



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M57 of 2020

BETWEEN:

MINISTER FOR HOME AFFAIRS
Appellant

DUA16

First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M58 of 2020

BETWEEN:

MINISTER FOR HOME AFFAIRS
Appellant

CHK16

First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

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OUTLINE OF THE RESPONDENTS' ORAL SUBMISSIONS

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

Part I - Fraud stultified the decision

The nature of the IAA's review

2. The core statutory function of the IAA, pursuant to s 473CC, is to review the referred fast track decision in accordance with the processes set out in part 7AA.

3. The IAA undertakes de novo merits review of a protection visa decision.

4. In a Part 7AA IAA review there is no right to appear, and a narrow right to give any new information to the IAA under s473DD. Therefore, the opportunity to make submissions – while not imperative per se - assumes importance when given.

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How to determine if fraud stultified the IAA's process

5. The ultimate issue to be determined is the effect of the fraud on the IAA's decision-making process.

6. Resolving that issue requires two things.

6.1. First, close attention is needed to the nature, scope and purpose of the particular system of review established by Parliament in Part 7AA of the Migration Act: *SZFDE* per HCA, (JBA 621 at [29]).

6.2. Secondly, evaluation is needed of whether the fraud effected the review in fact.

7. It is unnecessary to show that the fraud affected an imperative procedural fairness requirement or imperative legislative requirement. That was the factual circumstance in *SFZDE* but not the principle of that case.
8. Rather, the fraud can be shown to have stultified the review process as it in fact functioned in the closely examined statutory context.
9. As Mortimer J correctly observed in the Judgment below at [109] CAB133, “*it may not be necessary to fasten on a particular statutory power and identify that as being the power which has been stultified or subverted*”.
10. As French J observed in *SZFDE* (JBA 770 at [122]) fraud justifies certiorari if it distorts or vitiates “*the statutory processes leading to the impugned decision*” to such an extent that the decision was induced or affected by that fraud.
11. Alternatively, if it is necessary to show the fraud affected an imperative requirement, the IAA’s obligation to review the delegate’s decision can be affected by fraudulent submissions. This may be so where, as here, in carrying out its core review task, the IAA asked for, received, considered and acted upon fraudulent submissions.

The IAA’s process in this case was stultified by fraud

12. The Federal Court was correct to find fraud stultified the decisions.
13. The fraud is described by Mortimer J at *J* [102] (CAB 131) and by Griffiths J at *J* [49] (CAB 116).
- 20 14. Realistically, the fraud deprived DUA16 and CHK16 of their slim opportunity (the submissions) to influence the IAA to set aside the decision under review.
15. Failure to consider a submission of substance in fact made can constitute jurisdictional error: *CLV16* (JBA 749 at [54], [60] and [63]).

If materiality is required, it is made out here

16. If the IAA had received honest, individualised submissions, there is a realistic possibility that the outcome of the review could have been different.
17. Where a Court accepts there is a fraud on the IAA as is the case here, the Court should “proceed with caution” to find that the fraud could have had no bearing on the outcome, see *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145–146.

30 **Part II – Unreasonableness**

The IAA was aware the submissions related to a person other than the respective Respondent

18. The IAA in each case identified that the claims mentioned in the submission had no factual connection to the claims raised by the relevant Respondent.

IAA decision record for DUA16, CAB 7, [7]

IAA decision record for CHK16, CAB 22, [5]

19. The IAA in each case proceeded to make a decision on the review, having taken no steps to clarify or rectify the problem it had recognised with the submissions before it.

The IAA had statutory power to rectify the identified problem with the written submissions

20. Part 7AA, division 5 of the *Migration Act* gives the IAA discretion as to the conduct of its review, subject to the other provisions of part 7AA and the Practice Direction.

21. Section 473DC(3) additionally provides power to get new information.

22. The statutory powers regarding the conduct of the review are conferred on the condition that they be exercised reasonably.

The conduct of the review by the IAA was unreasonable in the circumstances

10 23. The conduct of the review will be unreasonable if no sensible decision-maker acting with due appreciation of its responsibilities could have taken that course.

SZVFW (JBA 380, [69]); *Li* (JBA 331, [71])

24. The conduct of the IAA in failing to make a simple and obvious enquiry to ensure that it had before it the material it was intended to have in conducting the review was below the minimum standard expected of a reasonable IAA in the circumstances.

It cannot be said that enquiries by the IAA would have yielded no useful result

25. It is sufficient that an opportunity to put on genuine submissions not affected by fraud could possibly have assisted the Respondents, and that such an opportunity would not have been futile.

20 26. There is no basis for concluding that the Respondents had already put before the IAA all that they could or wished to put before it on the review.

Cf *SZIAI* (JBA 454, [26])

Dated 14 October 2020

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