



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: M57/2020
File Title: Minister for Home Affairs v. DUA16 & Anor
Registry: Melbourne
Document filed: Form 27F - Outline of oral argument
Filing party: Appellant
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Nos M57/2020, M58/2020

BETWEEN:

MINISTER FOR HOME AFFAIRS
Appellant

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and

DUA16 and another
Respondents

BETWEEN:

MINISTER FOR HOME AFFAIRS
Appellant

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and

CHK16 and another
Respondents

APPELLANT’S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

- 1. This outline is in a form suitable for publication on the internet.

Part II: Outline of propositions

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The Minister’s appeals

- 2. The conduct of the agent found to be fraudulent in each case was:
 - a. she falsely represented to her client that she would make a submission to the IAA addressing his particular case while aware that, if the client knew the nature of the submission she proposed to send, he would not be prepared to pay for the service;
 - b. she charged and accepted fees on the footing that she would make a submission addressing the client’s particular case when in fact she was going to use a template;

c. in drafting and lodging a submission on behalf of her client, she was recklessly indifferent as to whether the contents of the submission were true; and

d. she falsely represented in the submission that it reflected the client's instructions.

- CAB 71-72 [58]-[62] (primary judge); 116-117 [49]-[50] (Griffiths J); 131 [102] (Mortimer J); 151-152 [188] (Wheelahan J)

3. In each case, the only impact of the agent's fraudulent conduct on the IAA's review was that the IAA received a submission that did little or nothing to advance the first respondent's case or to assist the IAA to perform its function.

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a. There was no evidence of any new information that the first respondent wished to put before the IAA and was not put; nor of any particular argument that the first respondent wanted to advance (AWS [48], [59]).

b. While the submission included factual claims that clearly related to a different person, the IAA correctly inferred that these were included in error and put them out of account (AWS [61]).

- *DUA16*: CAB 7 [7]; *CHK16*: CAB 22 [5]
- CAB 123 [75] (Griffiths J)

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c. Otherwise, in each case, the agent's (generally unhelpful) submissions had no material impact on the performance of the IAA's task. The IAA considered all of the relevant claims in the review material, and no error is identified in its reasoning (AWS [50]-[52]). There is no basis to conclude that the agent's submission caused the IAA to form an adverse view of the first respondent's credibility (ARS [10]-[12]).

4. Whether the decision of the IAA in each case was thereby vitiated depends on the construction of Part 7AA of the Act; in particular, whether a result of the fraudulent conduct was that the IAA did not carry out the review for which Part 7AA provides (AWS [29], [54]; ARS [3]-[5]; contrast RWS [20]-[21]).

- *SZFDE* at [29], [31], [48]-[49], [52]-[53] (JBA 632-639)
- *Hossain* at [23]-[24], [28] (JBA 304-306)
- CAB 118 [56]-[57] (Griffiths J)

5. Consideration of a submission from a referred person is not an “imperative function” of the IAA or a condition of the exercise of its jurisdiction (AWS [30]-[44], [55]-[57]; ARS [6]-[9]).

- Migration Act, ss 473CC, 473DA, 473DB, 473DC, 473DD, 473DE, 473FB
- CAB 118-122 [58]-[72], [74], 123-124 [77] (Griffiths J)
- Contrast *SZFDE* at [32], [47]-[51] (JBA 632-638), and note *BVD17* at [34] (JBA 220)

The notice of contention

10 6. There is not a proper basis to infer that the IAA gave no consideration to whether it should invite new information under s 473DC (AWS [68]).

7. It was not unreasonable for the IAA not to exercise that power.

a. There was nothing in either case to put the IAA on notice that the first respondent had more submissions to make or more information to put forward (AWS [69]-[72]; ARS [14]).

b. The alleged failure of the IAA is in substance a failure to make an inquiry. This Court has accepted that such an error might in some cases go to jurisdiction, but only where there is evidence that the inquiry would have yielded a useful result (ARS [15]).

- *SZLAI* at [25]-[26] (JBA 460).

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Dated: 14 October 2020

Geoffrey Kennett
Nick Wood