

BETWEEN:

CNY17
Appellant

and



Minister for Immigration and Border Protection
First Respondent

and

Immigration Assessment Authority
Second Respondent

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APPELLANT'S REPLY

Part I: Internet certification

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II: Reply to the response submissions by the Minister,¹ on the three questions

Question 1

2. The Minister fails to engage with the proper analysis of s 473CB(1), in its statutory scheme.² In particular and notably, the submissions by the Minister slide from the Authority's duty imposed by s 473DB(1) (MSR, [3]³), to discretion (MSR, [5]).
3. The submission that compliance by the Secretary with the duty in s 473CB(1) is '*prima facie*' (unexplained why only *prima facie*) 'a pre-requisite to the exercise of the IAA's discretion' (the 'discretion' is not identified, but it could only be s 473DC), would not be accepted.
4. As well, this Court ought not accept the Minister's submission that the Secretary has power, pursuant to s 473CB(1),⁴ to give 'additional' material to the Authority (MSR, [7]). This

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¹ Minister's Submissions in Response to Post Hearing letter of 31 October 2019 (MSR).

² Cf Appellant's Further Submissions of 24 October 2019 (AFS), [4]-[29].

³ The duty imposed by s 473DC(1) is an aspect of the duty imposed by s 473CC(1).

⁴ And/or, possibly, outside of the Act. Given MSR, [7.1], the precise submission is far from clear.

submission must ultimately reduce itself to one of the Secretary having power to give to the Authority materials which the Secretary considered not to be relevant to the review.⁵

5. The Minister also fails to explain how the Authority would know that some materials had not been given by the Secretary “‘under” s 473CB’ (MSR, [7.1]). The omission is troubling, given the ‘relaxed’ construction, which is advanced by the Minister, of the Secretary duty in par (c) of s 473CB(1). How, one asks rhetorically, is this possibly going to work?
6. Finally, the Minister repeats, albeit in more muted terms (MSR, [7.5]), the submission made orally⁶ that extraneous materials will still be before the Authority, after judicial review. They will not. Section 473EA(4)(a) imposes a duty on the Authority to return to the Secretary any materials which the Secretary had given to it.⁷

Question 2

7. It does not assist (*cf* MSR, [14]) when a party simply asserts correctness of his contended for position, for the purpose of then proceeding to say that nothing in the analysis by the other party addresses the asserted correctness.
8. What would have assisted, was identification by the Minister of what precisely he says is not correct in the Appellant’s submissions (AFS, [32]-[39]), and provision of submissions about why not correct.⁸ Instead, the Minister misdirects the focus from the need to examine the effect of the Secretary’s breach of antecedent duty (*Wei*), to the Authority’s discharge of its duty (AFS [34]; *cf* MSR [14]).
9. The law on a requirement of ‘materiality’ of error, before there will be a judicial conclusion of jurisdictional error, is still developing. That said, one thing is certain. The starting point is the statute in question. It is wrong in principle to start from other statutory contexts, even if recently considered by this Court. As well, the passage from the plurality in *Hossain*, quoted by the Minister, commences with ‘Ordinarily’.
10. Finally, the Appellant says as follows, with respect to the Minister’s intended reliance, in this context, upon what the majority said in *SZMTA* (MSR, [17]).

⁵ See *CNY17 v Minister for Immigration and Border Protection* [2019] HCA Trans 202 (**Transcript**), lines 2564-90 (exchanges between the Bench and Counsel for the Minister).

⁶ Transcript, lines 2472-77 (Counsel for the Minister).

⁷ Transcript, lines 2800-07 (Counsel for the Appellant).

⁸ The Minister could also have explained why he was departing from his submissions made at the hearing: Transcript, lines 2600-42 (exchanges between the Bench and Counsel for the Minister).

11. It is one thing to draw an inference that a tribunal did not have regard to the documents given to it by the Secretary (or the information therein), in reaching its decision.⁹ In *SZMTA*, the question of inference arose in circumstances of failure to disclose existence of a certificate, the failure being a breach of procedural fairness (in the form of the hearing rule,¹⁰ not there eliminated), and the tribunal having the discretion, for the purpose of exercise of any of its powers, to have regard to what the Secretary had given to it under cover of that certificate.
12. It is quite another to say that if the Authority does not state, in its reasons for affirming the Minister's decision, 'I find myself, in resolving issues which have arisen for me in terms of credibility of your claims, prejudiced against you', that the applicant for judicial review of the Authority's decision will fail on some onus to show the decision could have been different. It defies common sense that the Authority would self-report in this way.

Question 3

13. The Minister's submissions on this question commence by restating the position previously put, namely all that is required of the Secretary is to form a view (MSR, [18]). He continues to fail to say why the proposition that the Secretary is, in fact, obliged to reach the identified state of mind reasonably and on a correct understanding of the law, is wrong.
14. The parties agree that the answer to Question 3 is 'no relationship' (AFS, [45]), or, as the Minister puts it, 'the issues do not intersect doctrinally' (MSR, [20]).
15. What is notable however, in light of the Minister's acceptance that there is no intersection, is his position on ground 5, namely that it 'adds [nothing] to grounds 1 and 2'.¹¹ Grounds 1 and 2 deal with apprehended bias. The Minister's position lacks coherence.

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⁹ Relatedly, although for a future case, an absence of reference to the documents in the tribunal's reasons for decision would not show that the tribunal had not read those documents. In *SZMTA*, the majority spoke of paying regard: [47].

¹⁰ It follows from the parties' position on Question 3, that the bias rule likely raises different issues.

¹¹ Minister's Written Submissions dated 2 August 2019, [24]. Consistently with the position there taken, the Minister has not, in any filed documents or in oral submissions, addressed ground 5.