



BETWEEN:

BVD17
Appellant

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and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & Anor
Respondents

APPELLANT'S OUTLINE OF ORAL ARGUMENT

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1. This outline is in a form suitable for publication on the internet.

Ground 1

2. The facts relevant to ground 1 are stated in the appellant's written submissions (**AS**) at [6]-[16]. In short, the IAA had before it material that was subject to a certificate made under s 473GB(1) of the Migration Act. That material was before the delegate at the time that the delegate made the decision (and is mentioned generally by the delegate in her reasons). The IAA relied on that material in its review adversely to the appellant. The appellant did not know that there was a certificate before the IAA.

30 3. The existence of the certificate altered the procedural context of the review (*SZMTA*).

a. The appellant now accepts that s 473GB(3)(a) impliedly prohibits the IAA from considering certificate material unless the IAA exercises the discretion under that provision to have regard to that material. The discretion was lawfully exercised in substance, although the appellant does not accept that the IAA gave any specific mental attention to the requirement in s 473GB(3)(a).

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b. Although the certificate material is part of the review material before the IAA, s 473GB(3)(a) qualifies the obligation to perform the review by considering the "review material" (s 473DB(1)) in relation to certificate material, such that unless the discretion under s 473GB(3)(a) is exercised, the IAA does not, and cannot, consider the certificate material.

c. The appellant had a right to make submissions to the IAA in relation to any procedural issue in the review, including the possible exercise of any of the IAA's

procedural discretions (AS [17]-[18]). This included the right to make submissions about the possible exercise of the power under s 473GB(3)(b) (it would also include the right to make submissions about the possible exercise of the power in s 473GB(3)(a)). The IAA would be obliged to consider any such request.

- d. There is a difference between a request to be provided with review material generally, and a request to be provided with certificate material, because a request to be provided certificate material must address the “confidentiality considerations” that from the reason for the making of the certificate under s 473GB(1).
 - e. Being ignorant of the certificate disables an applicant from addressing this important procedural consideration (including, perhaps, by making comment on the validity of the certificate).
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4. But for any exclusionary effect of s 473DA, these matters imply an obligation upon the IAA to tell an applicant, at least, of the existence of the certificate (and may imply more, if it is necessary to put the applicant in a position to make meaningful submissions about any possible exercise of a procedural discretion).
 5. The implication arises from the application of the common law rule of statutory interpretation, that administrative action which affects a person’s rights or interests is impliedly conditioned upon compliance with the rules of procedural fairness, unless that implication is clearly excluded.
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6. Section 473DA does not exclude this obligation (AS [31]-[35]).
 - a. The provision (correctly) assumes that Div 3 of Pt 7, s 473GA, and s 473GB contain some of the “requirements” of the hearing rule.
 - b. It preserves the application of those requirements, and excludes all other requirements, by deeming compliance with those requirements to be compliance with the requirements of the hearing rule.
 - c. That does not cut down any requirement of the hearing rule as is found within s 473GB, or as is implied by the presence of s 473GB.
 - d. Attention to, and contrasts with, s422B does not assist the resolution of the present case.
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7. The Minister’s submissions about materiality are misconceived. The IAA relied on the certificate material adversely to the appellant, and he lost a valuable procedural opportunity in that respect, in relation to the attempt to persuade the IAA not to reason adversely to his interests.

Ground 2

8. The IAA did not consider the possible exercise of the discretion under s 473GB(3)(b).
- a. Although the IAA is not required to mention in the statement of reasons “everything that it did” (including how procedural matters were resolved), it should be inferred from IAA Reasons [3] that the IAA chose to do so in this case.
 - b. The absence of any mention of s473GB strongly indicates that this provision was not considered at all. Section 473GB(3)(a) was lawfully engaged in substance, nevertheless, because the IAA in fact chose to have regard to the certificate material (which meets the requirements of s 473GB(3)(a)).
- 10 c. That view is fortified by the inherent unlikelihood that the IAA, having considered whether to exercise the power under s 473GB(3)(b) and having formulated a reason for not doing so, would not mention that reason.
9. The failure to consider the possible exercise of the power under s 473GB(3)(b) was legally unreasonable.
- a. There were objectively powerful, although not necessarily conclusive, reasons favouring the exercise of the power under 473GB(3)(b). These included that the IAA knew that the appellant had never been provided with a chance to comment on the supposed “omission” from his brother’s protection visa file, and he was obviously very well placed to address the IAA’s concerns (and if he couldn’t do so, and promptly, that too would be highly probative).
 - b. The act of “considering” is very easy and could not compromise any of the exhortations to the IAA to act efficiently etc. If the power were exercised, the IAA could exercise control over the time and manner in which the applicant could take further procedural steps in the review, including to limit the scope of his attempt to advance any further information. This minimizes any “inefficiency” that might arise from an exercise of the power under s473GB(3)(b).
 - c. This arises in the context of the IAA performing a very important function viz. the applicant, but also in relation to a matter about which there is a significant public interest – ensuring that Australia honour its obligations to other civilized nations under relevant treaties (as those obligations are interpreted by Parliament).
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13 June 2019



ANGEL ALEKSOV