HIGH COURT OF AUSTRALIA

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File Number:	M57/2020
File Title:	Minister for Home Affairs v. DUA16 & Anor
Registry:	Melbourne
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondents
Date filed:	14 Aug 2020

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M57 of 2020

BETWEEN: **MINISTER FOR HOME AFFAIRS**
Applicant
and
DUA16
First Respondent
IMMIGRATION ASSESSMENT AUTHORITY
10 Second Respondent

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M58 of 2020

BETWEEN: **MINISTER FOR HOME AFFAIRS**
Applicant
and
CHK16
First Respondent
IMMIGRATION ASSESSMENT AUTHORITY
20 Second Respondent

RESPONDENTS' SUBMISSIONS

Part I:

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The Full Court unanimously held[1] and the Minister now accepts[2] that the actions of the migration agent and solicitor engaged by the respondents DUA16 and CHK16

[1] CAB 117 [54] (Griffiths J), 130-131 [101]-[102] (Mortimer J), 151 [185]-[189] (Wheelahan J).
[2] Appellant's submissions (**AS**) [2].

(the '**Agent**') constituted fraud. The nature of the Agent's fraud was correctly described by Mortimer J at [102]:

> *She dishonestly represented to the respondents that she would make submissions on their cases as individuals in return for the fees they paid her, concealing from them that she would use a template submission, with information that had no bearing on their cases. She dishonestly purported to take instructions from them on the basis she would be representing what they said to the IAA, but then instead represented to the IAA that what was in the filed submissions were the respondents' instructions, when that representation was false. She was*
10 *recklessly indifferent to the truth and accuracy of the filed submissions.*

3. The question for this Court on appeal is whether that fraud had a sufficient impact on the conduct of the review by the Authority to vitiate the Authority's decision.

4. Consistently with this Court's judgment in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 ('***SZFDE***'), that question will depend on whether the Agent's fraud stultified or distorted the operation of the legislative scheme for the conduct of the review.

5. DUA16 and CHK16 submit that the role played by the fraudulent submissions in the review by the Authority in this case, in which submissions were invited and received and affected the manner in which the review was conducted, was
20 sufficient to stultify the conduct of the review, whether or not the statutory scheme requires submissions to be invited or considered in every case (cf AS [4]-[6]).

6. Further, on the respondents' notices of contention, in circumstances where the Authority noticed that the submissions had nothing to do with the case, and contained facts that were clearly about some person other than him, the Authority in each case took no action to clarify the situation. That was legally unreasonable.

Part III: Section 78B notice

7. The respondents have considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* and do not consider it necessary.

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Part IV: Contested facts

8. The description of the fraudulent submissions in the Minister's submissions is apt to mislead. Those fraudulent submissions did not merely include "some" information that was false (cf AS [12]-[13]). In fact, as the detailed analysis of the content of the fraudulent submissions by Mortimer J at [136]-[154] makes clear, the submissions in each case purported to be submissions based on the instructions of the respective visa applicant, but actually contained virtually no facts from the narrative of each man[3] and contained "a substantial number of assertions which had no connection with the narrative given by either".[4] Those facts related to the
10 claims of some other unidentified person and presented a false impression about the factual basis of their claims. Contrary to the Minister's description of the fraudulent submissions, and as Mortimer J observed: "putting to one side one short sentence in DUA16's submissions, the IAA was falsely informed each submission was 'on behalf of' each respondent, when any connection between the submissions and the IAA's review of their visa application was no more than generic and coincidental."[5]

9. The respondents otherwise do not take issue with the facts set out by the Minister.

Part V: Argument

Fraud in public law

10. *SZFDE* affirms the principle that third party fraud may have such an impact on a
20 statutory process that the statutory process is stultified, and is to be regarded in law as having miscarried.

11. The importance of the availability of certiorari for an administrative decision affected by fraud was emphasised by the High Court in *SZFDE*, observing that a victim of fraud will often have no useful remedy except to have the fraudulently affected result set aside and a fresh review conducted.[6]

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[3] CAB 141 [138] (Mortimer J).
[4] CAB 142-143 [146]-[150] (Mortimer J).
[5] CAB 144 [154(b)] (Mortimer J).
[6] *SZFDE* [22].

12. As to the importance of certiorari extending to fraud by third parties, the High Court in *SZFDE* quoted with approval from Lindgren J in *Wati v Minister for Immigration and Ethnic Affairs*:

> *"although the amending Act of 1992 [the source of s 476] limited the grounds of judicial review, I find no reason to think that the fraud referred to in s 476(1)(f) was intended to be limited in the way suggested by the Minister. Indeed, it is easy to accept that the legislature may have wished to ensure that a decision would be able to be reviewed where it was induced or affected by the fraud of some person. Assume, for example, that a decision of [the*
> 10 *Immigration Review Tribunal ("the IRT")] adverse to an applicant for a protection visa had been procured by the fraud of the individual's opponents: in such a case, Australia would fail to observe its obligations under the Convention Relating to the Status of Refugees through no fault of the Minister or of the IRT, but as a result of a fraud perpetrated by others. It is not surprising to contemplate that the legislature might have wished, in such a case, that the fraud be able to be exposed and its effects remedied in this Court."*[7]

13. The judgment of French J in the Full Federal Court in *SZFDE* - which the High Court upheld on appeal - expressed the test as follows:

> 20 *Fraud and "analogous circumstances" will justify the grant of certiorari if they "distort" or "vitiate" the statutory process leading to the impugned decision to such an extent that it can be said that the decision was induced or affected by that fraud or those circumstances.*[8]

14. Justice French went on to explain that the statutory process could be sufficiently distorted or vitiated in more than one way, including where the decision-maker is misled by false material dishonestly put before it, or where favourable material is dishonestly withheld by a person who would ordinarily be expected to disclose it.[9]

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[7] (1996) 71 FCR 103 at 112, extracted in *SZFDE* [26].

[8] *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 ('***SZFDE* FCAFC**'), [122] (French J).

[9] *SZFDE* FCAFC, [122]-[123] (French J).

15. Justice Mortimer in the present case relied on those observations of French J in concluding, with respect correctly, that certiorari for third party fraud will be available where the approach of the decision-maker is distorted or vitiated by fraud; and it is not necessary to "fasten on a particular statutory power and identify that as being the power which has been stultified or subverted."[10]

16. On appeal, the High Court in *SZFDE* held that it was not necessary to determine at large the scope of judicial review for third party fraud[11] because it was apparent on the facts of that case that a specific statutory function – the requirement to invite an applicant for a hearing under s 425 of the Act – had been impeded by the fraud of the migration agent,[12] and that was sufficient to conclude that the decision of the Tribunal was not a decision according to law.[13]

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17. It is not correct to submit that the test for third party fraud emerging from *SZFDE* is that it must be established that the fraud had the immediate consequence of stultifying, subverting or disabling "an imperative statutory function" (there, being a reference to the hearing under part 7 of the Migration Act). The Court in *SZFDE* also described the outcome as based on the "central importance" of the hearing under part 7 (at [48]), and on the "critically important" natural justice provisions of part 7 (at [51]). This suggests that the expression "imperative function" is used in a descriptive sense, rather than a definitional sense.

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18. The stultification of an imperative function – a hearing under part 7 – was a sufficient basis for certiorari on the facts of *SZFDE*, but it does not follow that the identification of a specific statutory provision that has been stultified as a result of the fraud is a minimum basis for all third party fraud cases. That approach is not consistent with the principles articulated by French J in the Full Court in *SZFDE*, which were undisturbed by the High Court on appeal, nor with the principles in the numerous cases analysed in French J's judgment.

19. The excessively narrow test propounded by the Minister in this appeal (AS [2]) formed the basis for Griffiths J's dissent below, in which his Honour searched for a specific provision that had been subverted and described the respondents' reference

[10] [109] (Mortimer J).
[11] *SZFDE* [28]-[29].
[12] *SZFDE* [49].
[13] *SZFDE* [52]; see also CAB 151, [186]-[187] (Wheelahan J).

to the "review function" under s 473CC of the Act as being expressed at too high a level of generality.[14]

20. The correct approach is that applied by the majority of the Full Court below (Mortimer and Wheelahan JJ), namely whether the process of the review, in fact, was distorted or affected by the fraud, such that the decision can be said to be a result of the fraud.

21. Applying this approach, as Mortimer J observed at [123], reveals that in each case, the Authority invited submissions, the Agent provided submissions that were the product of her fraud on the respondents, and the Authority considered the
10 fraudulent submissions and referred to them in each decision record.

22. Accordingly, Mortimer J correctly found (with Wheelahan J agreeing) that "the role played by those submissions on the review is what matters in the assessment of the effect of [the Agent's] fraudulent conduct."[15]

If there is a search for "imperative functions", they are present in part 7AA

Section 473CC

23. Section 473CC(1) of the Act provides the Authority must review a decision referred to it under s 473CA. That review is to be conducted in accordance with the other provisions of part 7AA of the Act.

24. The "review" includes at least some discretely identifiable tasks. Among other
20 aspects of part 7AA, the Authority is <u>required</u> to consider the review material provided to it by the Secretary under s 473CB. It also has the power to get any new information pursuant to s 473DC, which carries the implied <u>obligation</u> to consider whether to exercise that power if the circumstances of the case so require.[16] Where the Authority receives new information, it <u>must</u> determine whether there are circumstances to justify considering that information in the review within the parameters of s 473DD. These are all aspects of the Authority's "review" function.

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[14] CAB 118 [57] (Griffiths J).
[15] CAB 138 [125] (Mortimer J).
[16] *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, [49] (Gageler, Keane and Nettle JJ).

25. In a case where submissions have been invited and received, there is an implied obligation on the part of the Authority to consider the submissions so received. That obligation has been found by the Full Federal Court in *Minister for Immigration and Border Protection v CLV16* (2018) 260 FCR 482 (‘***CLV16***’) and *DNA17 v Minister for Immigration* [2019] FCAFC 146 (‘***DNA17***’).

26. In both *CLV16* and *DNA17*, the Full Court held – with respect correctly – that failure to consider a submission of substance that was in fact made would constitute jurisdictional error.[17] In both cases, that principle was expressed as an orthodox application of the principle set out by this Court in *Dranichnikov v Minister for*
10 *Immigration and Multicultural Affairs*[18] that a “failure to respond to a substantial, clearly articulated argument relying on established facts” is a constructive failure to exercise jurisdiction. That was in addition to being a procedural unfairness.

27. Part 7AA is amenable to the *Dranichnikov* principle in fast-track review cases when submissions have in fact been invited and received. Contrary to the Minister’s submissions (AS [36]), there is no reason that the exhaustive statement of the natural justice hearing rule in s 473DA should produce the opposite result to the comparable exhaustive statement in s 422B, if submissions have been received in both cases. Consequently, the Minister’s purported reliance on *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 does not assist him.
20 The argument is not put by reference to the principles of procedural fairness.

28. Nothing in *Dranichnikov*, in relation to the finding that there was a constructive failure to perform a “review” turned on the identification of any of the features of the provisions establishing the procedures to be followed in the conduct of a review under part 7. Rather, the result flows from the inherent content in the function of performing a “review” of administrative decision. The first respondent submits that where a public body is charged to conduct a review of an administrative officer’s decision, even where procedural fairness is excluded outright, the place and function of any submissions that are in fact made is so closely connected with the “review” function that any such submissions must be considered.

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[17] *CLV16*, [54], [60] and [63] (Flick, Griffiths and Perry JJ); *DNA17*, [46]-[48] (Kerr, Davies and O’Bryan JJ).
[18] (2003) 77 ALJR 1088, [24] and [32] (Gummow and Callinan JJ), [88] (Kirby J), [95] (Hayne J).

29. Acceptance of this proposition would not require the Authority to invite submissions in every case, nor to delay its decision to await receipt of submissions. All that would be required is to consider submissions if they were in fact made and they in fact reached the Authority before the decision on the review was made.

30. Indeed, the Practice Direction contemplates this situation, where submissions are specifically invited from a visa applicant and time is allowed to furnish such submissions (implicitly indicating that a decision would not be made on the review until that time frame expired).

31. Rejection of this proposition would produce the perverse result that where the Authority had invited an applicant to make submissions on the review, inducing that applicant to expend potentially great time and expense, the Authority would be authorised in law to ignore the submission.

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Practice Direction

32. Section 473FB(1) of the Act provides that the President of the Authority may issue Practice Directions, not inconsistent with the Act, "as to the conduct of reviews by the Authority." The content of the obligation to conduct the review under s 473CC is therefore further defined by the Authority's Practice Directions (cf AS [42], which fails to recognise the authorisation of the Practice Direction under s 473FB(1) for that express purpose).

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33. The Practice Direction in force at the time of the reviews in the present cases – a copy of which was sent to each respondent – invited written submissions as to "why you disagree with the decision of the Department" and "any claim or matter that you presented to the Department that was overlooked."[19]

34. Although the review is a de novo review, the invitation of submissions is plainly intended to assist the Authority to reach the correct decision in the review, including by providing the applicant with an opportunity to persuade the Authority to reach a different decision than that reached by the delegate.[20]

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[19] First Respondent's Joint Book of Further Materials, 15 [20].

[20] CAB 138 [126] (Mortimer J), describing this role of submissions as having "a central function on the review" when understood in the proper context of review by the Authority.

35. Even if the consideration of written submissions is not a mandatory part of the review in every case before the Authority, they were in fact invited here and were in fact received. The Authority in each case approached the review on the basis that each visa applicant had taken the opportunity to persuade the Authority that the factual bases of their claims for protection – described by the Full Court as their "narratives" – warranted the grant of a protection visa, despite the delegate's finding to the contrary. In turn, the Authority assumed that each case had been put by each visa applicant and that there was nothing else that could be said by way of disagreement with the conclusion of the delegate or further explanation or narration
10 of their claims.

36. It is apparent from the attention paid by the Authority to the submissions it received in each case that it would have considered an honest submission that genuinely reflected the respondents' instructions if one had been received. That is enough to demonstrate that the Agent's fraud, which prevented the Authority from receiving such honest submissions, had a material effect on the conduct of the review – as defined or described by the Practice Direction - in the sense that the outcome of the review could have been different but for the fraud.

On the facts of these cases, the Agent's fraud stultified the conduct of the review

37. The question whether the fraud vitiated the conduct of the review in a given case
20 will depend on how the review was in fact conducted.

38. Having noted that the context in which the IAA made its decisions in each case was that it had invited, received and in fact considered the submissions, Mortimer J concluded that the fraudulent submissions in each case "formed part of the reasoning on each review, and contributed to [the Authority's] conclusion on each review that each respondent did not satisfy the criteria for the grant of a protection visa."[21]

39. In agreeing with Mortimer J, Wheelahan J succinctly summarised the effect of the Agent's fraud on the Authority's decision at [188]-[189]. The "material feature" of the respondents' case, according to his Honour, was that "in the discharge of its
30 statutory review function the Authority took account of submissions that contained

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[21] CAB 138 [124] (Mortimer J).

false information and which were prepared in furtherance of the ostensible discharge of a retainer that was procured dishonestly."[22]

40. The invitation to make submissions, and the submissions that were received in response, were the sole opportunity given to the respondents to participate in the review. Accordingly, it was by that means alone that the Authority could be persuaded to exercise its discretion to get new information under s 473DC,[23] and by that means alone that the Authority could take into account what the respondents wished to say about why their claims for a protection visa should be accepted despite the delegate's conclusion to the contrary.

10 41. The Minister accepted, and all members of the Full Court found, that the Authority in fact took the fraudulent submissions into account in each review.[24]

42. The result was that the fraudulent submissions created a number of false impressions on which the Authority acted in its review, as set out by Mortimer J at [154].

43. The Authority's decision record in each case stated that it had considered the aspects of the respondent's claims that had been emphasised in the written submissions.[25] However, in reality, all references to factual claims were not about the respondents' cases at all but were about other persons.

44. In the case of DUA16, the approach of the Authority was to treat the fraudulent
20 factual claims as new claims that had never been made before and the late inclusion of which was not explained.[26] In the case of CHK16, the Authority noted that the factual claims in the submissions bore no relationship to the evidence before it and raised two alternatives – either the submissions were not intended to have been provided in relation to CHK16 due to error, or they were new claims that were not explained.[27] In each case, the Authority's response must have created a negative impression of the respective respondent's credibility. In both cases, the Authority

[22] CAB 152 [189] (Wheelahan J).
[23] CAB 139-140 [133]-[135] (Mortimer J).
[24] CAB 123-124 [77] (Griffiths J), 144-145 [156] (Mortimer J), 152 [189] (Wheelahan J).
[25] DUA16 at IAA decision record [7], CAB 7; CHK16 at IAA decision record [5], CAB 22.
[26] DUA16 at IAA decision record [7], CAB 7; 145 [158] (Mortimer J).
[27] CHK16 at IAA decision record [5], CAB 22; 145 [157] (Mortimer J).

made adverse credibility findings in relation to the factual narrations of the respondents.[28]

45. In DUA16, when looking for an explanation about the Authority's concerns about the reasons for DUA16's brother's disappearance or abduction, the Authority turned to the fraudulent submissions. It found none, then concluded: "There is no credible evidence to support the contention in the representative's submission that the applicant is perceived as working against the government."[29] The latter "claim" was one of the fraudulent claims that was about some other person and repeated in most of the 40 submissions prepared by the Agent. It clearly had an adverse effect
10 on the Authority's view of the respondent's credibility, while also leading the Authority to believe, wrongly, that there was nothing more DUA16 could say about that issue.

46. The Authority's decision in CHK16 was based to a significant extent on several supposed inconsistencies in the respondent's evidence, arising from the delegate's decision, each of which the Authority accepted might have been explicable but the combination of which was decisive in rejecting the respondent's claim.[30] Plainly the opportunity to address those concerns through honest submissions was something that could have made a difference in the review. The fact that the Authority was misled into believing that there was no explanation CHK16 could
20 offer was significant in the Authority's decision.

47. It is clear that the receipt of the fraudulent submissions had a material effect on the Authority's review in each case. As Mortimer J concluded at [173]:

> *The IAA's task of determining whether each of the respondents met the criteria for the grant of a protection visa was subverted, and could not be described as a "true" exercise of power because the IAA was misled, not only about what the respondents had instructed Ms Rajasekaram to put to the IAA, but about the factual nature of their claims and the connection with applicable country information. The IAA was also misled into conducting its review on the basis that the respondents had nothing at all to say to it about*

[28] DUA16 at IAA decision record [21], CAB 9; CHK16 at IAA decision record [40], CAB 29.
[29] DUA16 at IAA decision record [24], CAB 10.
[30] CHK16 at IAA decision record, [40], CAB 29.

why it should accept the factual basis for their claims, and its sufficient connection to what was in the country information.

48. Her Honour explained at [178] that the disabling effect of the Agent's fraud was on the Authority's review task itself, "all the more so because (as the primary judge noted) of the very limited opportunities available to referred applicants to persuade the IAA why they satisfy the criteria for a protection visa."

49. That conclusion is consistent with the rationale for the availability of certiorari for third party fraud in public law cases, expressed by this Court in *SZFDE*, that it is sometimes necessary to unravel a decision where the process has been diverted by fraud, particularly where there is no other meaningful remedy available to the applicant. It is further consistent with the High Court's observation, adopted from Lord Macnaghten in *Reddaway v Banham*, that "fraud is infinite in variety."[31]

50. The majority of the Full Court identified with precision what conduct was fraudulent, how it was fraudulent and how it was acted upon.[32] In circumstances where the fraud clearly impacted the conduct of the review, the Authority's jurisdiction in each case was constructively unexercised.

Part VI: Notice of Contention

51. The respondents contend that the decision of the majority of the Full Court should be upheld on the further and alternative basis that it was unreasonable for the Authority in each case to make a decision on the review in circumstances where it was aware that the submissions before it did not relate to the case of the respective visa applicant but related to the claims of some other person, without taking any action to clarify the situation with the respondents or their Agent.

52. That argument was put as ground 3 of the amended notices of contention below. The majority did not uphold that ground in terms, but made clear that some of the arguments of that ground were instructive in the finding that the Authority's review was vitiated by fraud.[33]

[31] *SZFDE* [8].
[32] Consistent with *SZFDE* [41].
[33] CAB 130 [98] (Mortimer J).

53. A crucial premise from which the Minister's arguments on the appeal proceed (AS [20]) is that the Authority "did not proceed on the basis of a presumption of regularity", unlike in *SZFDE*, but "noted the evident error by the representative in including material in the submissions which related to persons other than the respondents."

54. As the Authority in each case was cognisant that it did not have before it submissions that were relevant to the respective respondents' claims, but had submissions that were related to a completely different set of facts with no connection to the evidence before it, the Minister argues that the fraudulent

10 submissions could not possibly have stultified the conduct of the review.

55. However, the question posed by the notices of contention is: having noticed that it had purported submissions that did not relate to the review before it, was it legally unreasonable for the Authority to ignore that obvious problem it had identified and take no steps whatsoever to address it before making a decision adverse to the respondent?

56. The powers of the Authority in conducting a review conferred by part 7AA of the Act, including the discretion in s 473FA in how it carries out its functions (subject to the constraints imposed by other parts of part 7AA), are conferred on the condition that they be exercised reasonably.[34]

20 57. What is reasonable in the circumstances of the given case is a fact-dependent assessment.

58. In each of the present cases, the Authority recognised that it had received submissions that had no relevance to the case before it.

59. In CHK16, the Authority observed:

> *Of some concern is the fact that despite clearly referring to the applicant, the submission contains reference to claims that appear to have no logical bearing or connection to the applicant. Specifically, the submission contains reference to the applicant having a profile as a media personality, his political*

[34] *Minister for Immigration v Li* (2013) 249 CLR 332, [29] (French CJ), [63] (Hayne, Kiefel and Bell JJ), [88] (Gageler J).

opposition to the Sri Lankan Army and its human rights practices (or for being anti-government), his status as a human rights student at university, a former member of the Sri Lankan police force and/or as a traitor. The applicant has made no earlier claims to fear harm on any of these bases. The evidence before me does not indicate he is a media personality, a member of the police force, that he studies human rights, or is politically opposed to the government in anyway, other than the existing claim that he was falsely accused of providing assistance to the LTTE. I am satisfied that these references are not intended to be new claims or information or form part of the applicant's case, but instead
10 *are references to unrelated matters that appear to have been included in a not insignificant error by the representative.*[35]

60. In DUA16, the Authority stated:

The submission makes reference to what appears to be a new claim. It states that the applicant is perceived to belong to the LTTE, is suspected of a crime, has been arrested and detained, and sexually abused. It states that his brother, who was arrested "alongside him", has sought asylum in Canada. None of these claims have ever been put forward by the applicant. The information about the brother is inconsistent with the applicant's own claims about his brother. I suspect that this part of the submission actually refers to another
20 *applicant, and appears in this submission in error.*[36]

61. In circumstances where engagement between the respondents and the Authority was sought out by the Authority, and the only practical means thereof – the submissions – was identified by the Authority as having "no logical bearing or connection to the applicant" and not intended to be part of the respondent's case (in the case of CHK16), and "actually refer[ring] to another applicant" (in the case of DUA16), no reasonable decision-maker would have continued with the review without taking any steps at all to ascertain the material that the respondents wished to be considered in support of their cases on review.

62. The Minister at AS [70] asserts that the failure of the Authority to take any steps to
30 address the identified problem with the fraudulent submissions was not

[35] CHK16 at IAA decision record [5], CAB 22.
[36] DUA16 at IAA decision record [7], CAB 7.

unreasonable because there was no evidence that a "correct document" – that is, honest submissions that related to the respondents' actual cases – existed. However, that is a straw man argument. The unreasonableness of the Authority does not depend on such a "correct document" already existing.

63. Had the Authority alerted the respondents to the problem it had identified with the submissions, the respondents might have been alerted to the Agent's fraud and might have instructed different, honest, solicitors to provide relevant and helpful arguments in submissions to the Authority. Or, the Agent, upon her fraud being discovered, might have taken the trouble to prepare the honest submissions that she
10 had told the respondents she would make and for which she had taken a substantial fee.

64. In any case, it is not necessary for the respondents to demonstrate what they would have said if they had been alerted to the fact that the Authority did not have the honest submissions. It is sufficient to establish that the unreasonable failure of the Authority to take any action in relation to the identified problem with the material before it could possibly have changed the course of the review that would have been conducted but for that unreasonable failure. That is, that they lost a meaningful opportunity to affect the outcome of the review.[37]

65. The simplicity of the steps that could have been taken – an email or phone call to
20 the respondents or their Agent[38] – when viewed in the context of the review which was to assess whether Australia should not return the visa applicants to a place where they claimed to fear being killed, tortured or otherwise persecuted, tells in favour of the visa applicants' argument. That is fortified by the observation that there was no pressing urgency in making a decision on the review.[39]

Part VII: Estimate of time required for oral argument

66. The respondents estimate that they will require a total of 1.5 hours for presentation of their oral arguments.

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[37] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, [58] (Gageler and Gordon JJ).
[38] *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, [49]-[51] (Nettle J).
[39] *Minister for Immigration v Li* (2013) 249 CLR 332, [41] (Hayne, Kiefel and Bell JJ).

Dated 14 August 2020

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