HIGH COURT OF AUSTRALIA

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File Number:	S71/2020
File Title:	AUS17 v. Minister for Immigration and Border Protection & A
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	31 Jul 2020

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IN THE HIGH COURT OF AUSTRALIA No. S71/2020

SYDNEY REGISTRY

BETWEEN: **AUS17**

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second respondent

APPELLANT'S REPLY

Date: 31 July 2020

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PART I: CERTIFICATION

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

PART II: SUBMISSIONS

Scope of the appeal

2. ***The Minister's new case that BVZ16, BBS16, CHF16, and CQW17 were all wrongly decided was never run below*** (cf. RS [35]). The primary judge was bound by *BVZ16* and *BBS16* and granted relief to the appellant following those judgments (**CAB 44** [43]-[44]). The Minister's notice of appeal did not challenge those decisions (**CAB 54**). The Minister expressly disavowed any challenge to *BVZ16*, *BBS16*, or *CHF16* before Logan J,[1] even on a formal basis. The Minister submitted to Kiefel CJ and Keane J, with reference to those decisions, that "the principles are well-established".[2] Not having been run below, that case cannot now be raised by notice of contention.[3] This Court should be reticent to permit the Minister to run a new case on appeal.

3. ***The Minister's submission that the appellant seeks to reagitate ground 4(b) of the special leave application is misconceived*** (cf. RS [54]-[55]). Ground 4(b) was limited to a contention that the letter spoke to events occurring after the delegate's decision (i.e. between that decision and the date of the letter), such that the IAA's conclusion that the letter could have been obtained before the delegate's decision revealed error. The appellant has neither pleaded that ground nor advanced any arguments seeking to develop that ground. To the extent there are factual matters and inferences that support the ground on which the appellant was granted special leave, the appellant is entitled to raise them.

4. ***The Minister mischaracterises the findings of the primary judge*** (cf. RS [12]-[13]). The primary judge's reasons for concluding that the IAA constructively failed to exercise jurisdiction (**CAB 47** [50]) were that the IAA failed to consider paragraph (b)(ii) and did

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1 Transcript of hearing before Logan J on 17 May 2018 at 22.34-35 ("the Minister isn't contending that those decisions are wrong").

2 Minister's special leave response filed 5 December 2019 at [10].

3 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 121 [169]-[170], 123 [181], 124 [184] (Gummow ACJ, Kirby, Hayne and Heydon JJ with whom Kiefel J agreed at 129 [200]).

not have regard to "the probative value" of the letter (**CAB 45** [47]), which was a shorthand for failing to undertake "an evaluation of the significance of the new information in the context of the applicant's claims more generally" under paragraph (b)(ii) (**CAB 47** [49]).

The proper construction of s 473DD

5. ***The policy position behind s 473DD was tempered by the insertion of paragraph (b)(ii)*** (cf. RS [40]). The policy position behind s 473DD stated in the extrinsic material before[4] paragraph (b)(ii) was introduced was retained after the amendment,[5] but given the terms of the amendment that explanation can only be understood as directed to paragraph (b)(i).

6. ***The chapeau to s 437DD(b) has work to do*** (cf. RS [36]). Paragraph (b) is engaged only where the referred applicant gives or proposes to give new information to the IAA. It is not engaged where the IAA exercises power under s 473DC to get new information itself, or where another person gives new information to the IAA. In such cases the IAA must consider only paragraph (a). Accordingly, the appellant's statements of principle about the circumstances in which the IAA must consider either limb of paragraph (b) are limited to cases engaging the chapeau to paragraph (b) (AS [30]-[32]). The submission at RS [37] misstates the appellant's case. Although the IAA may accept new information by considering only paragraphs (a) and (b)(i), the IAA cannot refuse to accept new information by considering only those paragraphs, because the information might satisfy paragraph (b)(ii) (and paragraph (a) informed by paragraph (b)(ii)) (AS [32]).

7. ***In determining whether it is bound not to consider new information under s 473DD, the IAA does not need to determine whether the new information is true*** (RS [44]). There is an important distinction between evaluating whether new information is true and evaluating the potential significance of the new information if true. Other than in cases where the new information cannot satisfy either limb of paragraph (b), the latter is a necessary part of the IAA's function under s 473DD and its duty to review (see below at [9]). The former need not be part of the IAA's function under s 473DD. If the new information is accepted, however, its veracity must be considered during the review.

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4 Australia, Senate, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at [919].

5 Australia, Senate, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Supplementary Explanatory Memorandum (GH118) at [31].

8. ***Evaluating the significance of new information in the context of an applicant's claims more generally is not the same as assessing relevance*** (cf. RS [45]). New information is information that "the Authority considers may be relevant" (s 473DC(1)(b)), which is limited to asking whether 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".[6] Section 473DD and the duty to review require more before new information is rejected: an evaluation of the extent to which the information, if true, could rationally affect assessment of facts or affect "consideration of the referred applicant's claims".

9. ***The Minister agrees that the IAA must consider new information that the IAA is satisfied meets the requirements of s 473DD*** (RS [28]). Once this proposition is accepted, the appellant's submissions with respect to construction and the duty to give reasons necessarily follow. In particular:

   (a) ***Construction***—On this approach, s 473DD has a binary operation. The IAA must consider new information that meets its requirements and must not consider new information that does not. Because the IAA must consider new information that meets the requirements of s 473DD, and because a failure to take account of cogent evidence providing substantial support to an applicant's case involves a failure to perform the duty to review (AS [47]-[48]), a finding that there are not "exceptional circumstances" to justify considering new information must include an evaluation of its potential significance.[7] A similar conclusion was reached in *BBS16* at [105].

   (b) ***Duty to give reasons***—On the binary operation just explained, the IAA cannot know what it is bound to consider, and what it is bound not to consider, until it has made findings under s 473DD in respect of all new information.[8] The IAA cannot make a decision on the review until it has made those findings. The making of

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6 *Minister for Immigration and Border Protection v CED16* [2020] HCA 24 at [23] (Gageler, Keane, Nettle and Gordon JJ), citing *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [6] (Kiefel CJ and Gageler J).

7 This proposition is limited to findings under paragraph (a). If the IAA is satisfied that the new information does not meet the requirements of paragraphs (b)(i) and (b)(ii), the IAA is bound not to consider the new information regardless of its potential significance. That is not this case.

8 Similarly, a court on judicial review cannot know what the IAA was bound to consider, or bound not to consider, or the material that was before the IAA as the decision-maker on the review, unless the IAA has made findings under s 473DD in respect of all new information.

those findings is therefore a condition on the exercise of the power to affirm the decision under review. It follows that those findings will always be material to the IAA's decision on the review: the IAA cannot lawfully consider those findings to be immaterial to its decision on the review. Findings on questions of fact that are material to the IAA's decision on the review must be set out in the IAA's reasons (AS [67]-[68]; cf. RS [46]), and their omission can reveal jurisdictional error.[9]

Application of the law to the facts

10. ***The Minister agrees that the IAA found that paragraph (b)(i) was not satisfied and that the IAA made no express finding as to paragraph (b)(ii)*** (RS [49(d)], [50]). The Minister's case appears to be that the IAA was under no obligation to make an express finding as to paragraph (b)(ii) (RS [50]) or, alternatively, that the IAA's description of the letter ("recounts the claims already provided") was inconsistent with the letter meeting paragraph (b)(ii) (RS [54]). As to the former, the absence of an express finding reveals error in the manner submitted above and in chief (AS [60]-[69]). As to the latter, the IAA's description reveals that the IAA failed to evaluate the potential significance of the letter under paragraph (b)(ii): there was no "active intellectual process" (AS [65]). The IAA did not summarise its content. Had its content been given attention, its purpose would have been obvious: to address the adverse finding made by the delegate. The letter was not so inherently wanting in relevance and credit that its possible probative value could plausibly be reflected in the expression "recounts the claims already provided". A former MP from the appellant's community could have learned of political affiliations, disputes, threats, and local legal proceedings concerning him in many ways (cf. RS [53]). Both Judge Driver and Logan J found that the letter contained personal information that could have affected the appellant's claims (**CAB 56** [47], **CAB 78** [27]), and the IAA either did not reject it as not credible (AS [62]) or accepted it was credible (RS [49(a)]).

11. ***The appellant did not need to "explain why the Letter met [(b)(ii)]"*** (cf. RS [51], [31]). In this case, it was self-evident that the new information was, on its face, "personal information", concerning the continuing interest in the appellant of both the EPDP and the Army, which was the dispositive issue for the delegate: "an applicant does not have to explain the blindingly obvious to the Authority, where the explanation for the provision of the new information plainly stems from the decision of the delegate and

[9] See, e.g., *BEZ17 v Minister for Home Affairs* [2019] FCA 283 at [60]-[61], [68]-[78] (Kerr J).

inheres in the information itself".[10] The IAA must review the decision according to what is "raised clearly or squarely on the material" before it.[11] In any event, the appellant's representative submitted that "[t]his letter clearly indicates that the applicant played a role as a Tamil political activist" (**AFM 49**); that "[o]n the new evidence" the appellant "will be identified at the airport as someone who is of interest to the Sri Lankan authorities" (**AFM 49**); and that "the army continues to look for him throughout the entirety of the country" (**AFM 51-52**), all of which presented the letter as containing personal information materially affecting the consideration of the appellant's claims.

12. ***Justice Logan's findings do not present any obstacle*** (cf. RS [52]). His Honour said no more than that the IAA was "not … unaware" that the letter "if accepted, was capable of corroborating at least some" claims (**CAB 70** [26]). That was not a finding that the IAA evaluated which, specifically, of the appellant's claims were corroborated by the letter, or evaluated the extent and potential significance of that corroboration for those specific claims, as well as for the appellant's credibility generally.[12] It is consistent with the IAA failing to undertake that task. Importantly, Logan J also found that the letter could have affected the IAA's finding that the appellant "was no longer of interest to the EPDP or the Army" because the letter "fairly read, admitted of a conclusion that those parties were still seeking out the [appellant], even after he had left Sri Lanka" (**CAB 71** [27]).

13. The other points made by the Minister about the letter (RS [55]) expose unresolved questions of fact that would have fallen to be resolved by the IAA had it evaluated the potential significance of the letter. The omission to do so supports the foregoing analysis.

Dated: 31 July 2020

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10 *DHV16 v Minister for Immigration* [2018] FCCA 349 at [93], [98] (Judge Driver).

11 *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111 at 139 [79] (Kenny, Tracey and Griffiths JJ), citing *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 18-19 [58]-[61] (Black CJ, French and Selway JJ).

12 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [4] (Gleeson CJ: "Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive"); *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 23-24 [81] (Kirby J).