IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S46 of 2019

BETWEEN:

BVD17
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

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

Part II: Outline

Ground One

1. The failure of the Second Respondent (**Authority**) to inform the Appellant of the fact that it had received a notification under s 473GB(2) of the *Migration Act 1958* (Cth) (**Act**), or a certificate under s 473GB(5) of the Act (**Certificate**), was not a jurisdictional error:
   1.1 The terms of s 473GB impose no such obligation: First Respondent's Submissions (**FRS**) at [8].
   1.2 There is a distinction between the notification, or the Certificate, on the one hand, and the "*document or information*" to which it relates, on the other hand: FRS [8] and [20].
   1.3 There is no obligation to hear from the referred applicant in relation to the exercise of the discretions in s 473GB(3) (as opposed to the obligation in s 473GB(3)(b) to have regard to advice from the Secretary). There is an inference that the Authority need not hear from a referred applicant in the exercise of its discretions under

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s 473GB(3): FRS [8] and [12] (referring to *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111 at [97] and [100]).

1.4 *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 92 ALJR 252 (***SZMTA***) is distinguishable, because of differences between Part 7 and Part 7AA of the Act:

1.4.1 Importantly, s 473DA differs from s 422B, especially in so far as s 473DA(1) uses the expression "*in relation to reviews conducted by the [Authority]*", rather than the words "*in relation to the matters it deals with*" in s 422B(2). The global reference in s 473DA(1) to "*reviews conducted by the [Authority]*", after the words "*in relation to*", supply the words of necessary intendment to exclude an obligation to afford a referred applicant natural justice being implied into the terms of s 473GB(3): FRS [9]-[13].

1.4.2 There is no equivalent in s 473DA to s 422B(3): FRS [14].

1.4.3 There is no equivalent in Part 7AA to other provisions in Part 7 that provide the procedural context of a review under Part 7, including s 423 (FRS [15]-[16]), s 424A, s 427(1)(c) and s 425 (FRS [17]-[19]).

1.5 Bare mention that there existed a Certificate, or that there had been a notification under s 473GB(2), could not have alerted the Appellant to the prospect that his brother's silence on a particular subject (as set out by the Authority at [18]) could be taken into account against the Appellant. Upon that basis, such bare awareness could not realistically have led to a different outcome: FRS [16]; also [3.3], below.

Ground Two

2. The Full Court did not err in failing to infer that the Authority had not considered the exercise of its discretion under s 473GB(3):

2.1 The Appellant carried the onus of proof to show that no consideration was given to the exercise of the discretion (FRS [24]) and the Full Court was correct to find that he did not discharge that onus: J [49], [56].

2.2 Section 473EA(1), either alone, or read with s 25D of the *Acts Interpretation Act 1901* (Cth), only obliged the Authority to give reasons for its "*decision on a review under this Part*". That is the final and operative decision of the Authority described in s 473CC(2), and not procedural steps or decisions taken in the course of the

review, such as the exercise of discretion under s 473GB(3): FRS [26]-[27]. The Full Court was correct to so conclude: FRS [30]-[31].

2.3 That construction of s 473EA(1) is consistent with this Court's past reasoning in relation to the similar obligation in s 430(1) of the Act, particularly in *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 597 at [31]-[32], [69]-[70], [91] and [92]:[1] FRS [28]-[30].

3. Nothing in the way that the Authority reasoned on the review gives rise to an inference that it did not consider the exercise of its discretion in s 473GB(3)(b): FRS [31]-[48].

10 3.1 Non-mention of s 473GB(3)(b) does not mean it was not considered: J [49].

3.2 If the Authority addresses a matter additional to that which s 473EA(1) obliges it to state, it does not follow that the Authority has chosen to address in its reasons *everything* it did – especially where s 473EA(1) does not so require: FRS [32]-[34]. Here, for example, the Authority affirmatively exercised its discretion under s 473GB(3)(a), but did not give reasons for that exercise of discretion: FRS [34].

3.3 The Authority's reasons at [18] do not suffice to support an inference that the discretion was not considered. The Authority had multiple concerns about the credibility of the Appellant's own evidence (see [7]-[30] of its reasons) – and the omission (from the Appellant's brother's claims) to which the Authority attached

20 "*some weight*", at [18], was only one matter that it took into account in rejecting the abduction claim: see FRS [35]; [38]-[43] and [45]; J [51], [54]-[55].

3.4 That the Authority did not, in fact, disclose the existence of the Certificate does not suffice to show a failure to consider exercising the discretion in s 473GB(3)(b). In some cases disclosure of the Certificate itself may tend to disclose or reveal the documents or information covered by it: FRS [36]-[37].

3.5 The Authority was entitled to take into account what had not been said by the Appellant's brother, without first seeking comment from the Appellant: FRS [46], [48]; see also J [58]. The fact that it did so does not give rise to an inference that it failed to consider the discretion in s 473GB(3)(b).

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G T Johnson SC and N D J Swan Dated: 13 July 2019

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[1] This aspect of *SZGUR* was more recently applied in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 185 [25] per French CJ, Bell, Keane and Gordon JJ.