HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

AUS17 APPELLANT

AND

MINISTER FOR IMMIGRATION AND
BORDER PROTECTION & ANOR RESPONDENTS

AUS17 v Minister for Immigration and Border Protection
[2020] HCA 37
Date of Hearing: 4 September 2020
Date of Judgment: 14 October 2020
S71/2020

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2, 3, 4 and 5 of the Federal Court of Australia made on 16 October 2019 and, in their place, order that the appeal to that Court be dismissed with costs.*

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

On appeal from the Federal Court of Australia

Representation

S B Lloyd SC and J B King for the appellant (instructed by Varess)

G R Kennett SC with B D Kaplan for the first respondent (instructed by Sparke Helmore Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

AUS17 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 delegate of Minister for Immigration and Border Protection refused to grant appellant protection visa – Where decision referred to Authority for review – Where appellant's representative supplied Authority with further materials including letter of support from third party which post-dated delegate's decision – Where Authority considered the letter was "new information" but concluded it was not able to be considered under s 473DD – Where Authority assessed new information against criteria in ss 473DD(b)(i) and 473DD(a) but not s 473DD(b)(ii) – Whether s 473DD requires Authority to consider criteria in ss 473DD(b)(i) and 473DD(b)(ii) before considering criterion in s 473DD(a).

Words and phrases – "credible personal information", "exceptional circumstances", "fast track reviewable decision", "Immigration Assessment Authority", "mandatory relevant consideration", "new information", "referred applicant".

Migration Act 1958 (Cth), Pt 7AA.

1 KIEFEL CJ, GAGELER, KEANE AND GORDON JJ. This appeal from a judgment of the Federal Court of Australia[1], on appeal from a judgment of the Federal Circuit Court of Australia[2] in an application for judicial review of a decision of the Immigration Assessment Authority, turns on the construction and operation of s 473DD within Pt 7AA of the *Migration Act 1958* (Cth).

Section 473DD in context

2 Part 7AA has now been surveyed on numerous occasions[3]. Section 473CC imposes a duty on the Authority to review a "fast track reviewable decision" referred to it by the Minister for Immigration and Border Protection by which a delegate of the Minister has refused under s 65 to grant a protection visa to the "referred applicant". The Authority is required by s 473DB to perform that duty by "considering" the "review material" provided to it by the Secretary of the Department of Immigration and Border Protection at the time of referral[4] "without accepting or requesting new information"[5] save to the extent that the Authority "gets" new information from the referred applicant or some other person under s 473DC and goes on to "consider" that new information under s 473DD.

3 "Information" – a communication of "knowledge of facts or circumstances ... of an evidentiary nature"[6] – amounts to "new information" if the information meets two conditions[7]. The first is that the information was not before the Minister

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1 *Minister for Immigration and Border Protection v AUS17* (2019) 167 ALD 313.

2 *AUS17 v Minister for Immigration and Border Protection* [2017] FCCA 1986.

3 See *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [1] and the cases there cited.

4 Sections 473BB (definition of "review material") and 473CB of the *Migration Act*.

5 Section 473DB(1)(a) of the *Migration Act*.

6 *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706 at 710-711 [21]; 380 ALR 216 at 222, quoting *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 440 [28].

7 Sections 473BB (definition of "new information") and 473DC(1) of the *Migration Act*. See *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 228 [24].

at the time of making the referred decision[8]. The second is that the Authority considers that the information might be "relevant" to the review[9], meaning that the Authority thinks that the information might be capable of rationally affecting its assessment of the probability of the existence of some fact about which it might be required to make a finding in its decision on the review[10].

4 The Authority "gets" new information within the meaning of s 473DC when and if the Authority physically obtains new information[11]. The Authority goes on to "consider" new information within the meaning of s 473DD when and if the Authority takes new information it has got into account in making its decision on the review, assigning the new information such probative weight as it thinks the new information deserves in its assessment of the probability of the existence of some fact about which it actually makes a finding[12].

5 Section 473DD is in the following terms:

> "For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment Authority must not consider any new information unless:
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> (a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and
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> (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

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8 Section 473DC(1)(a) of the *Migration Act*.

9 Section 473DC(1)(b) of the *Migration Act*.

10 *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706 at 711 [23]; 380 ALR 216 at 222.

11 cf *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 228 [23].

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

(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."

6 Though expressed to prohibit the Authority from considering new information if the criteria it specifies are not met, s 473DD necessarily operates against the background of s 473DB also to empower the Authority to consider new information if the criteria it specifies are met. For that binary outcome of the application of s 473DD to be workable, s 473DD must be construed to impose a duty on the Authority to assess new information that it has got against the specified criteria. Having performed that duty to assess the new information against the specified criteria, the Authority must take that new information into account in making its decision on the review if those criteria are met and must not take that new information into account in making its decision on the review if those criteria are not met.

7 The criteria that must be met if the Authority is to take new information that it has got into account in making its decision on the review vary according to the provenance of the new information that has been obtained by the Authority. All new information is required to meet the criterion specified in s 473DD(a) that the Authority is satisfied of the existence of "exceptional circumstances" justifying its consideration of that new information[13].

8 New information obtained from the referred applicant is required to meet at least one of the additional criteria specified in s 473DD(b). The additional criterion specified in s 473DD(b)(i) is met if the referred applicant satisfies the Authority that the new information meets the bipartite description of information that was not before the Minister at the time of making the referred decision and that could not have been before the Minister at the time of making the referred decision. The additional criterion specified in s 473DD(b)(ii) is met if the referred applicant satisfies the Authority that the new information meets the tripartite description of "credible personal information", that was not previously known, and that may have

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13 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 229 [29]-[30].

affected consideration of the referred applicant's claims to be a person in respect of whom Australia has protection obligations if it had been previously known[14].

9 Section 473DD(b)(ii) was inserted during the parliamentary process which resulted in the enactment of Pt 7AA for the express purpose of expanding the circumstances in which new information obtained from a referred applicant might be considered by the Authority beyond those which would have prevailed had s 473DD(a) been left to operate only in combination with s 473DD(b)(i)[15]. Section 473DD(b)(ii) to that extent modifies the policy manifest in s 5AAA, s 473DB and s 473DD(b)(i) of casting responsibility on the applicant for a protection visa to provide evidence to establish his or her claims to be a person in respect of whom Australia has protection obligations at the time of making the application. Section 473DD(b)(ii) allows for a very limited second opportunity to provide evidence that might previously have been provided.

10 Section 473DD would be at war with itself, and the purpose of s 473DD(b)(ii) would be thwarted, if the circumstance that there was new information from a referred applicant meeting the description in either s 473DD(b)(i) or s 473DD(b)(ii) were able to be ignored by the Authority in assessing the existence of exceptional circumstances justifying consideration of that new information in order to meet the criterion specified in s 473DD(a).

11 Logic and policy therefore demand that the Authority assess such new information as it might obtain from the referred applicant first against the criteria specified in both s 473DD(b)(i) and s 473DD(b)(ii) and only then against the criterion specified in s 473DD(a). If neither of the criteria specified in s 473DD(b)(i) and s 473DD(b)(ii) is met, the Authority is prohibited from taking the new information into account in making its decision on the review. Further assessment of the new information against the criterion specified in s 473DD(a) is redundant. If either the criterion specified in s 473DD(b)(i) or the criterion specified in s 473DD(b)(ii) is met, that is a circumstance which must be factored into the subsequent assessment of whether the new information meets the

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14 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 230-231 [33]-[34].

15 Australia, Senate, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Supplementary Explanatory Memorandum (Sheet GH118) at 6 [29], quoted in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 230 [33].

criterion specified in s 473DD(a). If both the criterion specified in s 473DD(b)(i) and the criterion specified in s 473DD(b)(ii) are met, that too is a circumstance which must be factored into the subsequent assessment of whether the new information meets the criterion specified in s 473DD(a) and which must heighten the prospect of that criterion being met.

12 The result, as has been recognised by the Federal Court in numerous other cases[16], is that the Authority does not perform the procedural duty imposed on it by s 473DD in its conduct of a review if it determines in the purported application of the criterion in s 473DD(a) that exceptional circumstances justifying consideration of new information obtained from the referred applicant do not exist without first assessing that information against the criteria specified in both s 473DD(b)(i) and s 473DD(b)(ii) and then taking the outcome of that assessment into account in its assessment against the criterion specified in s 473DD(a). The nature of the non-performance of the procedural duty in such a case is not inaccurately characterised as a failure to take account of a mandatory relevant consideration in the purported application of the criterion in s 473DD(a)[17].

13 As will be seen, that result was recognised and correctly applied by the Federal Circuit Court in the present case, but regrettably not by the Federal Court.

The present case

14 The appellant is a Sri Lankan citizen of Tamil ethnicity from the Jaffna District of Sri Lanka whose application for a protection visa was refused by a delegate of the Minister in a fast track reviewable decision which the Minister referred to the Authority.

15 Central to the appellant's claims to be a person in respect of whom Australia has protection obligations were his claims to fear mistreatment at the hands of the Eelam People's Democratic Party ("the EPDP") as well as at the hands of the Sri Lankan Army. Whilst the delegate accepted the evidence provided by the

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16 *BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221 at 224-225 [9], 230 [35]-[37]; *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111 at 144-146 [102]-[112]; *CHF16 v Minister for Immigration and Border Protection* (2017) 257 FCR 148 at 158-159 [44]-[45]; *Minister for Immigration and Border Protection v CQW17* (2018) 264 FCR 249 at 259 [47]-[49], 260 [51].

17 Pace *Minister for Immigration and Border Protection v CQW17* (2018) 264 FCR 249 at 259-260 [50].

appellant in support of those claims to be generally credible, the delegate found that the appellant did not face a real risk of the mistreatment he feared. That was in part because the delegate found that the appellant was no longer a person of interest to the EPDP and in part because the delegate found that the individuals within the Sri Lankan Army who might want to harm the appellant did not extend to the "army establishment" but were confined to soldiers located at a particular army camp who were colleagues of a soldier killed in a car accident in which the appellant had been involved.

16 Under cover of a submission from his migration agent, the appellant proffered to the Authority for the purpose of its review of the delegate's decision several documents which he had not provided to the Minister in support of his application. One was a letter which post-dated the decision of the delegate. The letter was from Mr Appathuray Vinayagamoorthy, a lawyer and former member of the Sri Lankan Parliament for the Jaffna District. The letter stated that the appellant and his family were known to Mr Vinayagamoorthy and went on to recount historical events corroborative of the appellant's claims. The letter added, "[e]ven still the EPDP and the Army visit his house to make inquiries about his whereabouts".

17 The Authority affirmed the decision of the delegate, finding amongst other things that the appellant had fabricated his claim to fear mistreatment at the hands of the EPDP and had embellished his claim to fear mistreatment at the hands of the Sri Lankan Army. The Authority recorded in the statement of reasons for its decision on the review that the letter was "new information" which it had not considered in making its decision on the review. That was for reasons which the Reviewer who constituted the Authority for the purpose of the review explained in the following terms:

> "I accept the letter of support from Appathuray Vinayagamoorthy could not have been provided to the delegate as it was written after the delegate's decision. However, the information it provides recounts the claims already provided by the applicant and in that regard there is no reason to believe that the applicant could not have obtained a letter outlining this information earlier and provided it to the Minister. I am not satisfied that any exceptional circumstances exist that justify considering the new information."

18 Plainly enough, the Authority assessed the letter against the criterion specified in s 473DD(b)(i), finding that criterion not to be met. It went on to assess the letter against the criterion specified in s 473DD(a), finding that criterion not to be met. There being nothing to suggest that the letter was incapable of being assessed by the Authority to meet the criterion specified in s 473DD(b)(ii), what the Authority should have done, but evidently did not do, was assess the letter

against the criterion specified in s 473DD(b)(ii) and then take that assessment into account in going on to assess the letter against the criterion specified in s 473DD(a).

19 In the Federal Circuit Court, Judge Driver correctly so found[18]. His Honour ordered the issue of writs of certiorari and mandamus directed to the Authority.

20 Exercising alone the appellate jurisdiction of the Federal Court, Logan J took the view that the Authority was not obliged to have regard to the criterion specified in s 473DD(b)(ii) in assessing the letter against the criterion specified in s 473DD(a)[19] and also took the view that the Authority's conclusion that the letter did not meet the criterion specified in s 473DD(b)(i) was a sufficient basis for its conclusion that the letter did not meet the criterion specified in s 473DD(a)[20]. In both respects, his Honour was wrong.

21 There being no challenge to his Honour's further finding that any misapplication of s 473DD in relation to the letter was material to the Authority's decision on the review[21], it follows that his Honour was wrong to allow the Minister's appeal from the orders of Judge Driver. Those orders are now to be restored.

Orders

22 The appeal is to be allowed with costs. The substantive orders made by Logan J are to be set aside. In their place, it is to be ordered that the appeal from the orders of Judge Driver is to be dismissed with costs.

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18 *AUS17 v Minister for Immigration and Border Protection* [2017] FCCA 1986 at [38]-[39], [47].

19 *Minister for Immigration and Border Protection v AUS17* (2019) 167 ALD 313 at 320 [24].

20 *Minister for Immigration and Border Protection v AUS17* (2019) 167 ALD 313 at 320-321 [26].

21 *Minister for Immigration and Border Protection v AUS17* (2019) 167 ALD 313 at 321 [27].

23 EDELMAN J. The facts and legislative provisions are set out in the joint reasons of the other members of this Court. I agree with the orders proposed by their Honours. With respect, I also agree that, as a matter of policy, a prudent approach for the Immigration Assessment Authority to take is that described in the joint reasons at [11]. When considering s 473DD, in relation to new information given or proposed to be given by a referred applicant, it would be efficient and prudent for the Authority first to consider the two conditions in s 473DD(b)(i) and s 473DD(b)(ii), and only subsequently to consider s 473DD(a) if one or both of the two conditions is met.

24 My only departure from the joint reasons is that I do not consider that such a reasoning procedure is demanded by the logic of s 473DD. In my view, an alternative approach that is equally open to the Authority as a matter of law is to consider s 473DD(a) first. If the "exceptional circumstances" criterion were not met, then there would not be a further requirement for the Authority to consider either limb of s 473DD(b) individually. This alternative approach by the Authority would align with the same manner of consideration of s 473DD(a) by the Authority where the new information is not given or proposed to be given to the Authority by the referred applicant, such as where new information is given by the Secretary. In the scenario where new information is given by the Secretary, the Authority would never turn to consider s 473DD(b) independently, although the issues raised by the two limbs of s 473DD(b) might often be considered as material circumstances in the assessment of whether there are "exceptional circumstances". This alternative approach also recognises that there will be some cases where the criteria in s 473DD(b) might not be relevant to s 473DD(a). One of those cases might be where new country information is provided to the Authority either by the Secretary or by the referred applicant. In considering whether exceptional circumstances exist, the Authority is not required to ask itself whether the country information is "credible personal information" within s 473DD(b)(ii). Plainly, country information is not personal information, which in broad terms is "information or an opinion about an identified individual, or an individual who is reasonably identifiable"[22].

25 The reason, nevertheless, that I consider the approach proposed by the joint reasons to be both efficient and prudent in the particular circumstance of new information given, or proposed to be given, by a referred applicant is that it reduces duplication of consideration and helps to ensure that material circumstances are not overlooked. Since s 473DD(a) will often require consideration of the two criteria in s 473DD(b) as part of all the material circumstances, a sensible and efficient approach is for s 473DD(b) to be considered first when it is engaged so that those considerations are in the forefront of the Authority's mind when considering exceptional circumstances. In this case, both criteria should have been

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22 *Migration Act 1958* (Cth), s 5(1) picking up the definition of "personal information" in *Privacy Act 1988* (Cth), s 6(1).

considered by the Authority in its assessment of whether exceptional circumstances existed to justify consideration of the letter but one of them was not considered. I agree with the joint reasons that Logan J erred on this point in his otherwise comprehensive and careful judgment.