HIGH COURT OF AUSTRALIA

GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

PLAINTIFF M174/2016 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

Plaintiff M174/2016 v Minister for Immigration and Border Protection
[2018] HCA 16
18 April 2018
M174/2016

ORDER

The questions referred to the Full Court be amended and answered as follows:

Question (1)

Did the delegate fail to comply with s 57(2) of the Migration Act *1958 (Cth) ("the Act")?*

Answer

No.

Question (2)

Could any failure by the delegate to comply with s 57(2) of the Act have the consequence that:

(a) there is no "fast track reviewable decision" capable of referral by the Minister (or his delegate) to the Immigration Assessment Authority ("the Authority") under s 473CA of the Act; or

(b) an essential precondition for the valid exercise of power by the Authority under s 473CC of the Act is not satisfied,

with the result that the Authority has no jurisdiction to conduct a review under Pt 7AA of the Act?

Answer

No.

Question (3)

Did the Authority fail to conduct a review in accordance with Pt 7AA because it was legally unreasonable for the Authority to fail to exercise its statutory powers to get, or to consider, new information?

Answer

No.

Question (4)

What, if any, relief should be granted?

Answer

None.

Question (5)

Who should pay the costs of and incidental to the special case?

Answer

The plaintiff.

Representation

J T Gleeson SC with R C Knowles for the plaintiff (instructed by Victoria Legal Aid)

S P Donaghue QC, Solicitor-General of the Commonwealth and N M Wood for the first defendant (instructed by Australian Government Solicitor)

Submitting appearance for the second defendant

CATCHWORDS

Plaintiff M174/2016 v Minister for Immigration and Border Protection

Migration – Pt 2 Div 3 subdiv AB of *Migration Act* 1958 (Cth) – Where plaintiff applied for protection visa – Where plaintiff claimed real chance of harm due to being Christian – Where plaintiff claimed to attend church regularly – Where delegate of Minister for Immigration and Border Protection called reverend of church and reverend provided information on plaintiff's attendance at church – Where delegate did not provide plaintiff with information provided by reverend or invite plaintiff to comment on it – Where delegate refused to grant protection visa to plaintiff – Whether delegate failed to comply with s 57(2) of *Migration Act*.

Migration – Pt 7AA of *Migration Act* 1958 (Cth) – Where plaintiff "fast track review applicant" within meaning of *Migration Act* – Whether decision affected by jurisdictional error because of failure to comply with s 57(2) a "fast track reviewable decision" within meaning of Pt 7AA – Where "new information" defined as documents or information not before Minister when deciding to refuse to grant protection visa that Immigration Assessment Authority considers may be relevant – Power of Authority to get new information – Power of Authority to consider new information – Obligation of Authority to invite applicant to comment on new information – Nature of review by Authority – Whether Authority's decision not to interview plaintiff and certain other persons or to have regard to certain information provided by plaintiff legally unreasonable.

Words and phrases – "condition of valid performance", "decision", "decision that is made in fact", "de novo consideration of the merits", "exceptional circumstances", "fast track reviewable decision", "jurisdictional error", "legally effective decision", "legally unreasonable", "new information", "not a valid decision", "not previously known", "personal information", "relevant information", "review material", "unreasonable failure to exercise power", "would be the reason, or part of the reason for refusing to grant a visa".

Migration Act 1958 (Cth), ss 5, 46A, 54, 55, 56, 57, 69, Pt 7AA.
Migration Regulations 1994 (Cth), reg 4.43.

1 GAGELER, KEANE AND NETTLE JJ. This special case in a proceeding on an application for constitutional writs in the original jurisdiction of this Court raises a question of statutory construction pivotal to the operation of Pt 7AA of the *Migration Act* 1958 (Cth) ("the Act"). Part 7AA was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) ("the 2014 Amendment Act") to provide for what the simplified outline of the Part in s 473BA of the Act describes as "a limited form of review" of a "fast track decision" constituted by a refusal to grant a protection visa to an applicant statutorily designated to be a "fast track applicant".

2 Pivotal to the operation of Pt 7AA is identification of a "fast track reviewable decision", which the Minister administering the Act ("the Minister") is obliged by s 473CA to refer to the Immigration Assessment Authority ("the Authority") and which the Authority is obliged by s 473CC to review and either to affirm or to remit to the Minister for reconsideration.

3 Is a fast track reviewable decision nothing more than a decision to refuse to grant a protection visa to a fast track applicant that is made in fact? Or is a fast track reviewable decision limited to a decision to refuse to grant a protection visa to a fast track applicant that is not invalid for non-compliance with the code of procedure for dealing with visa applications set out in subdiv AB of Div 3 of Pt 2 of the Act?

4 The answer is that a fast track reviewable decision is a decision to refuse to grant a protection visa to a fast track applicant that is made in fact, regardless of non-compliance with the code of procedure.

5 Two further substantive questions are raised on the agreed facts set out in the special case. They concern whether the delegate of the Minister failed to comply with s 57 of the Act in dealing with the plaintiff's application for a protection visa and whether the Authority acted unreasonably in failing to get or consider new information under s 473DC and s 473DD of the Act. Each of those further questions is answered in the negative.

The legislative scheme

6 The term "fast track applicant" is defined for the purposes of the Act to encompass two categories of person[1]. One is a person who is an unauthorised maritime arrival, who entered Australia on or after 13 August 2012 and before 1 January 2014, who has not been taken to a regional processing country, to whom the Minister has given a notice under s 46A(2) determining that the

---

1 Section 5(1) of the Act, definition of "fast track applicant".

prohibition imposed by s 46A(1) on the making of an application for a protection visa does not apply, and who has made a valid application for a protection visa in accordance with that determination[2]. The other is a person who is, or who is included in a class of persons who are, specified by legislative instrument for the purpose of the definition[3]. The agreed facts in the special case reveal that there were nearly 12,000 fast track applicants, including the plaintiff, as at March 2017.

7 For the most part, the general scheme of Div 3 of Pt 2 of the Act applies to a valid application for a protection visa that is made by a fast track applicant in the same way as it applies to a valid application for any other visa made by any other applicant. Section 47 imposes a duty on the Minister to consider the application. Section 65 imposes a duty on the Minister to grant the visa if satisfied, relevantly, that the criteria prescribed for the visa have been met or to refuse to grant the visa if not so satisfied. Section 66 imposes a duty on the Minister to notify the applicant of the decision[4] and, in the event that the decision is to refuse to grant the visa, to give the applicant written reasons as to why the Minister considers that any criterion for the grant of the visa is not met[5]. In the case of a fast track reviewable decision, the notification is also required to state that the decision has been referred for review under Pt 7AA[6].

8 Within Div 3 of Pt 2, subdiv AB sets out a code of procedure which governs the Minister's consideration of the application. The subdivision "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with"[7]. The matters with which the subdivision deals include the requirement of s 54 that the Minister "must, in deciding whether to grant or refuse to grant a visa, have regard to all of the information in the application", the requirement of s 55 that "[u]ntil the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister must have regard to that information in making the decision", and the requirement of s 56

---

2 Section 5(1) of the Act, definition of "fast track applicant", par (a).

3 Section 5(1) of the Act, definition of "fast track applicant", par (b).

4 Section 66(1) of the Act.

5 Section 66(2)(c) of the Act.

6 Section 66(2)(e) of the Act.

7 Section 51A(1) of the Act.

that "[i]n considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa".

9 Section 57 is also located within subdiv AB. The section deals with "relevant information". Section 57(1) defines that term, subject to an immaterial exclusion, to mean information that the Minister considers meets three conditions. The first condition is relevantly that the information "would be the reason, or part of the reason … for refusing to grant a visa". Whether or not that condition is met, it has been held in this Court in respect of a materially identical provision, "is to be determined in advance – and independently – of the [Minister's] particular reasoning on the facts of the case"[8]. For the condition to be met, it has again been held in this Court in respect of a materially identical provision, the information in question "should in its terms contain a 'rejection, denial or undermining' of the review applicant's claim"[9]. That is to say, the information must in its terms be of such significance as to lead the Minister to consider in advance of reasoning on the facts of the case that the information of itself "would", as distinct from "might", be the reason or part of the reason for refusing to grant the visa. The Court is not asked to reconsider that approach to the operation of the first condition in the present case.

10 The second condition that must be met for information to be relevant information as defined by s 57(1) is that the information "is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member". The third condition is that the information "was not given by the applicant for the purpose of the application".

11 Section 57(2) imposes obligations on the Minister to give to the applicant particulars of relevant information, to ensure as far as is reasonably practicable that the applicant understands why the relevant information is relevant to consideration of the application, and to invite the applicant to comment on it.

---

8 *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1195 [17]; 235 ALR 609 at 615; [2007] HCA 26. See also *SZJBD v Minister for Immigration and Citizenship* (2009) 179 FCR 109 at 133 [104].

9 *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at 513 [22], 514 [25]; [2009] HCA 31 (footnote omitted), quoting *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [17]; 235 ALR 609 at 615. See also *SZTGV v Minister for Immigration and Border Protection* (2015) 229 FCR 90 at 100 [18].

Compliance with s 57(2) is a condition of the valid performance of the duties of the Minister to consider a valid application and, if not satisfied that the criteria prescribed for the visa have been met, to refuse to grant the visa, with the consequence that non-compliance renders a decision to refuse to grant a visa invalid in the sense that the decision is ineffective in law to achieve that result[10]. Non-compliance with s 57(2) can therefore result in the Minister being restrained by a constitutional writ of prohibition from taking further statutory action on the basis that the decision to refuse to grant the visa is valid and can also mean that the duties of the Minister to consider and determine the application remain unfulfilled so that their performance is able to be compelled by a constitutional writ of mandamus.

12 Within Div 3 of Pt 2, s 69 provides that "[n]on-compliance by the Minister" with subdiv AB "in relation to a visa application does not mean that a decision to grant or refuse to grant the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed". Other than to note that the section has not previously been seen to impact on the availability of constitutional writs of mandamus or prohibition, or of the writ of certiorari, to remedy a non-compliance with subdiv AB which renders a purported decision to refuse to grant a visa ineffective in law to achieve that result[11], and that the section is not now suggested to have any such impact, there is no need to consider the operation of s 69 in the present case. In particular, there is no need to explore the sense in which, or the extent to which, or the purpose for which, the section might result in a decision to refuse to grant a visa which is ineffective in law to achieve that result because it is made in non-compliance with a provision of subdiv AB nevertheless being treated as a valid decision[12]. That is because the requisite analysis can proceed sufficiently on the basis that a decision to refuse to grant a visa made in non-compliance with s 57 is a decision that is made in fact.

---

10 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 321-322 [77], 345-346 [173], 354-355 [206]-[208]; [2005] HCA 24.

11 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 223 [36]; [2003] HCA 56, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 74 [47], 86-88 [100]-[104], 98 [144], 120 [204]; [2001] HCA 22.

12 Cf *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 604 [11]; [2002] HCA 11.

13 The term "fast track decision" is defined for the purposes of the Act, subject to immaterial exclusions, to mean "a decision to refuse to grant a protection visa to a fast track applicant"[13]. The term "fast track review applicant" is defined to mean "a fast track applicant"[14] other than a person who meets the further definition of an "excluded fast track review applicant"[15]. There is no suggestion that the plaintiff is an excluded fast track review applicant and there is no other need to examine that further definition.

14 Against the background of those other definitions, the critical term "fast track reviewable decision" is defined for the purposes of Pt 7AA in s 473BB. The term as so defined, subject to an immaterial exclusion, means either "a fast track decision in relation to a fast track review applicant"[16] or a fast track decision in relation to an excluded fast track review applicant which the Minister determines by legislative instrument should be reviewed under that Part[17].

15 Within Pt 7AA, Div 2 sets up a mechanism designed to result in automatic review of a fast track reviewable decision. Section 473CA imposes a duty on the Minister to refer a fast track reviewable decision to the Authority as soon as reasonably practicable after the decision is made. Section 473CB imposes a duty on the Secretary to the Department that is administered by the Minister ("the Secretary") to give the Authority specified "review material" in respect of each fast track reviewable decision that is referred by the Minister. The review material includes a statement that sets out the findings of fact made by the person who made the decision, refers to the evidence on which those findings were based, and gives reasons for the decision[18]. Importantly, the review material also includes "material provided by the referred applicant to the person making the decision before the decision was made"[19] and "any other material that is in the

---

13 Section 5(1) of the Act, definition of "fast track decision".

14 Section 5(1) of the Act, definition of "fast track review applicant".

15 Section 5(1) of the Act, definition of "excluded fast track review applicant".

16 Section 473BB of the Act, definition of "fast track reviewable decision", par (a).

17 Section 473BB of the Act, definition of "fast track reviewable decision", par (b) read with s 473BC of the Act.

18 Section 473CB(1)(a) of the Act.

19 Section 473CB(1)(b) of the Act.

Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review"[20].

16 Section 473CC(1) provides in that context that the Authority "must review a fast track reviewable decision referred to the Authority under section 473CA". Section 473CC(2) goes on to provide that the Authority may either "affirm the fast track reviewable decision" under s 473CC(2)(a) or "remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation" under s 473CC(2)(b).

17 Notwithstanding the inability of the Authority to set aside a fast track reviewable decision and to substitute its own decision, the Authority when conducting a review of a fast track reviewable decision is not concerned with the correction of error on the part of the Minister or delegate but is engaged in a de novo consideration of the merits of the decision that has been referred to it. The task of the Authority under s 473CC(1) is to consider the application for a protection visa afresh and to determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met. The powers conferred on the Authority by s 473CC(2) then enable the Authority to make orders appropriate to give effect to the outcome of its own determination of the merits. If the Authority is not satisfied that the criteria for the grant of the visa have been met, the appropriate order for the Authority to make is to affirm the decision under review. If the Authority is so satisfied, and the Authority has found no other statutory impediment to the grant of the visa, the appropriate order for the Authority to make is to remit the decision for reconsideration by the Minister in accordance with such permissible directions or recommendations as the Authority considers are appropriate to give effect to the Authority's determination.

18 The effect of the Authority affirming the fast track reviewable decision under review is that it is no longer solely the decision of the Minister or delegate to refuse to grant the visa, but rather the decision as affirmed by the Authority, that constitutes the determination of the fast track applicant's valid application for a protection visa. That effect of the Authority affirming the fast track reviewable decision under review bears on the nature of a fast track reviewable decision that is capable of being the subject of that review in a manner which will be explored later in these reasons.

19 Implicit in the power conferred on the Authority to remit the decision of the Minister or delegate to refuse to grant the visa for reconsideration by the

---

20 Section 473CB(1)(c) of the Act.

Minister in accordance with a direction, as distinct from a recommendation, is a corresponding duty on the part of the Minister. The Minister has a duty not only to consider again the remitted decision but to comply with any permissible direction given by the Authority when undertaking that reconsideration. The Authority's directions may leave little or no room for the Minister's own satisfaction or lack of satisfaction to intrude into the reconsideration. Amongst the directions which the Authority is permitted by regulation to give to the Minister are directions that the referred applicant must be taken to have satisfied the criteria for the visa that are specified in the direction or that the referred applicant is a refugee within the meaning of the Act[21].

20 Division 3 of Pt 7AA governs the conduct of the review by the Authority in a manner which also bears on the nature of a fast track reviewable decision that is capable of being the subject of that review. In the same way as subdiv AB of Div 3 of Pt 2 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters with which it deals in relation to the initial decision of the Minister or delegate, Div 3 of Pt 7AA "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by [the Authority]"[22].

21 There is no dispute between the parties that the various powers conferred on the Authority by Div 3 of Pt 7AA are conferred on the implied condition that they are to be exercised within the bounds of reasonableness, in the sense explained in *Minister for Immigration and Citizenship v Li*[23], with the consequence that an unreasonable failure to exercise such a power can render invalid a purported performance by the Authority of the duty imposed on it by s 473CC to conduct a review and either to affirm or to remit the decision under review.

22 Within Div 3, s 473DB sets out the primary requirement that, subject to the Part, the Authority is to review a fast track reviewable decision referred to it under s 473CA by considering the review material provided to the Authority under s 473CB without accepting or requesting new information and without interviewing the referred applicant. To that primary rule, subdiv C of Div 3 admits of exceptions. The principal provisions of subdiv C providing for those exceptions are contained in ss 473DC, 473DD and 473DE. Close attention needs to be paid to each of those provisions and to their interrelationship.

---

21 Regulation 4.43 of the Migration Regulations 1994 (Cth).

22 Section 473DA.

23 (2013) 249 CLR 332; [2013] HCA 18.

23 Section 473DC is concerned with when the Authority can "get", in the sense of seek out, "new information". The section is entirely facultative. It provides:

> "(1) Subject to this Part, [the Authority] may, in relation to a fast track decision, get any documents or information (***new information***) that:
>
> (a) were not before the Minister when the Minister made the decision under section 65; and
>
> (b) the Authority considers may be relevant.
>
> (2) [The Authority] does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances.
>
> (3) Without limiting subsection (1), [the Authority] may invite a person, orally or in writing, to give new information:
>
> (a) in writing; or
>
> (b) at an interview, whether conducted in person, by telephone or in any other way."

24 The term "new information" must be read consistently when used in ss 473DC, 473DD and 473DE as limited to "information" (which may or may not be recorded in a document), in the ordinary sense of a communication of knowledge about some particular fact, subject or event[24], that meets the two conditions set out in s 473DC(1)(a) and (b). The first is that the information was not before the Minister or delegate at the time of making the decision to refuse to grant the protection visa. The second is that the Authority considers that the information may be relevant.

25 There is no inherent dichotomy between new information which meets the two conditions set out in s 473DC(1)(a) and (b) and review material which the Secretary is required to give the Authority under s 473CB. That is because review material is not limited to information that was before the Minister or delegate at the time of making the decision to refuse to grant the protection visa.

---

24 *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at 259 [205].

26 In relation to information contained in review material given to the Authority by the Secretary that was before the Minister or delegate at the time of making the decision to refuse to grant the protection visa, s 473DA(2) makes clear that there is no general requirement for the Authority to give that material to the referred applicant. There is, however, nothing in Pt 7AA to preclude the Authority from giving the whole or some part of that material to the applicant or another person in the context of exercising the power conferred by s 473DC(3) to invite the giving of new information, and s 473DA(2) is not addressed to what might be required of the Authority in particular circumstances in order to exercise that power reasonably.

27 Information contained in review material given to the Authority by the Secretary that was not before the Minister or delegate at the time of making the decision to refuse to grant the protection visa will become new information if and when the Authority considers that the information may be relevant. The Authority will not need to invoke s 473DC in order to receive that new information. However, given that the Authority's obligation under s 473DB(1) to conduct its review by considering the review material is subject to Pt 7AA, the Authority will need to comply with s 473DD, and where applicable s 473DE, if the Authority is to take that new information into consideration.

28 Section 473DD imposes restrictions on when the Authority can consider new information. The section provides:

> "For the purposes of making a decision in relation to a fast track reviewable decision, [the Authority] must not consider any new information unless:
>
> (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."

29 The precondition set out in s 473DD(a) must always be met before the Authority can consider any new information. Whatever the source of new

information, the Authority needs always to be satisfied that there are "exceptional circumstances" to justify considering it.

30 Quite what will amount to exceptional circumstances is inherently incapable of exhaustive statement. The word "exceptional", in such a context, is not a term of art but "an ordinary, familiar English adjective": "[t]o be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered"[25].

31 Cumulatively upon the precondition set out in s 473DD(a) that the Authority must be satisfied that there are exceptional circumstances to justify considering new information, s 473DD(b) sets out a further precondition that must also be met before the Authority can consider new information that is given to it, or proposed to be given to it, by the referred applicant. In respect of new information within that category, the Authority must be satisfied of one or other of the circumstances set out in s 473DD(b)(i) and (ii).

32 The circumstance of which the Authority needs to be satisfied in order to meet s 473DD(b)(i) is that the new information that is given, or proposed to be given, by the referred applicant was not, and could not have been, provided to the Minister before the Minister or delegate made the decision to refuse to grant the protection visa. No explication of that circumstance is required in the present case.

33 The circumstance of which the Authority needs to be satisfied in order to meet s 473DD(b)(ii) does require some explication. In that provision, the term "personal information" takes its defined meaning within the Act of "information or an opinion about an identified individual, or an individual who is reasonably identifiable"[26]. Unaided by considerations of legislative history, the reference in s 473DD(b)(ii) to personal information which was not previously "known" might have been read as confined to personal information not previously known to the referred applicant. Legislative history, however, is against that reading. The provision is the result of an amendment to the Bill for the 2014 Amendment Act made in the Senate. The purpose of the amendment was explained at the time as being to "extend the types of 'new information' that a referred applicant may present to [the Authority] to include, for example, evidence of significant torture and trauma which, if it had been known by either the Minister or the referred

---

25 *R v Kelly* [2000] QB 198 at 208, quoted in *BVZ16 v Minister for Immigration and Border Protection* [2017] FCA 958 at [40].

26 Section 5(1) of the Act, definition of "personal information", read with s 6(1) of the *Privacy Act* 1988 (Cth), definition of "personal information".

applicant, may have affected the consideration of the referred applicant's asylum claims by the Minister"[27]. The Full Court of the Federal Court has correctly recognised that the identified purpose is best achieved by reading the reference to personal information which was not previously known as encompassing personal information which, although previously known to the referred applicant, was not previously known to the Minister[28].

34 Accordingly, all that the Authority needs to be satisfied of in order to meet the precondition to its consideration of new information given, or proposed to be given, by the referred applicant set out in s 473DD(b)(ii) is that: (1) the information is credible information about an identified individual, or an individual who is reasonably identifiable; (2) the information was not previously known by either the Minister or the referred applicant; and (3) had the information been known by either the Minister or the referred applicant, the information may have affected the consideration of the referred applicant's claims.

35 Section 473DE is concerned to ensure that the referred applicant has an opportunity to address new information that has been or is to be considered by the Authority under s 473DD and that would be the reason, or a part of the reason, for affirming the fast track reviewable decision. Section 473DE(1) provides:

> "[The Authority] must, in relation to a fast track reviewable decision:
>
> (a) give to the referred applicant particulars of any new information, but only if the new information:
>
> (i) has been, or is to be, considered by the Authority under section 473DD; and
>
> (ii) would be the reason, or a part of the reason, for affirming the fast track reviewable decision; and
>
> (b) explain to the referred applicant why the new information is relevant to the review; and

---

27 Australia, Senate, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Supplementary Explanatory Memorandum (Sheet GH118) at 6 [29].

28 See *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176 at [106].

(c) invite the referred applicant, orally or in writing, to give comments on the new information:

(i) in writing; or

(ii) at an interview, whether conducted in person, by telephone or in any other way."

36 Two other provisions in Pt 7AA ought to be noted. Section 473FA(1) contains a general exhortation that, in carrying out its functions under the Act, the Authority "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)". Section 473FB confers on the President of the Administrative Appeals Tribunal power to issue directions, not inconsistent with the Act and the regulations, as to the conduct of reviews by the Authority.

37 In the exercise of that power, the President on 16 September 2015 issued a direction entitled "Practice Direction for Applicants, Representatives and Authorised Recipients" ("the Practice Direction"). The Practice Direction states that a referred applicant may provide a written statement on why he or she disagrees with the decision of the Department under review and on any claim or matter that he or she presented to the Department that was overlooked.

38 Consistently with s 473DD, and adopting the grammatical form of addressing the referred applicant in the second person, the Practice Direction goes on to state:

> "We can only consider new information (information that was not before the Department) in very limited circumstances as set out in section 473DD of the Migration Act. We must be satisfied that there are exceptional circumstances to justify considering the new information provided by either you or the Department.
>
> If you want to give us new information, you must also provide an explanation as to why:
>
> - the information could not have been given to the Department before the decision was made, or
>
> - the information is credible personal information which was not previously known and may have affected consideration of your claims, had it been known."

The nature of a fast track reviewable decision

39 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*[29] has been aptly described as a "landmark decision" in the early history of the Administrative Appeals Tribunal[30]. The Full Court of the Federal Court there construed the reference in s 25 of the *Administrative Appeals Tribunal Act* 1975 (Cth) to a "decision" in respect of which an enactment might provide for review by that Tribunal as a reference to nothing more than "a decision in fact made, regardless of whether or not it is a legally effective decision"[31]. The fundamental reason for adopting that construction was fulfilment of the evident legislative purpose of the conferral of jurisdiction on the Tribunal "to promote good government by those carrying out the actual practical task of administering Acts of Parliament and making decisions incidental to that task": "[i]f administrative decisions are to be subjected to review in the course of good government exclusion from review of decisions made without power would remove from review those decisions most in need of review" and "technicality would be introduced at the outset"[32]. In the context of the Administrative Appeals Tribunal, that construction has not since been doubted.

40 The *Brian Lawlor* construction was applied by the Full Court of the Federal Court to former references in the Act to "decisions" of the Minister or of a delegate capable of being reviewed by each of the former Refugee Review Tribunal[33] and the former Migration Review Tribunal[34]. A pertinent example, to which the Minister draws attention in the present case, is *Kim v Minister for Immigration and Citizenship*[35]. The Migration Review Tribunal was there held to have had both jurisdiction to review, and power to affirm, a decision of a

---

29 (1979) 24 ALR 307.

30 *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495 at 514 [88].

31 (1979) 24 ALR 307 at 314; see also at 337.

32 (1979) 24 ALR 307 at 335; see also at 313-315.

33 *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495.

34 *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344; *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) 143 FCR 314.

35 (2008) 167 FCR 578.

delegate which had been conceded to be invalid in a prior proceeding for relief under s 39B of the *Judiciary Act* 1903 (Cth). The affirmation was held to have resulted in a valid affirmed decision which operated from the date of the invalid original decision.

41 The plaintiff does not challenge *Brian Lawlor* and does not call into question the application of the *Brian Lawlor* construction to the current definitions of "Part 5-reviewable decisions" and "Part 7-reviewable decisions" reviewable by the Administrative Appeals Tribunal in its Migration and Refugee Division under Pts 5 and 7 of the Act respectively. A "fast track reviewable decision" reviewable by the Authority under Pt 7AA of the Act is more limited, the plaintiff argues, because the form of review for which Pt 7AA provides is more limited.

42 Unlike the Administrative Appeals Tribunal[36], the former Refugee Review Tribunal[37], and the former Migration Review Tribunal[38], the Authority is not empowered to set aside the decision under review and to substitute its own decision, nor is the Authority empowered to "exercise all the powers and discretions that are conferred" on the person who made the decision under review. The limitations imposed on the Authority getting and considering new evidence, the plaintiff argues, mean that the procedures which must be followed and which are available to the Authority are insufficient to ensure that review under Pt 7AA will "cure" non-compliance on the part of the Minister or delegate with the code of procedure set out in subdiv AB of Div 3 of Pt 2.

43 Borrowing from the language of Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth*[39], the plaintiff argues that in Pt 7AA "Parliament has not evinced an intention that a decision by [the Authority] to confirm a refusal of a protection visa, made unfairly, and in contravention of the requirements of natural justice, shall stand". That is enough, the plaintiff argues, to compel rejection of the *Brian Lawlor* construction and to confine a fast track reviewable decision that can be reviewed and affirmed by the Authority to a refusal of a protection visa that is not invalid for non-compliance with the code of procedure set out in subdiv AB of Div 3 of Pt 2 of the Act.

---

36 See ss 349 and 415 of the Act.

37 See s 415 of the Act (as at 1 September 1994).

38 See s 349 of the Act (as at 1 September 1999).

39 (2003) 211 CLR 476 at 494 [37]; [2003] HCA 2.

44 The plaintiff goes further in arguing that such indications of parliamentary intention as are to be gleaned from extrinsic material are affirmatively to the effect that a fast track reviewable decision will be limited to a decision made in compliance with that code of procedure. The plaintiff points out that the explanatory memorandum for the Bill for the 2014 Amendment Act is replete with references which demonstrate that the 2014 Amendment Act was justified to, and enacted by, Parliament on the articulated assumption that the limited form of review for which Pt 7AA provides was appropriate given that a referred applicant would already have had the measure of procedural fairness provided by the code of procedure, including the opportunity that s 57 would require the applicant to have been given to respond to relevant information[40].

45 Part 7AA is undoubtedly framed on the assumption that a decision to refuse to grant a protection visa to a fast track applicant will ordinarily have been made in compliance with the code of procedure set out in subdiv AB of Div 3 of Pt 2. That is what the law requires and it is to be expected that the requirements of the law will be observed. That does not mean, however, that the Part is framed to permit review of a decision to refuse to grant a protection visa to a fast track applicant only if that decision has been made in compliance with the code of procedure. Further analysis is required of the consequences of a want of compliance with the code of procedure on the performance of the duty imposed on the Authority under Pt 7AA.

46 Non-compliance with s 54, 55 or 56 in making the decision under review, the Minister correctly points out, could have no meaningful impact on the quality of review under Pt 7AA given that performance by the Authority of the central task of considering the application for a protection visa afresh must render moot any failure to consider information that may have occurred on the part of the Minister or delegate in making the decision under review. Yet the Minister goes too far in arguing that non-compliance with s 57 can be no different from non-compliance with s 54, 55 or 56.

47 Non-compliance with s 57 is different, because it denies an applicant an opportunity to respond to prejudicial adverse information and to have any response included in the review material to be given to the Authority in a review under Pt 7AA. If the procedures for which Pt 7AA provides were so constrained as to preclude the Authority from conducting the review in a manner which would negate the want of procedural fairness that would be occasioned by an

---

40 Australia, House of Representatives, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Explanatory Memorandum at 130 [887]-[888], 131 [893], 135 [920], 136 [926].

applicant having been denied the opportunity that s 57 required, that would be a powerful and potentially decisive consideration weighing in favour of the plaintiff's construction. The procedures, however, are not so constrained.

48 Two broad scenarios can be imagined in which relevant information within the meaning of s 57(1), in respect of which there has been non-compliance with s 57(2), might end up being included in review material given to the Authority so as to be capable of bearing on the Authority's consideration of whether or not the referred applicant meets the criteria for the grant of a protection visa. One scenario is where the relevant information, although in the possession or control of the Secretary and considered by the Secretary to be relevant to the review, was not before the Minister or delegate at the time of making the decision to refuse to grant the protection visa. Were the Authority in that scenario to consider that the information may be relevant to its review, the relevant information would become new information – triggering the need for the Authority, in order for the information to be considered by the Authority, to be satisfied in accordance with s 473DD(a) that exceptional circumstances existed justifying that consideration and, if the information would be the reason or a part of the reason for affirming the decision under review, to give notice to the applicant under s 473DE(1).

49 The other scenario, which the plaintiff argues exists in the present case, is where relevant information in respect of which there has been non-compliance with s 57(2) was before the Minister or delegate at the time of making the decision to refuse to grant the protection visa. The relevant information in that scenario would not itself be new information and could not become new information. Were the Authority in that scenario to consider that the information may be relevant to its own consideration on the review, however, the Authority would not lack power to fashion its procedure so as to bring the relevant information to the attention of the referred applicant and to invite the applicant to respond. The Authority would have the capacity to exercise the discretion conferred on it by s 473DC(3) to invite the referred applicant to give new information in response to the relevant information and, in the context of issuing that invitation, to give the relevant information or particulars of it to the referred applicant. And the Authority would risk transgressing the bounds of reasonableness in the conduct of the review under s 473DB were the Authority to go on to treat the information as the reason, or a part of the reason, for affirming the decision to refuse to grant the protection visa without first exercising the discretion conferred by s 473DC(3) to issue such an invitation.

50 There could be no doubt that any new information that might be provided by the referred applicant in response to such an invitation or of the applicant's own volition in that other scenario – if relevant, responsive, credible, and about the applicant or another person – would meet the preconditions for consideration

by the Authority set out in s 473DD(a) and in s 473DD(b)(ii). The new information would meet the precondition set out in s 473DD(a) because the circumstances giving rise to the occasion for consideration of the information – prior non-compliance with s 57(2) – could not be regarded as anything other than exceptional. The new information would meet the additional precondition set out in s 473DD(b)(ii) because that information would not previously have been known by the Minister and because, had the information been known by the Minister, the information may have affected the consideration of the referred applicant's claims.

51 The prospect of non-compliance by the Minister or delegate with the code of procedure set out in subdiv AB of Div 3 of Pt 2 resulting in procedural unfairness to the referred applicant in the review to be conducted by the Authority under Pt 7AA cannot be dismissed as an impossibility. But that prospect cannot be treated as of such magnitude as would invoke the presumption against procedural unfairness on which the plaintiff relies or as would justify the conclusion that Pt 7AA is framed to permit of review of a decision to refuse to grant a protection visa only if that decision has been made in compliance with the code of procedure. The legislative choice to define a fast track decision simply as a decision to refuse to grant a protection visa to a fast track applicant suggests otherwise.

52 The limitations on the form of review for which Pt 7AA provides are in the end insufficient to warrant departure from the *Brian Lawlor* construction. Applying that construction, a fast track reviewable decision triggering the operation of the Part and forming the subject of the Authority's review is a decision made in fact to refuse to grant a protection visa to a fast track applicant, regardless of whether or not that decision is legally effective.

The circumstances of the plaintiff

53 Having resolved the main question of statutory construction, it remains to address those questions raised by the special case which arise out of the particular circumstances of the plaintiff.

54 The plaintiff is a citizen of Iran who entered Australia by sea without a visa on 11 October 2012 and who on arrival became an unlawful non-citizen and an offshore entry person within the meaning of the Act. He was not taken to a regional processing country and was released from immigration detention in December 2012. On 27 May 2015, the Minister determined under s 46A(2) that s 46A(1) did not apply to an application by him for a particular kind of protection visa known as a temporary protection visa and, on 1 September 2015, he applied for a temporary protection visa in accordance with that determination. At that time, he became a fast track applicant within the meaning of the Act.

55 In support of his application for a temporary protection visa, the plaintiff made a statutory declaration in which he claimed that he would face a real chance of serious or significant harm if he returned to Iran in the reasonably foreseeable future on account of his status as a convert to Christianity. The plaintiff stated that, since his arrival in Australia, he had regularly attended the Syndal Baptist Church, which is located in the Melbourne suburb of Glen Waverley. The plaintiff also submitted with his application a letter of support from Reverend Bill Brown of the Syndal Baptist Church. The letter was dated 14 June 2015.

56 On 12 November 2015, a delegate of the Minister interviewed the plaintiff. The plaintiff told the delegate that he had regularly attended the Syndal Baptist Church since his release from immigration detention and that he continued to do so. The plaintiff consented to the delegate contacting Reverend Brown.

57 The delegate telephoned Reverend Brown the next day to discuss the letter of support Reverend Brown had provided. The delegate's file note records that Reverend Brown told the delegate that the plaintiff stopped attending the Syndal Baptist Church in 2013 because he moved to another suburb, that he returned early in 2015 for a few weeks, and that since then he had only attended once, on 14 June 2015, at which time the plaintiff had requested a letter in support of his visa application.

58 The parties have chosen to label the contents of the delegate's file note "the Reverend Brown information". The delegate did not give particulars of the Reverend Brown information to the plaintiff or invite him to comment on it.

59 On 15 April 2016, the delegate made a decision to refuse to grant the plaintiff a temporary protection visa. In the record of her reasons for the decision, which was notified to the plaintiff, the delegate, having set out the Reverend Brown information, found that the plaintiff had ceased to attend church regularly in 2013, that he had "only returned to Syndal Baptist Church in June 2015 to seek a letter of support", and that he had participated in services at the Syndal Baptist Church "in order to falsely strengthen his claim for protection". The delegate accordingly did not accept that the plaintiff had genuinely converted to Christianity or would, on any return to Iran in the reasonably foreseeable future, be perceived by the Iranian authorities or others as a convert to Christianity. Indeed, the delegate was satisfied that the plaintiff had attended the Syndal Baptist Church for the sole purpose of strengthening his claim to be a refugee.

60 On or about 15 April 2016, the Minister referred the delegate's decision to the Authority. Within the review material which the Secretary gave to the Authority were the delegate's file note of her conversation with Reverend Brown

and the record of the delegate's reasons for her decision. On 19 April 2016, the Authority wrote to the plaintiff informing him of the referral and enclosing a copy of the Practice Direction.

61 On 13 May 2016, the plaintiff's migration agent wrote to the Authority. The letter requested that the Authority interview the plaintiff, as well as Reverend Brown and members of the congregation at the Syndal Baptist Church. The letter also enclosed additional documents which the migration agent submitted contained new information which the Authority should consider in reviewing the delegate's decision. In the letter, the migration agent argued that the exceptional circumstances justifying consideration of the information were that the plaintiff was a non-English speaker with a limited understanding of the protection visa application process who was not aware of the range of information he was required to continue to provide to the Department.

62 The enclosed documents included a further letter of support from Reverend Brown dated 10 May 2016. That further letter stated that "from 2014-2016, and because he has been living firstly in Pascoe Vale and then in Broadmeadows, [the plaintiff] has come to services [at the Syndal Baptist Church] more occasionally". The documents also included letters from other members of the congregation at the Syndal Baptist Church, one of which stated that, since the plaintiff had moved to another part of Melbourne, he "could not get [to the Syndal Baptist Church] as regularly as before but still made the effort when he could".

63 Without further communication to or from the plaintiff, the Authority on 19 May 2016 made its decision to affirm the delegate's decision to refuse to grant the plaintiff a temporary protection visa. The record of the Authority's reasons reveals that the Authority did not accept that the plaintiff had converted to Christianity or would, on any return to Iran in the reasonably foreseeable future, be perceived by the Iranian authorities or others as a convert to Christianity. Unlike the delegate, the Authority was not satisfied that the plaintiff had attended the Syndal Baptist Church for the sole purpose of strengthening his claim to be a refugee. Rather, the Authority took the view that the plaintiff's attendance at the Syndal Baptist Church had been because he enjoyed the social contact and was not the result of any real commitment on his part to Christianity.

64 In so finding, the Authority took into account the Reverend Brown information. Save for the information it contained about the plaintiff's church attendance in 2016, the Authority declined to take into account the contents of the further letter of support from Reverend Brown dated 10 May 2016. In that respect, the Authority explained:

> "The letter dated 10 May 2016 from Rev Brown largely restates the content of his June 2015 letter. In so far as it reiterates evidence provided to [the Department], the information is not new information and I have had regard to it. It contains the further information that the applicant attended church 'occasionally' over the period from 2014 to 2016. To the extent that the letter refers to the applicant's church attendance in 2016, this is new information which was not before the Minister and which may be relevant because it concerns the applicant's attendance at church after the protection interview and after the delegate's decision. The applicant was informed at the protection interview that he could provide further information for the delegate's consideration up until seven days after the protection interview; he was not told that he could provide new information at any time up until the decision was made, even though he was advised that there could be a delay before his application was finalised. In fact, there was a delay of some five months between the protection interview and the delegate's decision. I accept that the applicant may have thought that he could only provide new information about his attendance at church for seven days after the interview. In these circumstances, I consider that the new information could not have been provided before the Minister made his decision. Given the potential relevance of the applicant's ongoing religious activities and any development in his religious commitment to an assessment of the degree and genuineness of his commitment to Christianity, I consider that there are exceptional circumstances which justify consideration of new information about the applicant's religious activities during the period between the protection interview and now."

65 In relation to the congregants' letters, the Authority declined to take into account their contents at all because it was not satisfied there were exceptional circumstances to justify doing so. In that respect, the Authority explained:

> "The letter from Warren and Jill Andrews is undated. It confirms that the applicant attended Syndal Baptist Church and was enthusiastic in growing his Christian faith and his desire to follow Jesus Christ, until he and subsequently the authors of the letter moved away. It appears to refer to events which occurred before the protection interview and the Minister's decision, and does not specifically refer to events after either the protection interview, or the Minister's decision. The applicant was aware that he could provide supporting information of this kind, as demonstrated by his provision of the June 2015 letter from Rev Brown. He had legal assistance in preparing his protection visa application. I am not satisfied that there are exceptional circumstances justifying consideration of this letter.

> The letter from Ray Zimmer states that the applicant lived with Mr Zimmer for about six months from late 2012 until 2013. It states that the applicant regularly attended church with Mr Zimmer until he moved away and it was difficult to get there by public transport so he attended less often. It appears to refer to the applicant's religious activity before the protection interview and the Minister's decision, and does not specifically refer to developments after either the protection interview, or the Minister's decision. The letter also states that Mr Zimmer recalls a phone conversation between the applicant and his wife in which his wife told the applicant that the authorities had come looking for him. The letter indicates that this occurred two years after the applicant had left Iran, which would be in 2014. The applicant told the Department that the authorities had visited his family in his absence. I am not satisfied that there are exceptional circumstances justifying consideration of this information. The letter refers to events which took place before the delegate's [decision] was made. While it is true that the applicant is a non-English speaker with limited understanding of the protection process, this is true of almost all applicants, and is not, of itself, an exceptional circumstance. It is clear that the applicant was aware that he could provide supporting information of this kind, demonstrated by his provision of the June 2015 letter from Rev Brown. He had legal assistance in preparing his protection visa application. I am not satisfied in relation to the matters set out in [s 473DD] and I am prevented from considering this information."

66 The Authority also explained why it had chosen not to interview the plaintiff "and his supporters from the church". The Authority stated:

> "The Act provides that new information may be obtained by [the Authority], but makes clear that new information can only be considered in exceptional circumstances. Having listened to the protection interview and having regard to all the other material, I consider that the applicant has been given an opportunity to present his claims and respond to relevant issues." (footnote omitted)

67 The plaintiff's further amended application for an order to show cause contains a number of grounds of review on which the plaintiff contends that the decisions of the delegate and the Authority are attended by jurisdictional error. Not all of those grounds are encompassed within the questions of law that have been stated by the parties for the consideration of the Full Court.

68 Those grounds of review that are encompassed within the questions of law that have been stated by the parties include a ground of challenge to the decision of the delegate that the delegate failed to comply with s 57(2) of the Act in not

giving particulars of the Reverend Brown information to the plaintiff or inviting him to comment on it. They also include a ground of challenge to the decision of the Authority that the delegate's failure to comply with s 57(2) deprived her decision of the character of a fast track reviewable decision, with the consequence that the Authority had neither the duty nor the power to review it. They further include a ground of challenge to the decision of the Authority that the Authority failed to conduct a review in accordance with Pt 7AA: first, by unreasonably failing to get under s 473DC such information as would be obtained by interviewing the plaintiff, Reverend Brown and members of the congregation at the Syndal Baptist Church; and secondly, by unreasonably failing to consider under s 473DD information concerning the plaintiff's church attendance in 2014 and 2015 contained in the letter from Reverend Brown dated 10 May 2016 and in one of the congregants' letters.

The challenge to the delegate's decision

69 The conclusion, already stated, that a fast track reviewable decision is nothing more than a decision to refuse to grant a protection visa to a fast track applicant that is made in fact means that the plaintiff's challenge to the delegate's decision must fail unless the plaintiff's challenge to the Authority's decision can succeed on an independent ground.

70 The reason is not that review by the Authority in some way "cures" a defect of jurisdiction in the decision of the Minister or delegate that is under review. The reason is that, once a fast track reviewable decision is affirmed by the Authority, it is the order of the Authority operating by force of s 473CC(2)(a) of the Act to affirm the decision of the Minister or delegate that alone gives the decision of the Minister or delegate legal operation. Once affirmed by the Authority, the decision of the Minister or delegate has no independent continuing legal operation by force of s 65 of the Act, whether actual or purported. For that reason, any defect of jurisdiction in the decision of the Minister or delegate can simply have no bearing on the legal position of the referred applicant.

71 Non-compliance by the Minister or delegate with s 57(2) of the Act would have the potential to impact on the validity of the Authority's decision were relevant information obtained without compliance with s 57(2) included in review material given to the Authority and then taken into consideration by the Authority without the Authority first inviting the referred applicant to respond to that relevant information. The jurisdictional error which might impact on the validity of the Authority's decision in such a case would not lie in the prior non-compliance with s 57(2) on the part of the Minister or delegate. For reasons already given, jurisdictional error would potentially lie either in non-compliance on the part of the Authority with the duty imposed by s 473DE(1) (in a case where the relevant information was not before the Minister or delegate at the

time of making the decision under review and is therefore capable of being new information) or, in the absence of good reason for not doing so, in an unreasonable failure to exercise the power conferred by s 473DC(3) (in a case where the relevant information was before the Minister or delegate at the time of making the decision under review and is therefore incapable of being new information).

72 Here, there was no want of compliance with s 57(2) on the part of the delegate in not giving particulars of the Reverend Brown information to the plaintiff or inviting him to comment on it because the Reverend Brown information did not meet the critical condition for it to be characterised as relevant information within the meaning of s 57(1) that the information must in its terms be of such significance as necessarily to have led the delegate to consider in advance of reasoning on the facts of the case that the information of itself "would", as distinct from "might", be the reason or part of the reason for refusing to grant the protection visa. The Reverend Brown information supported the plaintiff's claim, so far as it went.

The Authority's review

73 The plaintiff's independent grounds of challenge to the decision of the Authority are extremely weak. They can be dealt with quite briefly. This is not a case in which the conduct of the Authority went anywhere near breaching the bounds of reasonableness.

74 The Authority's choice not to exercise its power under s 473DC(3) to interview the plaintiff, Reverend Brown and members of the congregation at the Syndal Baptist Church involved a considered exercise of discretion for reasons which the Authority recorded. That exercise of discretion was open to it and was eminently justified by the reasons it gave.

75 The Authority's choice not to consider information concerning the plaintiff's church attendance in 2014 and 2015 contained in the letter from Reverend Brown dated 10 May 2016 and in one of the congregants' letters was based on its lack of satisfaction that there were exceptional circumstances to justify considering that new information with the result that the precondition in s 473DD(a) was not met. That lack of satisfaction involved an evaluative judgment which was elaborately explained by the Authority. The judgment made was again open to the Authority and eminently justified by the reasons it gave.

Formal questions and answers

76 Given the way in which the special case was argued by the parties and in which the issues raised have now been determined, the second and most important of the questions stated by the parties for the consideration of the Full Court is appropriately rephrased to make clear that providing an answer to that question is not contingent on an affirmative answer to the first question.

77 With that slight rephrasing, the questions reserved and their answers are set out below.

1. Did the delegate fail to comply with s 57(2) of the Act?

   Answer: No.

2. Could any failure by the delegate to comply with s 57(2) of the Act have the consequence that:

   (a) there is no "fast track reviewable decision" capable of referral by the Minister (or his delegate) to the Authority under s 473CA of the Act; or

   (b) an essential precondition for the valid exercise of power by the Authority under s 473CC of the Act is not satisfied,

   with the result that the Authority has no jurisdiction to conduct a review under Pt 7AA of the Act?

   Answer: No.

3. Did the Authority fail to conduct a review in accordance with Pt 7AA because it was legally unreasonable for the Authority to fail to exercise its statutory powers to get, or to consider, new information?

   Answer: No.

4. What, if any, relief should be granted?

   Answer: None.

5. Who should pay the costs of and incidental to the special case?

   Answer: The plaintiff.

78 GORDON J. The legislative scheme and the plaintiff's circumstances are set out in the reasons of Gageler, Keane and Nettle JJ. I agree with their Honours' reformulation of the questions stated by the parties for the consideration of the Full Court and the answers to those questions.

79 I wish to add the following observations.

80 The special case concerns the operation of Pt 7AA of the *Migration Act* 1958 (Cth) ("the Act") and the making of a "fast track decision"[41] constituted by a refusal to grant a protection visa to a "fast track applicant"[42]. The objective of Pt 7AA is to provide "a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 [of Pt 7AA of the Act] (conduct of review)"[43]. It seeks to achieve that objective by creating a "fast track reviewable decision"[44] which the Minister administering the Act (or his or her delegate) ("the Minister") is obliged by s 473CA to refer to the Immigration Assessment Authority ("the Authority") as soon as reasonably practicable after the decision is made. The Authority is, in turn, obliged by s 473CC to review the decision and either affirm the decision or remit it to the Minister for reconsideration.

81 Question two of the special case raised an important question of construction of Pt 7AA – is a decision made to refuse to grant a protection visa to a fast track applicant a fast track reviewable decision regardless of whether or not it is a legally effective decision or validly made?

82 As *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*[45] shows, to confine the expression "fast track reviewable decision" to decisions made according to law would impermissibly confine the operation of the review structure set up by Pt 7AA of the Act, contrary to a stated object of that Part[46].

83 Part 7AA is drafted on the assumption that the Minister, in making a decision under s 65 to refuse to grant a protection visa, will ordinarily comply with the procedure set out in subdiv AB of Div 3 of Pt 2 of the Act. That is what the law requires and expects. But what then happens if the Minister fails to

---

41 s 5(1) of the Act.

42 s 5(1) of the Act.

43 ss 473BA and 473FA(1) of the Act.

44 s 473BB of the Act.

45 (1979) 24 ALR 307.

46 See ss 473BA and 473FA(1) of the Act.

comply with s 57, in subdiv AB of Div 3 of Pt 2 of the Act? The answer is to be found in Pt 7AA.

84 A number of aspects of that Part should be emphasised.

85 First, the review by the Authority conducted pursuant to Pt 7AA is a hearing de novo on the material provided to the Authority under s 473CB. The Authority's task is to consider the application for a protection visa and to determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met. It is a review of a specific and limited kind, at the conclusion of which the Authority has power to affirm the decision under review *or* to remit the decision for reconsideration by the Minister[47] in accordance with such directions or recommendations as are permitted by regulation[48] and as are necessary to give effect to the Authority's determination.

86 Second, as the plurality explains[49], there was no dispute that the various powers conferred on the Authority by Div 3 of Pt 7AA are to be exercised within the bounds of reasonableness[50]. An unreasonable failure by the Authority to exercise one of its powers may invalidate the purported performance by the Authority of the duty imposed on it by s 473CC to conduct a review and affirm or remit the decision under review.

87 Third, *subject to Pt 7AA*, the Authority reviews a fast track reviewable decision referred to it under s 473CA by considering the review material provided to it under s 473CB, without accepting or requesting new information and without interviewing the referred applicant[51].

88 Section 473DD in Pt 7AA provides an exception to the prohibition on the Authority considering new information. The Authority must not consider new information unless it is satisfied that there are *exceptional circumstances* to justify considering the new information[52]. Where the new information is given or proposed to be given to the Authority by the referred applicant, s 473DD(b)

---

47 s 473CC of the Act.

48 See reg 4.43 of the Migration Regulations 1994 (Cth).

49 At [21].

50 As that concept is explained in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.

51 s 473DB(1) of the Act.

52 s 473DD(a) of the Act.

imposes, relevantly, a further requirement that the new information was not, and could not have been, provided to the Minister before the Minister made the decision to refuse to grant the protection visa. Section 473DE provides the mechanism to ensure that the referred applicant has an opportunity to address new information that has been, or is to be, considered by the Authority under s 473DD where that new information would be the reason, or part of the reason, for affirming the fast track reviewable decision[53].

89 The law requires and expects that the Minister, in making a decision under s 65 to refuse to grant a protection visa, will comply with the procedure set out in subdiv AB of Div 3 of Pt 2 of the Act, which includes s 57. Compliance with that procedure would be the "ordinary" circumstance. But where no opportunity was given by the Minister to a fast track applicant to respond to adverse information contrary to the requirement in s 57, the fact of that non-compliance with s 57 would *itself* be an exceptional circumstance engaging the Authority's new information powers under ss 473DD and 473DE in Pt 7AA of the Act.

90 Exercising the new information powers in those circumstances cannot, and should not, be understood as the Authority conducting merits review of the Minister's decision. Rather, it is the Authority doing no more than it is directed to do – consider the application for a protection visa and determine for *itself* whether or not it is satisfied that the criteria for the grant of the visa have been met. A failure by the Authority to do so would constitute an unreasonable failure by the Authority to exercise its powers and may invalidate the purported performance by the Authority of the duty imposed on it.

91 Whether some significant departure from the prescribed procedure, other than non-compliance with s 57, would also be an exceptional circumstance sufficient to engage those new information powers does not arise and need not be decided.

---

53 See also Practice Direction for Applicants, Representatives and Authorised Recipients (September 2015).

92 EDELMAN J. The most fundamental question in this special case, question two, concerns the construction of legislation involving two tiers of decision making, where the effect of the legislation is to constrain the ability of a court exercising federal jurisdiction to enforce the limits of the decision maker's authority at the first tier. The context of that question is a "fast track reviewable decision" by a Minister or delegate, which is subject to a mandatory, de novo review by the Immigration Assessment Authority ("the Authority") under Pt 7AA of the *Migration Act* 1958 (Cth). When, as in this case, the Authority affirms the Minister or delegate's decision to refuse an applicant's visa application, that affirmation gives legal effect to the refusal. However, although the affirmation becomes the sole source of legal effect for the refusal, the Minister or delegate's decision and reasons must be considered as part of the Authority's review. Question two concerns the circumstance in which, as is alleged, a Minister or delegate's jurisdictional error contributes to the reasoning process of the Authority.

93 The particular jurisdictional error alleged by the plaintiff in this case was a failure by the delegate to comply with her duty to give to the plaintiff particulars of, and invite comment on, relevant information that she considered would be the reason, or part of the reason, for refusing to grant the plaintiff's visa[54]. The plaintiff submitted that the effect of Pt 7AA was that the Authority, on its review, was precluded from providing the information to the plaintiff because it was not "new information" as defined[55]. If this were correct then any review by the Authority would consider (i) the information relied upon by the delegate or in the possession or control of the Secretary of the Department[56], and (ii) the delegate's reasons for decision, relying upon the information[57]. In considering that information and those reasons, the Authority would be precluded from providing the information to the plaintiff for a response despite contravention by the delegate of s 57(2).

94 The Minister submitted that any failure by the delegate to afford procedural fairness was irrelevant because the Authority's decision "superseded" that of the delegate so as to render nugatory any jurisdictional error by the delegate. But Parliament will rarely be taken to contradict itself by (i) requiring a step to be taken as a matter of law, while at the same time (ii) authorising the

---

54 *Migration Act* 1958 (Cth), s 57.

55 *Migration Act* 1958 (Cth), s 473DC(1).

56 *Migration Act* 1958 (Cth), ss 473CB(1)(a)(ii), 473CB(1)(c), 473DB(1).

57 *Migration Act* 1958 (Cth), ss 473CB(1)(a)(iii), 473DB(1).

decision maker not to comply with that step[58] or authorising a process which incorporated that lack of compliance. Therefore, unless the contrary legislative intention were plain, Pt 7AA of the *Migration Act* is unlikely to be construed in a manner requiring the Authority to make a decision by a process that relied upon, or incorporated, a jurisdictional error by the delegate. Put another way, having proscribed conduct as a jurisdictional error by the delegate it is unlikely that Parliament would be taken to have intended that the error be relied upon by the Authority.

95 In contrast, the plaintiff submitted that because it was affected by jurisdictional error, the delegate's decision could not be a fast track reviewable decision and therefore the Authority could not review it. Putting to one side the force of the legislative assumption described above, this submission is inconsistent with the legislative intention of the scheme for at least two reasons[59]. First, when the legislation introducing the scheme was enacted, the decision of the Full Court of the Federal Court in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*[60] had stood for more than 30 years. As the plaintiff properly accepted, that decision applies to the full merits review of decisions under Pts 5 and 7 of the *Migration Act*[61], from which the decisions under Pt 7AA are carved out. A majority of the Full Court in *Brian Lawlor* held that a "decision" which could be the subject of review by the Administrative Appeals Tribunal under s 25 of the *Administrative Appeals Tribunal Act* 1975 (Cth) was a decision "in fact" regardless of whether it was legally effective[62]. Although the review under Pt 7AA is a more "limited form of review"[63] than the s 25 review in *Brian Lawlor* or the review under Pt 5 or Pt 7, it remains a de novo review by

---

58 See *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 at 275 [107]; 351 ALR 225 at 256; [2018] HCA 4.

59 It is unnecessary to consider the operation and effect of s 69(1) of the *Migration Act* 1958 (Cth).

60 (1979) 24 ALR 307.

61 See *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495 at 514-515 [88]; *Thayananthan v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 297 at 303 [28]; *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344 at 354 [31]-[32]; *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) 143 FCR 314 at 322 [33]-[36].

62 (1979) 24 ALR 307 at 314, 337.

63 *Migration Act* 1958 (Cth), s 473BA.

which the Authority is required to reach its own conclusion, including by reference to new information[64].

96 The second reason the plaintiff's submission is inconsistent with legislative intention is that it is contrary to the statutory goal of efficiency. Before Pt 7AA of the *Migration Act* came into force in 2015[65], in his Second Reading Speech, the Minister administering the Act said that it was aimed at addressing a backlog of 30,000 applications[66]. The goal of efficiency was made explicit in a provision that the Authority act in a manner that is "efficient, quick, [and] free of bias"[67], and a requirement that the Minister refer a fast track reviewable decision to the Authority "as soon as reasonably practicable after the decision is made"[68]. However, there could be significant inefficiency if any jurisdictional error by the Minister or delegate prevented the Authority from conducting a review. For instance, the Minister or delegate might make a jurisdictional error in refusing a visa without having regard to a document provided by an applicant in his or her application[69]. If the plaintiff's submission were correct, it would not matter that the Authority affirmed the decision of the Minister or delegate after the same review of all the materials and after concluding that the document did not lead to a different conclusion. The process would have to start again.

97 There is a third approach, which does not give rise to tension with the legislative intention, unlike the approaches of the Minister and the plaintiff. The third approach is to construe Pt 7AA in a manner that would not require the Authority to make its decisions in a way that relied upon a jurisdictional error by the delegate. In relation to the particular issue raised by this special case, Pt 7AA should be construed, as Gageler, Keane and Nettle JJ[70] explain, so that the Authority would have power[71] to invite an applicant to respond to relevant

---

64 *Migration Act* 1958 (Cth), s 473DC.

65 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth).

66 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 September 2014 at 10547.

67 *Migration Act* 1958 (Cth), s 473FA(1).

68 *Migration Act* 1958 (Cth), s 473CA.

69 *Migration Act* 1958 (Cth), s 54.

70 At [33]-[34], [49].

71 *Migration Act* 1958 (Cth), s 473DC(3).

information not given to him or her by the Minister or delegate in contravention of s 57(2). Failure to exercise that power might be legally unreasonable[72]. This construction is not inconsistent with s 473DA(2), which provides that, "[t]o avoid doubt", nothing in Pt 7AA requires the Authority to give an applicant any material that was before the Minister when the Minister made a decision to refuse a visa. That sub-section is premised upon the assumption that the Minister or delegate will comply with the requirements of Pt 2, Div 3, subdiv AB, including s 57(2). There is no *requirement* in Pt 7AA to give the applicant the material because "an applicant would have already been provided an opportunity to comment on relevant information that the Minister considered was the reason, or part of the reason for refusing to grant a visa"[73].

98 There are other circumstances in which the statutory conditions regulating the decision making process by the Authority may need to be construed so as not to permit or require the Authority to incorporate a jurisdictional error by the Minister or delegate. It is unnecessary to reach any concluded view about those circumstances. It suffices to give two examples as illustrations of the broader application of the issue currently before the Court. First, suppose a delegate committed a jurisdictional error by failing to have regard to a relevant document in making an adverse credibility finding as required by s 54. Although the delegate's reasons would be material required to be considered by the Authority[74], it might be necessary to construe the legislation so that it is legally unreasonable[75], and a jurisdictional error, for the Authority to place any reliance upon, or to incorporate, that credibility finding in affirming the decision.

99 Another circumstance, considered recently by the Full Court of the Federal Court[76], concerns the nature of the Authority's power to remit a decision "for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation"[77]. The Regulations make various

---

72 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.

73 Australia, House of Representatives, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Explanatory Memorandum at 130 [888].

74 *Migration Act* 1958 (Cth), ss 473CB(1)(a)(iii), 473DB(1).

75 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

76 *BMB16 v Minister for Immigration and Border Protection* [2017] FCAFC 169.

77 *Migration Act* 1958 (Cth), s 473CC(2)(b).

directions or recommendations impermissible[78]. If the power to remit were constrained by the Regulations[79] then the Authority might be required to affirm the decision despite (i) a jurisdictional error on the face of the delegate's reasons for decision, and (ii) the obligation upon the Authority to consider those reasons[80]. However, this result might be avoided by a construction of s 473CC(2)(a) requiring that (i) in deciding whether to affirm, the Authority has "such powers as are necessary to determine that an essential criterion [for the grant of the visa] is not fulfilled"[81], and (ii) in deciding whether to remit, the Authority has such powers as are necessary to determine that all essential criteria for the grant of the visa have been fulfilled, irrespective of the scope of its powers to give directions or recommendations.

100 For these reasons, in addition to those of Gageler, Keane and Nettle JJ, I agree with the answer to rephrased question two given by them. I also agree with their Honours' reasons and answers to questions one, three, four and five.

---

78 Migration Regulations 1994 (Cth), reg 4.43(3).

79 *BMB16 v Minister for Immigration and Border Protection* [2017] FCAFC 169 at [16], [32].

80 *Migration Act* 1958 (Cth), ss 473CB(1)(a)(iii), 473DB(1).

81 *BMB16 v Minister for Immigration and Border Protection* [2017] FCAFC 169 at [94].