HIGH COURT OF AUSTRALIA

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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

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

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

APPELLANT'S SUBMISSIONS

I. SUITABLE FOR PUBLICATION

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

II. ISSUES

2. The ultimate issue in these cases is, as Mortimer J identified[1] whether the conduct of the first respondents' (the **respondents'**) migrant agent (the **Agent**) "stultified" (or "disabled" or "subverted") "the imperative function" of the second respondent (the **Authority**) in each

[1] Core Appeal Book (**CAB**) 130 [100].

case under section 473CC of the *Migration Act 1958* (the **Act**) to "review" the decision of a delegate of the appellant (the **Minister**) to refuse to grant them a protection visa. (The Federal Court characterised the Agent's conduct as fraudulent,[2] and the Minister does not dispute that finding on appeal.[3])

3. Breaking that down, two particular issues emerge. *First*, what is the nature of the imperative statutory function said to have been stultified by the Agent's fraud? *Secondly*, has it been proven that that statutory function was in fact so stultified by the Agent's conduct?

4. Resolving the first issue requires, as this Court explained in *SZFDE v Minister for Immigration and Citizenship*, "close attention to the nature, scope and purpose of the particular system of review" by the Authority which Part 7AA of the Act establishes.[4]

5. The respondents' case below on the first issue was that the Authority's obligation to "review" a fast track reviewable decision requires it to consider any "submission" advanced to it by a referred applicant (as distinct from "new information" as defined in section 473DC(1) of the Act[5]). In particular, the respondents contended that that includes considering any "submission" advanced to it in response to a "practice direction" issued by the President of the Administrative Appeals Tribunal (the **Tribunal**) under section 473FB(1) (the **Practice Direction**).

6. The respondents' case below on the second issue was that the conduct of the Agent resulted in them losing their ability to make "submissions" to the Authority, and this is what "stultified" the performance of the function described above.

7. By majority (Mortimer J and Wheelahan JJ, Griffiths J dissenting), the Federal Court found that the Agent's conduct did stultify the performance of the Authority's review function. The Minister contends that the Court erred in doing so. In particular, the Minister contends that: the premise to the respondents' argument on the first issue is misconceived; and, in any event, on the second issue the respondents have not proved stultification in fact.

III. SECTION 78B NOTICES

8. The Minister has considered whether notices should be given in compliance with section 78B of the *Judiciary Act 1903*, and is satisfied that that it is not necessary.

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2 CAB 113-118 [37]-[55] (Griffiths J), 130-131 [101]-[102] (Mortimer J), 151 [185] (Wheelahan J).

3 CAB 176.

4 (2007) 232 CLR 189 at [29]. "Any application of a principle that 'fraud unravels everything', in the context of an application judicial review that requires the demonstration of jurisdictional error, requires consideration first of that which is to be 'unravelled'".

5 The meaning of this expression was recently considered in *Minister for Immigration and Border Protection v CED16* [2020] HCA 24 at [20]-[25].

IV. REASONS FOR JUDGMENT BELOW

9. There has been no report of the reasons for judgment of the primary court (the Federal Circuit Court) or the intermediate appellate court (the Federal Court) below. However, the internet citations are, respectively:

   9.1. *DUA16 v Minister for Immigration and Border Protection* [2019] FCCA 1128; and

   9.2. *Minister for Home Affairs v DUA16* [2019] FCAFC 221.

V. FACTS

10. The factual background to the matters is set out in the judgment of Griffiths J (Mortimer J agreeing at *J* [97]; see also Wheelahan J at *J* [185]). Key features are set out below.

11. The Agent provided four-page "submissions" to the Authority on behalf of each of the respondents, in a similar form which the Agent (with some variations) ultimately used in around 40 cases. Each submission stated that it was made on instructions (*J* [11], [22]). The respondents each paid the Agent a fee for her work (*J* [102]).

12. The "submissions" said "little" or "virtually nothing" about the respondent's respective personal circumstances (*J* [11], [22]). But each "submission" included information that: did not relate to the respondent or their claims; had not been given by the respondent to the Agent; and which instead related to another client of the Agent (*J* [11], [22]-[23]). For example, each "submission" asserted that the respondent was at risk of suffering harm in Sri Lanka by reason of being a "media personality" and an "ex-police m[a]n"; yet neither respondent had ever advanced such a claim or instructed the Agent to make such a claim.

13. Each "submission" also included "country information" that "dealt at a generic level about the risk of persecution and harm by Sri Lankan asylum seekers generally" (*J* [12]). This information, so far as it went, was relevant to the respondent's claims.

14. However, there was no evidence that either respondent asked the Agent to make a particular "submission" to the Authority, which the Agent did not make. Further, despite both respondents being aware that they had an opportunity to ask the Authority to consider "new information" (*J* [71]), there was no evidence that either had identified any "new information" to the Agent, or asked her to give any "new information" to the Authority.

15. In both matters, the Authority (correctly) suspected that certain information included in the "submissions" did not relate to either respondent and had been included by the Agent in error (*J* [15]-[16]; [24]-[25]). The Authority did not consider these aspects of the "submissions", but considered the other (generic) aspects of the "submissions" (*J* [16]).

16. Ultimately, the respondents did not allege that the Authority failed to consider any of their claims or evidence, or otherwise erred in its reasoning on the reviews. Both respondents, in the Federal Court proceedings, abandoned discrete grounds of review to that effect which they had previously advanced in the Federal Circuit Court proceedings. (The Federal Circuit Court did not consider these grounds, and the respondents' respective amended notices of contention indicated that they abandoned them in the Federal Court proceedings.)

VI. ARGUMENT

Federal Court's reasoning on stultification

17. Griffiths J and Mortimer J (with whom Wheelahan J agreed) each gave detailed reasons on the question of whether the Agent's conduct resulted in the Authority's decision being affected by jurisdictional error. It is convenient to start by outlining the reasoning of Griffiths J, which the Minister respectfully submits is correct, before outlining and then addressing the flaws in the reasoning of Mortimer J.

The reasoning of Griffiths J

18. Griffiths J commenced by identifying the need to pay close attention to the "nature, scope and purpose of the particular system of review" at issue (*J* [40]). Having identified some other features of the reasoning in *SZFDE* which are not at issue here (*J* [41]-[45]), his Honour also correctly emphasised the importance of precision in specifying "what was fraudulent, how it was fraudulent, and how it was acted upon". "Such precision is necessary not only to determine whether particular conduct is in fact fraudulent in the relevant sense, but also to determine if, and how, it has subverted an imperative statutory function" (*J* [46],). His Honour noted that the ultimate conclusion in *SZFDE* was that the "concomitant" of the rogue's conduct "was the stultification of the operation of the critically important natural justice provisions made by Div 4 of Pt 7 of the Act" (*J* [47]).

19. Griffiths J criticised the respondents' submission, to the effect that the Agent's fraud "disabled the IAA from conducting the [review] it was obliged to conduct under s 473CC", as being "expressed at too high a level of generality". "The respondents' reference to the IAA's 'review' function simply begs the question of what is the particular aspect of the review which was disabled, a question which can only be answered by a detailed consideration of the relevant provisions of Pt 7AA" (*J* [57]).

20. Importantly, Griffiths J observed, by reference to this Court's decision in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*,[6] that the Authority's task

[6] (2018) 264 CLR 217 at [17].

"is not to correct error on the part of the Minister or the delegate, but rather is to conduct a *de novo* consideration of the merits of the decision that has been referred to it" (*J* [59]). Accordingly, and having criticised the reasoning of the primary judge on the issue of stultification (*J* [73]-[76]),[7] his Honour held that it cannot have stultified an essential statutory function of the Authority for the Authority to have been "deprived" of "the benefit of any meaningful submissions about [why] the delegate was wrong", as the respondents had contended (*J* [77]). His Honour also noted that, unlike the position in *SZFDE*, the Authority "did not proceed on the basis of a presumption of regularity"; instead "it noted the evident error by the representative in including material in the submissions which related to persons other than the [respondents]" (*J* [78], see also [75]).

The reasoning of Mortimer J

21. Mortimer J held that "it may not be necessary to fasten on a particular statutory power and identify that as being the power which has been stultified or subverted", Rather, "[i]n some cases, the effect of the fraudulent conduct on an administrative decision-making process may be an effect that is best described … as 'distorting' or 'vitiating' the 'approach' to be taken by the decision-maker, or the outcome or decision made" (*J* [109]).

22. Mortimer J accepted that this Court's decision in *SZFDE* "emphasised that the 'nature, scope and purpose of the particular system of review' established by the legislative scheme was the key consideration in understanding how, if at all, fraudulent conduct 'unravels' an exercise of public power" (*J* [114]). Her Honour accepted that Part 7AA "imposes a number of restrictions and limitations on the conduct by the IAA of its review" that distinguishes the scheme in Part 7 considered in *SZFDE* (*J* [116]).

23. However, Mortimer J held that the Authority's "core obligation and imperative function" of considering the respondents' applications afresh had been "affected" by the Agent's fraud; indeed, her Honour held that the Agent's "submissions" had "a sufficiently profound effect on the IAA's review function so as to result in its review function remaining constructively unexercised" (*J* [120]).

24. Mortimer J's conclusion was informed by her view of the significance of "submissions" to the Authority as having "a central function on the review, representing the only opportunity to persuade the IAA to reach a different decision from the delegate" ([126]). Further, her Honour held that through "submissions" a visa applicant can "seek to put new information

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[7] Mortimer J did embrace the reasoning of the primary judge at [84]-[86], which the Minister submits was clearly errant including for the reasons identified by Griffiths J at [73]-[76].

before the IAA", or that "submissions" "might prompt the IAA to 'get' new information", notwithstanding the "primary rule" reflected in section 473DB (*J* [135]).

25. Mortimer J held that the submissions given by the Agent gave "the false impression to the IAA that each of the respondents had nothing particular to them to advance to it about why the factual basis of their claims, and the application of the country information to that factual basis, meant that contrary to the delegate's decision they did meet the criteria for the grant of a protection visa" (*J* [154(g)], see also [174]). On this basis, her Honour held:

> [173] … *The IAA's task of determining whether each of the respondents met the criteria for the grant of a protection visa was subverted, and could not be described as a "true" exercise of power because the IAA was misled, not only about what the respondents had instructed [the Agent] to put to the IAA, but about the factual nature of their claims and the connection with applicable country information. The IAA was also misled into conducting its review on the basis that the respondents had nothing at all to say about why it should accept the factual basis for their claims, and its sufficient connection to what was in the country information.*
>
> [174] *The filed submissions being the only additional, substantive material placed before it on behalf of the respondents', the IAA's assessment of whether the respondents met the criteria for a protection visa entirely miscarried.*

26. Mortimer J accepted that it was "difficult to conclude that the IAA acted entirely on a 'presumption of regularity', as the High Court found the Tribunal had done in *SZFDE*" (*J* [175]). However, her Honour held that "the fact that the IAA had some inkling that [the Agent] may have filed submissions that may not, in reality, have been about the referred applicant" and yet proceeded to make decisions "by reference to whether the factual narratives were new claims and new information" demonstrated that the reviews "were indeed subverted by the fraudulent conduct". "The IAA proceeded, in the alternative, on the basis that the respondents were each seeking to advance a raft of new and quite different claims, for the first time. That could not fail to undermine the IAA's opinion whether it should be satisfied they met the protection visa criteria." (*J* [176])

27. Wheelahan J's short reasons, concurring with Mortimer J, add little by way of analysis. His Honour held that "[t]he material feature of the respondents' cases is that, as Mortimer J has demonstrated, in the discharge of its statutory review function the Authority took account of submissions that contained false information" (*J* [189]).

The correct legal principles

SZFDE

28. The respondents' case has always been that the fraudulent conduct of the Agent had a stultifying effect on the processes of the Authority, so as to attract the operation of the principles explained by this Court in *SZFDE*. In *SZFDE*, this Court held that the appellants

had proved that the fraudulent conduct of a third party had the "immediate" consequence of "stultifying"[8] (or "disabling" or "subverting"[9]) an imperative statutory function.

29. The "concomitant" of the third party's fraudulent dealings with the appellants[10] was the stultification of the "critically important natural justice provisions made by Div 4 of Pt 7 of the Act".[11] The appeal "turned on the particular importance of the provisions of Div 4 of Pt 7 of the Act for the conduct by the Tribunal of reviews and the place therein of ss 425 and 426A".[12] The "rogue", who was not a registered migrant agent, had advised the appellants that it was in their best interests not to attend a hearing before the Tribunal to which they had been invited under section 425. That advice was dishonestly given for "self-protection, lest in the course of a Tribunal hearing there be revealed his apparently unlawful conduct" in giving immigration assistance to the appellants. The appellants accepted the advice and did not attend the hearing, and therefore did not have that opportunity to persuade the Tribunal of relevant claims, in circumstances where the Tribunal had invited them to a hearing because it was unable to make a favourable decision on the information before it.[13]

The Authority's duty to "review" a fast track reviewable decision

30. The "overriding duty"[14] of the Authority is to "review", under section 473CC(1), the "fast track reviewable decision" that is referred to it, for the purpose of exercising under section 473CC(2) one of the two powers described therein (affirming the fast track reviewable decision, or remitting the decision in accordance with permitted directions).

31. As this Court held in *Plaintiff M174* (at [17]), in reviewing the fast track reviewable decision (as distinct from the reasons for that decision), the task of the Authority under section 473CC(1) is to "consider the application for a protection visa afresh and to determine for itself whether or not it is satisfied that the criteria for the grant of the visa has been met". "[T]he Authority when conducting a review of a fast track reviewable decision is not concerned with the correction of error on the part of the Minister or delegate but is engaged in a de novo consideration of the merits of the decision that is referred to it".

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8 *SZFDE* at [49], [51].
9 *SZFDE* at [32].
10 The fraudulent advice was that it would be in the appellants' best interests not to attend a hearing before the Tribunal to which they had been invited under section 425. That advice was dishonestly given for "self-protection, lest in the course of a Tribunal hearing there be revealed his apparently unlawful conduct" in giving immigration assistance when his registration as a migration agent had been cancelled: *SZFDE* [45].
11 *SZFDE* at [51].
12 *SZFDE* at [53].
13 *SZFDE* at [49].
14 *BVD17 v Minister for Immigration and Border Protection* (2019) 92 ALJR 1091 at [11].

32. Of course, the performance of the Authority's "overriding duty" cannot be divorced from the provisions in Part 7AA that govern the manner in which that duty is to be performed. So much follows inexorably from the decision in *SZFDE*.

33. In that respect, section 473DB provides that, "[s]ubject to this Part", the Authority must do so "*by* considering the review material" (emphasis added). Thus, the Act itself speaks as to what the "review function" involves: it involves, "subject to the Act", considering the "review material" and (as explained by this Court in *Plaintiff M174/2016*) deciding for itself whether the applicant satisfies the relevant visa criteria.

34. The words "[s]ubject to this Part" in section 473DB accommodate the Authority considering "new information" where that is permitted under section 473DD. But nowhere in Part 7AA does Parliament expressly or impliedly require the Authority to consider "submissions" (not being "new information") as to "why the delegate was wrong" or as to any claim or matter that the referred applicant presented below which was overlooked. This point is elaborated below.

No obligation to invite or consider "submissions"

35. Parliament has exhaustively codified the requirements of the natural justice hearing rule in Part 7AA (see section 473DA).[15] And, significantly, no element of that scheme makes it a "condition on the valid performance"[16] of the Authority's task that it invites or considers any "submissions" from a referred applicant as to why they disagree with the delegate's decision, or as to any findings or decision that the Authority should make in light of the "pool of factual information"[17] before it comprising the "review material" (sections 473CB and 473DB) and any "new information" (sections 473DC and 473DD).[18]

36. Insofar as the Federal Court held otherwise in *Minister for Immigration and Border Protection v CLV16*[19] – being a judgment delivered before this Court's judgment in *BVD17*

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15 *BVD17 v Minister for Immigration and Border Protection* [2019] 93 ALJR 1091 at [28]-[36].

16 Cf. *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [11].

17 See *Minister for Immigration and Border Protection v CLV16* (2018) 260 FCR 482 at [54].

18 See also, e.g., *COA16 v Minister for Immigration and Border Protection* [2018] FCA 475 at [37]-[38]; *EUW17 v Minister for Immigration and Border Protection* [2019] FCA 744 at [28]. The proposition that the Authority does not have a duty to consider such a "submission" (i.e., that consideration of such a "submission" is not a condition to the valid performance of the Authority reviewing the delegate's decision) does not entail that the Authority does not have a power to consider such a "submission". The Minister does not submit that the Authority is precluded from considering a "submission": see *AAL19 v Minister for Home Affairs* [2020] FCAFC 114 at [35].

19 (2018) 260 FCR 482 at [54], [60], [63]. This was applied in *DNA17 v Minister for Immigration and Border Protection* [2019] FCAFC 744 at [47]-[48].

v Minister for Immigration and Border Protection[20] – the Federal Court's reasoning to that extent is wrong. In particular:

36.1. The Federal Court in that case was wrong to suggest (*J* [54]) that there is "no clearly expressed legislative intent" to "deny" an obligation of the Authority to consider such a "submission". The legislative intent of Parliament as to the confined scope of the natural justice hearing rule is clearly expressed by section 473DA (read with Division 3 and sections 473GA and 473GB), as this Court held in *BVD17*.

36.2. The Federal Court was also wrong insofar as it relied on its perception of notions of "good administrative decision-making",[21] or on the presumed existence of "expectations on the part of visa applicants" arising from the practice sheet,[22] to discern the existence of such a duty (*J* [42], [58]).

37. The scheme in Part 7AA of the Act is therefore significantly different to that in Part 7, which was the focus of this Court's reasoning in *SZFDE*. In Part 7, a review applicant has a right to present "arguments relating to the issues arising in relation to the decision under review" (section 423(1)(b)), which may include submissions and written argument; and, subject to exceptions, a right to appear before the Tribunal and present such arguments (section 425(1)).

38. The inclusion of these provisions in Division 4 of Part 7 of the Act would have been otiose, if the obligation of the Tribunal under section 414(1) to "review" a decision itself entailed considering any submission (or "argument") as to why the delegate's decision was wrong. Rather, the obligation to "review" is relevantly given content by those particular requirements. Further, the inclusion of those specific provisions in Part 7 makes the omission of equivalent provisions from Part 7AA eloquent: such provisions would have been included, if it were intended that the Authority was to have an obligation to consider any such submission (or "argument"). In that context, and particularly in the light of s 473DA, no such obligation arises simply by virtue of the "overriding duty" under section 473CC to "review" a decision. (Whereas Division 4 of Part 7 is a partial code of the natural justice hearing rule in relation to reviews by the Tribunal, Division 3 of Part 7AA (together

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20 (2019) 93 ALJR 1091.

21 As Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [32], "[t]he constitutional jurisdiction does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration".

22 This Court has repeatedly criticised the concept of "expectations" ("legitimate or not") as a criterion of an entitlement to procedural fairness in administrative law. See, e.g., *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [28]-[30] (Kiefel, Bell and Keane JJ).

with sections 473GA and 473GB) is, by virtue of s 473DA(1), a complete code of the natural justice hearing rule in relation to reviews by the Authority.)[23]

The Practice Direction

39. None of the above submissions is affected by the Practice Direction.[24]

40. The Practice Direction relevantly states that a review applicant may provide a written submission on "why you disagree with the decision of the Department",[25] and "any claim or matter that you presented to the Department that was overlooked".

41. However, as Griffiths J observed below (*J* [64]) compliance with such a direction is not a condition of the valid performance of the Authority's review function. That follows from section 473FB(3), which provides that "non-compliance with any direction does not mean that the Authority's decision on a review is an invalid decision".[26] Moreover, as Edelman J observed in *BVD17* (at [57]), that outcome also follows from section 473DA(1).

42. Of course, the existence and terms of the Practice Direction, being a subordinate instrument, also cannot logically inform the construction of section 473CC, or the provisions exhaustively stating the content of the natural justice hearing rule in Part 7AA.

43. It follows that consideration of a submission as to why the delegate's decision was wrong, or as to any claim or matter that was overlooked by the delegate, cannot itself represent an imperative (or even an "important") statutory function of the Authority.

44. Of course, if the Authority fails to consider a claim or significant evidence that was before the delegate, that may involve jurisdictional error of a well-recognised kind. Consideration of a submission may aid the Authority in avoiding such errors, but it does not follow that failure to consider the submission is itself an error. The ultimate question is whether the Authority performed its functions (and not whether it considered a submission that may or may not assist it in performing those functions).

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23 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at [31].

24 See book of further material.

25 Functionally, a submission as to why the delegate got the decision is wrong is equivalent to a submission as to what decision the Authority should make. Thus, a submission that the delegate should have been satisfied of X, is the same as submitting that the Authority should be satisfied of X.

26 Cf. *Commissioner of Taxation of the Commonwealth of Australia v Futuris* (2008) 237 CLR 146 at [24], discussing section 175 of the *Income Tax Assessment Act 1936* and in light of the principles explained in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. That section provided: "The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with." This Court explained that "[w]here s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the *Constitution* or under s 39B of the *Judiciary Act*".

Errors in the reasoning of Mortimer J

45. Having regard to the matters outlined above, the reasoning of Mortimer J is errant.

46. **First**, Mortimer J was wrong to reason from the premise that "submissions in fact made on behalf of a referred applicant" have a "central function on the review, representing the only opportunity to persuade the IAA to reach a different decision from the delegate" (*J* [126]). A submission addressed to what findings or decision the Authority should make on the review may (or may not) assist the Authority, but it does not in any relevant jurisdictional sense have a "central function" on a review under Part 7AA of the Act.

47. **Secondly**, while it is true that a referred applicant can "seek to put new information before the IAA" (*J* [135]), the Authority does not have a duty to get, request or accept any "new information", including where the Authority is requested to do so by a referred applicant or in any other circumstances (section 473DA(2)).

48. In any event, notwithstanding that both respondents were aware that they could seek to give "new information" to the Authority, there was no evidence that either of the respondents identified to the Agent or asked her to give to the Authority any "new information". Nor was there any evidence of any particular "submissions" (not being "new information") that the respondents wanted the Agent to make, but the Agent did not make. Accordingly, insofar as Mortimer J's finding that the submissions in fact given by the Agent to the Authority gave a "false impression to the IAA that each of the respondents had nothing particular to them to advance to it" (*J* [154(g)], [174]), there was no foundation for such a conclusion, let alone that this resulted in the Authority's function being stultified.

49. **Thirdly**, whether or not the respondents might have had some particular "submission" to advance to the Authority did not <u>in itself</u> have any bearing on the Authority's "review". That involved the Authority assessing, for itself, whether the respondents satisfied criteria for a protection visa by reference to the "review material". The Authority's performance of that task was not stultified by the creation of any "impression" referred to by Mortimer J, whether false or not. In the light of s 473DB(1), it would be completely unsurprising for the applicants to have put all of their claims and evidence to the delegate (and as noted earlier, there is no evidence that they had not).

50. **Fourthly**, Mortimer J was wrong to find that any such "false impression" that might have been created by the submissions given by the Agent resulted in the Authority being "misled … about the factual nature of [the respondents'] claims and the connection with applicable country information" or otherwise had a material effect on the Authority's "review" of the

delegate's decisions such that the Authority's decisions did not represent "a 'true' exercise of power" (*J* [173]) and "entirely miscarried" (*J* [174]).

51. In particular, it is clear from the terms of the Authority's reasons for its decisions[27] that it did not confine its attention to the "issues" addressed by the Agent in the submissions. To the contrary, notwithstanding that the submissions in fact given by the Agent did not address particular circumstances of the respondents' cases (other than insofar as their claims for protection derived merely from their status as Tamils, or as prospective failed asylum seekers returning to Sri Lanka having departed illegally etc), the Authority did proceed to consider in considerable detail the particular circumstances of the respondents' cases.

52. Revealingly, no error was ultimately asserted by either respondent in the Federal Court proceedings as to the Authority overlooking or otherwise erring in the manner in which it "reviewed" their particular claims and evidence as emerging from the "review material".[28] That is because, in truth, the Authority did not fail to consider any particular relevant circumstance of either respondent in the conduct of its review, notwithstanding the generally unhelpful nature of the Agent's submissions.

53. **Fifthly**, as Mortimer J accepted (*J* [175]), unlike *SZFDE*, the Authority clearly did not act on a "presumption of regularity". To the contrary, it correctly perceived that the "irrelevant" information had been included by the Agent in error, and did not consider it. And contrary to Mortimer J's reasoning (*J* [176]; cf. Griffiths J at *J* [78]), it cannot have stultified the Authority's decision that the Authority, *in the alternative*, also excluded that "irrelevant" information from consideration on the supposition that it would not have been satisfied of the matters in section 473DD with respect to that information in any event. It is impossible to see how the Authority's alternative basis for not considering this "irrelevant information" on the review could have "undermine[d] the IAA's opinion whether it should be satisfied [the respondents] met the protection visa criteria" ([176]), and no evidence or basis for this conclusion was identified by Mortimer J.

Authority's decision was not stultified by the Agent's conduct

54. It is useful to return to the two particular issues identified at [3] above. What is the nature of the imperative statutory function said to have been stultified by the Agent's fraud? Has it been proven that that statutory function was in fact so stultified?

55. On the first issue, the Court should not accept the premise to the respondents' cases. For the reasons outlined above, it is not the case that a failure by the Authority to consider a

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27 CAB 5 (for DUA16), 20 (for CHK16).

28 Notably, both respondents ultimately abandoned discrete grounds challenging the Authority's decision on the review, expressed in ground 3 of each of their respective notices of contention.

"submission" (not being "new information") – i.e., a submission as to why the referred applicant disagrees with the delegate's decision, or any claim or matter that was overlooked by the delegate – could itself give rise to jurisdictional error. (Although the Minister accepts that a failure to consider a claim may give rise to jurisdictional error.)

56. That is to say, a failure by the Authority to consider a "submission" (not being "new information") could not itself involve "a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it".[29]

57. It follows that, even if the Agents' conduct was such as to deprive the Authority of the benefit of "individualised submissions", that conduct cannot be said to have stultified an imperative statutory function of the Authority. The Authority "reviewed" the delegate's decision, by considering the review material, and determining that it was not satisfied that the respondents satisfied the relevant visa criteria. Whether or not "individualised submissions" that the respondents had paid the Agent to provide the Authority might have assisted the Authority is not to the point. The Authority would not have made a jurisdictional error by not considering any such (hypothetical) submissions. And, in any event, despite the absence of such (hypothetical) submissions that may have assisted the Authority, the respondents do not allege that the Authority failed to consider any of their claims or evidence, or otherwise erred in its reasoning.

58. In any event, on the second issue, the respondents have simply failed to prove that the Authority's decision was in fact stultified by the Agent's conduct. The respondents' case had an entirely abstract quality to it.

59. As noted above, the respondents advanced no evidence that they asked the Agent to make a particular "submission" to the Authority, which the Agent did not make. The respondents advanced no evidence that they identified any "new information" to the Agent, or asked her to give any "new information" to the Authority. Moreover, the respondents asserted no error in the reasoning of the Authority on the review material before it: in particular, they identified no way in which the content of the submissions which the Agent advanced, but which did not reflect their personal circumstances, "infected" the Authority's reasoning on the review.

60. It may be accepted that little of the respondents' *particular* "narrative" that had been given to the Minister as part of their visa applications (i.e., claims and evidence as to his *particular*

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[29] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [24] (Kiefel, Gageler and Keane JJ).

circumstances in Sri Lanka[30]) was reflected in the Agent's submissions. But that, in itself, is of no moment, in circumstances where the respondents have not alleged that the Authority erred by failing to consider any of their particular claims or evidence in the "review material". In that respect, while the Agent's submissions may have been of little or no assistance to the Authority, that did not result in the Authority failing to perform its function under section 473CC (read with section 473DB).

61. Likewise, the fact that the Agent's submissions contained information that did not relate to the respondent can hardly be said to have stultified the Authority's decisions, given that the Authority correctly perceived this fact and did not have regard to any of this information in making its decision. And whether the Authority knew that the Agent had engaged in fraud (as compared simply to a "not insignificant error") is not the point. In each case it knew what mattered: that, through some fault of the Agent, the submissions, in part, contained information that did not relate to her client.

62. The circumstance that the Agent took a fee, while probative of her fraudulent conduct vis-à-vis her client, says nothing as to whether her fraud had the immediate consequence of stultifying the Authority's decision. The same may be said of the mere fact that the Agent's "submissions" contained false (even "dishonest") information.

63. Accordingly, regardless of the impropriety of the Agent's conduct (taking a fee for doing little work, and advancing submissions, purportedly but not actually on "instructions", which were clearly irrelevant to the respondent's claims) has not been shown to have caused them any practical injustice.[31] Thus even if, contrary to the submissions above, fraud that results in an "individualised submission" not being advanced to the Authority could stultify an imperative statutory function of the Authority, that has not been demonstrated here.

64. It was incumbent on each respondent, as the moving party, to prove that the Agent's conduct in fact stultified the Authority's decision. The point is more fundamental than proving *materiality* (i.e., that, but for the stultification, there was a realistic possibility that the Authority would have made a different decision). The respondents had first to demonstrate stultification (i.e., jurisdictional error, subject to proof of materiality). This Court should not be satisfied that that was so demonstrated.

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30 However, it is to be noted that the respondent advanced various claims that were "generic" in the sense that they arose merely by virtue of being a Tamil, and a prospective failed asylum seekers etc. The Agent's submissions addressed these matters, and were therefore on any view not wholly irrelevant to the respondent's claims.

31 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. See also *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [57]-[60] (Gageler and Gordon JJ).

The respondents' notices of contention

65. The Minister notes that the respondents have filed a notice of contention, which invites this Court to find that the Federal Court erred in dismissing their separate complaint that the Authority unreasonably failed to consider or exercise its power under section 473DC to obtain new information from the respondents in light of the inclusion of the irrelevant information in the "submissions". That complaint was unanimously dismissed (Griffiths J at *J* [90]-[94], Mortimer J at *J* [98], Wheelahan J at *J* [185]), and correctly so.

66. Below, the respondents relied on the decision of the Federal Court in *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475. In *CRY16*, the Full Court held that the legislature "is taken to intend that the Authority's statutory power in s 473DC will be exercised reasonably". The Full Court held that it was unreasonable for the Authority not to consider exercising that power to get new information from the applicant about a particular subject (the impact of relocation to a particular place) in circumstances where (from *CRY16* at [82], [84]):

    66.1. the Authority knew that that particular issue had not been explored by the delegate;

    66.2. "the Authority knew that it did not have, but the [referred applicant] was likely to have, information" relevant to this particular issue; and

    66.3. the Authority thereby "disabled" itself from considering whether relocation was unreasonable and therefore "could not make" a permissible direction under section 473CC(2)(a).

67. The respondents submitted that their cases were analogous.

68. However, the Court should not accept that that the Authority did not consider whether to get (unspecified) new information from the respondents or the Agent under section 473DC of the Act. No such inference can be drawn from the absence of any description of such a process of consideration in the Authority's written statements under section 473EA. That is because section 473EA(1) does *not* require the Authority to set out its reasons for the consideration or exercise of its "procedural powers".[32]

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32 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at [16]. See also *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [68] (Gummow J, with whom Heydon and Crennan JJ agreed) and more broadly [66]-[73] and [31]-[31] (French CJ and Kiefel J); *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [25], [36].

69. Moreover, it was not unreasonable for the Authority not to exercise (or not to consider exercising) its power under section 473DC. The test for unreasonableness is stringent.[33] In both cases it is incorrect to begin with the proposition that the Authority knew that it did not have "the correct submissions relating to the [respondent]". Here, the Authority had before it submissions that identified each respondent by name and ID number, and addressed aspects of each respondent's case, while also including (evidently in error) *some* information that was irrelevant. There was nothing reasonably to suggest to the Authority that this was the "incorrect document" and there existed a "correct document". The Authority appears to have drawn the (clearly available) inference that that the Agent had wrongly included (e.g., by forgetting to delete from a precedent submission) particular information that related only to another Sri Lankan client.

70. For similar reasons, the Authority cannot be said to have known in either case that the Agent was likely to have the "correct document". The respondents adduced no evidence below that such a "correct document" existed, or indeed that they had instructed the Agent to give any particular "new information" or submissions to the Authority. In any event, given the legislative intention expressed in s 473DB(1), more than this would be needed to render a failure to invite further information unreasonable. The Authority did not "disable" itself from exercising its power under section 473CC.

71. Nor can the Authority's conduct be characterised as a constructive failure to exercise jurisdiction akin to that identified in this Court's decision *Wei v Minister for Immigration and Border Protection*.[34] The Authority advised the respondents directly that they could seek to give new information to it. The Authority did not know or have any reason to infer that there was *further* information or submissions that they wished to give.[35]

72. To the extent that the receipt of a document containing extraneous and irrelevant information demands that the decision-maker contact the relevant person, it will not be so in every case. The resolution of arguments concerning legal unreasonableness is fact dependent.[36] In this case, there was enough information in the "submissions" reasonably to suggest to the Authority that the respondents had given such new information and submissions as they wished to give, albeit that their representative had included (evidently by some oversight) *some* irrelevant material. Not exercising the power under section 473DC in those circumstances was not "devoid of any intelligible justification", even if

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33 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [11] (Kiefel CJ), see also [67]-[70] (Gageler J).

34 (2015) 257 CLR 22.

35 Cf. *Wei* at [50], by reference to an applicant's right under sections 119-121 to give comments on certain information.

36 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [38]. *DVO16 v Minister* [2019] FCAFC 157 at [10].

not exercising that power was not the "most reasonable" approach for the Authority to take.[37] It was within the decisional freedom of the Authority to proceed as it did.

VII. ORDERS SOUGHT

73. The Minister seeks the following orders:

73.1. The appeals be allowed.

73.2. Order 1 made by the Federal Court (insofar as the Federal Court dismissed the Minister's appeal from the judgment of the Federal Circuit Court) and order 2 made by the Federal Court in each case be set aside and, in their place, it be ordered that:

(a) the appeal be allowed;

(b) the judgment of the Federal Circuit Court be set aside;

(c) in place of that judgment, the first respondent's application for judicial review of the decision of the second respondent be dismissed.

VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

74. The Minister estimates that he requires 1.5 hours for presentation of his oral argument.

Dated: 17 July 2020

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GEOFFREY KENNETT SC
Tenth Floor Chambers

NICK WOOD
Owen Dixon Chambers

[37] *ASB17 v Minister for Home Affairs* (2019) 268 FCR 271 at [62].