HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M57 of 2020

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Appellant

DUA16

First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

10 Second Respondent

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M58 of 2020

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Appellant

CHK16

First Respondent

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IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

APPELLANT'S REPLY

I. SUITABLE FOR PUBLICATION

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

II. ARGUMENT

Fraud

Stultification of an imperative statutory function must be demonstrated

2. Consistently with the way they ran their case below, the respondents contend that the Authority's decisions are affected by jurisdictional error of the same kind as identified by this Court (in a different context) in *SZFDE*. That is, the respondents contend that the fraud of the Agent "stultified" the operation of the legislative scheme (*RS* [5]). The respondents do not ask this Court to hold that the Authority's decisions are affected by jurisdictional error as a result of third-party fraud based on any "large[r]" principles.[1]

3. Notwithstanding this, the respondents suggest that it is not incumbent on them to demonstrate that the fraud of the Agent stultified "an imperative statutory function" of the Authority (*RS* [17]). That is wrong. This Court's decision in *SZFDE* was founded on the holding that there had been a "subversion of the operation" of section 425, which in turn "subvert[ed] the observance by the Tribunal of its obligation to accord procedural fairness to applicants for review" ([31]). It was because of "the significance of procedural fairness for the principles concerned with jurisdictional error" that the Court concluded that the "subversion of the processes of the Tribunal" was "a matter of the first magnitude in the due administration of Pt 7 of the Act" ([31], see also [48]-[49]). It was because the Tribunal was "disabled from the due discharge of its imperative statutory functions" that there had been a "fraud 'on' the Tribunal" ([51]), with the "consequence" that "the decision made by the Tribunal is properly regarded, in law, as no decision at all" ([52]).

4. Of course, subversion of an imperative statutory function might occur in different ways.[2] And it is not necessary, in order to find that a decision is affected by jurisdictional error, to conclude that the function subverted is some "specific" duty of the same or a similar nature as occurred in *SZFDE* (procedural fairness).[3] In certain circumstances, third party fraud might stultify the performance by the Authority of its "overriding" duty to "review" the fast track reviewable decision in the manner stipulated by section 473DB of the Act; but it would be necessary to

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1 Cf. *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at [28]; *RS* [16].

2 See *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 at [122] (French J). His Honour ultimately found, consonantly with the High Court's finding on appeal, that what was "corrupted" by the fraud in that case was "the process of review which incorporates an opportunity for a hearing on the conditions set out in Pt 7" ([130]).

3 Cf. *RS* [18].

identify how the review that was conducted differed from that required by the Act. Here, it is necessary for the respondents to identify with precision the imperative statutory function at issue, and to explain how it was subverted.[4]

5. They have not done so. The respondents' submission that the Agent's conduct distorted or affected an (unspecified) "process" (*RS* [20]) lacks precision and force. Likewise, the fact that the Authority "referred to" the Agent's submissions (*RS* [21]) is clearly insufficient to demonstrate the subversion of an imperative statutory function. Acceptance of the respondents' primary case would be apt radically to expand the principles in *SZFDE*. Yet the respondents have neither invited the Court to do so, nor given any good reason to do so.

Stultification of an imperative statutory function not demonstrated

6. The respondents submit, in the alternative, that "[i]f there is a search for 'imperative functions'" (heading to *RS* [23]), there is an "implied obligation" imposed on the Authority to consider "submissions" that are "in fact" received by it (*RS* [25], [29]). This implication is said to flow from the "inherent content in the function of performing a 'review' of [an] administrative decision" (*RS* [28]). The respondents submit that the "content" of this obligation is "further defined" by the Practice Direction (*RS* [32]).

7. Yet the respondents fail to engage with the Minister's submissions on the content of the duty imposed by section 473DB of the Act (*AS* [35]-[44]). For example:

7.1. The respondents fail to give any account of the significance of Parliament conferring in Part 7 (as part of the requirements of the partially codified "natural justice hearing rule": section 422B(1)) a qualified right to present both oral and written "arguments" to the Tribunal, and conferring in Part 7AA no ruch right (in the entirely codified "natural justice hearing rule": section 473DA(1)).

7.2. As to the Practice Direction, it obviously cannot inform the construction of the Act. And the proposition that allowing applicants to give "submissions" as to why they disagree with the delegate's decision, or any claim or matter that they presented to the Department that was overlooked, is "consistent with the Act" (cf. section 473FB(1)) does not entail or suggest that it is a "condition on the valid performance"[5] of the Authority's task that it consider such submissions (cf. *RS* [32]). As the Minister has already accepted, consideration of such a submission may assist the Authority in avoiding jurisdictional error (*AS* [44]), but it does not follow that failing to consider the submission is itself a jurisdictional error (cf. *RS* [34]). In any event, as the Minister has

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4 Nothing in the reasons of French J in *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR suggests that such precision is unnecessary. Quite to the contrary, see [72], [74].

5 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) CLR 217 at [11].

already explained (*AS* [41]), either or both of section 473FB(3) and 473DA(1) have the effect that non-compliance with any implied obligation deriving from the Practice Direction (as disctint from the Act) does not mean that the Authority's decision on the review under section 473CC is invalid.

8. The respondents' reliance on *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 is misplaced. The principle for which that case stands presupposes that the relevant "claims" have been put before the decision-maker as part of the material required to be considered. Here, absent "exceptional circumstances", the claims that must be considered are those that emerge from the "review material": sections 473DB(1), 473DC(2), 473DD.

9. In any event, even if the Authority's decision on a review under section 473CC might in a particular case be affected by jurisdictional error in circumstances where the Authority has not considered a particular submission that was "in fact" received, the respondent's absolute proposition (*RS* [29]) should not be accepted. And, in these cases, when there is no evidence of what "submissions" the respondents would have made but for the Agent's fraud, there is no basis upon which this Court can find (or the courts below should have found) that the Agent's conduct in fact "stultified" the performance of an imperative statutory function (e.g., under section 473DB to "review" the delegate's decision).

10. Similarly, there is no evidentiary foundation for the respondents' submission that the Authority "wrongly" assumed that there was nothing beyond what was in the "submissions" "in fact" received that the respondents wanted to say (*RS* [35], [45]-[46]), which would have had a "material effect on the conduct of the review" (*RS* [36]). There is no evidence that the respondents instructed the Agent to give the Authority any "submissions" (or "new information") that were not given. Accordingly, even on the respondents' premise (the Authority is or may be obliged to consider submissions "in fact" received), there is no basis for the conclusion that the Agent's conduct "prevented the Authority from receiving … honest submissions" that, if received, might have had a material effect on the decision.

11. The respondents' submission that the Agent's conduct (or the Authority's "response") "must have created a negative impression of the respective respondents' credibility" (*RS* [44]) is speculative and wrong. The Authority was required to give its reasons for its decision on the review under section 473CC, including by setting out its findings on material questions of fact and referring to the evidence or other material on which those findings were made (section 473EA(1)(b), read with section 25D of the *Acts Interpretation Act 1901*). There is no basis for

the "divination" of additional or other reasons (or findings) to those that were expressed by the Authority.[6]

12. Nowhere in the Authority's reasons, in either case, did the Authority state that it formed any "negative impression" of the respondent's credibility based on the inclusion of the "wrong" or "irrelevant" information in the Agent's submissions. Contrary to the respondents' submissions (*AS* [44]), the Authority, in both cases,[7] correctly suspected that the "wrong" or "irrelevant" information was included in "error". In CHK16's case, the Authority expressly attributed this to the Agent. In DUA16's case, it is clear in context that the Authority attributed the error to the Agent (they were submissions of the DUA16's "representative" ([6], [24]), and it would be perverse to suppose that the Authority attributed the "error" to DUA16 personally).

Unreasonableness

13. The respondents characterise the Minister's submissions on their notice of contention as rebutting a "straw man argument" (*RS* [62]). But the Minister was, in fact, addressing the respondents' argument as to the Federal Court, which Griffiths J correctly rejected (*J* [90]-[93]; Mortimer J agreeing at [98], Wheelahan J agreeing at [185]).[8]

14. In any event, the respondents miss the fundamental point. The fundamental point is not whether it ought to have been apparent to the Authority in each case that there was a "correct document" that it had not been given. The fundamental point is, as Griffiths J explained, "[t]here was nothing in the submissions themselves or in the surrounding circumstances more generally to indicate to the [Authority] that the referred applicants might wish to make additional submissions" (*J* [93]). Or, to use the respondents' language, there was nothing in the circumstances to indicate that the respondents had not given the Authority all "the material that [they] wished to be considered in support of their cases" (*RS* [61]).

15. An additional, fatal, problem for the respondents is the absence of any evidence as to what "material" they would provided if the Authority had inquired as to whether they had given all the material that they wished to be considered in support of their cases. In the absence of such evidence, the Court cannot say that the inquiry would have yielded a "useful result" – i.e., the provision of material (i.e., submissions as to why they disagreed with the delegate's decision, or "new information") that might realistically have led a different decision. Contrary to the

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6 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [36]. See also, e.g., *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362 at [55] (Kenny J).

7 CAB 7 [7] (re DUA16) and CAB 22 [5] (re CHK16).

8 In particular, at *J* [90], Griffiths J records that the respondents contended that the Authority should have "contacte[d] the respondent's representative 'to obtain the correct submissions'". At *J* [93], Griffiths J held that "the IAA cannot be said to have known that it had a "incorrect document" or that there wa another "correct document" that was readily obtainable".

respondents' submissions, such evidence was necessary.[9] This is certainly not a case where the respondents were not in a position to say what "material" could or would have been elicited if the Authority had made the suggested inquiry.[10]

16. The respondents cite the reasons of Gageler and Gordon JJ in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [58] in support of the proposition that all they needed to do was to point to the loss of "a meaningful opportunity to affect the outcome of the review". It is not clear why, given that *WZARH* was a procedural fairness case, and the respondents do not allege a denial of procedural fairness. In any event, even if *WZARH* is useful by analogy, as their Honours explained, "[w]hat must be shown … will depend upon the precise defect alleged to have occurred" . And this is a case where the respondents have not shown that they suffered any practical detriment as a consequence of the Authority failing to check whether they had given all the "material" that they wished to.

Dated: 4 September 2020

GEOFFREY KENNETT
Tenth Floor Chambers

NICK WOOD
Owen Dixon Chambers

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9 Cf. *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [26]: "[T]here was nothing on the record to indicate that any further inquiry by the Tribunal … could have yielded a useful result. There was nothing before the Federal Magistrates Court or the Federal Court to indicate what information might be elicited if the Tribunal were to undertake the inquiry which was said to be critical to the validity of its decision". For this, and another, reason "there is no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review or that it was otherwise so unreasonable so as to support a finding that the Tribunal's decision was infected by jurisdictional error". This has been applied on many occasions. See, for example, recently: *Karan v Minister for Home Affairs* [2019] FCAFC 139 at [30], *DCR19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 501 at [71].

10 Cf. *Hinton v Minister for Immigration and Border Protection* (2015) 146 ALD 184 at [72]-[73].