IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S347 of 2019

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

Appellant

and

CED16

First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The first respondent **(respondent)** agrees with the appellant Minister's characterisation of the issues presented by the appeal. However, the respondent does not concede that success on the second ground of the Notice of Appeal would be sufficient to allow the appeal.

Filed on behalf of the First Respondent by:

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Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. The respondent has considered whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth). The respondent has concluded that no such notice is necessary.

Part IV: Facts

4. The respondent agrees with the factual background provided by the appellant at AS [9]-[15], save to add the following matters which were 'generally agreed' in the Federal Court proceedings.

5. The respondent is a Sri Lankan national of Tamil ethnicity. He arrived in Australia at Christmas Island on 10 September 2012 as an 'offshore entrant', as then defined in s 5(1) of the *Migration Act 1958* (Cth) **(the Act)** (now described in s 5AA of the Act) as an "unauthorised maritime arrival".[1] The respondent was released from detention sometime in February 2013.

6. In August 2015, the Department of Immigration and Border Protection (**Department**) informed the respondent that the Minister for Immigration and Border Protection (**Minister**) had lifted the bar under s 46A. On 4 September 2015 the respondent lodged an application for a Safe Haven Enterprise visa (**SHEV**).

7. On 19 May 2016 the delegate refused to grant the visa.[2] The delegate's decision included an assessment of whether the identity documents provided by the respondent were 'bogus documents', and an assessment of whether the respondent had given a false identity.[3]

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[1] *Migration Amendment (Unauthorised Maritime Arrivals And Other Measures) Act 2013* (No. 35, 2013) Schedule 1 Part 1 Item 8.

[2] Respondent's Book of Further Materials (**RFM**) 37-71.

[3] RFM 41-42 [12] - [25].

8. The delegate found the respondent 'has provided sufficient evidence of his identity which is consistent with his narrative and biometrics', and that '[a] check of relevant systems revealed no information that raises concern that the applicant has given a false identity.'[4]

9. The delegate also assessed whether the respondent might be an 'excluded fast track review applicant', including with by reference to identity documents provided by the first respondent, and whether 'security features were consistent with checks conducted on departmental databases', and an assessment of whether the
10 respondent's claims were 'manifestly unfounded'.[5]

10. On 19 May 2016, the same day as his decision, the delegate completed a checklist of documents of 'review material' to be complied in a "PDFP" electronic document to be sent to the "TPVP team" for referral to the Authority under s 473CB of the Act. Members of the TPVP team apparently held delegations from the Secretary of the Department in respect of the Secretary's obligations under s 473CB.[6] The checklist indicated that a "473GB certificate" was included in the PDFP, as were the documents to which that certificate related.[7]

20 11. The Authority did not conduct an interview with the respondent. On 11 July 2016, the Authority affirmed the delegate's decision.[8]

The Authority's decision

12. The Authority accurately summarised the respondent's claims for protection to fear persecution from the Tamil paramilitary group Tamil Makkal Viduthalai Puligal (TMVP), the Karuna Group and the Sri Lankan authorities: CAB 9-10 [5].

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[4] RFM 43 [24].

[5] RFM 69-71 [176]-[193].

[6] RFM 7-10 Referrals to IAA and Disclosure Checklist (**Checklist**).

[7] RFM 10 Checklist.

[8] CAB 8-27.

13. The Authority said that it 'had regard to the material referred by the Secretary under s 473CB of the Migration Act 1958': CAB 9 [3]. The Authority said that, 'on the basis of the documents and oral evidence given by the applicant', it accepted that the respondent was 'a national of Sri Lanka who was born in Batticaloa': CAB 10 [6].

14. The Authority did not express any consideration of matters relating to the identity assessment and finding by the delegate, or to the delegate's assessment of whether the evidence provided by the respondent of his identity, nationality and citizenship was 'bogus'.

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15. The Authority accepted that the respondent's father was a candidate in parliamentary elections who 'went missing' and died in the late 1990's (CAB 10-11 [7]-[8]); that the respondent was elected as deputy chairman of the local development group, but undertook only a limited range of activities in this capacity (CAB 11 [13]); that the TMVP forcibly recruited the respondent to assist the TMVP during its election campaign and that the respondent fled (CAB 12 [21]); that the TMVP visited his home 'two or three times' looking for him (CAB 13 [25]); and that on return the Sri Lankan authorities would consider the respondent a failed asylum seeker who had departed Sri Lanka illegally: CAB 13 [26].

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16. Despite these findings, and despite credible reports that the TMVP continued to be active, including in criminal activity (CAB 17 [44]), the Authority did not accept the TMVP posed an actual threat to the respondent (CAB 17 [43]), or that the respondent had a profile which would then have made him of interest to the TMVP: CAB 17 [46].

17. On the basis of country information, the Authority rejected the respondent's claims to fear harm as a failed asylum seeker or because of his unlawful departure from Sri Lanka: CAB 20 [59]. The Authority found the respondent was not entitled to

30 complementary protection, for the same reasons that it had not accepted his refugee claims: CAB 22 [71].

Procedural History and Non-Disclosure of IA Form in Court Proceedings

18. In the proceedings in the Federal Circuit Court, Judge Street ordered on 10 October 2016 that the Minister, the first respondent in those proceedings, file and serve copies of the Court Book.[9] The Index to the Appeal Book includes entries for the certificate and the IA Form in the Court Book in the Federal Circuit Court proceedings. The IA Form was marked 'NR', indicating that it was not reproduced in the Court Book. [10]

19. The Minister did not disclose the IA Form in the Federal Circuit Court proceedings despite the concession of the Minister's counsel, as recounted by Judge Street, that "there was an argument that might be raised of invalidity given... the description in the certificate... as being contrary to the public interest because it is a departmental working document": CAB 49 [49]. Judge Street treated the issue of materiality in effect as a criterion of jurisdictional error. His Honour found that "no rational argument had been developed as to how [the IA Form] could have any possible relevance to the outcome of the decision of the Authority": CAB 49 [51]. Therefore, his Honour found that whether or not the certificate was invalid, the undisclosed IA Form "was irrelevant to the determination of the applicant's claims" (CAB 49 [52]), and that even if there was an error concerning the certificate, there was "no practical injustice to the applicant" and therefore no jurisdictional error had been made out: CAB 50 [53].

20. Neither did the Minister produce the IA Form in the Federal Court proceedings, despite the Minister's concession that the certificate was invalid for not raising a proper claim for public interest immunity, and despite that the Minister was given the occasion to disclose the IA Form when the Court admitted affidavit evidence after the hearing that the IA Form was before the delegate.[11] The respondent did not call for the IA Form in either the Federal Circuit Court or the Federal Court proceedings.

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[9] RFM 13 [2] Orders of Judge Street

[10] RFM 18 Appeal Book Index at Item 5; RFM 21 at Item 16

[11] CAB 70 [7], being the affidavit of Alexander Lochland at RFM 26-73.

21. Justice Derrington dismissed the respondent's application for leave in respect of the first ground of the "Proposed Further Amended Notice of Appeal" to the Federal Court dated 9 August 2018: CAB 54-57.[12] The respondent does not contest Derrington J's conclusion in that regard.

22. The respondent formulated the second ground of appeal in the Proposed Further Amended Notice of Appeal upon the authority of the Full Court of the Federal Court in *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111 (***BBS16***). In *BBS16*, the Full Court held that a certificate/notification under s 473GB of the Act, even though invalid, could not be "new information" within the meaning of s 473DC(1) of the Act as the certificate was "properly addressed by reference to s 473GB and not by reference to the provisions in Pt 7AA which relate to 'new information'".[13]

23. In *BBS16*, the Full Court noted that the Minister did not "seriously dispute that the Court should infer that the IAA had considered both the certificate and the related information because of the IAA's statement at [5] of its reasons that it had 'had regard to the material referred to the Secretary (*sic*) under s 437CB…'"[14] The Full Court in *BBS16* also noted at [87] that it was common ground that "the referred material must have included the certificate..."[15]

24. In *AYF16 v Minister for Immigration and Border Protection* (2018) 264 FCR 654 (***AYF16***), the Full Court of the Federal Court dismissed a challenge to the correctness of the previous Full Court's reasoning and conclusions in *BBS16,* in particular the Full Court's finding that an invalid s 473GB certificate could not be 'new information'. One argument put in *AYF16* was that the Full Court was wrong to reach this conclusion because its reasoning assumed that the powers conferred by s

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[12] The "Amended Notice of Appeal" at CAB 60-63 filed by the first respondent on 19 November 2019 pursuant to Orders made on 25 September 2018 at CAB 67 incorrectly includes this first ground of appeal.

[13] *BBS16* at 142 [90].

[14] *BBS16* at 141 [87].

[15] *BBS16* at 141 [87].

473GB "were validly engaged by a valid certified notification".[16] The Full Court in *AYF16* rejected the argument on the basis that "...the certificate in *BBS16* was also invalid and the reasoning proceeded on that basis".[17]

25. In these proceedings, as in the Federal Court proceedings, it is common ground that the certificate purportedly issued under s 473GB (**certificate**) was invalid because the reason given on the certificate for the non-disclosure of the Identity Assessment Form (**IA Form)** was not sufficient to form the basis for a public interest immunity claim: AS [13]. Derrington J correctly regarded the pivotal issue, "raised by the circumstances of the case", was "how the IAA is obliged to deal with the information in a certificate given by the Minister purportedly under s 473GB and the accompanying confidential information where the certificate is invalid": CAB 68 [2]. Derrington J said that this 'pivotal issue' "arose tangentially as a necessary consequence of the Minister's submissions", an "elemental part" of which was that "...the general provisions in Part 7AA concerning the giving of information to the IAA as 'review material' were unaffected by the specific provisions relating to new or confidential information": CAB 68 [3].

26. The appellant does not repeat that submission in these proceedings. The appellant made that submission before the appellant adduced evidence after the Federal Court hearing that the IA Form the subject of the certificate was before the delegate when the delegate made his decision and therefore could not be 'new information' in any event: CAB 70 [7]. Neither does the appellant now submit that the certificate was part of the review material the Secretary gave to the Authority under s 473CB of the Act.

27. It is common ground in these proceedings that the certificate was not given or accepted as part of the s 473CB review material, despite Derrington J's finding to the contrary that it was "probably correct" that the Secretary gave the certificate to the Authority "as 'review material'": at CAB 75 [28].

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[16] *BBS16* at 121 [19].

[17] *AYF16* at 665 [38].

Part V: Argument

28. Justice Derrington was correct to find that the certificate was invalid, and that it was new information to which s 473DB applied (CAB 85 [56]), requiring the Authority to deal with the certificate in accordance with Subdivision C of Division 3, rather than the provisions in Division 6: CAB 85 [57].

29. Section 473DB requires the Authority to review a fast track reviewable decision referred to it under s 473CA by considering the review material provided to the Authority under 473CB *without accepting* or requesting new information. This prohibition against accepting new information includes material in the review material and other material from the applicant or another person. It also includes material such as the invalid certificate.

30. As the certificate was invalid and the Authority misunderstood the legal effect of the certificate when it accepted the certificate from the Secretary as if s 473GB applied to it, the question arises whether the acceptance by the Authority of the certificate from the Secretary was supported by any other law or power. A mistake as to the source of a power does not result in the invalidity of an act done otherwise within power.[18]

31. Even if the giving and acceptance of the certificate was only in the "execution of a bare non-prerogative executive capacity", these acts were still subject to the general law.[19] This included the status of 'new information' under Part 7AA of the Act. In particular s 473DB(1)(a) prohibits the Authority accepting 'new information', as defined in ss 473BB and 473DC(1). This prohibition is said to be subject to "this Part", including the provisions in Subdivision C of Division 3 of Part 7AA concerning "additional" or new information.

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[18] *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 184 per Fullagar J; *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 469 per McHugh J.

[19] *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 98 [135] per Gageler J.

32. The scheme of Part 7AA allows the Authority to accept new information in four ways.

a. *First*, the Secretary may include new information in the review material it gives to the Authority under s 473CB(1)(c). This Court addressed this possibility in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (***Plaintiff M174***), holding that the review material the Secretary gives to the Authority under s 473CB is not limited to information that was before the Minister or delegate at the time of making the decision to refuse to grant the protection visa.[20] However such information is not 'new information' until the Authority considers it "may be relevant" under s 473DB(1)(b).[21]

b. *Secondly*, s 473DC empowers the Authority with discretions to get information by inviting or requesting a person, including the referred applicant, to give new information in writing or at an interview. These discretions are not expressed to be the exclusive means by which the Authority might obtain new information.

c. *Thirdly*, s 473DC(2) empowers the Authority to consider new information at the request of the referred applicant or another person, subject to s 473DD of the Act.

33. The *fourth* possible way in which the Authority may accept new information is raised by this case and yet to be considered by this Court. This fourth way involves the acceptance by the Authority from the Secretary of 'new information', not being review material, in the form of a certificate ostensibly issued and notified to the Authority under s 473GB, upon a purported exercise of statutory authority that was devoid of legal effect in relation to the document or information the subject of the certificate.[22]

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[20] *Plaintiff M174* at 228-229 [25]-[27] per Gageler, Keane and Nettle JJ.

[21] *Plaintiff M174* at 229 [27] per Gageler, Keane and Nettle JJ.

[22] See e.g. *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (***SZMTA***) at 443 [40] per Bell, Gageler and Keane JJ in relation to a similar invalid certificate purportedly issued under Part 7 of the Act.

34. It is common ground that the Authority received the certificate at the same time as the review material, purportedly as notification that s 473GB applied to the information to which the certificate related (the IA Form), and that the certificate was not given or accepted as part of the review material.

35. It is also common ground that the IA Form was before the delegate when the delegate made his decision. The appellant provided an affidavit proving this in response to Derrington J's indication to the parties that the IA Form and the certificate may amount to new information (despite *BBS16* and *AYF16*): CAB 70 [7]. It may be inferred from the terms of s 473GB(2) that the Secretary gave the IA Form to the Authority "in compliance with a requirement of or under this Act", as part of the review material given by the Secretary to the Authority under s 473CB(1)(c).

36. Justice Derrington correctly reasoned that as the certificate provided to the Authority was invalid, there was no reason why the "confidential information" provisions in Division 6 of Part 7AA applied to it: CAB 85 [56]. His Honour held that if the invalid certificate was new information then the Authority was required to consider it in accordance in s 473DB: CAB 85 [56]. That is, the Authority was not to accept the 'new information' except in accordance with the "statutory conditions or preconditions" of Subdivision C of Division 3 in relation to new information: CAB 85 [57].

37. The appellant's submissions do not challenge this core reasoning, but rather take issue with Derrington J's characterisation of the certificate as 'new information' in the first place. The appellant does not dispute that if the certificate was new information, then it would need to have been dealt with under Subdivision C of Division 3. The appellant does not take issue that the certificate was not dealt with under Subdivision C – only that, *first*, the certificate was not new information and that, *second,* s 473DE did not apply to the certificate even if it was new information.

38. Justice Derrington was correct to find the certificate was new information because the Authority had considered the certificate to be relevant and because that the certificate was not before the delegate: at CAB 85 [57]. Therefore the certificate

satisfied both limbs of the definition of 'new information' in s 473DC(1). If this submission is accepted, the appeal should be dismissed even though s 473DE did not apply to the certificate.

The certificate was 'information'

39. The appellant submits that the certificate was not 'information': AS [36]-[40].

40. It is not in issue that 'information' in ss 473DC, 473DD and 473DE is a "communication of knowledge of some particular fact, subject or event".[23] However, just because the certificate incorrectly stated facts and circumstances relating to the IA Form did not deny its quality as 'information'. Information will still be "information" regardless "of whether it is reliable or has a sound factual basis".[24]

41. The certificate communicated information as that term is defined is 473DC(1), and according to the "ordinary sense" described by this Court in *Plaintiff M174*.[25] The very purpose of s 473GB(2)(a) is that the Secretary notify the Authority of its knowledge that the s 473GB applies in relation to the underlying information. The Secretary does by this communicating certain matters by means of a Certificate, which in this case the appellant has set out at AS [37] (a) – (d). These matters all fall within the ordinary sense of information described. The invalidity of the certificate did not mean the material within it ceased to be 'information', or that the certificate was no longer 'a document' under s 473DC(1).

42. The appellant also argues that none of the statements in the certificate '*[were] of a factual or evidentiary nature or had any bearing on the substantive merits of the decision being reviewed or the issues arising on the review*': AS [40]. This

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[23] *Plaintiff M174* at 228 [24] per Gageler, Nettle and Keane JJ, citing the formula in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 236 FCR 549 at 555 [24] per Finn and Stone JJ *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at 259 [205] per Allsop J.

[24] *Win v Minister for Immigration and Multicultural Affairs* (2001) 105 FCR 212 at 217-218 [19]-[22].

[25] *Plaintiff M174* at 228 [24] per Bell, Gageler and Keane JJ.

formulation was devised by this Court in *SZMTA* as applying to 'information' in the context of Division 4 of Part 7 of the Act and the operation of s 427(1)(c) within that Division.[26] It should be distinguished from that different and wider formulation devised by this Court in *Plaintiff M174* applying to information in the context of review under Part 7AA of the Act.

43. Section 427(1)(c) within Part 7 of the Act empowers the Administrative Appeals Tribunal to give information to the applicant and to the Secretary. There is no corresponding provision in Part 7AA. Indeed, s 473DA(2) provides that nothing in Part 7AA requires the Authority to give to the applicant any material that was before the Minister.

44. Unlike merits reviews under Parts 5 and 7 of the Act, the review under Part 7AA is a review 'de novo' of the merits of the referred decision; on the papers - subject to exceptions; in which procedural fairness is effectively excluded; and where the acceptance of new information by the Authority is prohibited by s 473DB(1), again - subject to exceptions.[27] Therefore, which "documents or information" amount to 'information' under s 473DC(1) should not be seen through the lens of procedural fairness appropriate to reviews under Parts 5 or 7, including the operation of Division 4 within Part 7 regulating the conduct of reviews.

45. In this regard, it is significant that, unlike Parts 5 or 7, Part 7AA provides its own definition of "information" at ss 473BB and 473DC to mean "documents **or** information". The expression in the alternative, particularly in the context of a review on the papers, suggests a wider reach to include material that might not otherwise be "information" in the context of a review under Parts 5 or 7.

The certificate was 'new information'

46. If (as set out above) the certificate was, or contained, 'information', then it satisfied s 473DC(1)(a) (because it was not before the Delegate). However, information

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[26] *SZMTA* at 440 [28] per Bell, Gageler and Keane JJ.

[27] *Plaintiff M174* at 226 [17].

received by the Authority, whether or not as review material, is not 'new information' unless and until the Authority considers it "may be relevant" under s 473DB(1)(b).[28]

47. It should be inferred that the Authority had in fact considered that the certificate 'may be relevant' for the purposes of s 473DC(1)(b), because the Authority "can be expected in the ordinary course to treat a notification [here under s 473GB] by the Secretary that the section applies as a sufficient basis for accepting that the section does in fact apply to a document or information to which the notification relates".[29]

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48. That is to say, in exercising the discretion the Authority believed it had to 'have regard to' the IA Form, it examined the IA Form as part of the review material and acted upon its own assessment of the relevance of that material.[30] Because the Authority was acting according to the certificate, it must also have had regard to the certificate – or, in the terms of s 473DC(1)(b), it must have considered that the certificate 'may be relevant'.

49. There is nothing in the Authority's decision or the material provided by the Minister in the Appeal Book to indicate that the Authority had recognised the certificate to be
20 invalid. As Derrington J said: "...the IAA had stated in its reasons that it had considered the material before it and made no exception in relation to the s 473GB certificate or the IA Form": CAB 74 [23]. As it may be inferred the Authority believed the certificate was valid, it may also be inferred the Authority believed it could only consider the IA Form in the exercise of the discretion under s 473GB(3)(a), the application of which had been notified by the certificate.

50. In response to a submission by the Minister that it had not been established the Authority had given consideration to either the certificate or the IA Form, Derrington J said that he regarded the Authority's statement that it had "had regard to" to the

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[28] *Plaintiff M174* at 229 [27] per Gageler, Keane and Nettle JJ.

[29] *SZMTA* at 445 [47] per Bell, Gageler and Keane JJ.

[30] *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 (***CNY17***) at [7].

material referred by the Secretary under s 473CB (CAB 9 [3]) to mean the Authority had considered the certificate and IA Form (CAB 78 [36]).

51. As the Authority said it had regard to the material referred to it by the Secretary under s 473CB (CAB 9 [3]), it follows that it had regard to the IA Form, although, unlike the other review material, the only way the Authority might have "had regard to" the IA Form, believing s 473GB applied to the IA Form, was to exercise the discretion it believed it had under s 473GB(3)(a).[31] The Authority did not have this discretion because the certificate was invalid. But because the Authority *believed* that the certificate was valid, it follows that it also considered the certificate 'may be relevant', thereby satisfying the second limb of the definition of 'new information' under s 473DC(1)(b).

52. Justice Derrington's statements at CAB 80 [40] and 84 [55] to the apparent effect that the certificate was *prima facie* new information or new information because it was not before the delegate should fairly be read with his Honour's citation of *Plaintiff M174* at 229 [27]: CAB 77 [32]. *Plaintiff M174* there addresses both limbs of s 473DC(1)(a) and (b) and it informed his Honour's ultimate finding that the certificate was new information because it was not before the delegate *and* "was considered to be relevant by the IAA…": CAB 85 [57].

The certificate was 'new information' even though it was not part of the review material

53. Even though the certificate was not part of the review material, and assuming the Authority had considered that it may be relevant , Derrington J was correct to hold that "the IAA is required to consider it pursuant to s 473DB": CAB 85 [56]. That is, if the certificate was 'new information', it was subject to the prohibition on the Authority under s 473DB(1)(a) from accepting new information for consideration, "subject to this Part" (in particular, the exceptions in Subdivision C of Division 3 relating to additional and new information). If the Authority nonetheless considered

[31] *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1095 [10].

the certificate, then it considered new information in breach of the prohibition under s 473DB.

54. As indicated, the respondent accepts that the certificate was not given by the Secretary or accepted by the Authority as part of the review material. The appellant challenges the assumption Derrington J had made at CAB 75 [28], "for the purposes of this matter", that the certificate was sent "in purported compliance with s 473CB" as part of the review material: AS [41]. But the correctness of his Honour's ultimate finding that the certificate was 'new information' does not depend on his assumption that it was part of the review material. This assumption arose in the context of his Honour addressing the Minister's former submission that, as part of the review material, the certificate could not therefore be new information.

55. The respondent's concession that the certificate did not form part of the review material is for different reasons to those proposed by the appellant. Contrary to the appellant's submissions at AS [43]-[44], when the Secretary provided the certificate to the Authority with the review material, it could not have been in accordance with s 473GB(2)(a) because the Secretary had no duty or authority to notify the Authority under that subsection.[32] As the certificate was invalid, s 473GB(2)(a) did not apply to it and the purported exercise of statutory authority under s 473GB(2)(a) was devoid of legal effect.

Materiality

56. The Authority's error was material to its exercise of power as to amount to jurisdictional error.

57. It is accepted that it is a question of fact whether a legal error is so material to the decision as to amount to jurisdictional error in respect of which the respondent bears the onus of proof. It is also accepted that materiality is to be determined by inferences drawn from the evidence adduced on the application.[33]

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[33] *SZMTA* at 445 [45] per Bell, Gageler and Keane JJ.

58. Determination of the jurisdictional import or gravity of the error – that is, whether the breach "could realistically have resulted in a different decision"[34] – will depend on the nature of the error. For example, whether the error was an inviolable limitation governing the conduct of the review (as in this case of an incorrect and invalid notification) or a breach of procedural fairness may have a bearing on how the burden may be discharged. Proof of the materiality of a breach of procedural fairness may be more fact dependent and specific than a breach of precondition to the exercise of power.[35]

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59. In this case the Authority "had regard to" to the IA Form upon its understanding "in the ordinary course" that the certificate was valid. This is not a case where a court on judicial review could infer the Authority had left the IA Form out of account.[36] The Authority said it "had regard to" the review material of which the IA Form was a part. As it may be inferred the Authority treated the certificate as valid, it could only have "had regard" to the IA Form in the exercise of its discretion under s 473GB(3)(a).

60. As Derrington J recognised, the difficulty for the respondent in the discharge of the
20 burden of proof was that the contents of the IA Form were not known to him. Despite having effectively withdrawn the public interest claim in respect of the IA Form, the Minister still did not disclose it in the Court Book which the Federal Circuit Court had ordered it to produce. The burden of proof on an applicant should not be increased or rendered immovable by Minister's failure to comply with a Court's orders.

61. The Minister declined to reproduce the IA Form in the Court Book in the Federal Circuit Court proceedings despite the order of that Court on 10 October 2016 that it "file and serve a Court Book", and despite that the Minister had "accepted there was

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[34] *SZMTA* at 445 [45] per Bell, Gageler and Keane JJ.

[35] This is consistent with the Full Federal Court's reasoning in *Nguyen v Minister for Home Affairs* [2019] FCAFC 128 at [48]-[49], [51] and [54]. See also *CNY17* at [127] per Edelman J.

[36] *SZMTA* at 445 [48] per Bell, Gageler and Keane JJ.

an argument that might be raised of invalidity.. given the description in the certificate... as being contrary to the public interest because it is a departmental working document": CAB 49 [49].

62. Neither did the Minister produce the IA Form in the Federal Court proceedings in which the Minister had submitted the certificate was invalid and the IA Form was part of the review material, and in which the Minister was given leave after the hearing to adduce evidence that the IA Form had been before the delegate.[37]

63. In these circumstances it was open for Derrington J to reason that the materiality of the Authority's breach of s 473DB in its acceptance of the certificate derived from the IA Form, in that the assertion of a claim of a public immunity by the Minister in the certificate "heightened the import of the information in the IA Form": CAB 86 [59].

64. It was also open for Derrington J to find that the contents of the IA Form could not be assumed to be benign: CAB 74 [23]. The original delegate's assessment of the respondent's identity referred to biometric identifiers, the evidence the respondent had provided in support of his identity, the respondent's knowledge and narrative of his life in Sri Lanka and claims for protection, and certain Departmental databases and 'relevant systems'.[38]

Justice Derrington's conclusion that the certificate was new information did not depend on his analysis of the operation of s 473DE

65. Justice Derrington's conclusion that the certificate was 'new information' did not depend upon his analysis of the operation of s 473DE in relation to the certificate. His Honour's consideration of the application of s 473DE was an analysis of what he thought the Authority should have done, and therefore as proof that the Authority had failed to treat the certificate as subject to the new information provisions of Division 3.

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[37] RFM 26-73.

[38] See paras [7]-[9] above.

66. While the inference should be drawn the Authority believed and acted as if its discretion in s 473GB(3)(a) was enlivened by the certificate, the same inference cannot be drawn from the Authority's failure to give the respondent particulars under s 473DE, as Derrington J had reasoned at CAB 79 [38]. It is not contested that s 473DE did not require disclosure of the certificate. The certificate was not, in its terms, of dispositive relevance to the respondent's claims for protection and therefore was not 'information "would be the reason or part of the reason for affirming the fast track reviewable decision" so as to require disclosure under s 473DE(1)(a)(ii).

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67. Nonetheless, if the certificate were 'new information', s 473DB would prohibit the Authority from accepting it, subject to the exceptions in Subdivision C of Division 3. This Court may find the certificate was new information and subject to the prohibition in s 473DB even if it finds s 473DE did not apply to the certificate.

68. Justice Derrington's consideration of the application of s 473DE was not a necessary part of his Honour's conclusions that the certificate was 'new information' which the Authority was required to treat in accordance with Subdivision C of Division 3. The appellant does not contest that the Authority did not deal with the certificate in
20 accordance with Subdivision C, only that it did not have to, and that in any event s 473DE did not apply to the certificate.

69. It follows that any error in his Honour's conclusions on the application of s 473DE in relation to the certificate does not provide of itself a basis on which to allow the appeal against his Honour's orders. The inference that the Authority believed that its discretion in s 473GB(3) was enlivened may be drawn from its expectation "in the ordinary course" that the certificate was valid,[39] and does not require this Court to find that s 473DE applied either to the IA Form or the certificate.

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[39] *SZMTA* at 445 [47] per Bell, Gageler and Keane JJ.

Part VI:

70. The respondent estimates he will require an hour for the presentation of his oral argument.

Dated: 27 February 2020

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ANNEXURE – LIST OF RELEVANT STATUTORY PROVISIONS

Migration Act 1958 (Cth) (compilation number 131, as at 11 July 2016): ss 427, 473BB, 473CA-473DE, and 473GB