



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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No S71/2020

BETWEEN:

AUS17
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions

2. The case has not been advanced as one involving legal unreasonableness; rather, AUS17 submits that the IAA proceeded on an incorrect understanding of what s 473DD(a) of the *Migration Act 1958* (Cth) required. The issues, therefore, involve the construction of s 473DD; the nature of the relevant “new information”; and the inferences to be drawn from the IAA’s reasons.
3. The **construction of s 473DD** must begin and end with its text, read in context. The following points are clear:
 - (a) Section 473DD falls to be applied after information has been received and identified as coming within the definition of “new information” in s 473DC(1), but before the information is “considered” as part of the IAA’s review. The information will, therefore, have been identified as potentially “relevant”, but (ordinarily) no final view will have been reached about its veracity or weight.
 - (b) In its terms, s 473DD has two requirements which apply cumulatively (RWS [29]-[30]). One or other of the tests in para (b) must be met; and the IAA must be satisfied that there are “exceptional circumstances to justify” considering the information (para (a)). Obviously, satisfaction of one of the tests in para (b) would not of itself be sufficient to constitute “exceptional circumstances”.

- (c) “Exceptional circumstances to justify considering” is an ordinary English expression which calls for an evaluative judgment by the IAA, whose content is “inherently incapable of exhaustive statement” (RWS [33]-[34]). It would be erroneous for the IAA to regard any particular factor as necessarily determinative of whether exceptional circumstances existed (RWS [35]).
- (d) It can be accepted that satisfaction (or not) of the requirements of para (b) may properly guide the IAA’s judgment as to whether “exceptional circumstances” of the relevant kind exist. But the structure of the section denies those matters any determinative role (RWS [34]). Nor (as AUS17 accepts: AWS [32]) are they mandatory relevant considerations.
- (e) It is erroneous to conclude that para (b)(ii) has some special status because the section is a “remedial” provision (RWS [27]). The label is inapt because s 473DD, according to its terms, is *restrictive* as to the new information that can be considered (and because para (a) works both ways: it also applies to information from sources other than the referred applicant). In any event, there is no choice between available constructions of para (a) that is resolved by such a characterisation.
- (f) It is also erroneous to conclude that para (b)(ii) has a special status on the basis of an *a priori* concept of a “review” (RWS [39]). Section 473DD is part of Division 3 of Part 7AA, which governs the “conduct” of the “review” referred to in s 473CC. Unlike ss 473DB and 473DC, it is not expressed to be “subject to this Part”. Its strictures shape the concept of “review”, rather than the reverse. And the proposition that the IAA must always consider whether new information is “credible personal information” is inconsistent with the terms of s 473DD itself (RWS [42]-[43]).
- (g) Section 473DD(b)(ii) does not carve out an exception from the policy that protection visa applicants should be expected to advance their claims and supporting material at the earliest opportunity (*cf* ss 5AAA, 473DB(1)) (RWS [40]; Supplementary Explanatory Memorandum, JBA 796 at 801 [31]).
- (h) Thus, as a matter of statutory construction, the test for “exceptional circumstances” in para (a) does not operate differently depending on whether para (b)(i) or para (b)(ii) is engaged.

4. The **letter**, in respect of which AUS17 contends that the IAA erred (AFM 53-54):

- (a) said that AUS17 was “known” to the author;
 - (b) was unspecific about the sources of the author’s knowledge of particular events;
 - (c) broadly supported AUS17’s claims about his experiences in Sri Lanka; and
 - (d) said that “[e]ven still the EPDP and the Army visit his house” (but did not explain whether this meant AUS17’s last residence, in Colombo, or his parents’ house in Jaffna).
5. The IAA was not under a statutory duty to give reasons for its conclusions under s 473DD (RWS [46]). Absence of reference in its **reasons** to whether or not the letter came within para (b)(ii) – or the potential significance of the information – does not, therefore, found a sound inference that the IAA did not turn its mind to that issue in considering whether the circumstances were “exceptional”. The IAA dealt with three separate bodies of material that it had identified as “new information” (CAB 8 [9]-[11]) and, in relation to each, stated its conclusion as to exceptional circumstances without elaboration. The evidence therefore does not found a conclusion that the IAA failed to have regard to the nature or potential significance of the letter.
6. Further, it is clear from the IAA’s reasons at [6] and [10] that it had regard to the source and contents of the letter, recognising that it was potentially relevant (in that it was “new information” as defined) and lent support to AUS17’s claims. To the extent that s 473DD(a) requires consideration of the significance of the information in deciding whether there are “exceptional circumstances”, the IAA’s reasons are at least consistent with it having engaged in that consideration (RWS [52]-[56]).
7. Nor did the IAA tie its conclusion that there were no relevant “exceptional circumstances” to its finding that an equivalent letter could have been obtained earlier (CAB 8 [10]). It therefore did not fall into the error of treating failure to satisfy s 473DD(b)(i) as determinative of the issue posed by para (a) (RWS [56]).

Dated: 4 September 2020

Geoffrey Kennett
Bora Kaplan