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 of 2020 S71/2020

BETWEEN:

AUS17
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. This appeal raises the following issues:

   a) Whether, in forming the satisfaction described in s 473DD(a) of the *Migration Act 1958* (Cth) (**Act**) in relation to new information, the Immigration Assessment Authority (**Authority**) is required to have regard to the precondition in s 473DD(b)(ii).

   b) Whether the Authority otherwise misapplied s 473DD(a) to new information that sought to corroborate the appellant's claims (**Letter**).[1]

3. For the reasons that follow, each question should be answered "no".

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[1] The Letter can be found at 53-54 of the Appellant's Further Material filed on 12 June 2020 (**AFM**).

4. The first question identified by the appellant at [2(a)] of his submissions filed on 12 June 2020 (**AS**) does not arise, as the Federal Court did not find that non-satisfaction of the precondition in s 473DD(b)(i) is itself a sufficient basis for the Authority to conclude that there are not exceptional circumstances to justify considering new information (and nor did the Authority so reason in the present case). Even if the Authority reasoned in that way, however, that would not betray a misunderstanding of the breadth of the phrase "exceptional circumstances" in s 473DD(a).

5. The second question identified by the appellant at AS [2(b)] should be answered "no" if by "evaluating the significance of the information for its review" the appellant suggests that the Authority must determine whether the new information is true. If what is suggested is that the Authority is required to turn its mind to how the information bears upon a referred applicant's claims, that was done in this case.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

6. The first respondent (**Minister**) has considered whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

Part IV: Contested Facts

7. The Minister generally agrees with the appellant's summary of his claims for protection and the findings made by the Minister's delegate and the Authority at AS [5]-[19].

8. As to the procedural history of the matter, the Minister adds the following by way of supplementation or clarification (*cf* AS [21]).

9. In the Federal Circuit Court, the appellant had argued that the Authority "fail[ed] to comply with s 473DD of the Act" on the ground that it "refused to consider the evidence on the basis that s 473DD(b)(i) was not made out in the circumstances" yet "failed to consider whether s 473DD(b)(ii) applied to the [new information]": AFM 61.

10. The primary judge upheld this challenge to the Authority's decision. His Honour considered that the Authority had made "the same error" (Core Appeal Book (**CAB**) 45 [47]) as that which had been identified by White J in *BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221 (***BVZ16***). The primary judge held that the Authority "failed to have regard to all material considerations in determining whether to accept the new information", that its "consideration in relation to s 473DD(a) was not

informed by the consideration of both sub paragraphs of s 473DD(b)", that "a material consideration to which the Authority should have had regard was that the letter in issue was provided to corroborate several of the applicant's claims" and that "[a] relevant consideration for the Authority was the probative value of that purportedly corroborative evidence" (CAB 45-46 [47]).

11. The primary judge went on to refer to White J's observations as to the meaning of the words "not previously known" in s 473DD(b)(ii) (at CAB 46-47 [48]-[49]). That question, whether s 473DD(b)(ii) directs attention to the knowledge of the Minister's delegate, does not fall for consideration in this appeal.[2]

10 12. Contrary to what appears to be suggested at AS [58], the primary judge made no finding, at CAB 46 [49], that the Authority made a jurisdictional error by failing to "evaluat[e] the significance of the new information in the context of the [appellant]'s claims more generally". That paragraph summarised White J's reasons in *BVZ16* at 234 [57] (which merely described the type of new information to which each of s 473DD(b)(i) and s 473DD(b)(ii) refers).

13. The primary judge concluded that "there was a constructive failure of jurisdiction by the Authority in this case because of its misapplication of s 473DD … to the new information provided by the [appellant]": CAB 47 [50]. The "constructive failure of jurisdiction" on the part of the Authority was earlier described at CAB 45-46 [47].

20 14. On appeal to the Federal Court, the Minister relevantly advanced two propositions.

15. The first was that, in finding that the Authority had misapplied s 473DD of the Act in respect of the Letter by not having regard to s 473DD(b)(ii), the primary judge wrongly elevated the condition in that subparagraph to the status of a mandatory consideration. That was accepted by Logan J (at CAB 69-70 [24]-[25]).

16. The second was that, even if the Authority was required to have regard to the potentially corroborative nature of the Letter in determining whether there existed exceptional circumstances to justify its consideration, it did so. That proposition was also accepted by Logan J (at CAB 70 [26]).

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[2] In any event, it was answered in the affirmative by Gageler, Keane and Nettle JJ in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (***Plaintiff M174***) at 230-231 [33].

Part V: Argument

Overview of the legislative scheme

17. The scheme of review established by Part 7AA of the Act was considered by this Court in *Plaintiff M174* at 225-232 [13]-[38], *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 (***BVD17***) at 1094-1096 [3]-[17], *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 (***CNY17***) at 144-145 [2]-[8], 154-155 [60]-[67] and 161-162 [114]-[116] and *Minister for Immigration and Border Protection v CED16* [2020] HCA 24 (***CED16***). For the purposes of this appeal, it suffices to note the following features of the scheme.

10 18. Section 473CC(1) provides that the Authority must "review" a fast track reviewable decision referred to it under s 473CA. When conducting a review of the fast track reviewable decision, the Authority "is engaged in a de novo consideration of the merits of the decision that has been referred to it".[3]

19. While s 473CC(1) appears in Division 2 of Part 7AA, it is not correct to say that it "stands outside and apart from th[e] provisions [in Division 3]" (AS [44]). As this Court has stated, the manner in which the Authority is to go about discharging the duty in s 473CC(1) is described in Division 3 of Part 7AA.[4] In other words, s 473CC(1) does not impose a free-standing duty to review a fast track reviewable decision divorced from those provisions in Part 7AA that direct the Authority as to how it must perform that duty.

20 20. Division 3 commences with s 473DA(1), which provides that that Division, together with ss 473GA and 473GB (which are not presently relevant), is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Authority.[5]

21. Section 473DB(1) sets out the "primary requirement"[6] or "primary obligation"[7] of the Authority – to review a fast track reviewable decision by considering the review material given to it by the Secretary of the Minister's department and without interviewing the

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3 *Plaintiff M174* at 226 [17] per Gageler, Keane and Nettle JJ. See also at 245 [85] per Gordon J, 246 [92], 248 [95] per Edelman J.
4 *BVD17* at 1095 [12] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ. See also *CNY17* at 144 [4] per Kiefel CJ and Gageler J, 161 [114] per Edelman J.
5 *BVD17* at 1094 [2], 1098-1099 [29]-[34] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.
6 *Plaintiff M174* at 227 [22] per Gageler, Keane and Nettle JJ.
7 *BVD17* at 1096 [14]-[15] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

referred applicant or without accepting or requesting new information. The duty in s 473DB(1) is said to be "[s]ubject to … Part [7AA]".

22. Two provisions that qualify the obligation in s 473DB(1) are ss 473DC and 473DD. The former confers a power on the Authority, which must be exercised within the bounds of reasonableness,[8] to "get" (or "seek out"[9]) "new information". The phrase "new information" is defined in s 473DC(1)[10] as information or documents that were not before the Minister when a decision was made under s 65 and the Authority considers may be relevant. Both conditions must be met before information will constitute new information.[11] "Information" in this context refers to material or documentation of an evidentiary nature.[12]

23. Section 473DC(3) also confers power on the Authority (which is expressed not to limit s 473DC(1)) to invite a person to give new information. However, despite its powers in ss 473DC(1) and (3), the Authority is not under a duty to "get, request or accept" any new information in any circumstances: s 473DC(2). Given that the Authority in the present case accepted the Letter (in the sense that it received it for the limited purpose of assessing it against the requirements of s 473DD), no question arises as to whether "the duty to review requires that the [Authority] not 'fail or refuse to turn its attention to', and reasonably 'form and act on its own assessment of', the new information in determining whether it is bound not to consider it" (AS [50])[13] and how the appellant's submissions sit with the terms of s 473DC(2).

24. If information meets the conditions in ss 473DC(1)(a) and (b), its consideration by the Authority in reviewing the fast track reviewable decision is governed by s 473DD, which provides as follows:

> ***Considering new information in exceptional circumstances***
>
> *For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment Authority must not consider any new information unless:*

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8 *Plaintiff M174* at 227 [21], 235-236 [49], 242 [71] per Gageler, Keane and Nettle JJ, 245 [86] per Gordon J, 249 [97] per Edelman J.

9 *Plaintiff M174* at 228 [23] per Gageler, Keane and Nettle JJ.

10 See s 473BB.

11 *Plaintiff M174* at 228 [24], 229 [27] per Gageler, Keane and Nettle JJ; *CED16* at [16] per Gageler, Keane, Nettle and Gordon JJ, [30] per Edelman J.

12 *CED16* at [22]-[23] per Gageler, Keane, Nettle and Gordon JJ, [28], [30] per Edelman J.

13 The words quoted were taken from the judgment of Kiefel CJ and Gageler J in *CNY17* at 145 [7]. Their Honours were there concerned with the duty in s 473DB(1), however.

(a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and

(b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:

(i) was not, and could not have been, provided to the Minister before the Minister made the decision under section 65; or

(ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

10 25. The limited nature of a review under Part 7AA is confirmed by s 473FA(1), an exhortative provision[14] which states that the Authority, in carrying out its functions, "is to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)".

The proper construction of s 473DD

26. The following aspects of s 473DD are significant.

27. **Section 473DD is a prohibition:** Together with s 473DB(1), s 473DD operates to prohibit (subject to exceptions) the consideration of new information.[15] Section 473DD is not "of a remedial nature" (*cf* AS [27]). It confirms the limited nature of the scheme of review established under Part 7AA of the Act.[16] It is intended to operate in "rare
20 situations".[17] It reinforces the notion, implicit in ss 5AAA and 473DB(1), that a protection visa applicant must present his or her claims for protection (and evidence in support of them) as early as possible in the visa application process.[18]

28. Contrary to what appears to be suggested by the appellant in various parts of his submissions (AS [32], [40], [42], [43] and [56]), the application of s 473DD to an item of new information does not have the result that the Authority has refused to "accept" that

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14 *Plaintiff M174* at 231 [36] per Gageler, Keane and Nettle JJ.

15 *CAQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 203 (***CAQ17***) at [81] per Derrington and Steward JJ. Special leave refused: [2020] HCASL 111.

16 See ss 473BA and 473FA(1).

17 Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (**EM**) at [909].

18 EM at [920]. See also Supplementary Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (**Supplementary EM**) at [31].

information. In the context of Part 7AA, new information can only be assessed against the requirements of s 473DD (and, if the information meets the conditions set out in that provision, considered for the purposes of making a decision on review) if it has first been accepted. While the Authority has no duty to accept new information (s 473DC(2)),[19] the opening words of s 473DB(1) suggest that it can accept new information for the limited purpose of assessing it against the requirements of, relevantly, s 473DD without contravening the former. If the requirements of s 473DD are met, the Authority must consider the new information and does not retain a residual discretion not to do so. This case is about the position after, not prior to (*cf* AS [43]), acceptance of new information.

10 29. **The Authority must be satisfied of the existence of exceptional circumstances in every case:** Whether or not new information is given by, or on behalf of, a referred applicant, the precondition in s 473DD(a) "must always be met before the Authority can consider [it]".[20] Compliance with that precondition turns on the Authority's satisfaction of the existence of exceptional circumstances to justify consideration of the new information. That the circumstances must be "exceptional" before the Authority can consider new information also militates against the appellant's argument that s 473DD is a "remedial" provision.

30. **Section 473DD(b) is a further precondition:** Where new information is given by, or on behalf of, a referred applicant, the Authority will be prohibited from considering that
20 information unless a "further precondition"[21] or "further requirement"[22] is met. That requirement, set out in s 473DD(b), operates "[c]umulatively upon the precondition set out in s 473DD(a)".[23] So much is apparent from the structure of s 473DD: the word "and" separating ss 473DD(a) and (b) operates conjunctively such that compliance with only one of s 473DD(a) or s 473DD(b) will not be sufficient to lift the prohibition on considering new information. As a Full Court of the Federal Court recently observed, "[i]f one is not met then the new information must not be considered."[24]

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19 See also s 473FB(5), which provides that the Authority "is not required to accept new information" from a person if he or she "fails to comply with a relevant direction that applies to the person".

20 *Plaintiff M174* at 229 [29] per Gageler, Keane and Nettle JJ.

21 *Plaintiff M174* at 230 [31] per Gageler, Keane and Nettle JJ.

22 *Plaintiff M174* at 245 [88] per Gordon J.

23 *Plaintiff M174* at 230 [31] per Gageler, Keane and Nettle JJ. See also *CNY17* at 154-155 [65] per Nettle and Gordon JJ.

24 *BDY18 v Minister for Immigration and Border Protection* [2020] FCAFC 24 at [26] per McKerracher, Colvin and Jackson JJ.

31. **Section 473DD(b) requires the referred applicant to satisfy the Authority:** Unlike the precondition in s 473DD(a) (which refers to the Authority being satisfied of the matters there described), compliance with the precondition in s 473DD(b) requires *the referred applicant* to satisfy the Authority of the matters described in subparas (i) or (ii). Accordingly, the terms of s 473DD(b) "at least cal[l] for some material from an applicant by way of explanation"[25] as to why the new information upon which he or she seeks to rely meets the precondition in s 473DD(b)(i) or s 473DD(b)(ii).

32. **Only one of s 473DD(b)(i) or s 473DD(b)(ii) needs to be met:** To satisfy the precondition in s 473DD(b), a referred applicant needs only to meet the requirements of one of s 473DD(b)(i) or s 473DD(b)(ii). However, contrary to AS [29], the Authority need not turn its mind to the precondition in s 473DD(a) if the referred applicant has not satisfied it of the matters in ss 473DD(b)(i) or (ii). Conversely, the fact that "exceptional circumstances" may exist will not be sufficient to displace the prohibition on the consideration of new information if the referred applicant has satisfied the Authority of neither s 473DD(b)(i) nor s 473DD(b)(ii).

33. **"Exceptional circumstances" is not defined, but compliance with s 473DD(b) will not be enough to meet s 473DD(a):** The phrase "exceptional circumstances" in s 473DD(a) is not defined in the Act. As this Court stated in *Plaintiff M174*, "[q]uite what will amount to exceptional circumstances is inherently incapable of exhaustive statement"; and, while a circumstance need not be unique, unprecedented or very rare in order to be regarded as "exceptional", it "cannot be one that is regularly, or routinely, or normally encountered".[26]

34. In assessing whether or not exceptional circumstances exist to justify considering new information, the Authority is not expressly required to have regard to any particular factors, including the "further precondition[s]" or "further requirement[s]" in ss 473DD(b)(i) and/or (ii).[27] Nor, particularly as s 473DD(a) calls for an evaluative judgment to be made,[28] can any mandatory relevant considerations be inferred.[29] Subject

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25 *AUH17 v Minister for Immigration and Border Protection* [2018] FCA 388 (***AUH17***) at [33] per Mortimer J.

26 At 229 [30] per Gageler, Keane and Nettle JJ.

27 *AQU17 v Minister for Immigration and Border Protection* (2018) 162 ALD 442 (***AQU17***) at [14], [16] per McKerracher, Murphy and Davies JJ (special leave refused: [2018] HCASL 327); *CAQ17* at [37] per Mortimer J, [122] per Derrington and Steward JJ.

28 *Plaintiff M174* at 243 [75] per Gageler, Keane and Nettle JJ.

29 By the process of implication described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

to forming the satisfaction described in s 473DD(a) reasonably and on a correct understanding of the law,[30] the factors to which it has regard in assessing the existence of exceptional circumstances are entirely a matter for the Authority. However, it is clear from the structure of the section that satisfaction as to ss 473DD(b)(i) or (ii), without more, cannot be enough to constitute "exceptional circumstances".

35. Given the breadth of the phrase "exceptional circumstances", the Authority *may* have regard to the factors in ss 473DD(b)(i) and/or (ii) in forming a view as to whether the precondition in s 473DD(a) has been met,[31] but it need not do so (*cf* AS [32]). To the extent that Full Courts of the Federal Court have held that the circumstances of a particular case may *require* the Authority to have regard to the precondition in s 473DD(b)(ii) in assessing whether exceptional circumstances exist,[32] those cases were wrongly decided. However, at least some of those cases[33] can be seen as standing for a narrower proposition: the Authority may fall into jurisdictional error if it considers that an unsatisfactory explanation (or a failure to provide any explanation) as to why new information was not given to the Minister before a decision was made under s 65 of the Act is decisive of the existence or otherwise of exceptional circumstances. That is not this case (*cf* AS [32]).

36. Contrary to AS [30], there is nothing in the text, context or purpose of s 473DD to suggest that the Authority's assessment of exceptional circumstances must involve "at least one of the conditions in paragraph (b)" "in cases engaging the chapeau to paragraph (b)". The chapeau to s 473DD(b) cannot be divorced from the text of subparas (b)(i) and (ii); it has no work to do on its own.

37. In any event, on the appellant's construction of s 473DD at AS [30], the Authority may lawfully exclude new information if it is not satisfied that there exist exceptional circumstances to justify its consideration, and that satisfaction is informed by the precondition in s 473DD(b)(i) and not the precondition in s 473DD(b)(ii). As Mortimer J

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30 *cf Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 30 [57] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

31 *AQU17* at [16] per McKerracher, Murphy and Davies JJ; *DLB17 v Minister for Home Affairs* [2018] FCAFC 230 (***DLB17***) at [22] per McKerracher, Barker and Banks-Smith JJ (special leave refused: [2019] HCASL 110).

32 *BVZ16* at 230 [36]-[37] per White J; *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111 (***BBS16***) at 144 [102]-[103] per Kenny, Tracey and Griffiths JJ; *CHF16 v Minister for Immigration and Border Protection* (2017) 257 FCR 148 (***CHF16***) at 158-159 [44] per Gilmour, Robertson and Kerr JJ; *Minister for Immigration and Border Protection v CQW17* (2018) 264 FCR 249 at 259-260 [50]-[51] per McKerracher, Murphy and Davies JJ.

33 *BVZ16*, *BBS16* and *CHF16*.

observed in *CAQ17* at [36], "the [appellant's] argument positively asserts that s 473DD(b) can be brought into the exceptional circumstances analysis: if that is true for subpara (ii), it is also true for subpara (i)."

38. The appellant is correct to submit, at AS [33], that s 473DD proceeds from the premise that information that falls to be assessed against its requirements was not before the Minister when a decision was made on the referred applicant's visa application. The balance of those submissions, however, misunderstands what was said in the case to which the appellant refers. As will be developed below, the Authority in the present case examined circumstances beyond "[t]he mere fact of non-disclosure"[34] of the Letter to the delegate. The precondition in s 473DD(b)(i) looks beyond that circumstance in that it calls for consideration of whether the information *could have been*, but was not, given to the delegate.

39. **Section 473DD(b)(ii) does not assume a special status in a review:** There is nothing in the text, context or purpose of s 473DD(b)(ii) that warrants its being given "special"[35] status in the context of a review under Part 7AA of the Act (*cf* AS [37]-[38]). That subparagraph merely "extends the types of new information that a referred applicant may present to the [Authority]".[36] Any new information (whether or not it comes within s 473DD(b)(ii)) must still meet the condition in s 473DD(a).

40. Nor, contrary to AS [37], did the insertion of s 473DD(b)(ii) displace the Government's "policy position" in enacting Part 7AA. The extrinsic material upon which the appellant relies contradicts his submissions.[37]

41. The appellant's reliance, at AS [38], on the Full Court's judgment in *Minister for Immigration and Border Protection v CLV16* (2018) 260 FCR 482 (***CLV16***) at 503-504 [91] is misplaced. That case principally concerned the proper construction of s 473DC. One of the issues that arose was whether the Authority could consider a submission containing 'argument' (as opposed to 'information') or canvassing the reasons as to why new information should be considered without the requirements of s 473DD having to be met. The Full Court answered that question in the affirmative. The present case raises different issues.

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34 *ALJ18 v Minister for Home Affairs* [2020] FCA 491 at [37] per Mortimer J.
35 See the sub-heading above AS [39] and the submissions at AS [51].
36 Supplementary EM at [29].
37 Supplementary EM at [31].

42. At AS [40] and [56]-[57], the appellant submits that, where a referred applicant provides to the Authority new information that is credible, personal information that, had it been known (to the Minister), may have affected his or her claims, the Authority cannot affirm the fast track reviewable decision without evaluating the significance of that information for the review.

43. A difficulty with this submission is that it proceeds from the premise that the Authority has formed the view that the new information meets the precondition in s 473DD(b)(ii). It therefore assumes an obligation on the Authority to consider, and make a finding in relation to, that subparagraph as a condition on the validity of a decision under s 473CC(2)(a) to affirm the fast track reviewable decision. For the reasons given above, however, nothing demands that consideration be given to s 473DD(b)(ii) in the context of the Authority's assessment of exceptional circumstances under s 473DD(a) or otherwise. Nor, contrary to AS [56], does the Full Court's judgment in *BBS16* support that proposition.[38]

44. If it is being suggested by the appellant that an evaluation of the significance of the new information requires consideration of the truth of that information (AS [57]), that submission finds no support in the text, context or purpose of s 473DD or in any of the authorities to which reference has been made. The Full Court in *DLB17* only went so far as to state that, in assessing the new information against the requirements of s 473DD(a), the Authority is not prevented from considering whether it is satisfied as to the truth of the information. It is a different proposition to say that the Authority is required to do so.

45. If what is being suggested by the appellant is nothing more than that the Authority is required to turn its mind to how the information bears upon a referred applicant's claims for protection, it is hard to see what this adds to s 473DC(1)(b). In any event, for the reasons given below that was done in this case.

46. **Reasons for decisions under s 473DD are not required:** The Authority is not under a duty to give reasons for any determination under s 473DD not to consider new information.[39] That is significant, as, absent a duty to give reasons, "it is difficult to draw an inference that the decision has been attended by an error of law from what has not been

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38 At 144 [105], the Full Court merely described the new information to which each of s 473DD(b)(i) and s 473DD(b)(ii) refers.

39 The "decision" referred to in s 473EA(1) is the Authority's ultimate decision on the review: *BVD17* at 1096 [16] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

said"[40] (*cf* AS [67]). The Authority might only be disposed to identify "its main concern as to why there [a]re not exceptional circumstances", and it does not follow that it has not had regard to other matters.[41]

The present case

47. For the reasons that follow, the Federal Court was correct to conclude that the primary judge had erred in finding, at CAB 45 [47] and 47 [50], that the Authority had misapplied s 473DD to the Letter.

48. The Authority relevantly commenced its reasons by identifying the Letter as having been written by an "Attorney at Law and Notary Public Commissioner for Oaths" and that it "post-date[d] the delegate's decision" and was "new information": CAB 8 [6]. By finding that the Letter comprised new information, the Authority should be taken to have accepted that the Letter "may be relevant" to the review (s 473DC(1)(b)).

49. At CAB 8 [8], the Authority correctly stated the terms of s 473DD before returning to the Letter at CAB 8 [10]. There, the Authority made the following findings:

a) It described the Letter as a "letter of support from [the author], Attorney at Law and Notary Public Commissioner of Oaths". In doing so, the Authority should be taken to have appreciated that the new information: (i) purported to corroborate the appellant's claims, and (ii) was given by a person who held himself out to be a lawyer. In characterising the new information as being material that "support[ed]" the appellant, the Authority may be seen as "accepting the factual information … was credible" (*cf* AS [63(c)]),[42] at least in the sense that it was not able to be rejected immediately.

b) The Authority accepted that the Letter "could not have been provided to the delegate as it was written after the delegate's decision".

c) It found that "the information it provides recounts the claims already provided by the applicant". This finding is important, as it indicates that the Authority: (i)

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40 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 185 [25] per French CJ, Bell, Keane and Gordon JJ.

41 *CAQ17* at [119]-[120] per Derrington and Steward JJ. See also *BVD17* at 1100 [38]-[40] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ. *cf Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 606 [31] per French CJ and Kiefel J, 616-617 [67]-[69] per Gummow J.

42 *CAQ17* at [37] per Mortimer J.

turned its mind to the information contained in the Letter, (ii) formed a view as to the potential significance of the new information in the light of the appellant's claims for protection, and (iii) having considered the information contained in the Letter to this extent, must have appreciated that it was written by a person who held himself out to be a former Member of the Sri Lankan Parliament.

d) It found that "there [wa]s no reason to believe that the applicant could not have obtained a letter outlining this information earlier and provided it to the Minister". That amounted to a finding that s 473DD(b)(i) was not satisfied, because the "information"[43] could have been communicated to the delegate before his decision was made. It also meant that the fact that the Letter itself did not yet exist at that time was not a circumstance justifying its consideration in the review.

e) It was "not satisfied that any exceptional circumstances exist that justify considering the new information". This finding should be seen as having been informed by the findings made in the balance of [10] of the Authority's reasons for decision.

50. In expressing its lack of satisfaction as to the issue in s 473DD(a), the Authority did not make an express finding in relation to the precondition in s 473DD(b)(ii). For the reasons given above, however, it was under no obligation to do so (*cf* AS [60], [62]). By finding otherwise at CAB 45-46 [47], the primary judge not only misunderstood s 473DD (by reasoning that the Authority's assessment of exceptional circumstances "was obliged to be 'informed' by a consideration of the matters specified in s 473DD(b)": Logan J at CAB 70 [24]) but his Honour also misread *BVZ16*. Nothing that White J said in that case supported the primary judge's conclusions at CAB 45-46 [47]. At 224 [9], White J merely observed that ss 473DD(a) and (b) are "cumulative", but that they "may nevertheless overlap to some extent". At 230 [35]-[37], White J found that the Authority had not made findings in relation to the preconditions in ss 473DD(b)(i) and (ii). That bespoke jurisdictional error not because the Authority's assessment of exceptional circumstances in s 473DD(a) was required to be, or should have been, informed by the precondition in s 473DD(b)(ii), but because its findings in relation to the former were themselves erroneous. Thus, at 232 [46]-[47], White J held that the Authority had reasoned that its rejection of the appellant's explanation for not having disclosed the new information

[43] *cf*, e.g., *CED16* at [22]-[23] per Gageler, Keane, Nettle and Gordon JJ.

earlier "was decisive of the requirement that the circumstances be exceptional", which evinced a misunderstanding of s 473DD(a). The same cannot be said about the Authority's findings at CAB 8 [10].

51. Moreover, the Authority cannot be criticised for not having made an express finding on the precondition in s 473DD(b)(ii) in the face of the lack of any attempt by the appellant's former representative to explain why the Letter met that precondition. The representative's submissions to the Authority merely stated that "[t]he letter was dated 12/10/2016 and on that basis could not have been provided to the delegate": AFM 49.20-21. The direction issued pursuant to s 473FB by the then President of the Administrative Appeals Tribunal, Kerr J, required the appellant to provide an explanation as to why the new information met the precondition in s 473DD(b)(i) or s 473DD(b)(ii): AFM 45 [23]. The content of his submissions to the Authority suggests that the appellant sought only to satisfy the Authority that the Letter came within the former precondition. "In circumstances where the appellant had not put any express material before the … Authority to explain why he was relying on [the precondition in s 473DD(b)(ii)], the … Authority was not in error"[44] not to have made an express finding on that precondition.

52. While it is unclear whether jurisdictional error was found on this additional basis, the primary judge was also wrong to find that the Authority "should" have had regard to "a material consideration", being that the Letter was given "to corroborate several of the [appellant]'s claims". As Logan J correctly held at CAB 70 [26], the Authority was not unaware that the Letter, if accepted, was capable of corroborating at least some of the appellant's claims. It referred to the new information as a "letter of support" (i.e. one that supported the appellant's case or purported to corroborate his claims for protection). In circumstances where the Authority was not under a duty to give any, let alone comprehensive, reasons for its determination under s 473DD, the reasons that it did give made plain the bases for its not being satisfied that there were exceptional circumstances to justify considering the Letter.

53. While the Authority considered that the Letter purported to corroborate the appellant's claims, it is far from clear that it demanded to be given particular weight in that regard (*cf* AS [63(d)]). The author did not, for example, state that he had first-hand knowledge of the various events set out in the Letter. On three occasions the author stated that he

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44 *AUH17* at [33] per Mortimer J.

"underst[ood]" that the appellant took part in processions against the Eelam People's Democratic Party (**EPDP**), was "arrested on suspicion" and was "taken into custody by the TID and was detained": AFM 53. That expression suggests that the author had merely been informed of the appellant's claims (presumably by the appellant or somebody acting on his behalf).

54. The Authority evaluated the significance (if any) of the Letter in the context of the appellant's claims. As stated above, having looked at the new information, the Authority described it as recounting the claims already advanced by the appellant. That description is inconsistent with the Letter containing anything that met the precondition in s 473DD(b)(ii). That is a factual finding the correctness of which was not challenged by the appellant below and forms no part of the appeal.[45] In any event, a mere factual error cannot amount to an error of law.

55. The appellant's submissions at AS [63(e)] and [64] go to matters in respect of which he was not granted special leave. If the appellant is permitted to advance those submissions, the Minister submits as follows:

a) As to the EPDP and the Army "visit[ing] his house to make inquiries about his whereabouts", it is not an unreasonable interpretation of the Letter to read the words "his house" as referring to his family home in Karainagar (in Jaffna). In his protection visa interview, for example, the appellant referred to "his house" as the family residence in Karainagar: AFM 24 [11].

b) While in his visa application the appellant did not identify the EPDP as having searched for him following his departure from Sri Lanka (but only the Army: AFM 12 [41], 22 [9], 24 [11] and 31 [61]), that is immaterial, as irrespective of whether he was of ongoing interest to the EPDP and/or the Army, the point was that people continued to enquire as to his whereabouts since his departure. The appellant had claimed before the delegate that he feared persecution at the hands of the EPDP and the Army: AFM 12 [38]-[39], 13 [43]-[44], 18 [24]. However, he did not claim that he was at greater risk of harm from the EPDP than the Army.

c) In any event, s 473DD(b)(ii) turned on the Authority being persuaded that the Letter contained information, not known to the delegate, that might have affected

[45] Special leave to appeal in respect of ground 4(b) in the appellant's application for special leave dated 14 November 2019 not having been granted.

consideration of the appellant's claims. At most, it was required to turn its mind to that issue; and, as outlined above, it did so. The fact that a different view could be taken of the potential significance of one assertion in the Letter does not point to error.

56. Contrary to AS [65], the Authority, in considering whether there were exceptional circumstances to justify considering the Letter, did not confine its attention to the fact that the appellant could have provided the information to the Minister. It referred also to the content of the letter and its source (evidently seeing no "exceptional circumstances" arising from those matters, either). The reasons of Logan J at CAB 70 [26] need to be understood in that light. His Honour did not say that non-satisfaction of the precondition in s 473DD(b)(i) was a sufficient basis for satisfaction that no exceptional circumstances exist (*cf* AS [65]); rather, it was the Authority's not being satisfied that "*this corroborative letter* could not have been obtained and furnished to the Minister before the delegate made the decision under review" [emphasis added]. In other words, there were not exceptional circumstances to justify consideration of the Letter, notwithstanding that it sought to corroborate the appellant's claims, as the information could have been provided to the Minister.

57. In any event, even if the Authority was not satisfied that there existed exceptional circumstances to justify considering the Letter because a relevantly identical document containing information seeking to corroborate the appellant's claims could have been provided to the delegate before a decision was made on his visa application, that does not evince jurisdictional error. It was not the case that additional considerations were needed to justify a finding that the circumstances were not "exceptional"; rather, there was nothing to persuade the Authority that they were. The Authority is entitled to find against a referred applicant on the precondition in s 473DD(a) based on a failure by him or her to satisfy it of the precondition in s 473DD(b)(i) – as long as it appreciates that non-satisfaction of the latter does not *require* an adverse finding in relation to the former. There was no such misunderstanding of the provision or "overly narrow interpretation of the expression 'exceptional circumstances'" (AS [65]) in the present case. Nor was there any failure to engage, to the extent necessary, with the contents of the Letter.

Part VI: Notice of contention / notice of cross-appeal

58. The Minister has not filed a notice of contention or a notice of cross-appeal in these proceedings.

Part VII: Oral argument

59. The Minister anticipates that he will require approximately one hour for the presentation of his oral argument.

Dated: 10 July 2020

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S71 of 2020

BETWEEN:

AUS17
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE FIRST RESPONDENT

The statutory provisions referred to in the first respondent's submissions are as follows:

1. *Migration Act 1958* (Cth), ss 473BA, 473BB, 473CC, 473DA-473DD, 473EA, 473FA, 473FB (as at 9 January 2017).