulent, adduce evidence to establish those facts on the balance of probabilities and persuade the court that the evidence is of a sufficient standard in view of the seriousness of the allegation. However, in many cases, the only evidence available will be the testimony of the allegedly defrauded party. In *SZFDE*, Mr H's contact details appeared in the appellants' Tribunal application form and the appellants adduced corroborative evidence in the form of letters to Mr H from the Law Society of New South Wales and the Migration Agents Registration Authority regarding the cancellation of his legal practising certificate and migration agent registration respectively.[40] As the first appellant alleged that she had paid Mr H $8,400 and lent him a further $5,000, it was also open to the appellants to adduce evidence of these financial transactions.[41]

However, in other circumstances, the evidence available may be scarce. That was the case in *Wang v Minister for Immigration and Citizenship*[42] and *SZLWS v Minister for Immigration and Citizenship*,[43] where the Federal Magistrates Court rejected allegations of fraud for which the only evidence was the affidavit and oral testimony of the respective applicants. In *SZLIX v Minister for Immigration and Citizenship*, the Federal Magistrates Court was presented with a similar paucity of evidence.[44] In that case, the applicant was in immigration detention and about to be removed from Australia, so the Court expedited the hearing. Despite the poor state of the evidence, the Federal Magistrate found that the migration agent had acted fraudulently by writing a false residential address on the Tribunal application form and failing to inform the applicant that the Tribunal had invited him to a hearing, with the consequence that the applicant failed to attend the hearing. His Honour found that these circumstances fell within the principles established by *SZFDE* and quashed the Tribunal's decision. On appeal, the Full Federal Court found that there was insufficient evidence to

support a finding of fraud.[45] Accordingly, it remitted the matter to the Federal Magistrates Court for re-hearing, with the benefit of more satisfactory evidence. After re-hearing the matter and evaluating the evidence in greater depth, the Federal Magistrate found that the applicant had not made out his complaint of fraud and dismissed the application.[46]

These early examples of how the courts have interpreted the High Court's decision in *SZFDE* illustrate the difficulty of establishing third party fraud without independent corroborative evidence. In particular, that is because an applicant's testimony alone will rarely provide direct evidence of the alleged fraudster's state of mind. As mere negligence does not amount to fraud, a judicial review applicant must be able to point to something from which the court can draw an inference of deliberate misconduct. In *SZFDE*, the appellants pointed to Mr H's motive to avoid the Tribunal's discovery of his commission of a criminal offence, namely his receipt of a fee for providing immigration assistance whilst not being registered as a migration agent.[47] However, to open this inference to the Court, first the appellants had to issue subpoenas to the Law Society of New South Wales and the Migration Agents Registration Authority to produce evidence of the cancellation of Mr H's legal practising certificate and migration agent registration.[48]

In *SZFDE* at first instance, at the Court's direction, the appellants served Mr H with copies of their affidavits and afforded him an opportunity to defend his reputation.[49] In circumstances where there is no "paper trail" relating to the conduct in question, it would be advisable to issue the person accused of fraud with a subpoena to give evidence and, if necessary, to cross-examine him or her as an unfavourable witness.[50] However, in many instances, the victim of fraudulent conduct may be unwilling or unable to identify or locate the person responsible. Further, although there is an incentive for the alleged fraudster to defend his or her reputation, there is also a disincentive to cooperation in the form of the ordeal of participating as a witness and being cross-examined in the course of litigation. Thus early experience indicates that the courts will determine whether fraud has been established to the requisite standard almost exclusively on the basis of the veracity of the applicant's evidence given by affidavit and from the witness box.

One feature which distinguishes third party fraud cases from standard judicial review proceedings is the amount of time dedicated by applicants, respondents and the courts to evidence. In most other judicial review proceedings, the entirety of the relevant evidence before the court will be in documentary form. Usually, this will comprise a small number of affidavits and a single court book containing the decision under review, other documents before the decision maker and correspondence between the relevant parties. It is fairly uncommon that oral evidence will be relevant to the issues in dispute, or that cross-examination will assist the court in the disposition of the application. This is unsurprising, as the task of the courts is to supervise administrative action, rather than the actions of the world at large. Allegations of misconduct in relation to administrative decision making are an exception to this general rule.

Where evidence is contested, it is almost inevitable that legal costs will rise. Of its nature, contested factual litigation requires additional work for solicitors and barristers alike. For solicitors, this may involve issuing subpoenas, preparing witness statements and appearing at multiple interlocutory court dates. For barristers, this may involve additional preparation for cross-examination and appearing at more lengthy hearings. In *SZFDE* at first instance, it seems likely that, after seven court dates,[51] the party-party costs would have been several times the $5,000 amount provided by the non-binding scale set out in the *Federal Magistrates Court Rules*.[52] In a standard migration case heard in the Federal Magistrates Court involving two or three court dates, a court book, one or two affidavits, perhaps a hearing transcript, written submissions and the retention of junior counsel, party-party costs of approximately $5,000 are fairly common. The *Federal Court Rules* provide for a similar amount.[53] However, the contested factual litigation prompted by allegations of third party

fraud has the potential to cause legal costs in judicial review proceedings to soar. Such litigation also carries with it increased pressure on judicial time and court resources. Though these considerations should not discourage lawyers and the courts from dealing thoroughly with allegations of fraud where they are properly raised, they do carry implications for the distribution of public funds, which court administrators and government clients should bear in mind.

Conclusion

The High Court's decision in *SZFDE* is significant, not because its contribution to the development of Australian administrative law is revolutionary, but because of what it reveals about the High Court justices' sense of justice and fairness. In particular, this decision illustrates the willingness of the Court to give effect to fundamental principles of fairness, even in the interpretation of a statutory scheme which was drafted for the express purpose of precluding the courts from doing precisely this. Although *SZFDE* concerned the operation of the particular statutory scheme which governed the operation of the Refugee Review Tribunal and although almost all of the subsequent cases to consider the High Court's decision have been migration cases, the implications of this decision extend beyond the field of migration law. Indeed, the concepts of statutory stultification and statutory interpretation by reference to judicial notions of fairness are capable of application throughout and beyond administrative law. Tax law is one possible candidate for the wider application of these concepts in future.[54] However, for those involved in the disposition of migration cases, the practical consequences of the High Court's decision in *SZFDE* have already arrived.

Endnotes

1 (2007) 237 ALR 64.
2 (2007) 237 ALR 64 at [14].
3 (2007) 237 ALR 64 at [45]; *Migration Act 1958* (Cth), section 281.
4 Migration Act, section 474; *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).
5 Migration Act, Part 2, Division 3, Subdivisions AB, C, E, F; Part 5, Division 5; Part 7, Division 4.
6 Migration Act, sections 360, 425.
7 (2007) 237 ALR 64 at [8]-[27].
8 Wade and Forsyth, *Administrative Law,* 9th ed (2004) at 416; (2007) 237 ALR 64 at [13].
9 (2007) 237 ALR 64 at [12]-[13].
10 *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 at [129] per French J.
11 (2007) 237 ALR 64 at [11].
12 E.g. *Federal Court Rules* Order 35, rule 7(2)(b); *Federal Magistrates Court Rules 2001* (Cth) rule 16.05(2)(b); (2006) 154 FCR 365 at [110].
13 (2007) 237 ALR 64 at [17]-[23].
14 (2006) 154 FCR 365 at [104]-[124].
15 (2006) 154 FCR 365 at [118].
16 *R v Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Gormly* [1951] 2 All ER 1030 at 1034; *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712-713; *Al Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 at 895.
17 (2006) 154 FCR 365 at [121].
18 (2007) 237 ALR 64 at [19], [21].
19 (2007) 237 ALR 64 at [6].
20 *Wati v Minister for Immigration and Ethnic Affairs* (1996) 71 FCR 103; *Jama v Minister for Immigration and Multicultural Affairs* (2000) 61 ALD 387.
21 *R (Burns) v County Court Judge of Tyrone* [1961] NI 167 at 172; (2007) 237 ALR 64 at [20].
22 (2007) 237 ALR 64 at [20].
23 *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth); Explanatory Memorandum, Migration Legislation Amendment (Procedural Fairness) Bill 2002 (Cth) at [31]-[35]; Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1106, (Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs). See also (2006) 154 FCR 365 at [138] and the authorities cited there. Note that subsequent legislation, namely the *Migration Amendment (Review Provisions) Act 2007* (Cth), has introduced subsection 422B(3), which provides that "*in applying this Division, the Tribunal must act in a way that is fair and just.*"
24 Migration Act, sections 425(2)(a), (b), (c).

25 (2006) 154 FCR 365 at [94], [211]-[212]; *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [37]; *Minister for Immigration and Multicultural and Indigenous Affairs v SZFHC* (2006) 150 FCR 439 at [41]; *VNAA v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 136 FCR 407 at [14]-[15].
26 (2006) 154 FCR 365 at [235]; *SZFDE v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 199 FLR 1 at [56]-[57].
27 (2005) 199 FLR 1 at [4], [22]-[26]; (2006) 154 FCR 365 at [19]-[23].
28 (2007) 237 ALR 64 at [31]-[32].
29 (2007) 237 ALR 64 at [49]-[52].
30 (2007) 237 ALR 64 at [47]; (2006) 154 FCR 365 at [128].
31 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [43]; *Annetts v McCann* (1990) 170 CLR 596 at [2]; *Kioa v West* (1985) 159 CLR 550 at [31].
32 (2007) 237 ALR 64 at [6].
33 (2007) 237 ALR 64 at [53].
34 [2008] FCA 600.
35 [2008] FCA 600 at [54].
36 [2008] FCA 600 at [53]; (2008) 245 ALR 501 at [33].
37 (2006) 154 FCR 365 at [7]-[24].
38 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712-713; (2007) 237 ALR 64 at [15].
39 (1938) 60 CLR 336; (2007) 237 ALR 64 at [25].
40 (2005) 199 FLR 1 at [30].
41 (2005) 199 FLR 1 at [26].
42 [2007] FMCA 1480.
43 [2008] FMCA 840.
44 [2007] FMCA 1625.
45 (2008) 245 ALR 501.
46 *SZLIX v Minister for Immigration and Citizenship* [2008] FMCA 945.
47 (2007) 237 ALR 64 at [45].
48 (2005) 199 FLR 1 at [14], [30].
49 (2005) 199 FLR 1 at [12]-[13].
50 E.g. pursuant to the *Evidence Act 1995* (Cth), section 38.
51 https://www.comcourts.gov.au/public/esearch/file_details/Federal/P/SYG3495/2004.
52 Rule 44.15; Schedule 1, Part 2, item 1(c).
53 Order 62, rule 12; Schedule 2, item 43D.
54 See *Bonnell v Deputy Commissioner of Taxation (No 5)* [2008] FCA 991 at [29].