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

REPLY

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Part I: Certification

1. These submissions are in a form suitable for publication on the internet. They are made in reply to the submissions filed by the Respondent on 27 February 2020 (**RS**). Abbreviations and acronyms employed in these submissions have the meanings given to them in the Minister's submissions, as amended, filed on 10 February 2020 (**AS**).

Part II: Reply

Concessions

2. The Respondent makes two important concessions in his submissions.

3. At RS [27] and [34], the Respondent accepts that the certificate was not given or accepted as part of the review material provided to the Authority pursuant to s 473CB(1) of the Act. As will be developed below, a consequence of this concession is that the Respondent cannot point to the Authority's reasons at CAB 9 [3] as suggesting that it considered that the certificate may be relevant (within the meaning of s 473DC(1)(b)).

4. At RS [2] and [66], the Respondent concedes that the Federal Court was wrong to hold that the certificate was new information of the kind to which s 473DE(1) applied. That concession, however, has the consequence that the Authority did not make any jurisdictional error as found by the Federal Court, being non-compliance with the duty in s 473DE(1). In this connection, a bare error as to whether information is or is not new information (as defined) is not sufficient to give rise to jurisdictional error unless it carries some consequence for the Authority's decision. The Federal Court considered the consequence to be that there was a duty on the Authority to comply with s 473DE(1) and that that did not occur (at CAB 85-86 [58]-[59]). The Federal Court did not identify any other consequence of treating the certificate other than as new information.

5. Accordingly, contrary to RS [2], if the Minister makes out his second ground of appeal, the appeal should be allowed and the consequential relief sought should be granted.

The identity assessment form

6. As to RS [19]-[20] and [60]-[64], the Respondent had the onus in establishing a material breach of the Act.[1] Notwithstanding that the Respondent was aware of the

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1 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (***SZMTA***) at 445 [46] per Bell, Gageler and Keane JJ.

existence of the certificate, he did not call for the identity assessment form in the Federal Circuit Court or in the Federal Court or issue a notice to produce for the production of that document. It was open to the Respondent to do so. In the absence of evidence as to the contents of the identity assessment form, there was no warrant for the Federal Court to conclude that the certificate either heightened the import of the information in that document or that its contents could not be assumed to be benign (*cf* RS [63]-[64]).

7. Moreover, and contrary to RS [49], [53] and [59], this appeal involves consideration of the question whether the certificate, not the identity assessment form, amounted to new information. The Respondent conceded as much at the hearing of the Minister's application for special leave to appeal.[2]

'Acceptance' of new information

8. At various points in his submissions (RS [29]-[33], and [36]), the Respondent refers to the Authority having 'accepted' the certificate and that such acceptance contravened s 473DB(1) of the Act. There are several responses to these submissions.

9. *First*, it is not clear from the Respondent's submissions what is meant by 'acceptance' in this context. If the Respondent's argument is that the Authority did not decline to receive the certificate in a physical sense, there are difficulties with that argument. In circumstances where there is no obligation on the Authority to give reasons for its procedural decisions[3] (such as an exercise of the discretionary powers in ss 473DC(1) and (3) or to accept an item of new information), the Respondent is unable to establish, to the requisite standard of proof, that the Authority accepted (in any sense) the certificate. There is, for example, no reference to the certificate in the Authority's statement of reasons. It is also difficult to see how acceptance of new information could be a breach of s 473DB(1), when the Authority could not form a view about its validity or how, if at all, to act upon it, until it has accepted (that is to say, received) it.

10. Contrary to RS [30], there is no evidence to suggest that the Authority misunderstood the legal effect of the certificate.

11. *Secondly*, acceptance of an item of new information is not, in itself, a breach of s 473DB(1). The primary rule set out in that subsection is expressed to be "subject to … Part [7AA]". Those words engage ss 473DC to 473DF of the Act. Accordingly, acceptance of an item of new information would not, itself, contravene s 473DB(1) if

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2 *Minister for Immigration and Border Protection v CED16* [2019] HCATrans 246 at line 30.

3 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1096 [16] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

the purpose of doing so is to assess that information against the requirements of ss 473DC to 473DE.

12. *Thirdly*, even if the Authority accepted the certificate, and that step resulted in a breach of s 473DB(1), to take that step cannot, in and of itself, result in jurisdictional error. The Respondent must still establish materiality. But the mere acceptance of new information itself has no consequence for the Authority's decision. Had the Authority not received the certificate, the outcome of the review could not realistically have been any different.

13. *Fourthly*, the point raised by the Respondent is one which was not raised in either court below. No notice of contention has been filed. For that reason alone, the point should not be entertained by this Court.

14. Contrary to RS [28], [36], [63] and [67], the Federal Court did not find that the Authority had breached s 473DB(1) by accepting the certificate (or any breach of s 473DB(1)). The Federal Court in the final sentence of [56] of its reasons (at CAB 85) was dealing with the identity assessment form, not the certificate.

The certificate was not 'information'

15. The Respondent submits, at RS [39]-[45], that the certificate contained "information" for the purposes of s 473DC(1). That submission should be rejected.

16. The word "information" must be read consistently when used in ss 473DC, 473DD and 473DE.[4] Also, a consistent meaning should be given to that word wherever it appears in the Act (for example, in ss 57, 359, 359AA, 359A, 424, 424AA and 424A).[5] Information cannot be information (properly understood) within the meaning of s 473DC(1) unless it conveys knowledge of some particular fact, subject or event. Information will not meet that requirement unless it has some relevance in a substantive, and not merely procedural, sense. Contrary to RS [40]-[41], the certificate did not communicate knowledge (in the sense just described) of any particular fact, subject or event.

17. The Respondent's submissions at RS [42] are wrong. The formulation in each of *Plaintiff M174* at 228 [24] and *SZMTA* at 440 [28] was concerned with the substantive merits of the review. The former is not a "different and wider formulation" applying only to cases involving Part 7AA of the Act. The formulation employed in *Plaintiff*

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4 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (***Plaintiff M174***) at 228 [24] per Gageler, Keane and Nettle JJ.

5 See, for example, *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 387 [65] per French CJ, Kiefel, Bell, Keane and Gordon JJ (and the cases cited therein).

M174 was derived from the judgment of Allsop J (as his Honour then was) in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 (***SZEEU***) at 259 [205] (a case which involved Part 7 of the Act). That case, in turn, cited, with approval, *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 236 FCR 549 at 555 [24], which this Court endorsed in *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 (***SZBYR***) at 1196 [18]. It was in the last-mentioned case that "information" was said to relate to "the existence of evidentiary material or documentation". *SZBYR* was cited by the plurality in *Plaintiff M174* at 223 [9].

10 18. The submission in the first sentence in RS [45] is not correct. Section 473BB does not define the word "information"; it provides a definition of "new information" by referring the reader to s 473DC(1). The Respondent's submission is also inconsistent with *Plaintiff M174* at 228 [24], which plainly applied the reasoning in *SZEEU* to Part 7AA.

19. Also contrary to RS [45], there is no dichotomy between "information" and "documents" in s 473DC(1). A "document" must still contain "information" in order to meet the definition in s 473DC(1),[6] as otherwise any document, even one which is devoid of content, would qualify as "new information" which would need to be assessed against the requirements of ss 473DD and 473DE. It can be assumed that the
20 word "documents" appears in s 473DC(1) as not every piece of new information will be given in documentary form. For example, new information can be given orally by a referred applicant at an interview to which he or she has been invited pursuant to s 473DC(3).

The certificate was not 'new information'

20. The fundamental difficulty with the Respondent's submission, and the holding of the Federal Court, that the certificate was new information is that the evidence does not establish that the certificate met the requirements of s 473DC(1)(b).

21. Contrary to the reasoning of the Federal Court at CAB 74 [23] and 78 [36], the Authority's statement at CAB 9 [3] that it "had regard to the material referred by the
30 Secretary under s 473CB" is irrelevant to the question whether s 473DC(1)(b) was met especially in the light of the Respondent's concession that the certificate did not form a part of the "review material" given to the Authority pursuant to s 473CB(1). The Respondent's submissions to the contrary at RS [49] should be rejected. In any

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6 *Minister for Immigration and Border Protection v CLV16* (2018) 260 FCR 482 at 491 [53] per Flick, Griffiths and Perry JJ.

event, the Authority at CAB 9 [3] did not say that it had regard to the certificate as part of its substantive consideration of the merits of the fast track reviewable decision.

22. Contrary to RS [47], to say that the Authority might assume that the notification by the Secretary that s 473GB applies is not to say that the Authority considers that the certificate may be relevant for the purposes of s 473DC(1)(b). There is also nothing in the evidence to suggest, or from which it could be inferred, that the Authority considered that the certificate may be relevant to the review even if it were assumed that the Authority believed that the certificate was valid and turned its mind to the discretionary powers in ss 473GB(3)(a) and (b). It may be, for example, that the Authority disregarded those discretions because it thought that the certificate may not have substantive relevance to the review.

23. While the certificate was invalid (as was common ground below) and the Authority did not have any power under s 473GB(3)(a), there is no support for the submission, made by the Respondent at RS [51], that "because the Authority *believed* that the certificate was valid [a proposition that the Minister denies], it follows that it also considered the certificate 'may be relevant'" [emphasis in original].

A submission not made

24. At no time in either court below did the Minister make the submission, attributed to him in the final sentence of RS [54], that, "as part of the review material, the certificate could not … be new information". As submitted previously, the Minister made no submission before the Federal Court as to whether or not the certificate was new information, as that question was not raised by the Respondent or by Derrington J prior to the delivery of judgment.

Full Court authorities

25. The authorities cited at RS [22]-[24] do not assist the Respondent. Each supports the proposition that a certificate is not new information within the meaning of s 473DC(1).

Dated: 20 March 2020

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