IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M72 of 2019

BETWEEN:

CNY17
Appellant

and

Minister for Immigration and Border Protection
First Respondent

and

Immigration Assessment Authority
Second Respondent

APPELLANT'S FURTHER SUBMISSIONS

Part I: Internet certification

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

Part II: Further submissions on the three questions

2. On 17 October 2019, the parties were informed that this Court would be assisted by further submissions on three questions.

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 short answer to Question 1 is Yes.

4. The role of s 473CB(1) is to be ascertained by having regard to:

   a. what gives rise to the occasion for exercise of the duty; and

   b. the kind of review to be conducted by the Authority under Part 7AA.

   Part 2 and Part 7AA form an integrated statutory scheme for an administrative determination of whether Australia owes protection obligations to a person. It is only with reference to the operation of the scheme in its entirety that the question posed by this Court can be answered.[1]

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[1] Cf *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 (***Wei***) at [6]-[15], where Gageler and Keane JJ analysed in some detail the 'integrated statutory scheme' applying in that case.

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5. In the case of any protection visa application,[2] its determination (whether by the Minister pursuant to s 65, or by the AAT under Part 7, or by the Authority on the 'limited review'[3] under Part 7AA) will require consideration of the application for a protection visa,[4] meaning, relevantly, consideration of the claims by the applicant.[5]

6. By operation of s 46, an application for a protection visa for which a 'fast track applicant' can apply[6] is only valid if made on an approved form. In the case of the protection visa for which the Appellant applied, the approved form[7] required certain information to be given, including 'Your reasons for claiming protection', and it allowed for the applicant to 'attach additional details' and, more generally, it permitted the provision of other documents apart from the form itself. In particular, as part of the section on 'Your reasons for claiming protection', the form stated: 'A decision may be made on the information provided in your written application and you may not be given another opportunity to present these claims. Therefore, it is important that you include all details relevant to your case and provide any supporting documents at the time you lodge your protection application'.[8]

7. By operation of ss 54 and 55, the Minister is under a duty, in deciding whether to grant or refuse to grant a visa, to have regard to all the information in the application, which include any information given by the applicant after the application is first lodged. The only further information that may come within the universe of what the Minister must consider, prior to grant or refusal of a visa,[9] is that which he may get pursuant to s 56.

8. Against that background:

   a. par (a) of s 473CB(1) requires provision to the Authority of, effectively, the reasons for the decision of the Minister (or delegate) refusing to grant a protection visa; and

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2 What are 'protection visas' is defined in s 35A. In the case of protection visas, there must be an application for it – see s 45. Only a subset of applicants for protection visa are affected by existence and operation of Part 7AA. See definitions of 'fast track applicant', 'fast track review applicant' and 'fast track decision' in s 5(1), and definitions of 'fast track reviewable decision' and 'referred applicant' in s 473BB.

3 See s 473FA(1).

4 See, with regards to Part 7AA, *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (***Plaintiff M174***) at [17] (Gageler, Keane and Nettle JJ).

5 See eg *Htun v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136 at [42] (Allsop J, with whom Spender and Merkel JJ agreed).

6 A 'fast track applicant' can only apply for a Temporary Protection (Class XD) visa or a Safe Haven Enterprise (Class XE) visa.

7 The Appellant agrees with the identification of the relevant provisions of the Act, regulations in the *Migration Regulations 2004* (Cth), and legislative instruments in the Minister's Note on Status of Visa Application Form, dated 23 October 2019, at [2]-[6].

8 **ABFM 103**.

9 See s 65(1): 'after considering a valid application for a visa'.

b. par (b) of s 473CB(1) requires provision to the Authority of the entire application for a protection visa, and of any other materials such as written submissions or any document handed up by the applicant to the delegate at the hearing (if there was a hearing).

9. All those materials must be included in the 'review material', for the Authority to exercise its jurisdiction under s 473CC. Put differently, if a 'referred applicant' had knowledge that the Authority was proposing to embark upon exercise of its review jurisdiction without the Secretary having provided all those materials, a writ of prohibition directed to the Authority could be sought.

10. Accordingly, (even if only) by reason of the above, the answer to Question 1 must be Yes.

11. The matters in par (d) of s 473CB(1) are directed at enabling the Authority to communicate with a 'referred applicant'.

12. The 'additional information' provisions (ss 473DC, 473DD and 473DE) demonstrate that the 'contact detail information' is a pre-requisite to exercise of jurisdiction, or at least its non-provision could stultify the exercise of jurisdiction from a certain point onwards.

13. As well, a practice direction, which has been made under s 473FB,[10] requires the Authority to be able to communicate with a 'referred applicant' in order to let him/her know of being able to make written submissions on certain matters (noting, however, that subs (3) provides that the Authority's duty to comply with a practice direction is 'as far as practicable').

14. Finally, s 473EB(1) requires the Authority to notify the referred applicant of 'a decision on review', and whilst this duty arises at the end of exercise of jurisdiction it is, of course, of importance having regard to the time limits imposed in Part 8 of the Act in respect of any application for judicial review.

15. Next to be considered is par (c) of s 473CB(1).

16. The first thing to note about this provision, which makes it quite different from s 428(3) in Part 7, is that it is anchored to 'the time the decision is referred to the Authority', ie the time when the Minister complies with duty imposed upon him by s 473CA. Because of that express language, and because of the fact that what is provided by the Secretary under s 473CB(1) is the 'review material' that, *first*, must be considered (s 473DB(1)) and, *second*,

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[10] See eg *Plaintiff M174* at [37]-[38] (Gageler, Keane and Nettle JJ), [88] (Gordon J). The practice direction was in evidence in the court below: **CAB 125**, item 23(d).

defines the universe of what can be considered by the Authority,[11] there can be only one instance of consideration of 'relevance' by the Secretary and then provision of 'any other material' within par (c). Section 473CB(1) does not operate in an ambulatory fashion.[12]

17. Whether 'any other material' is provided to the Authority by the Secretary (in addition to what the Secretary is duty bound to provide in every case – pars (a), (b) and (d)), depends on the Secretary's state of mind that such material is 'relevant to the review'.

18. There may be no documents given by the Secretary to the Authority as 'other material ... considered ... relevant to the review'. However, there can be non-compliance with the duty by provision of some 'other material', purportedly under par (c) of s 473CB(1).

10 19. *First*, as the Appellant has already submitted, discharge of the duty in s 473CB(1), so far as par (c) is concerned, depends on the Secretary reaching the state of mind reasonably, and on a correct understanding of the law.

20. *Second*, there can be only one occasion when the Secretary can 'consider'.

21. *Third*, it follows from the scheme as a whole, including Part 2 of the Act, that a very limited range of materials can ever be validly within possible consideration by the Secretary. In the main, these materials will be:

    a. what the delegate got pursuant to s 56 (if anything);

    b. communications from the delegate to the applicant, eg any s 57 letters (responses would come within par (b) of s 473CB(1));

20 c. any transcript or audio file of the hearing before the delegate (if there was one).

    The above materials would be either documents or information (eg, what is revealed by the transcript) that were before the delegate when he/she made the decision under s 65.

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[11] Subject to exercise by the Authority of the power to get 'new information'.

[12] See also subs (2) of s 473CB, again supporting the conclusion that the whole of the duty in s 473CB(1) is to be discharged at the one time.

In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, this Court noted (at [13]) that no examination had been given in the court below to 'whether s 418(3) was to be given an ambulatory effect requiring the Secretary to give to the Registrar of the Tribunal any document coming into the Secretary's possession or control after the Secretary had first transmitted relevant documents to the Tribunal'. It was not necessary for this Court, in that case, to determine that issue. Cf *SZOIN v Minister for Immigration and Citizenship* (2011) 191 FCR 123 where the Full Court of the Federal Court (Bennett and McKerracher JJ, Rares J dissenting on this point) considered that the duty of the Secretary pursuant to s 418(3) was a continuing one.

22. In *Plaintiff M174*, the plurality said that there was 'no inherent dichotomy between new information which meets the two conditions set out in s 473DC(1)(a) and (b) and review material which the Secretary is required to give the Authority under s 473CB', because 'review material is not limited to information that was before ... the delegate at the time of making the decision to refuse to grant the protection visa'.[13]

23. Having regard to the obligation of the Secretary to give the 'review material' to the Authority 'at the same time as, or as soon as reasonably practicable after, the decision is referred to the Authority' (s 473CB(2)), and that the Minister must refer 'as soon as reasonably practicable after the decision is made' (s 473CA), the time within which any other materials, apart from the ones identified at [21] above, may come to be in the Secretary's possession or control, is limited. That said, conceivably an applicant may have provided to the Department some materials after the making of the s 65 decision,[14] or a 'dob in' letter may have been received.

24. However, the Secretary's power (coupled with the duty) in s 473CB(1)(c) to give any post-decision materials must depend on the Authority being able, upon its receipt, to exercise its powers (subject to constraints) and discharge its duties in ss 473DC, 473DD and 473DE.

25. Limiting the range of materials upon which the Secretary may, acting reasonably and on a correct understanding of the law, reach the requisite state of mind ('considered ... relevant to the review') advances the purpose of the duty (coupled with a power) in s 473CB(1)(c), having regard to the fact that the 'primary rule'[15] is that the review by the Authority will be on the papers (the 'review material'), and that such 'limited review' is still to be a fair one.[16]

26. The final aspect of this part of the analysis is consideration of ss 473GA and 473GB.

27. Section 473GA must operate as a limit upon the power of the Secretary (arising because of the duty in s 473CB(1)) to give materials to the Authority. Whilst not impossible to conceive of extreme examples where a document given by the applicant as part of his/her application for a protection visa, or some information within it, may engage the provision, it must be the case that, principally, it would be in respect of documents or information which the delegate got, pursuant to s 56, that s 473GA would operate.

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13 *Plaintiff M174* at [25] (Gageler, Keane and Nettle JJ).

14 See eg *EEM17 v Minister for Immigration and Border Protection* [2018] FCAFC 180.

15 *Plaintiff M174* at [22] (Gageler, Keane and Nettle JJ).

16 See eg *EVS17 v Minister for Immigration and Border Protection* [2019] FCAFC 20 at [41] (Allsop CJ, Markovic and Steward JJ): 'The conduct of the review is intended to be, to a degree, restricted, but fair'.

28. Similar considerations apply with respect to s 473GB. Its main scope of operation must be in respect of documents or information which the delegate got, pursuant to s 56. Some post-decision documents such as 'dob in' letters might also cause subs (1) to be engaged. And if a certificate or notification is validly given, what this Court said in *BVD17*[17] would apply.

29. All that being said, the Secretary's power to give a document or information to the Authority, pursuant to s 473CB(1)(c) and under cover of a certificate or notification, must still depend on the Authority being able to know if those materials satisfy par (a) of the definition in s 473DC(1). This is because the discretion in s 473GB(3)(a) is conferred 'for the purpose of the exercise of [the Authority's] powers in relation to a fast track reviewable decision', which include the power in s 473DC(1) and (3).

30. In summary, compliance by the Secretary with the limits of so much of the duty (coupled with a power) in s 473CB(1) to provide 'other material' considered by the Secretary to be 'relevant to the review' is a pre-requisite to the exercise of jurisdiction by the Authority under s 473CC. This is because, absent compliance, two things are possible:

    a. the Authority might proceed by considering an excess of 'review material'; and/or

    b. the Authority might be disabled from exercising its powers (subject to constraints) and discharging its duties in ss 473DC, 473DD and 473DE.

    And the Act does not contemplate either of these two things occurring.

Question 2 – If yes, does non-compliance by the Secretary with the duty imposed by s 473CB(1) give rise to jurisdictional error on the part of the Authority only if the non-compliance is material to the outcome of the review in the sense that the decision of the Authority might have been different had the Secretary complied with the duty?

31. The short answer to Question 2 is No.

32. Among recent authorities of this Court, the analysis most relevant is found in the judgment of Justices Gageler and Keane in *Wei*. (Justice Nettle dissented, without however casting doubt on the propositions of principle to be found in the majority's judgment.) That analysis has the following steps.

33. *First*,[18] there is no reason in principle why jurisdictional error should be confined to error or fault on the part of the decision-maker.

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[17] *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34.

[18] *Wei* at [23].

34. *Second*,[19] there remains utility in the terminological distinction between an 'imperative' duty and a 'directory' one, for the purpose of describing (ie, for 'the end of the inquiry, not the beginning'[20]) whether or not a material breach of an antecedent statutory duty results in an invalid exercise of a decision-making power. The question, if it be one of 'materiality',[21] looks at the anterior statutory duty and evaluates the nature of its breach, not at whether the decision of the 'innocent' decision-maker might have been different.

35. *Third*,[22] central to the process of statutory construction, at the conclusion of which the label of 'imperative' may be attached to a duty, is an inquiry as to whether the statutory purpose of that duty, when considered within the particular statutory scheme of which that duty forms part, would be advanced by holding the consequent exercise of power by the 'innocent' decision-maker to be invalid.

36. *Fourth*,[23] considerations which bear on that inquiry include the justice and convenience of holding that a breach of that anterior duty invalidates an exercise of the subsequent decision-making power.

37. *Fifth*,[24] a duty is imperative where a material breach would work to the peculiar disadvantage of an individual.

38. *Sixth*, the 'injustice' is not measured by reference to the particular case. In *Wei*, Gageler and Keane JJ considered that the 'injustice to the holder of the student visa of the power to cancel that visa being exercised on the basis of incorrect information downloaded from PRISMS is manifest'.[25] The particular case was then considered, but simply to illustrate the point.

39. Non-compliance by the Secretary with the duty in s 473CB(1) will, other than in few cases,[26] be a material breach working to the peculiar disadvantage of the referred applicant.

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19 *Wei* at [25].

20 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93], quoted in *Wei* at [26].

21 Other passages in the judgment of their Honours (eg [32]-[33]) support the conclusion that 'material' is being used in a different sense to how deployed in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 and *Minister for Immigration and Border protection v SZMTA* (2019) 91 ALJR 252.

22 *Wei* at [26].

23 *Wei* at [27].

24 *Wei* at [28].

25 *Wei* at [31] (emphasis added).

26 Eg providing sufficient contact details, but not all that is required under par (d).

Question 3 – Where non-compliance results in the Secretary giving the Authority 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 of reasonable apprehension of bias?

40. For the reasons given above, in answer to Question 2, the duty in s 473CB(1)(c) is imperative. Provision by the Secretary of material that is irrelevant to the review and prejudicial to a referred applicant will always be a material breach of that imperative duty.

41. In the present case, the breach of duty by the Secretary resulted in the Authority having to consider the extraneous material as 'review material', thereby exceeding its jurisdiction.[27]

42. In apprehended bias, the fair-minded lay person would look at the fact of provision to the Authority of extraneous material which it is duty-bound to consider, being materials that have the imprimatur of the Secretary having considered them relevant to the review, and which are prejudicial to the interests of the referred applicant.

43. If the materials are prejudicial, that is the end of the matter.

44. However, the informed[28] fair-minded lay person may think the materials not to be prejudicial at all. It would not be reasonable, to take one example, to consider provision by the Secretary to the Authority of a document which simply lists the names of all officers in the Department to be prejudicial. The material is extraneous. The Authority would still need to consider it. But it would not be a reasonable response by this passenger on the Clapham omnibus[29] – ie, the fair-minded person ought not have this response – to think that the Authority might not bring an impartial mind to determination of the review because it had to consider this list.

45. The answer to Question 3 is that there is no relationship. However, breach of duty by the Secretary and apprehended bias may, and in this case will, lead to the same end-point. The decision of the Authority should be quashed.

Dated: 24 October 2019

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27 **CAB 133**, Notice of Appeal, Ground 5.

28 *Isbester v Knox City Council* (2015) 225 CLR 135 at [23] (Kiefel, Bell, Keane and Nettle JJ), [57] (Gageler J).

29 *Healthcare at Home Ltd v Common Services Agency* [2014] 4 All ER 210 at [1] (Lord Read, for the Court).