HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, GORDON AND EDELMAN JJ

Matter No M57/2020

MINISTER FOR HOME AFFAIRS — APPELLANT

AND

DUA16 & ANOR — RESPONDENTS

Matter No M58/2020

MINISTER FOR HOME AFFAIRS — APPELLANT

AND

CHK16 & ANOR — RESPONDENTS

Minister for Home Affairs v DUA16
Minister for Home Affairs v CHK16
[2020] HCA 46
Date of Hearing: 14 October 2020
Date of Judgment: 9 December 2020
M57/2020 & M58/2020

ORDER

Matter No M57/2020

1. *Appeal allowed.*

2. *Save as to costs, set aside the orders of the Full Court of the Federal Court of Australia made on 10 December 2019 and, in their place, order that:*

    (a) the appeal be allowed; and

(b) orders 1 and 2 of the orders of the Federal Circuit Court of Australia made on 30 April 2019 be set aside and, in their place, it be ordered that the application be dismissed.

Matter No M58/2020

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

G R Kennett SC with N M Wood for the appellant in both matters (instructed by Clayton Utz)

G A Costello SC and A N P McBeth for the first respondent in both matters (instructed by Clothier Anderson Immigration Lawyers)

Submitting appearance for the second respondent in both matters

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Minister for Home Affairs v DUA16
Minister for Home Affairs v CHK16

Immigration – Refugees – Application for protection visa – Immigration Assessment Authority ("Authority") – Review by Authority under Pt 7AA of *Migration Act 1958* (Cth) – Where applicants engaged registered migration agent to provide submissions to Authority – Where agent fraudulently provided pro forma submissions – Where fraudulent submissions contained personal information relevant to a different person – Where Authority unaware of fraud but aware that submissions erroneously related to another individual – Where Authority disregarded information relating to another individual – Whether agent's fraud stultified Authority's review – Whether Authority's decision was vitiated by agent's fraud – Whether agent's fraud contributed in adverse way to exercise of any duty, function, or power by Authority – Whether Authority's failure to seek corrected submissions containing potentially new information legally unreasonable.

Words and phrases – "agent", "fraud", "fraudulent submissions", "legal unreasonableness", "new information", "personal circumstances", "personal information", "practice direction", "statutory review function", "stultified", "submissions", "vitiate".

Migration Act 1958 (Cth), Pt 7AA.

KIEFEL CJ, BELL, KEANE, GORDON AND EDELMAN JJ.

Introduction

1 The Immigration Assessment Authority ("the Authority") has a Practice Direction inviting submissions from applicants for asylum on matters including whether there were any errors in a refusal of asylum by a delegate of the Minister. CHK16 and DUA16 paid a registered migration agent to provide submissions on their behalf. It was found, and it is now common ground, that the agent's conduct was fraudulent because it consisted of her concealing from her clients that she intended to use a pro forma submission with the belief that if she disclosed that to her clients they would not have been prepared to pay for her professional services. The agent acted fraudulently in up to 40 cases including in the cases of CHK16 and DUA16.

2 In the case of CHK16, the agent, acting fraudulently, provided submissions where the entirety of the personal circumstances concerned the wrong person. The Authority was unaware of the agent's fraud. The Authority noticed that the submissions concerned the wrong person yet did not seek to obtain the correct submissions and any new information about the correct applicant. Instead, it had regard to the submissions concerning generic information and legal issues but disregarded the information concerning the personal circumstances of the wrong person.

3 In the case of DUA16, the agent, again acting fraudulently, provided submissions that contained information relevant to DUA16's application and some information relevant to a different applicant. The Authority, constituted by a different member and again unaware of the fraud, concluded that those latter references had been included by mistake.

4 In each case, a majority of the Full Court of the Federal Court of Australia concluded that the decision of the Authority was vitiated by the fraud of the agent. The Minister appeals from those decisions on the basis that the fraud had not been shown to have had any effect on a statutory function. By notices of contention, each of CHK16 and DUA16 contends that the Full Court's decision should be upheld because it was legally unreasonable for the Authority not to exercise its power to obtain corrected submissions, involving potentially new information, from the agent when it knew that the submissions concerned the wrong person either entirely or in part. For the reasons below, the decisions were not vitiated by the agent's fraud. As to the notices of contention, in the case of CHK16 it was legally unreasonable for the Authority not to exercise its statutory power to invite the agent to provide the correct submissions containing any new information but

in the case of DUA16 the Authority's failure to seek new information was not legally unreasonable.

The first respondents' cases and their agent's fraud

5 The written submissions made by each of CHK16 and DUA16 were prepared on their behalf by a registered migration agent who was also a solicitor. Each paid $600 to the agent to prepare such submissions. The agent said that in 40 cases the submissions that she prepared for the Authority were based upon a template from the first written submission that she had ever prepared. In some cases, the template submissions were not amended at all, and in other cases the template submissions were amended based upon instructions. The submissions made on behalf of CHK16 contained none of CHK16's personal information, rather they were the submissions concerned with a different person whose circumstances formed the basis of the template; CHK16 had not been asked for any new information and was not shown the submissions. The submissions made on behalf of DUA16 did involve amendments to the template to include his personal information.

CHK16

6 CHK16 arrived in Australia in 2012 as an unauthorised maritime arrival. On 10 September 2015, he applied for a protection visa. The essence of CHK16's claim for protection was that he had become a person of interest to Sri Lankan authorities, who he feared would abuse him, because they wrongly suspected him to be a transporter for the Liberation Tigers of Tamil Eelam ("the LTTE"). He worked in a transport business which often required travel and deliveries around areas under the control of the LTTE. In 2012, he had borrowed money from a money lender but had not been able to repay on time. Following the default, the money lender allegedly complained to the authorities in order to make life difficult for CHK16. In March and May 2012, CHK16 was interrogated by members of the Criminal Investigation Department ("the CID") concerning an allegation that he had transported goods for the LTTE. He denied this allegation, but he was threatened and abused. The threats were to his life and the kidnap of his children. He continued to deny the allegations but was told that the process would continue. He sold his wife's jewellery to fund the cost of travel to Australia. Since his arrival in Australia, members of the CID have visited his family home on multiple occasions to ask for his location. After an interview, a delegate of the Minister refused his application.

7 As CHK16 was a fast track applicant, his application was referred by the Minister to the Authority for review[1]. The agent for CHK16 provided submissions to the Authority on his behalf. The submissions were slightly more than four pages. They bore the applicant's name and said that they were the product of his instructions. But the entirety of the personal detail in the submissions concerned a different person. For instance:

(i) The submissions asserted that the applicant "was reading a Human Rights degree at the University of Colombo at the time of his departure to Australia in 2013". CHK16 had arrived in Australia in 2012. He had described living in a refugee camp before commencing work as a transporter, but had never suggested that he had read for a human rights degree at the University of Colombo.

(ii) The submissions asserted that the applicant had an actual or imputed political opinion of being opposed to the Sri Lankan Government and its lack of human rights practices. CHK16 had never asserted any such political opinions.

(iii) The submissions asserted that the applicant was at risk as a media personality. CHK16 was not, and is not, a media personality.

(iv) The submissions asserted that the applicant was at risk as an ex-policeman, and that the "applicant instructs that he will be killed if Sri Lankan Authorities find out he has divulged insider information only he knows, detailing human right abuses, he has witnessed, having been a senior police person with Sri Lanka Police". CHK16 was never a policeman.

(v) The submissions asserted that the applicant had assisted two separate organisations with their investigations into human rights violations. CHK16 had made no such claim.

(vi) The submissions asserted that the delegate had erred by concluding that the applicant could relocate within Sri Lanka. The delegate had reached no such conclusion in relation to CHK16.

8 The Authority had been provided by the Secretary with materials including the reasons for the delegate's decision and the material provided by CHK16 to the

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

delegate[2]. The only logical conclusion that could be drawn from the contrast between that material and the written submissions is that the submissions and information provided by CHK16's agent concerned the wrong person. As Judge Riethmuller concluded in the Federal Circuit Court, CHK16 wished to put a claim for protection based on his own circumstances and he had relied upon his agent to do so. The agent had not asked CHK16 whether he wished to give any new information. Nor had she shown him the written submissions which she had prepared, despite having told him that he would need to make submissions and having charged him $600 for them. The written submissions were about a different person.

9 The Authority expressed the natural concern that the claims made in the application "appear to have no logical bearing or connection to the applicant". The Authority was rightly satisfied that the personal circumstances were not intended to form part of CHK16's case. Nevertheless, the Authority took into account the generic aspects of the submissions – legal submissions and country information – although it disregarded specific reports that predated the decision of the delegate, did not contain credible personal information, and had not been before the delegate. The Authority affirmed the decision of the delegate.

DUA16

10 DUA16 arrived in Australia in 2012 as an unauthorised maritime arrival. On 20 January 2016, he applied for a protection visa. He claimed protection as a Tamil whose parents were killed in 1999 by shelling and whose brother was abducted in 2008. DUA16 claimed that his brother was abducted by a group connected to the Sri Lankan army. DUA16 said that the Sri Lankan army searched his house shortly after his brother had been abducted and that, in fear, he had quit his job and gone into hiding. He said that "once in a while" the army would visit his brother's wife to ask for his location. His principal concern is that he would be thought to have supported the LTTE.

11 The claim for protection by DUA16 was dismissed by a delegate of the Minister. As a fast track applicant, DUA16's application was referred by the Minister to the Authority for consideration. The agent prepared a four-page submission in support of DUA16's application by making amendments to a template document.

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2 See *Migration Act*, ss 473CB(1)(a), 473CB(1)(b).

12 The submissions referred to some of DUA16's personal circumstances. After an introductory section concerned with the law, the submissions commenced with reference to DUA16's loss of his parents in the war and one of his brothers still being missing. The submissions continued with later reference to DUA16's genuine fear of persecution by "the Sri Lankan government and the forces working alongside with the government". In contrast with these accurate references, two paragraphs of the submissions contained apparently erroneous material. One paragraph said that the applicant had been "arrested and detained and he has been persecuted by way of sexual abuse by the SLA. His brother who was arrested along side him has successfully sought asylum in Canada." Towards the conclusion of the submissions, a second paragraph, which was identical to a paragraph in the submissions for CHK16, said that "[t]he latest UNHCR guidelines specifically lists media personalities and ex-police men as 'at risk profiles' (the applicant belongs to both groups)". None of the matters in these two paragraphs was consistent with DUA16's case before the delegate.

13 The Authority noticed the erroneous reference in the first paragraph described above. It drew a reasonable inference that "this part of the submission actually refers to another applicant, and appears in this submission in error". The Authority observed that in any event the requirements in s 473DD of the *Migration Act 1958* (Cth) for consideration of new information had not been met. The erroneous reference in the second paragraph, described above, was disregarded. The Authority observed that "[o]therwise, the submission restates the applicant's claims and puts forward legal arguments addressing the delegate's decision". The Authority affirmed the decision of the delegate.

Fraud that vitiates the exercise of a statutory duty, function, or power

14 In *SZFDE v Minister for Immigration and Citizenship*[3], this Court held that a decision of the Refugee Review Tribunal was correctly set aside in circumstances where a rogue had perpetrated a fraud on a family of applicants by falsely representing that he was a solicitor and a migration agent and dissuading the applicants from attending the Tribunal hearing. The fraud was also perpetrated on the Tribunal, whose decision to proceed in the absence of the applicants might not

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3 (2007) 232 CLR 189.

have been made if it had known about the misconduct[4]. This Court emphasised that the appeal required "close attention to the nature, scope and purpose of the particular system of review" rather than reliance upon maxims such as "fraud unravels everything"[5]. The rogue's fraud stultified the operation of the legislative scheme to afford natural justice to the applicants[6].

15 The insistence by this Court in *SZFDE* that a ground of review for fraud requires a focus upon the manner in which the fraud adversely affected the operation of the particular system of review, and therefore the statutory functions and powers of the Tribunal, was appropriate because grounds of judicial review arise by implication from the statute which provides the jurisdiction to make the decision[7]. Just as it is usually implied that a decision will be invalid if a decision-maker exercises their powers fraudulently[8], so too it will usually be implied that a decision will be invalid if a decision-maker is defrauded in the exercise of statutory powers. The implication requires that some aspect of the operation of the legislative scheme be affected by actual fraud or dishonesty, not merely negligence[9]. As this Court said in *SZFDE*[10], "there are sound reasons of policy"

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4 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 202-203 [36].

5 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 200-201 [29].

6 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 206 [49]-[51].

7 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 132 [23], 145 [66].

8 See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 663 [28].

9 Compare *SZSXT v Minister for Immigration and Border Protection* (2014) 222 FCR 73 at 85-86 [60]-[61] with *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151 at 172 [59].

10 (2007) 232 CLR 189 at 207 [53].

why an administrative decision is not vitiated merely by bad or negligent advice or some other mishap that leads to detriment to an applicant.

16 In the Federal Circuit Court, Judge Riethmuller correctly concluded that in the cases of both CHK16 and DUA16 the Authority had not been misled by the extraneous material nor had it been precluded from considering other material that was before it. However, his Honour set aside both decisions of the Authority on the basis that the proper performance of the Authority's functions had been stultified by the conduct of the agent[11].

17 An appeal to the Full Court of the Federal Court was dismissed by a majority of the Court. In the majority, Mortimer J found that the agent had made a series of false representations to the Authority which misled the Authority about (i) what the agent had been instructed to put to the Authority, (ii) the factual nature of the claims and their connection with applicable country information, and (iii) whether CHK16 and DUA16 had anything at all to say about why the Authority should accept the factual basis for their claims and its connection with the country information[12]. Her Honour concluded that the Authority's review had been subverted in each case because it determined the review by reference to matters which included the fraudulently provided submissions[13]. Wheelahan J generally agreed with Mortimer J, observing that the main feature of the first respondents' cases was that in the discharge of its statutory review function the Authority took account of submissions that contained false information and which were prepared in the ostensible discharge of a retainer that was procured dishonestly[14]. Griffiths J dissented. His Honour held that the Authority had been aware of the errors in the submissions and the Authority had not proceeded on the basis of a presumption of regularity[15].

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11 *DUA16 v Minister for Immigration and Border Protection* [2019] FCCA 1128 at [86].

12 *Minister for Home Affairs v DUA16* (2019) 273 FCR 213 at 249 [173].

13 *Minister for Home Affairs v DUA16* (2019) 273 FCR 213 at 249 [176].

14 *Minister for Home Affairs v DUA16* (2019) 273 FCR 213 at 251 [189].

15 *Minister for Home Affairs v DUA16* (2019) 273 FCR 213 at 230 [78].

18 In this Court, the Minister correctly submitted that, as a ground of judicial review, fraud must affect a particular duty, function, or power of the Authority. It is not sufficient to assert that fraud might be said to affect the process of decision-making in some abstract sense. In oral submissions, CHK16 and DUA16 submitted that the agent's fraud had stultified the "core review function" in s 473CC. The only particular aspect of that core review function that was said to have been stultified was that the Authority had requested submissions in a Practice Direction and had received fraudulent submissions.

19 The duty in s 473CC to conduct a review is contained in Div 2 of Pt 7AA. The Authority is required to affirm the fast track reviewable decision or remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation[16]. Section 473CC says nothing about the manner of conducting the review: the effect of sub-s (1) is to impose a duty on the Authority to reach a decision, with sub-s (2) providing for the decisions that may be reached. The manner in which the review must be conducted is the subject of Div 3 of Pt 7AA.

20 Whether or not the duty in s 473CC is properly described as a "core review function", it was a duty that was performed by the Authority. The Authority affirmed the decision of the delegate with respect to CHK16 and DUA16 respectively. Whatever effect the fraud might be said to have had on the manner or process of decision-making in the abstract, it did not prevent or affect the Authority's duty to conduct a review in accordance with the process described in Div 3 and to reach an outcome.

21 The only particular power of the Authority upon which CHK16 and DUA16 relied as having been stultified by fraud was the power in s 473FB for the President of the Authority to issue Practice Directions. But although CHK16 and DUA16 were correct that the Authority had requested submissions in a Practice Direction made under that power, and that the Authority had received fraudulent submissions, the power to make Practice Directions was entirely unaffected by the agent's fraud. The effect of the agent's fraud on the action that either CHK16 or DUA16 would have taken to provide submissions and new information according to the Practice Direction did not affect the President's power to issue Practice Directions in the first place.

22 In each of these appeals, the agent's fraud did not contribute in any adverse way to the exercise of any duty, function, or power by the Authority. The approach

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16 *Migration Act*, s 473CC(2).

of Griffiths J in dissent was correct. Subject to the notices of contention concerning unreasonableness, the appeals should be allowed.

Legal unreasonableness

23 The Practice Direction issued by the President of the Authority in the exercise of the power in s 473FB permitted written submissions and new information and explanations to be provided to the Authority on matters including: "why you disagree with the decision of the Department". In the Federal Circuit Court, Judge Riethmuller found that CHK16 wished to put his claim for protection on the basis of his own circumstances and that DUA16 would have sought to provide more information if his agent had told him that he had the opportunity to do so[17].

24 In the Full Court of the Federal Court, each of CHK16 and DUA16 filed a notice of contention. One ground of their notices of contention, which it had not been necessary for Judge Riethmuller to consider, was that the Authority erred by failing to consider the exercise of its discretion in s 473DC of the *Migration Act* to obtain new information. This contention was dismissed. Griffiths J, with whom Mortimer and Wheelahan JJ agreed on this point, dismissed the contention because submissions are not "new information"[18]. In this Court, each of CHK16 and DUA16 relied upon a similar notice of contention, asserting the unreasonableness of the Authority making a decision on the review without first contacting CHK16 or DUA16 to seek clarification or to get new information under s 473DC.

25 In this Court, the Minister correctly accepted that submissions that were made upon instructions from CHK16 or DUA16 might have contained new information. "New information" refers to documents or information of an evidentiary nature that were not before the Minister at the time of making the referred decision and which the Authority considers may be relevant[19]. In the

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17 *DUA16 v Minister for Immigration and Border Protection* [2019] FCCA 1128 at [71], [79].

18 *Minister for Home Affairs v DUA16* (2019) 273 FCR 213 at 233 [90]. See also at 234 [98] per Mortimer J, 250 [185] per Wheelahan J.

19 *Migration Act*, ss 473BB (definition of "new information"), 473DC(1). See *AUS17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 1007 at 1009 [3]; *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706 at 710-711 [21]; 380 ALR 216 at 222.

section of the Authority's Practice Direction concerned with applicants seeking to provide submissions, it was expressly contemplated that submissions might contain new information, with the Authority summarising the requirements in s 473DD before new information could be considered. Since new information can be contained, and might be expected to be contained, in submissions, the Authority's power in s 473DC to get new information plainly extended to getting submissions containing that new information. Therefore, Griffiths J erred by dismissing the notices of contention on the ground that submissions are not new information. It is necessary to consider whether, in the particular circumstances of each of CHK16 and DUA16, the failure of the Authority to exercise the power in s 473DC to get new information by inviting written submissions was legally unreasonable.

26 A requirement of legal reasonableness in the exercise of a decision-maker's power is derived by implication from the statute[20], including an implication of the required threshold of unreasonableness, which is usually high[21]. Any legal unreasonableness is to be judged at the time the power is exercised or should have been exercised[22]. It is not to be assessed through the lens of procedural fairness to the applicant[23]. Instead, whether the implied requirements of legal reasonableness have been satisfied requires a close focus upon the particular circumstances of exercise of the statutory power: the conclusion is drawn "from the facts and from the matters falling for consideration in the exercise of the statutory power"[24].

27 As Griffiths J correctly held in the Full Court, there is no general obligation on the Authority to advise referred applicants of their opportunities to present new

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20 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63].

21 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 551 [11], 564 [52], 575 [89], 586 [135].

22 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928 at 953-954 [101]; 383 ALR 407 at 437.

23 *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475 at 491 [67]. See *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1099 [34]; 373 ALR 196 at 204-205.

24 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76].

information[25]. Nor is there any general obligation upon the Authority to get new information[26]. This is so even if the submissions are hopeless, or if they contain errors, even major errors, about facts or law. However, the power in s 473DC is still subject to the usual implication that it must be exercised within the bounds of legal reasonableness[27]. Hence, this Court has held that a decision can be invalid if it is made in circumstances which exceed the high threshold of legal unreasonableness for the Authority's failure to exercise the power in s 473DC to get new information[28].

28 The circumstances of CHK16's case are extreme. The Authority was aware that CHK16 intended to provide submissions and that the submissions might contain new information. But it was apparent, as the Authority realised, that the submissions provided by the agent concerned a different person and that none of the personal information related to CHK16. As the Authority was aware, this was the only opportunity that CHK16 would have to provide his own new information, which could be of considerable importance. On CHK16's case before the delegate, the consequences of refusal of his protection visa could place his life at risk. A request from the Authority for the correct submissions and CHK16's correct personal information would have been a very simple matter[29]. The Authority had, itself, indicated in its Practice Direction that submissions that were too long would be returned with an opportunity given to provide new submissions. These circumstances reflect the observation of six members of this Court in *Minister for Immigration and Citizenship v SZIAI*[30]:

> "The failure of an administrative decision-maker to make inquiry into factual matters which can readily be determined and are of critical significance to a decision made under statutory authority, has sometimes

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25 *Minister for Home Affairs v DUA16* (2019) 273 FCR 213 at 228 [68].

26 *Migration Act*, s 473DC(2).

27 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 227 [21], 245 [86], 249 [97].

28 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928; 383 ALR 407.

29 cf *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 40-41 [51].

30 (2009) 83 ALJR 1123 at 1128 [20]; 259 ALR 429 at 434.

been said to support characterisation of the decision as an exercise of power so unreasonable that no reasonable person would have so exercised it."

29 The legal unreasonableness of the failure by the Authority to get new information by requesting the correct submissions pursuant to s 473DC is plain when the alternative approach taken by the Authority is considered. Rather than taking the simple route of asking for the correct submissions, consistently with its own procedures for returning submissions that are too long, the Authority filleted the submissions that plainly concerned the wrong person into generic and non-generic information. The Authority then treated the generic information in the submissions concerning another person as though the information had been correctly provided in relation to CHK16's circumstances. On no view could that have been a reasonable course to take.

30 The Minister submitted that an integer that militates against a conclusion of unreasonableness for a failure to inquire is the lack of any possibility of a useful result. So much can be accepted. If the Authority could not have reasonably expected any useful result it could not be unreasonable for it to fail to invite CHK16 to provide submissions with any new information[31]. But, contrary to the Minister's submissions, there are two reasons which indicate that the Authority might reasonably have expected a useful result from the agent. First, the Authority did not suspect that the agent was fraudulent. A plausible inference would simply have been that the agent had provided the wrong submissions. On that basis, the most likely outcome of an invitation to provide the correct submissions, containing any new information, would have been that they would be provided. Secondly, and in any event, even if the Authority had suspected fraud the most likely response by a fraudulent agent to an invitation to provide correct submissions with new information would have been to do so.

31 The notices of contention were expressed in terms of the unreasonable failure by the Authority to exercise its power under s 473DC. In oral submissions, the first respondents contended that the same conclusion could be reached on the basis of unreasonableness in the exercise of the Authority's general powers in the conduct of the review. The exercise of powers and functions by the Authority is addressed in Div 5. Section 473FB, in Div 5, provides that the President of the Authority may issue a written direction as to the conduct of reviews by the Authority. As explained above, the Practice Direction issued by the President told referred applicants that the Authority invited and would accept submissions for the

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31 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123; 259 ALR 429.

purposes of the review. After submissions were provided to the Authority on behalf of CHK16 which did not relate to CHK16's case, and which were understood by the Authority not to relate to CHK16's case, it was legally unreasonable for the Authority not to ask why the submissions did not relate to CHK16's case. That is, no reasonable decision-maker would have decided the review without making further inquiry.

32 Sections 473FB(3) and 473FB(4) do not detract from this conclusion. There was no suggestion, nor could there be, that the Practice Direction was not complied with or that it was not practicable for the Authority to make further inquiry. The steps were simple. But the submissions that the Authority had invited CHK16 to provide, and which were provided and then considered by the Authority, concerned another referred applicant. The Authority found that the submissions did not concern or relate to CHK16. The failure of the Authority to make any further inquiry was legally unreasonable.

33 No issue arises as to the effect of materiality upon this legal unreasonableness. The Minister properly accepted that it would be a difficult proposition to assert that any coherent and forceful submission that CHK16 might have provided could not have made a difference to his case. He expressly disclaimed a submission that a better submission by CHK16 could not possibly have made a difference. That reasoning must include new information contained in the submission.

34 DUA16's case is different. In DUA16's case it was not legally unreasonable for the Authority to fail to exercise either its powers under s 473DC to get new information or its powers in the general conduct of the review to get new submissions. The conclusion that the Authority reasonably drew from the submissions with which it was presented, and by having regard to the review material, was that a small amount of the information had been included by mistake. The Authority disregarded these errors and, moreover, pointed out that the requirements in s 473DD of the *Migration Act* for consideration of new information had not been met. The statutory context and the high threshold of legal unreasonableness precludes a conclusion that it could be legally unreasonable for the Authority to fail to get new information in light of what it reasonably identified as errors in submissions. It was reasonable for the Authority to disregard that information and to explain, in the alternative, why the information could not be considered even if it had not been included by mistake.

Conclusion and orders

35 Special leave was granted in each of these appeals subject to the Minister's undertaking to pay the reasonable costs of the first respondent in each of the applications for special leave and the appeals, and not to disturb the costs orders below. In *Minister for Home Affairs v CHK16*, orders should be made dismissing the appeal. In *Minister for Home Affairs v DUA16*, orders should be made as follows:

1. Appeal allowed.

2. Save as to costs, set aside the orders of the Full Court of the Federal Court of Australia made on 10 December 2019 and, in their place, order that:

   (a) the appeal be allowed; and

   (b) orders 1 and 2 of the orders of the Federal Circuit Court of Australia made on 30 April 2019 be set aside and, in their place, it be ordered that the application be dismissed.