IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M 72 OF 2019**

On Appeal From
the Full Court of the Federal Court of Australia

BETWEEN: **CNY17**
Appellant

10 **AND:** **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

20 **RESPONDENT'S SUBMISSIONS IN RESPONSE TO POST HEARING LETTER**

PART I FORM OF SUBMISSIONS

1. We certify that these submissions are in a form suitable for publication on the internet.

PART II FURTHER SUBMISSIONS

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2. The following submissions are made in response to the letter from the Court to the parties of 17 October 2019. In short, the first respondent's answers to those questions are:

   2.1. In principle, compliance with s 473CB is a pre-requisite to the IAA's exercise of jurisdiction under s 473CC. However, the question does not arise, as provision of
40 additional material does not amount to non-compliance.

   2.2. Any non-compliance with s 473CB could only be jurisdictional error if it was material.

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2.3. The tests for materiality of a breach of s 473CB on the one hand, and apprehended bias on the other, have distinct doctrinal bases and different concerns.

Question 1 – is compliance by the Secretary with the duty imposed by s 473CB(1) a pre-requisite to the exercise of jurisdiction by the Authority under s 473CC?

3. The IAA is required to conduct its review "by considering the review material provided to the Authority under section 473CB" and (subject to ss 473DC and 473DD) without considering "new information": s 473DB(1).

4. The meaning of "review material" is to be found in s 473CB(1). It is the material listed in paras (a) to (d), which the Secretary "must give" to the IAA.

5. The Minister therefore accepts that compliance with the duty imposed by s 473CB(1) – to provide the IAA with all of the material referred to – is *prima facie* a pre-requisite to the exercise of the IAA's discretion. That is subject to the materiality of any non-compliance, as discussed below in response to Question 2. Decisions of the Full Court of the Federal Court support this position.[1]

6. Non-compliance by omission of material falling within para (a), (b) or (d) of s 473(1) will ordinarily be fairly clear. More complex questions may arise in relation to para (c), including as to whether non-compliance can arise from a conclusion by the Secretary that particular material is not relevant. It is not necessary to explore those questions here, as no omission is complained of.

7. It is important to note, however, that s 473CB(1) in its terms only specifies the material that *must* be provided; it does not impose any express *prohibition* on the provision of additional material. Nor should a negative stipulation be implied.

7.1. Anything that obviously fell outside s 473CB(1)(a)-(d) would not be provided "under" s 473CB, and the IAA could put it to one side consistently with its duty under s 473DB.

7.2. Further, to the extent that any material is provided by the Secretary that was not before the primary decision-maker, its contents constitute "new information"[2]

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1 See *Minister for Immigration and Border Protection v CPA16* [2019] FCAFC 40 at [32]; *EVS17 v Minister for Immigration and Border Protection* [2019] FCAFC 20 at [30]-[35].

2 *Plaintiff M174/2018 v Minister for Immigration and Border Protection* (2018) 353 ALR 600 at [24] per Gageler, Keane and Nettle JJ.

which may only be taken into account if it passes through the filter of s 473DD (and subject to compliance with s 473DE).

7.3. Over-provision of material by the Secretary therefore does not in itself create any impediment to the proper performance by the IAA of its review function. Indeed the quality of the review may be enhanced by additional material.

7.4. The material must be provided at the time of the referral or as soon as practicable thereafter (s 473CB(2)), by an officer who does not know what issues the IAA will consider significant. Under s 473CB(1)(c), the Secretary *must* provide any material that he or she considers to be relevant to the review. Relevance may involve nuanced and contestable judgments; but, on the Appellant's construction, any miscalculation in that regard by the Secretary or his delegate would undo the whole process.

7.5. The last point is important because, if *provision* of extraneous material constituted a breach of s 473CB and thereby vitiated a decision of the IAA, the error would occur upon provision of the material and could not be remedied (contrast an *omission* of relevant material, which can be remedied by providing the material). The IAA, having received extraneous material, would be disabled from making any valid decision on the review. Even following judicial review, it is difficult to see how the IAA could make any valid decision unless the provision of the material (despite having occurred in fact) could somehow be undone. That is manifestly an inconvenient result – including for the visa applicant – which is unlikely to have been intended.

8. For these reasons, while it is accepted that performance by the Secretary of his obligation under s 473CB is a prerequisite to the exercise of the IAA's jurisdiction, that provision should not be construed so as to preclude the provision of any material that is not required by s 473CB(1). Thus, the question posed does not arise in the present case.

Question 2 – if the answer to Question 1 is "yes", does non-compliance by the Secretary with s 473CB(1) give rise to jurisdictional error on the part of the Authority only if the non-compliance is material?

9. The application of a test of materiality is supported directly by recent decisions of this Court. The hypothetical error in this question is no different to the kind of procedural

error considered in *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252 or *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123.

10. In *SZMTA*, the error was the failure on the part of the Administrative Appeals Tribunal to alert the applicant to the existence of a certificate given by the Secretary of the Department under s 438 of the Act. Where a notification under s 438 was incorrect, that notification was also an act devoid of statutory authority.[3] But in any event, the failure to notify an applicant of a notification, valid or not, constituted a breach of the Tribunal's obligation of procedural fairness.[4] Even in that case, however, the Court held that the Act should not be interpreted as denying legal force to the Tribunal's decision unless the error was material.[5] Critically for the answer to this question, the joint judgment said at [45]:

> Materiality, whether of a breach of procedural fairness in the case of an undisclosed notification or of a breach of an inviolable limitation governing the conduct of the review in the case of an incorrect and invalid notification, is thus in each case essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision.

11. The propositions in that passage are supported by the joint judgment in *Hossain*. At [24], Kiefel CJ, Gageler and Keane JJ referred to jurisdictional error in the sense of failing to comply with one or more statutory pre-conditions for an exercise of power. At [27] their Honours referred to the need to interpret the statute to discern whether a particular non-compliance with a statutory pre-condition would take the resulting decision outside of the jurisdiction of the Tribunal. At [29], their Honours said that a statute would ordinarily be read as incorporating a threshold of materiality where there has been non-compliance. At [31] their Honours concluded:

> Ordinarily, as here, breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision.

12. These passages contain the answer for this question. There is no reason to depart from them in the circumstances of this case. Nothing in the Act requires or suggests a different result. A breach of s 473CB(1), if a pre-requisite of or a condition on the exercise of power by the IAA under s 473CC, must be material before it will be found to be jurisdictional error.

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3 *SMZTA* at [40].
4 *SZMTA* at [38].
5 *SZMTA* at [44].

13. As foreshadowed – and especially if s 473CB(1) is capable of being "breached" by the provision of additional material – materiality might also be the only safety valve for potentially significant inconvenience. For example, where obviously irrelevant (and not prejudicial) material was provided to the IAA, that might constitute a breach of s 473CB(1)(c), but could not be material. Without a materiality test, however, it is not clear how invalidity of the IAA's decision in that scenario could ever be avoided.

14. With respect, nothing in AS [32]-[39] assists the Court. The matters canvassed at AS [33]-[38] appear to address the issues raised by Question 1. Nothing there addresses the requirement for materiality as distinct from the anterior finding of non-compliance with the statute. Indeed, in *Wei*, referred to by the appellant, Gageler and Keane JJ referred at [25] to an invalid exercise of decision-making power where there has been "a *material* breach of an antecedent statutory duty" (emphasis added).

15. Finally, AS [39] is irrelevant. That most non-compliance would be material says nothing about whether the threshold of materiality is a part of the test.

16. The answer to this question, in line with recent authority, is "yes".

17. Significantly, if the provision of extraneous material constitutes the breach of an obligation under s 473CB(1), the question of materiality must begin with the evidence of the actual decision and the reasoning behind it. The material was certainly irrelevant to any substantive issue and there is no suggestion that the IAA regarded it otherwise. (Had it done so, that would probably be an error in itself.) Nor is there anything to indicate that the material affected the IAA's assessment of the appellant's credibility. Thus, it is impossible to identify any possibility that the decision would have been different if the material had not been provided.[6]

Question 3 – where the Secretary gives the IAA material that is irrelevant to the review and prejudicial to the applicant, what, if any, is the relationship between the test of materiality and the test for reasonable apprehension of bias?)

18. The material in question in the present case was evidently regarded by the Secretary as "relevant". The first respondent submits that that view was open to him; and the material therefore formed part of the "review material".

[6] Noting that the appellant bears the onus in this respect: *SZMTA* at [46].

19. If that submission is not correct, a question would arise (canvassed above) whether that conclusion in itself points to jurisdictional error by the IAA. If it does point to error, the next question is one of materiality: could the omission of the material in question realistically have led the IAA's review to have a different outcome?

20. That question runs to some extent in parallel with a question that arises in relation to apprehended bias: was the material of a kind which would lead the hypothetical fair-minded observer to apprehend that the IAA might depart from relevant standards of impartiality? Both questions might well be answered in the negative if the material is irrelevant and anodyne. But the issues do not intersect doctrinally. One goes to whether, in the particular circumstances (and in fact), the *outcome* of the review could have been different if an error had not occurred. The other goes ultimately to *appearances* and is to be addressed at a point in time before the outcome is known.[7]

21. As noted above, if the provision of extraneous material constitutes the breach of an obligation under s 473CB(1), the question of materiality must depend on evidence of the actual decision and the reasoning behind it. That evidence provides no basis for an assertion that the Secretary's inclusion of the material deprived the appellant of the possibility of a favourable outcome.

22. Conversely, the test for apprehended bias looks to whether a hypothetical fair-minded observer, looking at circumstances before the decision was made, might have feared that the IAA would be improperly swayed by the material. It is not necessary for the appellant to prove, by reference to the decision, that the material actually had or could rationally have had any effect on the IAA's reasoning. Rather, the nature of the material (and the extent to which it actually was prejudicial) feeds into the assessment of whether the hypothetical fair-minded observer would have entertained that fear. Submissions have already been made on that point.[8]

23. If a reasonable apprehension of bias arose in the present case, the First Respondent would not submit that it was immaterial. An argument framed in those terms might be misconceived, given the matters outlined above. It is possible to imagine circumstances in which relief might not be granted despite a reasonable apprehension

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7 *Michael Wilson and Partners v Nicholls* (2011) 244 CLR 427 at [68]; reasons of Mortimer J in the Court below at [14]-[18].

8 Especially at RWS [36]-[42].

of bias being established: eg if, on the material before the decision maker, only one decision was legally open. However, such cases may be properly analysed as turning on utility and the exercise of judicial discretion rather than materiality of the error. It is not necessary to decide that issue here.

Dated: 31 October 2019

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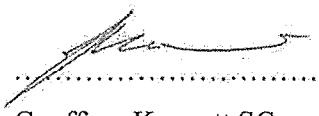

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