HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

BVD17 APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR RESPONDENTS

BVD17 v Minister for Immigration and Border Protection
[2019] HCA 34
9 October 2019
S46/2019

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

A Aleksov for the appellant (instructed by Australian Presence Legal)

G T Johnson SC with N D J Swan for the first respondent (instructed by MinterEllison)

Submitting appearance for the second respondent

CATCHWORDS

BVD17 v Minister for Immigration and Border Protection

Immigration – Refugees – Application for protection visa – Immigration Assessment Authority ("Authority") – Review by Authority under Pt 7AA of *Migration Act 1958* (Cth) – Where decision by delegate of Minister for Immigration and Border Protection to refuse protection visa referred to Authority for review – Where Secretary of Department of Immigration and Border Protection gave Authority documents and information – Where Secretary notified Authority that s 473GB applied to documents and information – Where s 473GB(3) conferred discretions on Authority, upon notification, to have regard to matter in document or to information and to disclose matter in document or information to referred applicant – Where documents and information not disclosed to referred applicant during review – Where fact of notification not disclosed to referred applicant during review – Whether procedural fairness required Authority to disclose fact of notification to referred applicant.

Administrative law – Judicial review – Jurisdictional error – Procedural fairness – Where Div 3 of Pt 7AA, s 473GA and s 473GB provided exhaustive statement of natural justice hearing rule in relation to reviews by Authority – Whether implied obligation of procedural fairness precluded.

Words and phrases – "disclosure", "document or information", "exclusion of procedural fairness", "exhaustive statement", "fact of notification", "natural justice hearing rule", "notification".

Migration Act 1958 (Cth), Pt 7AA.

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ. This Court accepted in *Minister for Immigration and Border Protection v SZMTA*[1] that the giving of a notification under s 438(2)(a) of the *Migration Act 1958* (Cth) ("the Act") triggers an obligation of procedural fairness on the part of the Administrative Appeals Tribunal ("the Tribunal") to disclose the fact of notification to an applicant for review under Pt 7. The question of general importance in the present appeal is whether the giving of a notification under s 473GB(2)(a) triggers an equivalent obligation of procedural fairness on the part of the Immigration Assessment Authority ("the Authority") to disclose the fact of notification to a referred applicant in a review under Pt 7AA.

2 The short answer is that procedural fairness does not oblige the Authority to disclose the fact of notification under s 473GB(2)(a) to a referred applicant in a review under Pt 7AA. The short reason is that s 473DA precludes such an obligation from arising.

Relevant provisions of Pt 7AA

3 The scheme of Pt 7AA of the Act, under which the Authority must review a "fast track reviewable decision"[2] made by the Minister for Immigration and Border Protection ("the Minister") refusing under s 65 to grant a protection visa to a "fast track applicant"[3], was considered in detail in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*[4]. For the purposes of the present appeal, it is sufficient to mention only some features of the scheme.

4 Section 473CA mandates referral of a fast track reviewable decision to the Authority by the Minister. Upon that referral occurring, s 473CB requires the Secretary of the Department of Immigration and Border Protection ("the Department") to give to the Authority specified categories of "review material". The specified categories of review material include any material in the

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1 (2019) 93 ALJR 252 at 257 [2], 269 [78]; 363 ALR 599 at 602, 618; [2019] HCA 3.

2 Section 473BB of the Act (definition of "fast track reviewable decision").

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

4 (2018) 92 ALJR 481; 353 ALR 600; [2018] HCA 16.

Secretary's possession or control considered by the Secretary to be relevant to the review[5].

5 Two provisions located in Div 6 of Pt 7AA qualify the obligation of the Secretary under s 473CB. One is s 473GA, which takes precedence over s 473CB to prevent the Secretary from giving the Authority a document or information if the Minister certifies under s 473GA(2) that disclosure would be contrary to the public interest because it would prejudice Australia's security, defence or international relations or because it would involve disclosure of Cabinet deliberations. The other is s 473GB, which operates to impose cumulative obligations and to confer supplementary powers on the Secretary and on the Authority where the Secretary gives to the Authority a document or information to which that section applies.

6 By force of s 473GB(1), s 473GB applies to a document or information in either of two circumstances. One is where the Minister certifies that disclosure would be contrary to the public interest for a specified reason (other than a reason justifying certification under s 473GA) that could form the basis for a claim by the Commonwealth for non-disclosure in a court[6]. The other is where the document (or matter contained in the document) or information was given to the Minister or an officer of the Department in confidence[7].

7 Where s 473GB applies to a document or information which the Secretary gives to the Authority, s 473GB(2)(a) obliges the Secretary to notify the Authority in writing that the section applies in relation to the document or information. Complementing that obligation is a power, conferred on the Secretary by s 473GB(2)(b), to give the Authority any written advice that the Secretary thinks relevant about the significance of the notified document or information.

8 The consequence for the Authority of the Secretary giving a notice under s 473GB(2)(a) is addressed in s 473GB(3), which provides:

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

6 Section 473GB(1)(a) and (5) of the Act.

7 Section 473GB(1)(b) of the Act.

> "If the Immigration Assessment Authority is given a document or information and is notified that this section applies in relation to it, the Authority:
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> (a) may, for the purpose of the exercise of its powers in relation to a fast track reviewable decision in respect of a referred applicant, have regard to any matter contained in the document, or to the information; and
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> (b) may, if the Authority thinks it appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the referred applicant."

9 In relation to any matter or information which the Authority discloses to a referred applicant under s 473GB(3)(b), s 473GB(4) obliges the Authority to give a direction under s 473GD restricting its publication.

10 Conformably with the analysis in *SZMTA* of the operation of s 438(3), three aspects of the operation of s 473GB(3) are not in dispute in the appeal. First, the Authority has no power to have regard to notified information or matter for the purpose of exercising any of its powers in relation to a fast track reviewable decision in respect of a referred applicant unless the Authority affirmatively exercises the discretion conferred on it by s 473GB(3)(a)[8]. Second, the Authority has no power to disclose the notified information or matter to the referred applicant unless the Authority affirmatively exercises the discretion conferred on it by s 473GB(3)(b)[9]. Third, the discretion conferred by s 473GB(3)(b) is conditioned by the requirement that it must be exercised within the bounds of reasonableness[10]. Also not in dispute in the appeal is that the discretions conferred by s 473GB(3)(a) and (b) are so bound together that an affirmative exercise of the discretion conferred by s 473GB(3)(a) gives rise to a

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8 (2019) 93 ALJR 252 at 260 [23]; 363 ALR 599 at 607.

9 (2019) 93 ALJR 252 at 260 [24]; 363 ALR 599 at 607.

10 (2019) 93 ALJR 252 at 260 [24]; 363 ALR 599 at 607.

duty on the part of the Authority to consider exercise of the discretion conferred by s 473GB(3)(b)[11].

11 The overriding duty of the Authority to review a fast track reviewable decision referred to it under s 473CA is imposed by s 473CC(1). The outcome of the review is the making of a decision by the Authority under s 473CC(2) either to affirm the fast track reviewable decision referred to it or to remit the decision referred to it for reconsideration in accordance with such directions or recommendations as are permitted by regulation.

12 How the Authority is ordinarily to go about conducting a review in the performance of the overriding duty imposed on it by s 473CC is the topic addressed in Div 3 of Pt 7AA. The powers of the Authority "in relation to a fast track reviewable decision in respect of a referred applicant" to which s 473GB(3)(a) refers encompass the powers conferred on the Authority by that Division.

13 Division 3 commences with s 473DA, the construction and operation of which are central to answering the main question in the appeal. Section 473DA is headed "Exhaustive statement of natural justice hearing rule". Sub-section (1) provides:

> "This Division, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority."

Sub-section (2) adds:

> "To avoid doubt, nothing in this Part requires the Immigration Assessment Authority to give to a referred applicant any material that was before the Minister when the Minister made the decision under section 65."

14 Within Div 3, s 473DB(1) goes on to spell out that the primary obligation of the Authority is to review a fast track reviewable decision referred to it under s 473CA by considering the review material given under s 473CB "without accepting or requesting new information" and "without interviewing the referred

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11 cf *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 499, 505; [1947] HCA 21.

applicant". The primary obligation is nevertheless imposed "[s]ubject to this Part", an expression indicating that the generality of the primary obligation can be qualified in the conduct of a particular review by the operation of other provisions located within Pt 7AA.

15 The provisions which can operate to qualify the primary obligation spelt out in s 473DB(1) include s 473GB. They also include other provisions within Div 3. Amongst those other provisions is s 473DC(1), which confers a discretion on the Authority, itself to be exercised within the bounds of reasonableness[12], to get "new information", being documents or information that were not before the Minister when making the decision under s 65 and that the Authority considers may be relevant. Amongst them also is s 473DC(3), which confers a discretion on the Authority, again to be exercised within the bounds of reasonableness[13], to invite any person to provide new information in writing or in an interview. Consideration and disclosure by the Authority of such new information as the Authority might get under s 473DC(1) or s 473DC(3) are then governed by ss 473DD and 473DE.

16 Two further provisions of Pt 7AA are also appropriate to be mentioned. Section 473EA, which is located within Div 4, requires a decision of the Authority on a review under Pt 7AA to be accompanied by a written statement setting out both "the decision of the Authority on the review" and "the reasons for the decision"[14]. The analysis in *Minister for Immigration and Citizenship v SZGUR*[15] of the materially identical requirement in s 430 for the Refugee Review Tribunal to give a statement of the reasons for its decision in a review under Pt 7 supports two conclusions about which there is no dispute in the appeal. One is that the decision of the Authority on the review to which s 473EA refers is the ultimate decision of the Authority under s 473CC(2) either to affirm the fast track reviewable decision referred to it or to remit the decision referred to it for

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12 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481 at 487-488 [21], 497 [86], 498 [90]; 353 ALR 600 at 607, 620-621.

13 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481 at 487-488 [21], 492 [49], 496 [71], 497 [86], 499-500 [97]; 353 ALR 600 at 607, 613, 618, 620-621, 623-624.

14 See also s 25D of the *Acts Interpretation Act 1901* (Cth).

15 (2011) 241 CLR 594 at 606 [32], 616-617 [69], 623 [91]-[92]; [2011] HCA 1.

reconsideration in accordance with such directions or recommendations as are permitted by regulation. The other is that the Authority, in giving reasons for that ultimate decision to affirm or remit, is not required to give reasons for the exercise or non-exercise of a procedural power such as those conferred on it by s 473DC(1) or s 473GB(3).

17 Finally, s 473FB, which is located within Div 5, permits the President of the Tribunal to issue directions as to the conduct of reviews[16] and requires the Authority so far as practicable to comply with those directions whilst making plain that non-compliance does not have the result that a decision of the Authority is invalid[17]. Directions that have in fact been issued by the President make provision for a referred applicant to provide written submissions to the Authority on topics identified as "why you disagree with the decision of the Department" and "any claim or matter that you presented to the Department that was overlooked"[18].

Facts

18 The appellant is a citizen of Sri Lanka who arrived in Australia as an unauthorised maritime arrival on 13 October 2012. He applied for a protection visa, which a delegate of the Minister refused. The Minister referred the decision of the delegate to the Authority for review. The Authority affirmed the decision of the delegate.

19 The Authority's written statement of its reasons for decision records that the Authority found that the appellant had fabricated his claims to have been of interest to authorities in Sri Lanka. The statement indicates that, in so finding, the Authority placed weight on the absence of corroboration of one of the appellant's claims in information contained in documents in a file of the Department which related to an application for a protection visa which had been made by another member of the appellant's family.

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16 Section 473FB(1)(b) of the Act, read with s 473BB (definition of "President").

17 Section 473FB(3) of the Act.

18 *Practice Direction for Applicants, Representatives and Authorised Recipients*, Practice Direction 1 (2018) at 3 [23].

20 The departmental file had been before the delegate at the time of making the decision to refuse the appellant a protection visa but the delegate had not relied adversely on the contents of the file in making that decision. The file had been included in the review material given to the Authority by the Secretary to the Department under s 473CB of the Act and had been accompanied by a notification given to the Authority under s 473GB(2)(a) by a delegate of the Secretary. The notification stated that s 473GB applied to the documents and information in the file and expressed the view of the delegate that the documents and information in the file should not be disclosed to the appellant because they had been given to the Minister or to an officer of the Department in confidence.

21 In the course of the review, the Authority did not disclose any of the documents or information in the file to the appellant and did not disclose the fact of having been given the notification under s 473GB(2) of the Act to the appellant.

22 The Authority's written statement of its reasons for decision records that the Authority had regard to the review material and to particular country information, which it specifically identified as "new information", and that no further submissions or new information were provided to it. The statement makes no reference to the notification under s 473GB(2)(a) of the Act and makes no reference to the exercise of any discretion by the Authority under s 473GB(3) of the Act.

Procedural history

23 The appellant applied to the Federal Circuit Court for judicial review of the decision of the Authority under s 476 of the Act on grounds that the Authority's failure to disclose the documents and information in the file to him was both procedurally unfair and legally unreasonable. The Federal Circuit Court dismissed the application[19].

24 The appellant then appealed from the decision of the Federal Circuit Court to the Federal Court. The appeal was on a single ground, albeit the ground had two limbs. The ground was that the Federal Circuit Court erred in failing to find either: that the Authority failed to consider the exercise of the discretion conferred by s 473GB(3)(b) at all; or that, if the Authority did consider

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19 *BVD17 v Minister for Immigration and Border Protection* [2017] FCCA 3046.

exercising that discretion, the Authority's failure to exercise the discretion to disclose the documents and information was legally unreasonable.

25 The appeal was heard and determined by the Full Court of the Federal Court, constituted by Flick, Markovic and Banks-Smith JJ. The Full Court unanimously dismissed the appeal[20], concluding that there was insufficient evidence from which to infer that the Authority failed to consider exercising the discretion conferred by s 473GB(3)(b)[21], and that the appellant had not met the onus of establishing that an exercise of discretion to deny disclosure was legally unreasonable[22].

Appeal to this Court

26 The decision of the Full Court of the Federal Court having been delivered before that of this Court in *SZMTA*, special leave to appeal was granted to permit the appellant to rely on a ground not raised in the Federal Circuit Court or the Full Court. The new ground is to the effect that, by failing to disclose to the appellant the fact of having been given the notification under s 473GB(2)(a), the Authority breached an obligation of procedural fairness. Resolution of the new ground turns entirely on the statutory question whether the Authority has an implied obligation of procedural fairness to disclose the fact of notification under s 473GB(2)(a) to a referred applicant in a review under Pt 7AA.

27 Special leave to appeal was also granted to allow the appellant to reagitate the ground on which he was unsuccessful in the Full Court. At the hearing of the appeal, however, the appellant confined his argument on that ground to the contention that the Full Court was wrong to conclude that there was insufficient evidence from which to infer that the Authority failed to consider exercising the discretion conferred by s 473GB(3)(b). The appellant conceded that the Authority would have been entitled to give weight to the confidential quality of the documents and information which were the subject of the notification under s 473GB(2)(a). Further conceding that the weight reasonably able to be given to

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20 *BVD17 v Minister for Immigration and Border Protection* (2018) 261 FCR 35.

21 *BVD17 v Minister for Immigration and Border Protection* (2018) 261 FCR 35 at 47 [56].

22 *BVD17 v Minister for Immigration and Border Protection* (2018) 261 FCR 35 at 48 [60].

their confidential quality could not be assessed because the documents and information had not been put in evidence, the appellant did not renew his contention that, if the Authority did consider exercising that discretion, its failure to exercise the discretion to disclose the documents and information was legally unreasonable.

Procedural fairness

28 The thrust of the appellant's argument at the hearing of the appeal was that the reasoning in *SZMTA* concerning the operation of s 438(2)(a) to give rise to an obligation of procedural fairness within the scheme of Pt 7 is transferable to the operation of s 473GB(2)(a) within the scheme of Pt 7AA. The Minister, as first respondent to the appeal, relied on the differences between the two schemes emphasised in earlier reasoning of the Full Court of the Federal Court in *Minister for Immigration and Border Protection v BBS16*[23].

29 Identification of the incidents of the Authority's obligation to afford procedural fairness in the conduct of a review under Pt 7AA necessarily begins with the prescription in s 473DA(1) that Div 3, together with ss 473GA and 473GB, "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the [Authority]". For reasons which will become apparent, that prescription is alone sufficient to preclude an obligation of procedural fairness on the part of the Authority to disclose the fact of notification under s 473GB(2)(a) to a referred applicant. Whether such an obligation would arise as an incident of the Authority's obligation to afford procedural fairness within the scheme of Pt 7AA were it not for the prescription in s 473DA(1) need not be explored.

30 The prescription in s 473DA(1) has some parallels with the prescriptions in s 422B(1) and (2), the scope and operation of which were considered in *SZMTA*[24]. Like them, the prescription in s 473DA(1) is framed in a way that is consistent with legislative acknowledgement of an obligation to afford procedural fairness which arises as an implied condition of performance of the duty to conduct a review through operation of a common law principle of

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23 (2017) 257 FCR 111.

24 (2019) 93 ALJR 252 at 262 [34]-[37]; 363 ALR 599 at 609-610.

statutory interpretation[25]. And like them, the prescription in s 473DA(1) "recognises that the precise content of that obligation to afford procedural fairness depends on 'the particular statutory framework'"[26].

31 Unlike the prescriptions in s 422B(1) and (2) as interpreted in *SZMTA*[27], however, the prescription in s 473DA(1) is not framed to confine the exhaustiveness of its operation, in defining the content of the obligation to afford procedural fairness which it acknowledges, to the discrete subject matters of the provisions to which it refers. Instead, it extends the exhaustiveness of its operation, in defining the content of the Authority's obligation to afford procedural fairness, to the entirety of the performance of the overriding duty imposed on the Authority by s 473CC(1) to review a fast track reviewable decision referred to it under s 473CA. The reasoning in *SZMTA*[28], that an incident of the obligation of procedural fairness which conditions performance of the overriding duty of the Tribunal to conduct a review under Pt 7 can arise outside the scope of the discrete subject matters of the provisions to which s 422B(1) and (2) refer, can therefore have no application to the Authority.

32 Recognising that the prescription in s 473DA(1) is broad in its scope, the appellant argued that the effect of its operation on the identification of the incidents of the Authority's obligation to afford procedural fairness is minimal. The appellant argued that the "exhaustive statement of the requirements of the natural justice hearing rule" to which s 473DA(1) refers encompasses all that is expressed in and implied by the totality of the provisions which s 473DA(1) mentions. If a particular obligation of disclosure arises by implication from

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25 (2019) 93 ALJR 252 at 262 [34]; 363 ALR 599 at 609. See also *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 205 [75]; [2016] HCA 29.

26 (2019) 93 ALJR 252 at 262 [34]; 363 ALR 599 at 609, quoting *Kioa v West* (1985) 159 CLR 550 at 584; [1985] HCA 81 and *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504; [1963] HCA 41.

27 (2019) 93 ALJR 252 at 262 [35]-[37]; 363 ALR 599 at 609-610. See also *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624 at 637 [57]; *Minister for Immigration and Citizenship v SZMOK* (2009) 247 FCR 404 at 407 [9].

28 (2019) 93 ALJR 252 at 261-262 [27]-[37]; 363 ALR 599 at 608-610.

construing Div 3 in combination with s 473GA or s 473GB against the background of the common law then, according to the appellant, that implied obligation is itself part of the "exhaustive statement of the requirements of the natural justice hearing rule" to which s 473DA(1) refers. All that the prescription in s 473DA(1) achieves, according to the appellant, is to prevent recourse to provisions in Pt 7AA other than Div 3 and ss 473GA and 473GB in determining the express or implied incidents of the Authority's obligation of procedural fairness. For example, it precludes an implication arising from the requirement of s 473FB for the Authority, so far as practicable, to comply with a direction by the President as to the conduct of reviews.

33 The argument would deprive s 473DA(1) of any meaningful operation. It cannot be accepted. The evident purpose of s 473DA(1) in prescribing that the provisions to which it refers are to be taken to be an "exhaustive statement of the requirements of the natural justice hearing rule" is to require that those provisions be construed as a codification of the incidents of the Authority's acknowledged obligation of procedural fairness. The prescription does not preclude all implications. Importantly, it does not preclude an implication that a statutory power within the provisions to which s 473DA(1) refers must be exercised only within the bounds of legal reasonableness. What the prescription does preclude is an incident of the Authority's obligation of procedural fairness arising as a matter of implication through the application of the common law principle of statutory interpretation according to which, where the exercise of a power or the performance of a duty is conditioned by a requirement to afford procedural fairness, "regard must be had to the circumstances of the particular case to ascertain what is needed to satisfy the condition" with the result that "[i]t is not possible precisely and exhaustively to state what the repository of a statutory power must always do to satisfy [the] condition"[29].

34 The consequence of the codifying effect of s 473DA(1) was correctly stated by the Full Court of the Federal Court constituted by Robertson, Murphy and Kerr JJ in *Minister for Immigration and Border Protection v CRY16*[30] and in *Minister for Immigration and Border Protection v DZU16*[31]. The consequence is that, except to the extent that procedural unfairness overlaps with legal

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29 *Kioa v West* (1985) 159 CLR 550 at 611. See also at 585.

30 (2017) 253 FCR 475 at 491 [67].

31 (2018) 253 FCR 526 at 552-553 [99].

unreasonableness, procedural fairness analysis is not the "lens" through which the content of the procedural obligations imposed on the Authority in the conduct of a review under Pt 7AA is to be determined.

35 Consistent with the earlier conclusion of the Full Court in *BBS16*[32], the entirety of the content of the Authority's obligation of procedural fairness in the context of a notification under s 473GB(2)(a) is to be found in the outworking of the discretions conferred on the Authority by s 473GB(3). Section 473DA(1) leaves no room for an additional obligation of disclosure to arise in the manner recognised in *SZMTA*.

36 For completeness, the overlapping operation of s 473DA(2) in the circumstances giving rise to the present appeal is also to be noted. The prescription in s 473DA(2), it will be recalled, is to the effect that nothing in Pt 7AA requires the Authority to give to a referred applicant any material that was before the Minister when making the decision under s 65. There might be circumstances in which the prescription would not prevent the Authority being required to provide material that was before the Minister to a referred applicant as an incident of a legally reasonable exercise of the discretion conferred on it by s 473DC(3)[33]. Similarly, there might be circumstances in which the prescription would not prevent the Authority being required to provide such material to a referred applicant as a consequence of a legally reasonable exercise of the discretion conferred on it by s 473GB(3)(b). However, the prescription does operate to preclude an obligation on the part of the Authority to give such material to a referred applicant from otherwise arising as a matter of implication.

Exercise of discretion

37 The appellant's argument that the Full Court was wrong to conclude that there was insufficient evidence from which to infer that the Authority failed to consider exercising the discretion conferred by s 473GB(3)(b) can be dealt with quite readily.

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32 (2017) 257 FCR 111 at 144 [100].

33 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481 at 492 [49], 499-500 [97]; 353 ALR 600 at 613, 623-624.

38 As the recent decision in *Plaintiff M47/2018 v Minister for Home Affairs*[34] well enough illustrates, leaving constitutional and legislative facts aside, it is the plaintiff in an application for judicial review of administrative action who has the onus of establishing on the balance of probabilities the facts on which a claim to relief is founded. To the extent that the factual basis for a claim to relief is sought to be founded on an inference to be drawn from a decision-maker's statement of reasons, the appropriateness of drawing the inference falls to be evaluated having regard to two settled principles. One is that such a statement of reasons must be read fairly and not in an unduly critical manner[35]. The other is that it must be read in light of the content of the statutory obligation pursuant to which it was prepared[36].

39 The appellant's contention before the Full Court that the Authority failed to consider the exercise of the discretion conferred by s 473GB(3)(b) was based solely on an inference sought to be drawn from the fact that the Authority's statement of its reasons for decision contains no reference to the discretion. The Full Court did not err in rejecting that contention.

40 Given that the Authority was under no obligation to give reasons for its exercise or non-exercise of any procedural power, the mere failure of the Authority to mention the discretion conferred by s 473GB(3)(b) cannot support the drawing of an inference that the exercise of the discretion was not considered. The Authority's specific reference to taking particular country information into account as "new information", thereby indicating an exercise of discretion under s 473DC(1), lends no added support to the drawing of the inference. Having been before the delegate at the time of the decision under review, the information contained in the documents in the departmental file did not meet the description of "new information". The Authority's reference to one statutory power having been exercised in respect of one category of information cannot be taken to

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34 (2019) 93 ALJR 732; 367 ALR 711; [2019] HCA 17. See also *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 616 [67], 623 [91]-[92].

35 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; [1996] HCA 6.

36 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 606 [32], 617 [70], 623 [91]-[92].

indicate that the Authority failed to consider the exercise of another statutory power in respect of another category of information.

Orders

41 The appeal must be dismissed with costs.

EDELMAN J.

Introduction

42 Even with the benefit of omniscience, God still afforded Adam the benefit of the natural justice hearing rule[37]. That rule has long been understood to be a foundational principle of justice. When statute creates a decision-making process, the usual implication that would be drawn by any reasonable reader from the language is that the hearing will follow a procedure that is fair in light of the relevant provisions. It would require words of extreme clarity before a court could conclude that Parliament intended to create a process that permitted a statutory hearing process to proceed unfairly.

43 At the heart of this appeal is whether s 473DA(1) of the *Migration Act 1958* (Cth) excludes the ordinary manner in which implications are drawn or whether it provides, as it says, that the relevant ("exhaustive") provisions to consider for an implication of "the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority" are those contained in the same Division as well as ss 473GA and 473GB. The implication would then be assessed in the ordinary manner but without recourse to other provisions.

44 The facts and background to this appeal are set out in the joint reasons for decision of the other members of this Court. I agree with those reasons for dismissing the second ground of appeal, concerning the alleged inference that the Immigration Assessment Authority ("the Authority") failed to consider exercising the discretion conferred by s 473GB(3)(b) of the *Migration Act*. I also agree with the conclusion reached in relation to the first ground of appeal, but for different reasons. In my view, s 473DA(1) of the *Migration Act* does not impliedly alter the underlying principles of statutory interpretation so as to preclude any implication of procedural fairness based on the natural justice hearing rule. Instead, I would dismiss the first ground of appeal because there was no practical unfairness to the appellant.

When statutory words exclude procedural fairness

45 When a decision-maker exercises a statutory power that would affect the rights or liabilities of another person, questions arise as to how that power should be exercised. The "hearing rule" is an expression, or more commonly an implication, in a statute of a requirement of procedural fairness in the exercise of

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37 Genesis 3:11. See *R v Chancellor of Cambridge University* (1723) 1 Str 557 at 567 [93 ER 698 at 704].

that statutory power[38]. The implication will always depend upon the legislative intention; although where a power is conferred without express qualification, it will usually involve an implication[39] that the power be exercised by respecting those requirements of justice that natural reason would require having regard to all of the circumstances. At a high level of generality, one of the requirements that will inform the terms of any implication, subject to the terms and context of the statutory power, will often be the principle based upon conventional assumptions to which the common law gives effect that a person should have a "reasonable opportunity of presenting [their] case"[40].

46 The threshold question on this appeal is whether s 473DA(1) of the *Migration Act* excludes any implication that would otherwise arise from the words of the statute in their context giving effect to a reasonable opportunity for an applicant to present their case, when any of the powers in Div 3 of Pt 7AA, s 473GA, or s 473GB are exercised by the Authority. Section 473DA(1) of the *Migration Act* provides:

> "This Division, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority."

47 There is an immediate difficulty in interpreting s 473DA(1) as drawing a conceptual distinction within Div 3 and ss 473GA and 473GB between (i) express terms that impose duties that fall within the classification of the natural justice hearing rule, and (ii) implied terms that fall within that classification. That difficulty, which has been identified in the context of contractual instruments, is that it "flies in the face of our experience of the way language is used" to create a "conceptual difference between construing the

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38 See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 256 [2]; [2010] HCA 23.

39 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 491; [1977] HCA 39; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 407-408; [1982] HCA 26; *Kioa v West* (1985) 159 CLR 550 at 609; [1985] HCA 81; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258-259 [11]-[13]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97]; [2012] HCA 31.

40 *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118, quoted in *Kioa v West* (1985) 159 CLR 550 at 613 and Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 511. See also *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 341 [52]; [2015] HCA 40.

meaning of the words used ... and implying a term"[41]. As O'Connor J put it, "[e]very implication which the law makes is embodied in the contract just as effectively as if it were written therein in express language"[42]. Since the legislative intention from which a statutory implication is made also depends on context, including the common law background to the statutory words, "a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive"[43]. Hence, in *Kioa v West*[44], Brennan J did not separate expression and implication when his Honour described the "procedural requirements ... expressly or impliedly prescribed by statute" as a question of interpretation that "demands a universal answer", albeit an answer which would be applied in a manner that would vary according to the circumstances of the case.

48 In the context of Div 3 of Pt 7AA, there could be serious difficulties in drawing lines between express requirements of procedural fairness such as those in s 473DE(1) and implied requirements. For instance, when the Authority exercises its powers in relation to s 473DE(1), are matters such as (i) limits to the way the Authority thinks it appropriate to "give" the particulars of the new information, (ii) the extent of the particulars, or (iii) the manner of giving an invitation to comment on the new information, matters that are implied against the background of common law principles in light of which they were enacted, or matters that are an application of the express terms, or both? Ultimately, this issue can be put to one side because neither the semantic meaning nor the context of s 473DA(1) has the effect of excluding any implication that would be drawn from Div 3, s 473GA, or s 473GB to give effect to procedural fairness.

49 The semantic meaning of the words of s 473DA(1) does not exclude an implication to give effect to the natural justice hearing rule when powers in Div 3 of Pt 7AA or ss 473GA and 473GB are exercised. Rather, the plain meaning of the words of s 473DA(1) is that the relevant provisions are the only provisions from which any obligations that could be characterised as part of the natural justice hearing rule could be expressed or implied for reviews conducted by the Authority.

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41 Hoffmann, "Language and Lawyers" (2018) 134 *Law Quarterly Review* 553 at 563. Compare *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at 756 [26]-[27].

42 *Hart v MacDonald* (1910) 10 CLR 417 at 427; [1910] HCA 13.

43 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97].

44 (1985) 159 CLR 550 at 611.

50 Nor does the context in which this provision was enacted suggest the exclusion of procedural fairness implications in the exercise of powers by the Authority within Div 3 of Pt 7AA, s 473GA, or s 473GB. The words of s 473DA(1) are very similar to those of ss 51A, 97A, 118A, 127A, 357A, and 422B, which were inserted by items 1-6 of Sch 1 to the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) and commenced on 4 July 2002 ("the 2002 Provisions"). Each of the 2002 Provisions provides that various other provisions, Divisions, or Subdivisions are "taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with" or "the matters it deals with". These words have been held to be "consistent with the implication of an obligation to afford procedural fairness"[45]. They do not exclude an implication that would otherwise be drawn from the provisions to which they refer.

51 There is one linguistic difference between the 2002 Provisions and s 473DA(1). The 2002 Provisions are expressed to apply "in relation to the matters they deal with" rather than, as s 473DA(1) was expressed in 2014, "in relation to reviews conducted by the Immigration Assessment Authority". But this difference concerns the range of matters that are the subject of the procedural fairness obligation. It is not concerned with any distinction between express and implied terms. Part 7AA limits the sources from which *any* hearing rule procedural fairness implication can be drawn in a hearing by the Authority to the provisions mentioned. Similarly, the reference in s 473DA(1) to "reviews conducted by the Immigration Assessment Authority" means "in relation to *all* subject matters dealt with by the Immigration Assessment Authority" in reviews under Pt 7AA. In contrast, the 2002 Provisions do not limit the entirety of the hearing rule procedural fairness obligations before the Administrative Appeals Tribunal ("the Tribunal"). Each of the 2002 Provisions constrains the Tribunal to confine its assessment of any express or implied obligations of procedural fairness to the subject matter of those provisions.

52 This meaning of s 473DA(1) is confirmed by the use of the same words as the 2002 Provisions in the Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), which by item 21 of Sch 4 inserted Pt 7AA, including s 473DA, into the *Migration Act*[46]:

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45 *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252 at 262 [34]; 363 ALR 599 at 609; [2019] HCA 3.

46 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 130 [886].

> "The purpose of this amendment is to make clear that sections 473GA, 473GB and Division 3 of Part 7AA of the Migration Act are an exhaustive statement of the requirements of the natural justice hearing rule *in relation to the matters they deal with*. Division 3 sets out how the IAA should conduct its review and outlines how the IAA is to review decisions on the papers and provides limits on the consideration of new information for the purposes of making a decision in relation to a fast track reviewable decision. Section[s] 473GA and 473GB deal with the disclosure of confidential information to and by the IAA." (emphasis added)

53 This meaning is also supported by s 473DA(2) and the interpretation that has been given to that sub-section. That sub-section, "[t]o avoid doubt", relevantly provides that "nothing in this Part requires the Immigration Assessment Authority to give to a referred applicant any material that was before the Minister when the Minister made the decision under section 65". Section 473DA(2) has been confined to implications requiring the giving of such material that would be drawn only from the natural justice hearing rule[47]. But it does not exclude all implications, including implications that would require the Authority to give the referred applicant other material.

54 The legislative intention underlying s 473DA(2) is to confirm beyond doubt that a particular, pertinent implication should not be drawn from the provisions in Pt 7AA. The premise of s 473DA(2) is that since implications *might* be drawn from the principles of the natural justice hearing rule it was necessary to remove any doubt about whether *this* particular implication could be drawn. Hence, when the Explanatory Memorandum explained the purpose of s 473DA(2), it did not say that the sub-section existed to confirm the exclusion of only one of the many possible implications that were also excluded. Rather, it explained that s 473DA(2) was there to remove doubts that might otherwise have permitted the particular implication of a liberty to comment to be drawn from the relevant provisions. The preferred position, which sought to remove doubt, was that the implication should not be drawn because, as the Explanatory Memorandum said, the applicant had already been given an opportunity to comment[48]:

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47 See *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481 at 488 [26], 499-500 [97]; 353 ALR 600 at 608, 623-624; [2018] HCA 16.

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

> "The purpose of [s 473DA(2)] is to put beyond doubt that the IAA is not required to give a referred applicant any material that was before the Minister for comment. This is because under subsection 57(2) of the Migration Act and in relation to their fast track decision, 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."

55 The principle of legality is a further reason why the words of s 473DA(1) should not be strained to reach a conclusion that any implication of procedural fairness is excluded. That principle usually represents the natural process of reasoning that the more important or fundamental a person's right, and the greater the alleged adverse effect on the right, the less likely it is that Parliament would have intended that effect, and the clearer the words that are required to achieve it. It is, perhaps unsurprisingly, a principle that is pertinent when considerations of the legality of executive action are concerned. Implications that are based upon principles of natural justice are important liberties that have been held only to be excluded by "plain words of necessary intendment", and not by "indirect references, uncertain inferences or equivocal considerations"[49].

56 The Minister submitted, however, that the exclusion could be drawn from the statement appearing in s 422B, but not in s 473DA, that "[i]n applying this Division, the Tribunal must act in a way that is fair and just"[50]. In effect, the Minister's submission was that the absence of an express reference to acting fairly and justly in s 473DA implied that the Authority was empowered to act in a way that was unfair or unjust in the exercise of its powers even if the natural implication to draw from the relevant provision was to the contrary. That submission cannot be accepted. There is a convention of language that omission of a matter that is expressly mentioned elsewhere can imply its absence. But the force of this convention depends entirely on context. Here, a person's right to a reasonable opportunity to present a case, if naturally implied as part of a decision-maker's powers, is not an aspect of procedural fairness that can usually be abolished by Parliament by a nudge and a wink.

57 In summary, s 473DA(1) does not say that "in the process of interpreting the meaning of Div 3 of Pt 7AA and ss 473GA and 473GB, a court cannot draw

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49 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [14]-[15], quoting respectively *Annetts v McCann* (1990) 170 CLR 596 at 598; [1990] HCA 57 and *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396; [1958] HCA 6.

50 *Migration Act*, s 422B(3). See also *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252 at 262 [36]; 363 ALR 599 at 609.

any implication that would require conduct to give a person a reasonable opportunity to present a case". What s 473DA(1) does, however, is exclude from consideration, for any implication, those terms and provisions outside Div 3 of Pt 7AA or ss 473GA and 473GB. It precludes from the consideration of what procedural fairness requires in "reviews conducted by the Immigration Assessment Authority" any other legislative provisions, such as s 473FB in Div 5, which concerns practice directions issued by the President.

The limited implications of procedural fairness and unreasonableness in s 473GB

58 The only provision from which the appellant sought to draw an implication of procedural fairness, requiring disclosure to him that the Authority had received material that was the subject of a certificate, was s 473GB(3). Section 473GB(3) provides:

> "If the Immigration Assessment Authority is given a document or information and is notified that this section applies in relation to it, the Authority:
>
> (a) may, for the purpose of the exercise of its powers in relation to a fast track reviewable decision in respect of a referred applicant, have regard to any matter contained in the document, or to the information; and
>
> (b) may, if the Authority thinks it appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the referred applicant."

59 The "document or information" to which s 473GB(3) refers is not the written certificate. The certificate is issued under s 473GB(5) to certify that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for reasons, broadly, of public interest immunity or confidentiality[51].

60 Section 473GB(3) does not expressly require the Authority to disclose any matter contained in the document, or the information, to the referred applicant. However, the appellant submitted that s 473GB(3) contained an implied power to disclose to him that a certificate had been issued and a duty to do so where procedural fairness required.

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51 *Migration Act*, s 473GB(1).

61 Although the Minister had submitted that any such implication of procedural fairness had been excluded by s 473DA(1), the Minister accepted that s 473DA(1) had not excluded a requirement that the Authority must act according to an implied requirement of legal reasonableness in exercising its powers under s 473GB(3). In other words, even if any implication of procedural fairness were excluded by s 473DA(1), an implication with almost precisely the same content could be implied as a requirement of legal reasonableness.

62 It is hard to imagine any circumstance in which the exercise of a power in a manner contrary to the requirements of procedural fairness that would be implied but for the purported exclusion by s 473DA(1) would not be legally unreasonable[52]. However, in light of the conclusion I have reached about the proper interpretation of s 473DA(1), it is not necessary to consider the extent to which the acceptance of possible implications of legal reasonableness which might encompass the entirety of any duty of procedural fairness casts doubt upon whether Parliament would have intended to exclude an implication of the latter.

63 It can be assumed for the purposes of this appeal that the Authority has a power to disclose that a certificate had been issued in addition to the power to disclose information or documents that are the subject of the certificate. It might be expected that a duty to exercise that power in order to give procedural fairness to an applicant would arise only in exceptional circumstances. However, one circumstance where the effective functioning of s 473GB(3) might arguably require the exercise of the power to disclose that a certificate had been issued is if it is necessary to obtain submissions from an applicant concerning whether there should be disclosure of information that is the subject of the certificate[53].

64 It suffices for the purposes of this appeal to assume both the existence of that power and a duty to exercise it where necessary to give applicants a reasonable opportunity to present a case. Even on this assumption there was no duty for the Authority to disclose the existence of the certificate in this case.

Unfairness, unreasonableness and materiality

65 In written submissions, a focus of the Minister was upon whether any procedural unfairness or unreasonableness arising from a failure to disclose the

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52 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 373 [99]; [2013] HCA 18; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481 at 492 [49], 499-500 [97]; 353 ALR 600 at 613, 623-624.

53 See *Migration Act*, s 473DC(3) and *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481 at 488 [26], 492 [49], 499-500 [97]; 353 ALR 600 at 608, 613, 623-624.

existence of the certificate was material. However, he accepted in oral submissions that there is an anterior issue to materiality. This is whether the failure to disclose was unfair or unreasonable.

66 Both "unfair" and "unreasonable" are relative terms. For an exercise of power to be procedurally unfair there must be sufficient "practical injustice" in the departure from the procedure impliedly required by the statute[54]. For an exercise of power to be legally unreasonable it must be unreasonable to the degree required by the statutory implication[55]. It is only where an irregularity reaches the threshold of practical unfairness or the required statutory standard of unreasonableness that the question of materiality arises. Then, for a finding of jurisdictional error, materiality requires consideration of (i) whether the conduct involved a fundamental irregularity[56], or, if not, (ii) whether, despite the unfairness or unreasonableness, the result would not inevitably have been the same or, put another way, there was a possibility of a successful outcome[57]. There may, however, be circumstances where a discretion might nevertheless be exercised to refuse a new hearing, including practical reasons that have subsequently arisen that would make a new hearing futile[58].

67 Subject to issues concerning the substantive or evidentiary onus of proof[59] the same basic reasoning has long applied in relation to the proviso in criminal

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54 See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]-[38]; [2003] HCA 6.

55 See, eg, *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at 728 [53], 739-740 [133]-[135]; 357 ALR 408 at 421-422, 437-438; [2018] HCA 30.

56 *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 at 789 [40], 795-796 [72]; 359 ALR 1 at 11, 19; [2018] HCA 34.

57 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 341 [56]; *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 at 788 [31], 790 [42], 795 [72]; 359 ALR 1 at 9, 11, 19. See also *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; [1986] HCA 54.

58 *Nobarani v Mariconte* (2018) 92 ALJR 806 at 813 [39]; 359 ALR 31 at 39; [2018] HCA 36.

59 *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252 at 263 [46], but cf 272 [93]-[95]; 363 ALR 599 at 611, but cf 622-623. And compare *Mraz v The Queen* (1955) 93 CLR 493 at 514; [1955] HCA 59; *TKWJ v The Queen* (2002) 212 CLR 124 at 143 [63]; [2002] HCA 46; *Lindsay v*

(Footnote continues on next page)

appeals, where the adjective "substantial" is often used in place of "material". In most formulations of the common appeal provisions, an appeal will not be allowed unless there is a miscarriage of justice and it is not established that the miscarriage is not substantial[60]. The miscarriage is not substantial if the error was not fundamental and the result of the appeal would inevitably have been the same[61]. Again, there can be reasons why discretion might nevertheless be exercised not to grant a new trial.

68 The important point for this appeal is that in this process the anterior question to whether an error is jurisdictional, or whether a miscarriage of justice is substantial, is whether the action or error qualifies as legally unjust or legally unreasonable or, in the language of the criminal law, a miscarriage of justice. It was not asserted in this Court that the failure of the Authority to disclose to the appellant that it had received material that was the subject of a certificate was a jurisdictional error due to legal unreasonableness. The failure did not reach the sufficient threshold of unreasonableness. Nor did it reach the required threshold of legal unfairness. The failure to inform the appellant of the existence of the certificate did not affect the manner in which the review was conducted. The fact of the existence of the certificate would not have revealed to the appellant anything new about the subject matter to which the certificate related. It would not have revealed to the appellant anything about his brother's evidence or omissions from that evidence, and would not have revealed any significance that the Authority might have placed on that evidence or those omissions.

Conclusion

69 For these reasons the first ground of appeal must be dismissed. I agree with the reasons of the joint judgment for dismissing the second ground of appeal, and with the orders proposed in the joint judgment.

The Queen (2015) 255 CLR 272 at 294 [64]; [2015] HCA 16; *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

60 *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Procedure Act 1921* (SA), s 158(1)(c), (2); *Criminal Code* (Qld), s 668E(1), (1A); *Criminal Appeals Act 2004* (WA), s 30(3)(c), (4); *Criminal Code* (Tas), s 402(1), (2); *Criminal Code* (NT), s 411(1), (2); *Supreme Court Act 1933* (ACT), s 37O(2)(a)(iii), (3)(b). Compare *Criminal Procedure Act 2009* (Vic), s 276.

61 *OKS v Western Australia* (2019) 93 ALJR 438 at 446-447 [35]-[38]; 364 ALR 573 at 581-583; [2019] HCA 10.