

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

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FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

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Filed on behalf of the First Respondent by:

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Part I: Certification

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

Part II: Propositions

2. Because the Authority did not recognise the certificate to be invalid and “new information”, the Authority breached a primary obligation in its conduct of the review not to accept “new information”: s 473DB(1)(a); *MI74* at [22].

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3. It may be inferred from what could be expected to occur in the course of the regular administration of the Act that the Authority assumed the s 473GB certificate was valid and relied upon it: *SZMTA* at [47]. The Federal Court was correct to reach this conclusion at CAB 85, [57] and CAB 86, [60].

4. Because it thought that the invalid certificate was valid, the Authority exercised important powers in s 473GB(3) which it did not have. These powers qualified the Authority’s primary obligations under s 473DB(1), including by allowing the Authority to have regard to notified ‘new information’ as if the provisions in Subdivision C of Division 3 of Part 7AA regulating the consideration of ‘new information’ did not apply to it.

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5. By failing to recognise the certificate was invalid, and treating it as if it were valid (ie as a mandatory relevant consideration), the Authority failed to recognise or treat the certificate itself as ‘new information’ under Division 3 of Part 7AA, including s 473DC and 473DD.

6. It is not in issue that, because the certificate was invalid, the ‘disclosure of information’ provisions in Division 6 of Part 7AA did not apply to it, despite *BBS16*. It is also not in issue that, if the invalid certificate was ‘new information’, s 473DB(a) would not allow the Authority to accept it except in accordance with Division 3, including s 473DD which requires the Authority to be satisfied there are exceptional circumstances justifying its consideration of the new information. It is not in issue that s 473DE did not apply to the certificate.

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7. The certificate was ‘information’ in ordinary sense of a ‘communication of knowledge of some particular fact, subject or event’: *MI74* at [24]. The very purpose of notification was to inform the Authority that s 473GB applied to the IA Form.
8. The meaning of ‘information’ in the Act should be read in the context of the particular kind of review to which each use of the term ‘information’ relates, given the differences between the kinds of merits reviews the Act provides in Part 7 and Part 7AA.
9. In a Part 7AA review, the reduction of the term ‘information’ to ‘evidentiary material’ will narrow the exclusion from the review of information which was not before the delegate.
10. Not being before the delegate, the certificate became ‘new information’ when the Authority considered it “may be relevant” under s 473DC(1)(b). Because the Authority believed that the certificate was valid, it followed that the Authority believed its consideration of it was mandated by statute.
11. Further, as the Authority believed it could only ‘have regard to’ to the IA Form by the exercise of its discretion under s 473GB(3)(a), it follows as a matter of regularity that when the Authority said at CAB 9 [3], that it “had regard to” the review material referred by the Secretary under s 473CB” (which included the IA Form) this meant the Authority had *a priori* considered the certificate.
12. Materiality should be assessed according to the nature of the error. For example, proof of the materiality of a breach of procedural fairness may be more fact dependant and specific than a breach of a precondition to the exercise of a power. Further, the Authority’s exercise of powers it did not have and its breach of a primary obligation in its conduct of the review (by accepting ‘new information’) is at the other end of the spectrum from technical breaches of procedural fairness.
13. In the circumstances of previous forensic choices by both parties and the disordered exercise of power by the Authority, it is difficult for the respondent to be specific about how “compliance could realistically have resulted in a different decision”: *SZMTA* at [45].

14. The materiality of the error of accepting the certificate depends in part on the relevance of the IA Form. Inferences as to the relevance of the IA Form can be drawn from the opinion formed by the Secretary to include the IA Form in the review material it gave to the Authority under s 473CB(1)(c): *CNY17* at [6].
15. Another inference as to the IA Form's relevance can be drawn from the Authority's statement at CAB 9 [3] that it had regard to the 'review material' of which the IA Form was a part, even though the Authority believed s 473GB(3)(a) allowed it to disregard the Form.
- 10 16. It was open to the Federal Court to find at CAB 74 [23] it could not "necessarily assume the information in the document is benign" because of the forensic choice of the Minister not to adduce the IA Form and because of the fact that the certificate was issued at all.
17. It may be inferred, as the Federal Court did at CAB 86 [59], that the assertion in the certificate that its disclosure would be contrary to the public interest heightened the import of the information in the IA Form.
18. The Federal Court's conclusion that the certificate was 'new information' did not depend on its misunderstanding that s 473DE applied to the certificate and its orders should not
20 disturbed on this basis.
19. The Federal Court's conclusion at CAB 85 [57] that the Authority relied on the certificate as if it were valid is not vitiated because that Court offered as proofs for this conclusion that the Authority did not apply s 473DE to the certificate when the Court mistakenly thought it should have: CAB 79 [38](b) and 86 [61], or that the Authority was given and had 'regard to' the certificate as part of the review material: CAB 74 [23] and CAB 75 [28]. The Authority's expectation of the regular administration of the Act (and hence the validity of the certificate) is an independent basis for the same conclusion.

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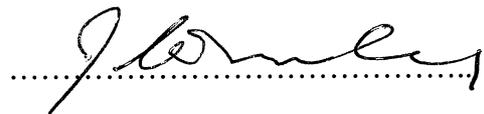
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Dated: 8 June 2020