HIGH COURT OF AUSTRALIA

GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

MINISTER FOR IMMIGRATION AND BORDER PROTECTION APPELLANT

AND

CED16 & ANOR RESPONDENTS

Minister for Immigration and Border Protection v CED16
[2020] HCA 24
Date of Hearing: 9 June 2020
Date of Judgment: 30 June 2020
S347/2019

ORDER

1. *Appeal allowed.*

2. *Set aside order 2 made by the Federal Court of Australia on 25 September 2018 and order 1 made by the Federal Court of Australia on 3 April 2019. In their place, order that the appeal from the judgment of the Federal Circuit Court of Australia given on 14 February 2017 be dismissed.*

3. *The appellant pay the first respondent's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

G T Johnson SC with B D Kaplan for the appellant (instructed by HWL Ebsworth Lawyers)

J F Gormly with D J McDonald-Norman for the first respondent (instructed by Labour Pains Legal)

Submitting appearance for the second respondent

CATCHWORDS

Minister for Immigration and Border Protection v CED16

Immigration – Refugees – Application for protection visa – Immigration Assessment Authority ("Authority") – Review by Authority under Pt 7AA of *Migration Act 1958* (Cth) – Where delegate of Minister for Immigration and Border Protection refused to grant first respondent protection visa – Where decision referred to Authority for review – Where Authority ordinarily obliged to consider "review material" provided by Secretary of Department of Immigration and Border Protection ("Secretary") without considering "new information" – Where review material must include material considered by Secretary to be relevant to review – Where review material included identity assessment form – Where Authority notified that s 473GB applied to identity assessment form – Where notification included certificate purporting to certify that disclosure of information or matter contained in identity assessment form contrary to public interest – Where certificate invalid – Where certificate not before delegate at time of making decision under review – Whether certificate "new information" within meaning of s 473DC(1) – Whether certificate a "document" or contained "information" – Whether Authority could be inferred to have considered that certificate may have been relevant to conduct of review.

Words and phrases – "certificate", "document", "documentation or information of an evidentiary nature", "fact, subject or event", "fast track reviewable decision", "identity assessment form", "information", "new information", "notification", "procedural obligation", "protection visa", "relevant", "relevant to the conduct of the review", "review material".

Migration Act 1958 (Cth), Pt 7AA.

1 GAGELER, KEANE, NETTLE AND GORDON JJ. The Minister for Immigration and Border Protection appeals by special leave from a judgment of Derrington J in the Federal Court of Australia allowing an appeal from a judgment of Judge Street in the Federal Circuit Court of Australia. The judgment of Judge Street dismissed an application by the first respondent for judicial review of a decision of the Immigration Assessment Authority which affirmed a decision of a delegate of the Minister not to grant the first respondent a protection visa. The appeal from the judgment of Derrington J is to be allowed and the judgment of Judge Street dismissing the application for judicial review is to be restored in the application of principles established in prior decisions of this Court. No novel issue arises.

2 The matter to which the appeal relates has an unfortunate procedural history. The first respondent, who is a citizen of Sri Lanka, arrived in Australia in September 2012 as an "unauthorised maritime arrival" within the meaning of the *Migration Act 1958* (Cth). The first respondent lodged an application for a protection visa in September 2015. The delegate of the Minister decided not to grant the visa in May 2016. Being a "fast track reviewable decision" within the meaning of the Act, the decision of the delegate of the Minister was immediately referred for review by the Authority under Pt 7AA of the Act.

3 In compliance with s 473CB(1) of the Act, a delegate of the Secretary of the Department of Immigration and Border Protection soon after the referral gave to the Authority "review material" which was required by s 473CB(1)(c) to include any material in the Secretary's possession or control "considered by the Secretary [at the time of referral] to be relevant to the review". Included within the review material given to the Authority by the delegate of the Secretary was a document described as a "Draft IMAPS Identity Assessment Form" ("the Identity Assessment Form").

4 Contemporaneously with the referral, in purported compliance with s 473GB(2)(a), notification was given to the Authority that s 473GB applied to the Identity Assessment Form. Included within that notification was a certificate ("the Certificate") stated to be issued by a delegate of the Minister under s 473GB(5) which purported to certify for the purpose of s 473GB(1)(a) that disclosure of information or matter contained in the Identity Assessment Form would be contrary to the public interest "because it is a Departmental working document".

5 The Authority made its decision to affirm the decision of the delegate of the Minister not to grant the first respondent a protection visa in July 2016. The statement of reasons for its decision which the Authority then gave in accordance with s 473EA(1)(b) of the Act contained the statement that the Authority "had regard to the material referred by the Secretary under s 473CB". The statement of

reasons made no reference to the Identity Assessment Form or to the Certificate and addressed no issue concerning the identity of the first respondent.

6 The first respondent's application to the Federal Circuit Court for judicial review of the decision of the Authority identified a number of grounds of review. The penultimate ground, although not formulated with precision, was broadly to the effect that the decision of the Authority was affected by jurisdictional error for reasons related to the invalidity of the Certificate.

7 At the first return date of the application for judicial review in October 2016, Judge Street fixed the application for hearing on a date in February 2017 and made other timetabling directions. One of those other directions was a direction that the Minister by a date in November 2016 file and serve on the first respondent a "Court Book". The Court Book which the Minister went on to file and serve in accordance with that direction included a copy of the Certificate. The Court Book did not include a copy of the Identity Assessment Form. The index to the Court Book listed the Identity Assessment Form as a document on the departmental file which had been before the Authority but indicated that it was a document which was "not reproduced" in the Court Book. The first respondent, who was then legally represented, did not seek its production. In the result, the Identity Assessment Form was not put in evidence.

8 The hearing of the application for judicial review proceeded before Judge Street on the scheduled date in February 2017. For reasons given orally at the conclusion of the hearing on that date and later published in writing, his Honour dismissed the application[1]. His Honour rejected the penultimate ground of review without finding it necessary to determine whether the Certificate was invalid. His Honour did so on the basis that "no rational argument" was developed before him as to how the Identity Assessment Form "could have possible relevance to the outcome of the decision of the Authority"[2].

9 During the course of the appeal by the first respondent from the judgment of Judge Street to the Federal Court, the Minister adduced further evidence for the purpose of demonstrating that the Identity Assessment Form had been before the delegate of the Minister at the time of making the initial decision not to grant the

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1 *CED16 v Minister for Immigration and Border Protection* [2017] FCCA 233.

2 [2017] FCCA 233 at [51].

first respondent a protection visa. But again, the Identity Assessment Form was not put in evidence.

10 Exercising the appellate jurisdiction of the Federal Court alone, as is common in migration appeals, Derrington J heard the appeal in August 2018. In September 2018, his Honour delivered a judgment in which he allowed the appeal but made no consequential orders[3]. In April 2019, his Honour delivered a further judgment in which he set aside the order of Judge Street dismissing the application for judicial review and ordered the issue of writs of certiorari and mandamus directed to the Authority[4].

11 The first respondent had sought leave at the hearing of the appeal to the Federal Court to rely on proposed grounds of appeal formulated in terms differing from the grounds on which he had relied in the application before Judge Street. In his reasons for judgment delivered in September 2018, Derrington J granted the first respondent leave to rely on just one of those proposed grounds of appeal. The ground of appeal on which his Honour then granted leave was formulated in terms that the decision of the Authority "was affected by jurisdictional error because the statutory condition required to enliven the discretionary powers under s 473GB(3)(a) and (b) had not been met". As the ground was particularised by the first respondent, the statutory pre-condition in s 473GB(2)(a) to the enlivening of the powers conferred by s 473GB(3)(a) and (b) had not been met "because the Certificate was invalid, it not having been issued for the purposes of s 473GB(1)".

12 The Minister for his part had conceded at the hearing of the appeal to the Federal Court that the Certificate was invalid. The concession was well made. The reason specified in the Certificate, that the Identity Assessment Form was a "Departmental working document", was plainly an insufficient basis for "a claim by the Crown in right of the Commonwealth in a judicial proceeding" that information or matter contained in the Identity Assessment Form "should not be disclosed". The Certificate therefore failed to meet the description in s 473GB(1)(a), as a consequence of which the whole of s 473GB (including the duty imposed on the Secretary by s 473GB(2)(a) and the powers conferred on the Authority by s 473GB(3)(a) and (b)) simply had no application to the Identity Assessment Form.

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3 *CED16 v Minister for Immigration and Border Protection* (2018) 265 FCR 115.

4 *CED16 v Minister for Immigration and Border Protection [No 2]* [2019] FCA 438.

13 To determine the appeal on the sole ground of appeal on which his Honour ultimately granted the first respondent leave to rely, Derrington J was accordingly required to turn his attention to the effect on the decision of the Authority of the non-enlivening of the powers conferred by s 473GB(3)(a) and (b). In his reasons for judgment delivered in September 2018, Derrington J instead adopted a path of reasoning not canvassed in the parties' submissions. The Certificate, his Honour then held, was "new information" within the meaning given by s 473DC(1)[5]. The Authority, his Honour then found, fell into jurisdictional error by having regard to that "new information" in making its decision without giving, or considering giving, particulars of it to the first respondent in compliance with s 473DE(1)[6].

14 The Minister argues in the appeal to this Court that Derrington J was wrong to characterise the Certificate as "new information" within the meaning given by s 473DC(1) for the reason that the Certificate was incapable of satisfying the description of "information" consistently with reasoning of this Court in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*[7] and in *Minister for Immigration and Border Protection v SZMTA*[8]. The Minister argues in the alternative that, even if the Certificate contained "new information", Derrington J was wrong to think that s 473DE(1) applied to the Certificate for the reason that the Certificate was incapable of satisfying the condition in s 473DE(1)(a)(ii), that any new information it contained "would be the reason, or a part of the reason" for affirming the delegate's decision, as the language of that condition has been consistently interpreted by this Court in *SZBYR v Minister for Immigration and*

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5 *CED16 v Minister for Immigration and Border Protection* (2018) 265 FCR 115 at 131 [57], 132 [60].

6 *CED16 v Minister for Immigration and Border Protection* (2018) 265 FCR 115 at 131-132 [59], 132 [61].

7 (2018) 264 CLR 217 at 228 [24].

8 (2019) 264 CLR 421 at 440 [28].

Citizenship[9], *Minister for Immigration and Citizenship v SZLFX*[10], *Plaintiff M174/2016*[11] and *SZMTA*[12].

15 The first respondent concedes in the appeal to this Court that the Certificate was incapable of satisfying the condition in s 473DE(1)(a)(ii) as interpreted in *SZBYR*, *SZLFX*, *Plaintiff M174/2016* and *SZMTA*. The first respondent nevertheless contends that Derrington J was correct to hold that the Certificate was "new information" and correct to conclude that receipt of that "new information" caused the Authority to fall into jurisdictional error. Receipt of the "new information" caused the Authority to fall into jurisdictional error, the first respondent contends, not because it led to the Authority failing to comply with s 473DC(1) but because it led to the Authority failing to perform the procedural obligation imposed by s 473DB(1)(a) to review the fast track reviewable decision referred to it "by considering the review material provided to the Authority under section 473CB ... without accepting ... new information".

16 The meaning given to "new information" by s 473DC(1) for the purposes of Pt 7AA is "any documents or information" that satisfy two conditions. The first condition, specified in s 473DC(1)(a), requires that the documents or information not have been before the Minister or delegate at the time of the making of the decision under review. The second condition, specified in s 473DC(1)(b), requires that the Authority consider that the documents or information "may be relevant".

17 Taken at its highest, the argument now put by the first respondent that the Certificate met the definition of "new information" is that: (1) the Certificate was a "document" or contained "information"; (2) the Certificate was not before the delegate of the Minister at the time of the making of the decision not to grant the protection visa; and (3) having received the Certificate at the time of referral, the Authority can be inferred to have considered that the Certificate may have been relevant to the conduct of the review.

18 The argument that the Authority can be inferred to have considered that the Certificate may have been relevant to the conduct of the review is put by the first respondent at two levels. At the more general level, the first respondent argues that

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9 (2007) 81 ALJR 1190 at 1195-1196 [17]; 235 ALR 609 at 615.

10 (2009) 238 CLR 507 at 513-514 [20]-[23].

11 (2018) 264 CLR 217 at 223 [9].

12 (2019) 264 CLR 421 at 435 [10].

the fact that the Certificate was given to the Authority in conjunction with the purported notification under s 473GB(2)(a) justifies the inference that the Authority accepted the Certificate to be valid for the purpose of s 473GB(1)(a) so as to enliven the powers conferred by s 473GB(3)(a) and (b) in relation to information contained in the Identity Assessment Form. At a more specific level, the first respondent argues that the statement in the Authority's reasons that the Authority "had regard to the material referred by the Secretary under s 473CB" justifies the inference that the Authority in fact exercised the power conferred by s 473GB(3)(a) to take information contained in the Identity Assessment Form into account in making its decision to affirm the decision under review.

19 Whilst the more general inference is available to be drawn, the more specific inference is not. Fairly read within the statutory context in which the Authority's reasons were given[13], its statement that it "had regard to the material referred by the Secretary under s 473CB" did no more than reflect the Authority's conscious compliance with the primary procedural obligation imposed on it by s 473DB(1) to review the fast track reviewable decision referred to it by considering the review material provided to it under s 473CB. The obligation imposed by s 473DB(1) is no more than "that the Authority examine the review material provided to it by the Secretary in order for the Authority to form and act on its own assessment of the relevance of that material to the review of the referred decision"[14]. The statement alone provides no foundation for an inference that the Authority treated any specific part of the review material as a basis for making any finding of fact that formed part of the reason for its decision to affirm the decision under review[15]. Even less does the statement provide a foundation for an inference that the Authority took into account review material covered by any notification or purported notification under s 473GB(2)(a)[16]. However, that minor difficulty for

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13 cf *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1100 [38]-[40]; 373 ALR 196 at 205-206.

14 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [7]; 375 ALR 47 at 50.

15 cf *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [8]; 375 ALR 47 at 50.

16 cf *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [47].

the first respondent's attempt to support the overall conclusion of Derrington J can be put to one side.

20 The fundamental difficulty with the notion that the Certificate met the definition of "new information" in s 473DC(1) is essentially that captured in the central argument of the Minister in the appeal to this Court that the Certificate was incapable of satisfying the description of "information".

21 The plurality in *Plaintiff M174/2016*[17] explained that "[t]he 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". Adapting to the scheme of Pt 7AA the subsequent holding in *SZMTA*[18] concerning the same terminology in Pt 7 of the Act, "[t]he term 'information' in the context of [Div 3] cannot sensibly be read as extending beyond knowledge of facts or circumstances relating to material or documentation of an evidentiary nature".

22 Interpreted in accordance with the authority of *Plaintiff M174/2016* and *SZMTA*, the reference to "any documents or information" in the definition of "new information" in s 473DC(1) has no application to a certificate issued or purporting to be issued under s 473GB(5) for the purpose of s 473GB(1)(a), just as the definition has no application to a written notification made or purporting to be made under s 473GB(2)(a). A certificate or notification of that nature is an instrument which, if valid, has statutory consequences under s 473GB(3)(a) and (b). It is not a document which communicates knowledge of facts or circumstances of an evidentiary nature.

23 Consistently with the confinement of s 473DC(1)'s reference to "any documents or information" to documentation or information of an evidentiary nature, the word "relevant" in s 473DC(1)(b) can only sensibly be read as having the same meaning that the word "relevant" has in s 473CB(1)(c). Documentation or information of an evidentiary nature that the Authority considers may be "relevant" is documentation or information of an evidentiary nature that the Authority considers "capable directly or indirectly of rationally affecting assessment of the probability of the existence of some fact about which the

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17 (2018) 264 CLR 217 at 228 [24].

18 (2019) 264 CLR 421 at 440 [28].

Authority might be required to make a finding in the conduct of its review of the referred decision"[19].

24 The Certificate was therefore not a "document" nor did it contain "information" within the reference to "any documents or information" in the definition of "new information" in s 473DC(1). Moreover, even if the Authority had treated the Certificate as valid to enliven the powers conferred by s 473GB(3)(a) and (b), and even if the Authority had gone on to exercise the power conferred by s 473GB(3)(a) to take the Identity Assessment Form into account in making some finding of fact in the review, the Authority cannot thereby be taken to have considered that the Certificate "may be relevant" within the meaning of s 473DC(1)(b).

25 In contrast to the Certificate, the Identity Assessment Form to which the Certificate related did have the character of documentation of an evidentiary nature. As Derrington J appears correctly to have recognised[20], however, the Identity Assessment Form was excluded from the definition of "new information" in s 473DC(1) for the reason that it had been before the delegate of the Minister at the time of making the decision not to grant the protection visa.

26 For completeness, it is to be noted that the first respondent does not seek by notice of contention to uphold the orders made by Derrington J by invoking another aspect of the reasoning in *SZMTA*[21] to argue that the invalid notification purporting to be made under s 473GB(2)(a) "amount[ed], without more, to an unauthorised act in breach of a limitation within the statutory procedures which condition the performance of the overarching duty of the [Authority] to conduct a review" subject to the implied limitation that "the Act is not to be interpreted to deny legal force to a decision made on a review in the conduct of which there has been a breach of that limitation unless that breach is material". The appeal can be, and is to be, allowed without reference to any issue of materiality.

27 The appeal is to be allowed. The substantive orders made by Derrington J are to be set aside. The order of Judge Street dismissing the application for judicial review is to be restored. In accordance with undertakings as to costs given by the

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19 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [6]; 375 ALR 47 at 50.

20 *CED16 v Minister for Immigration and Border Protection* (2018) 265 FCR 115 at 118 [7].

21 (2019) 264 CLR 421 at 444 [44].

Minister as a condition of the grant of special leave, the costs orders made by Derrington J are to be left undisturbed.

28 EDELMAN J. The *Migration Act 1958* (Cth) has been the subject of vast amounts of litigation. It has been amended many times. Sometimes the litigation has concerned amendments in response to judicial interpretations which have, themselves, been the response to amendments. This background, together with the particular context and purpose of some of the legislative provisions, can sometimes give a provision a meaning that might be contrary to the first impression of a reasonable reader whose understanding of the legislation is consistent with the plain language drafting technique of parliamentary counsel[22]. The essence of this appeal concerns the short, and mundane, issue of the meaning of two words, "new information". I agree with the joint judgment that those words in Pt 7AA describe only a particular class of new information. As the joint judgment explains, the same conclusion was reached in relation to the meaning of "information" in the context of Pt 7 of the *Migration Act* by Bell, Gageler and Keane JJ in *Minister for Immigration and Border Protection v SZMTA*[23], a decision delivered subsequent to that of Derrington J in the Federal Court of Australia from which this appeal is brought. In the context of Pt 7, as in the context of Pt 7AA, "information" is limited to "facts or circumstances relating to material or documentation of an evidentiary nature"[24]. That conclusion resolves this appeal.

29 In the Federal Court of Australia, the conclusion of Derrington J that the Immigration Assessment Authority ("the Authority") had made a jurisdictional error was dependent upon the ordinary meaning of the words "new information". The oral submissions of the first respondent in this Court also relied upon the same ordinary meaning of those words. The first respondent accepted that the entirety of his argument that the Authority had contravened s 473DB(1)(a) of the *Migration Act* depended upon establishing that the Authority had accepted "new information".

30 In light of the context in which "new information" appears in s 473DB(1)(a), I agree with the joint judgment that these words should not be interpreted to mean all information which is new. The words must mean only new information of an evidentiary nature. This restriction upon the ordinary meaning of "new information" in Pt 7AA can be most directly seen in the "definition"[25] of

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22 Office of Parliamentary Counsel, *Plain English Manual* (2016). See Dharmananda, "Drafting Statutes and Statutory Interpretation: Express or Assumed Rules?" (2019) 45 *Monash University Law Review* 401.

23 (2019) 264 CLR 421.

24 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 440 [28]. See also *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [18]; 235 ALR 609 at 616.

25 See s 473BB: "***new information*** has the meaning given by subsection 473DC(1)".

"new information" in s 473DC(1), which provides that subject to Pt 7AA 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". The relevance to which s 473DC(1) refers is relevance to the Authority's decision. The documents or information which comprise "new information" must therefore be documents or information that are capable of being considered by the Authority to be relevant to its decision. That class of documents concerns material or documentation of an evidentiary nature.

31 The certificate issued by the delegate of the Minister purported to be a certification pursuant to s 473GB(5). It relevantly provided:

> "I notify the Immigration Assessment Authority that section 473GB of the *Migration Act 1958* applies to a document or information in the document titled CLD2015/20746095 AAR054 DRAFT IMAPS Identity Assessment Form ...
>
> In my view, this document or information should not be disclosed to the referred applicant or the referred applicant's representative because:
>
> (a) the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest because it is a Departmental working document."

The classification of the matter to which the certificate related as a "Departmental working document" was insufficient to meet either of the required criteria for certification in s 473GB(1).

32 If the Identity Assessment Form had not been before the Minister at the time that the Minister made his decision under s 65 it might have contained new information. But since that form was before the Minister this appeal resolves simply to whether the certificate itself is material that could be capable of being relevant to the Authority's decision. The certificate effectively did no more than notify the Authority of the title of the form and the reason asserted for its non-disclosure to the applicant or to the applicant's representative. It was not material that was capable of being considered by the Authority to be relevant to the Authority's decision. The Authority made no specific reference to it.

33 The appeal should be allowed and orders made as proposed in the joint judgment.