

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

and

10

CED16
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I

1. This outline is in a form suitable for publication on the Internet.

20 **Part II**

Errors made by the Federal Court

2. The Second Respondent (**Authority**) was not required to treat the purported certificate (**certificate**) under s 473GB of the *Migration Act 1958* (Cth) (**Act**) (Core Appeal Book (**CAB**) 6) as “new information” within the meaning of Part 7AA of the Act and the Federal Court of Australia was wrong to find otherwise.¹ The Federal Court was also wrong to find that s 473DE of the Act applied to the certificate, but that is now conceded by the First Respondent (**Respondent**) (at RS [2] and [66]).

3. The Federal Court's findings of jurisdictional error related only to the certificate. No issue arises in relation to the document covered by it, as it was not “new information” (AS [20]-
30 [21]; RS [20]) – as the Federal Court accepted (CAB 69-70 [7], 80 [39]).²

The certificate was not “new information”

4. First, it was not “information” within the meaning of s 473DC(1):

¹ Relevant aspects of the scheme of review established by Part 7AA of the Act are summarised at AS [24]-[35].

² Because of that finding, any conflation by the Federal Court in parts of its judgment (particularly at CAB 79 [38] and 85 [56]) of the certificate with the identity assessment form is immaterial for present purposes.

- It contained no more than assertions as to the application of s 473GB (AS [37]). It was not “information” because it was not “*a communication of knowledge about some particular fact, subject or event*”³ or “*knowledge of facts or circumstances relating to material or documentation of an evidentiary nature*”.⁴ It had no factual or evidential bearing upon the merits of the referred decision or the issues on the review (AS [38]; Reply [16]-[19]).
 - Not being “information” in the requisite sense, it could not be “new information” (AS [39]).
5. Secondly, the essential requirement (for “new information”) in s 473DC(1)(b) was not met (AS [46]; Reply [20]). There is no evidence that the Authority considered that the certificate “may be relevant” (AS [46]). The Authority took no issue with the Respondent’s identity.
 6. The Federal Court incorrectly considered that the certificate had to be “new information” only because it was not before the delegate when the decision under s 65 was made (AS [20] and [47], referring to the Federal Court at CAB 80 [39]-[40], 84-85 [55]-[57], 86 [60]).
 7. The certificate was not a part of the “review material” provided by the Secretary under s 473CB (AS [41]-[45]). The Respondent now concedes this (RS [27]; [34]). The Federal Court erred in holding or assuming otherwise at CAB 75 [28] and 78 [36]. This is a further reason why the Authority’s reasons at CAB 9 [3] did not show that it considered that the certificate may be relevant to the review (AS [47]-[48]; Reply [21]).
 8. Nor does anything else in the Authority reasons suggest that it saw the certificate to be of any substantive relevance to the review (AS [20], [46]; Reply [22]-[23]);⁵ rather, it appears not to have been considered material to the decision (AS [48]).
 9. Given the absence of any duty upon the Authority to give reasons for procedural decisions (AS [35]), the Respondent is certainly not assisted by the absence of reference to the certificate in the Authority’s reasons.

³ *Plaintiff MI74/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 228 [24]; *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [18].

⁴ *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 440 [28].

⁵ A matter for its own assessment: *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [7].

Section 473DE(1) was not engaged

10. Given the Respondent's concession, it is no longer in issue that the Federal Court erred in finding any obligation under s 473DE in relation to the certificate (AS [20], referring to the Federal Court at CAB 68 [2], 85 [57]-[58], 86 [60]; AS [51]-[56]).

(Im)materiality

11. A bare error as to whether something was "new information" would not be jurisdictional if the error was not "material" to the Authority's decision.

12. No "material" error was found by the Federal Court even if (contrary to the Appellant's case) the certificate was "new information", given that the Federal Court's findings as to s 473DE are conceded by the Respondent and fall away.

Other issues raised by the Respondent

13. Contrary to RS [29]-[33] and [36], whether the Authority "accepted" the certificate, or whether there was thereby some "breach" of s 473DB(1) of the Act, is not an issue that falls for determination. Neither issue was raised by the present Respondent before the Federal Court (Reply [10], [13]). Nor was there any finding by the Federal Court that, for example, the Authority had "accepted" the certificate or thereby "breached" s 473DB(1).

14. It is not clear what is meant by the Respondent by "acceptance" in this context: Reply [9]. There could not be a breach of s 473DB(1) simply by reason of physical receipt of a certificate. The opening words of s 473DB(1) would suggest that the Authority can accept new information for the limited purpose of assessing it against the requirements of ss 473DC-473DE without contravening the former: Reply [11].

15. As already submitted, it is not shown that the Authority saw the certificate as relevant to the review (if that is what the Respondent seeks to convey.) Also, if the Respondent is asserting some "acceptance" of the validity of the certificate, it is not shown that the Authority decided that question either way.

16. In any event, any error was not material (Reply [12]). Particularly given the content of the certificate and that the Authority took no issue with the identity of the Respondent, the decision on the review could not realistically have been different.

30 Dated: 9 June 2020

Geoffrey Johnson SC

Bora Kaplan