



HIGH COURT OF AUSTRALIA

30 June 2020

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v CED16 & ANOR [2020] HCA 24

Today the High Court unanimously allowed an appeal from a judgment of the Federal Court of Australia. The issue raised by the appeal was whether an invalid certificate purportedly issued by a delegate of the Minister for Immigration and Border Protection ("the Minister") under s 473GB of the *Migration Act 1958* (Cth) was "new information" within the meaning of s 473DC(1) of the Act. Section 473GB relevantly provides that the Minister may issue a written certificate certifying that certain information given by the Secretary of the Department of Immigration and Border Protection ("the Department") to the Immigration Assessment Authority ("the Authority") as part of the "fast track review process" established by Pt 7AA of the Act should not be disclosed because it would ground a claim of public interest immunity by the Commonwealth. Section 473DC(1) relevantly defines "new information" to mean "documents or information" that "were not before the Minister when the Minister made the decision [under review]" and that "the Authority considers may be relevant".

The first respondent's application for a protection visa was refused by a delegate of the Minister and this decision was referred to the Authority for review under Pt 7AA of the Act. The "review material" provided by a delegate of the Secretary of the Department to the Authority included a "Draft IMAPS Identity Assessment Form" ("the Identity Assessment Form"). A certificate was purportedly issued under s 473GB(5) ("the Certificate") certifying for the purpose of s 473GB(1)(a) that disclosure of the information contained in the Identity Assessment Form would be contrary to the public interest "because it is a Departmental working document". The Authority affirmed the delegate's decision and an application for judicial review was dismissed by the Federal Circuit Court.

On appeal before a single judge exercising the appellate jurisdiction of the Federal Court, the Minister conceded that the Certificate was invalid for the reason that the characterisation of a document as a "Departmental working document" was insufficient to support a claim of public interest immunity. The Federal Court held that the Authority's decision was affected by jurisdictional error and should be set aside on the basis that the invalid certificate was "new information" within the meaning of s 473DC(1), and by having regard to this information in making its decision the Authority did not comply with the obligation in s 473DE(1) of the Act to provide particulars of new information to a referred applicant.

Before the High Court, the appellant argued that the Federal Court was wrong to characterise the invalid Certificate as "new information" within the meaning of s 473DC(1) of the Act. The Court unanimously held that the term "information" in the phrase "new information" in s 473DC(1) should be interpreted to mean the communication of knowledge about some particular fact, subject or event that is of an evidentiary nature. In addition, the Court held that information will only be "relevant" for the purposes of meeting the definition of "new information" if the Authority considers that the information is capable directly or indirectly of rationally affecting assessment of the probability of the existence of some fact about which the Authority might be required to make a finding in the conduct of its review of the referred decision. The Court concluded that the Certificate was incapable of being "new information" within the meaning of s 473DC(1) as it was not a "document" nor did it contain "information" of an evidentiary nature that was capable of being considered relevant to the conduct of the review being undertaken by the Authority.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*