



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

No. S71/2020

**BETWEEN:**

**AUS17**

Appellant

and

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**MINISTER FOR IMMIGRATION AND  
BORDER PROTECTION**

First respondent

**IMMIGRATION ASSESSMENT  
AUTHORITY**

Second respondent

**APPELLANT’S OUTLINE OF ORAL SUBMISSIONS**

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Date: 4 September 2020

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## PART I CERTIFICATION

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This outline of oral submissions is in a form suitable for publication on the internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### Part 7AA and section 473DD of the Act

1. **Context and international obligations:** Part 7AA involves assessment of protection obligations. There are parallel but different processes for fast track applicants and other protection visa applicants, with reviews by the IAA and the AAT.
2. **Duty to review:** Both the IAA and the AAT have a duty to review. The IAA's review is "limited" only insofar as the Act specifies procedures that are more limited than in the AAT. The duty to review does not otherwise have a different meaning: AS [44]-[48]. Section 473DB(1) provides for a review, "[s]ubject to this Part", without accepting new information. Section 473DC(1) states two criteria for identifying "new information", consideration of which is then governed by conditions in s 473DD.
  - *MIBP v CED16* [2020] HCA 24 at [23] (**JBA/C/160**)
3. **Differences between section 473DD(a) and (b):** Paragraph (a) must be satisfied in every case, whereas (b) is conditional, in the sense that it applies only when the condition in it is met. Paragraph (a) requires a broad evaluation of all the circumstances, whereas (b) is clearly defined and does not really entail matters of opinion or policy.
4. **Relationship between section 473DD(a) and (b):** Satisfaction of paragraph (b)(i) and/or (b)(ii) can only strengthen the justification for considering new information. It will always weigh in favour of circumstances being exceptional (by moving the case away from "one that is regularly, or routinely, or normally encountered": AS [31]).
5. **Consequence of relationship:** Where the new information is given by the referred applicant, the IAA misconstrues the ambit of "exceptional circumstances" in (a) if it fails to consider whether either (b)(i) or (b)(ii) has been satisfied. In other words, if the IAA concludes that it is not satisfied of exceptional circumstances without considering (b)(ii), that is an error of law. That does not mean it is a mandatory relevant consideration.
  - *MIBP v CQW17* (2018) FCR 249 at [47]-[51] (**JBA/D/538**)

6. ***The parties agree that section 473DD has a binary operation:*** Where the IAA is satisfied that new information meets s 473DD, there is no residual discretion not to consider it, and it is material before the decision-maker on the review: AS [43], [68]. In circumstances where the IAA is either bound to consider new information, or bound not to consider it, the duty to review includes a duty to form and act on its own assessment under s 473DD: AS [49]-[50].
- *Plaintiff M174/2016 v MIBP* (2018) 264 CLR 217 at [95] (**JBA/C/353**)
  - *CNY17 v MIBP* (2019) 94 ALJR 140 at [7], [140] (**JBA/C/127, 148**)
7. ***What must be done by the IAA:*** In cases engaging the chapeau to (b), that is, where the referred applicant has given or proposed to give new information to the IAA—
- (a) the IAA must not find there are not exceptional circumstances under (a) without considering whether the new information satisfies (b)(ii): AS [30]-[32], Rep [6];
  - (b) the IAA must evaluate the potential significance of the new information for consideration of the referred applicant’s claims, either when considering (b)(ii), or if the IAA is otherwise satisfied that the new information meets s 473DD, in the review: AS [56]-[57], Rep [9(a)];
- *MIBP v CQW17* (2018) 264 FCR 249 at [50]-[54], [69] (**JBA/D/538, 541**)
  - *MIBP v BBS16* (2017) 257 FCR 111 at [105] (**JBA/D/524**)
  - *Plaintiff M174/2016 v MIBP* (2018) 264 CLR 217 at [50] (**JBA/C/341**)
8. ***The duty to give reasons:*** The binary operation of s 473DD means that the formation of a state of satisfaction under s 473DD according to law is a condition on the exercise of the power to affirm the fast track reviewable decision (s 473CC(2)): Rep [9]. Findings under s 473DD are necessarily material to the IAA’s decision on the review, and the Court is entitled to infer that any matter not mentioned in the reasons was not considered by the IAA to be material to its decision on the review: AS [66]-[69].

### **The IAA’s reasons**

9. ***The parties agree that the IAA made no express finding as to (b)(ii):*** Rep [10], RS [50].
10. ***It should be inferred that the IAA failed to consider (b)(ii):*** In every other instance of new information, the IAA expressly referred to (b)(ii), and expressly stated whether it was satisfied or not satisfied that the new information met (b)(ii): AS [60]-[62] (**CAB 8**).

In the present instance, the IAA neither referred to (b)(ii), nor stated whether it was satisfied or not satisfied that the letter met (b)(ii). The present instance is indistinguishable from a case in which the IAA failed to consider (b)(ii).

11. *It should be inferred that the IAA failed to evaluate the potential significance of the letter for consideration of the appellant's claims:* The IAA's description of the letter ("recounts the claims already provided") reveals that there was no evaluation of the more significant parts of the letter that did much more than recount previous claims: Rep [10]. No "active intellectual process" was directed to those parts: AS [63]-[65].
12. *The same inferences can also be drawn per Yusuf:* AS [66]-[69]; Rep [9(b)].

### **The primary judgment**

13. *The primary judge's findings were correct:* The IAA's consideration of (a) in relation to the letter was not informed by (b)(ii): **CAB 45** [47]. The IAA did not consider its "probative value". What (b)(ii) required was an evaluation of the potential significance of the new information for the appellant's claims more generally: **CAB 46** [49].

### **Errors by Justice Logan in the application of the law to this case**

14. Logan J erred in holding that Judge Driver granted relief on the basis that (b)(ii) is a mandatory relevant consideration (which was never the appellant's case): **CAB 69** [23]-[24], rather than following *BVZ16* and *BBS16*.
15. Logan J did not find that the IAA considered (b)(ii), or that the IAA evaluated the potential significance of the letter. "[C]apable of corroborating" "at least some" claims is merely relevance, not evaluation of potential significance: Rep [12]. His Honour erred in holding that non-satisfaction of (b)(i) was "a sufficient basis" for satisfaction that no exceptional circumstances exist under (a): **CAB 70** [26]. In any event, the primary judge's findings were correct.

Dated: 4 September 2020

**Stephen Lloyd**  
Sixth Floor Selborne Chambers

**James King**  
Sixth Floor Selborne Chambers

Section 422B

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## **Division 4—Conduct of review**

### **422B Exhaustive statement of natural justice hearing rule**

- (1) This 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.
- (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.
- (3) In applying this Division, the Tribunal must act in a way that is fair and just.

### **423 Documents to be given to the Refugee Review Tribunal**

- (1) An applicant for review by the Tribunal may give the Registrar:
  - (a) a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider; and
  - (b) written arguments relating to the issues arising in relation to the decision under review.
- (2) The Secretary may give the Registrar written argument relating to the issues arising in relation to the decision under review.

### **424 Tribunal may seek information**

- (1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.
- (2) Without limiting subsection (1), the Tribunal may invite, either orally (including by telephone) or in writing, a person to give information.

Section 424AA

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- (3) A written invitation under subsection (2) must be given to the person:
- (a) except where paragraph (b) applies—by one of the methods specified in section 441A; or
  - (b) if the person is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

**424AA Information and invitation given orally by Tribunal while applicant appearing**

If an applicant is appearing before the Tribunal because of an invitation under section 425:

- (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
- (b) if the Tribunal does so—the Tribunal must:
  - (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and
  - (ii) orally invite the applicant to comment on or respond to the information; and
  - (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and
  - (iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

**424A Information and invitation given in writing by Tribunal**

- (1) Subject to subsections (2A) and (3), the Tribunal must: