IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S347 of 2019

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Appellant

and

CED16

10 First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

APPELLANT'S AMENDED SUBMISSIONS

Amended on 10 February 2020 pursuant to a direction of Deputy Registrar Grey made on 7 February 2020

Part I: Certification

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

Part II: Issues

2. This appeal raises the following issues.

20 3. *First*, whether an invalid certificate issued by a delegate of the appellant, the Minister for Immigration and Border Protection (**Minister**), for the purposes of s 473GB of the *Migration Act 1958* (Cth) (**Act**), that s 473GB applied in relation to a document or information, amounted to "new information" as defined in s 473DC(1).

4. *Secondly*, whether the second respondent, the Immigration Assessment Authority (**Authority**), was required by s 473DE(1) of the Act to give to the first respondent (**Respondent**) particulars of the certificate or to state or otherwise show that it had considered whether that section was enlivened by the certificate.

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Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The Minister has considered whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

Part IV: Citations of judgments below and the orders now challenged

6. This appeal is brought pursuant to special leave granted on 13 December 2019 ([2019] HCATrans 246) and is from part of the judgment and orders of Derrington J, exercising alone the appellate jurisdiction of the Federal Court of Australia, dated 25 September 2018: *CED16 v Minister for Immigration and Border Protection* [2018] FCA 1451; (2018) 265 FCR 115. The part which is the subject of this appeal is that by which his Honour allowed the Respondent's appeal from the judgment and orders of the Federal Circuit Court of Australia (**FCCA**): *CED16 v Minister for Immigration and Border Protection* [2017] FCCA 233. Those two judgments are reproduced in the Core Appeal Book (**CAB**) at CAB 65-90 and CAB 29-52, respectively.

7. On 3 April 2019, Derrington J made further orders, consequential upon the allowing of the appeal, by which, relevantly (in order 1), order 2 made by the FCCA was set aside and writs of certiorari and mandamus were issued: *CED16 v Minister for Immigration and Border Protection (No 2)* [2019] FCA 438. Those orders were made after the Minister's special leave application was filed, but further orders were foreshadowed in that application[1] and copies of Derrington J's supplementary orders and reasons for them were provided in a Supplementary Application Book. They are now reproduced at CAB 92-100. If the present appeal is allowed, order 1 made by Derrington J on 3 April 2019 ought to fall and be set aside with order 2 made on 25 September 2018 (upon the same basis).

8. For abundant clarity, it is noted that the Minister does not seek to disturb the orders as to costs made by Derrington J on either date. The Minister has also agreed to pay the Respondent's costs in this Court.

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1 See [2] (footnote 1) of the Minister's application for special leave filed on 23 October 2018.

Part V: Facts

Background

9. The Respondent is a citizen of Sri Lanka who entered Australia as an "unauthorised maritime arrival" (as defined in s 5AA of the Act) on 10 September 2012: CAB 9 [1].

10. On 4 September 2015, the Respondent made an application for a Safe Haven Enterprise (Class XE) visa (**SHEV**) (CAB 9 [1]), a type of protection visa created by s 35A of the Act.

11. On 19 May 2016, a delegate of the Minister made a decision, pursuant to s 65(1)(b) of the Act, to refuse to grant a SHEV to the Respondent: CAB 9 [1].

12. On the same day, a delegate of the Minister issued a certificate to the Authority pursuant to s 473GB(5) of the Act (**certificate**): CAB 6.[2] It relevantly provided as follows:

> ***NOTIFICATION REGARDING THE DISCLOSURE OF CERTAIN INFORMATION COVERED BY SECTION 473GB OF THE* MIGRATION ACT 1958**
>
> *I notify the Immigration Assessment Authority that section 473GB of the* Migration Act 1958 *applies to a document or information in the document titled CLD2015/20746095 AAR054 DRAFT IMAPS Identity Assessment Form contained in PDF Portfolio D-1-PRID95583760 – [name of the Respondent] - CID77303259253.*
>
> *In my view, this document or information should not be disclosed to the referred applicant or the referred applicant's representative because:*
>
> *(a) the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest because it is a Departmental working document.*

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2 While the certificate did not state whether or not the Minister's delegate was also a delegate of the Secretary, no question was raised by the (present) Respondent that the person who issued the certificate pursuant to s 473GB(5) did not have the power to give a notification to the Authority pursuant to s 473GB(2)(a). Nor did Derrington J make any finding to that effect. In any event, it is not relevant whether the Minister's delegate was also the Secretary's delegate for the purposes of s 473GB(2)(a), as it was common ground before Derrington J and before the primary judge, that the certificate was invalid and there was no finding otherwise. At CAB 74 [22], Derrington J accepted that "it appears to have been clear the s 473GB Certificate was invalidly issued".

The Immigration Assessment Authority's use and disclosure of a document or information covered by this certificate is subject to subsections 473GB(3) and 473GB(4) of the Migration Act 1958.

This certificate is made pursuant to subsection 473GB(5) of the Migration Act 1958.

13. There was no dispute before Derrington J that the certificate was invalid because the precondition in s 473GB(1)(a) was not met in relation to the document the subject of the notification given pursuant to s 473GB(2)(a) (**notification**), namely, the 'DRAFT IMAPS Identity Assessment Form' (**identity assessment form**): CAB 71 [14], 73 [21]). That is to say, it was common ground that the mere fact that the identity assessment form was a "Departmental working document" was not a reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information in the document should not be disclosed, on grounds that to do so would be contrary to the public interest.

14. The delegate's decision to refuse to grant a SHEV to the Respondent was a "fast track reviewable decision" as defined in s 473BB. Accordingly, in discharge of his duty under s 473CA, the Minister referred the delegate's decision to the Authority for review.

15. On 11 July 2016, the Authority made a decision, pursuant to s 473CC(2)(a), to affirm the delegate's decision: CAB 8-27. The Authority was not satisfied that the Respondent had a well-founded fear of persecution and, therefore, was not satisfied that he was a "refugee" for the purposes of the criterion for the grant of a SHEV in s 36(2)(a): CAB 20 [61]. The Authority also was not satisfied that there were substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to Sri Lanka, there was a real risk that the Respondent will suffer significant harm such as to meet the criterion for the grant of a SHEV in s 36(2)(aa): CAB 22 [71].

Procedural history

16. The Respondent applied for judicial review of the Authority's decision. Drawing on the reasoning of Beach J in *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1, the Respondent contended that the Authority's decision was affected by jurisdictional error because the certificate was invalid and he was not given an opportunity

to comment on the identity assessment form. That application was dismissed by the primary judge on 14 February 2017: CAB 29-52.

17. The Respondent appealed from the primary judge's orders to the Federal Court of Australia. In a 'Proposed Further Amended Notice of Appeal' dated 9 August 2018,[3] he advanced two grounds of appeal: *first*, the primary judge made an appealable error in not finding that the certificate was invalid, and, *secondly*, the Authority made a jurisdictional error "because the statutory condition required to enliven the discretionary powers under s 473GB(3)(a) and (b) had not been met": CAB 54. In the particulars to the second ground, the Respondent contended that that condition was not met "because the [c]ertificate was invalid" and, "[a]s a result the Authority's exercise of the [discretions] under s 473GB ... miscarried": CAB 55. Neither ground could be advanced unless the Respondent first obtained a grant of leave to amend his notice of appeal. Further, the second ground required a further grant of leave, as it had not been advanced before the primary judge.

18. Justice Derrington refused to grant leave to the Respondent to advance the first proposed ground of appeal: CAB 73-74 [20]-[25].[4] His Honour there explained that the primary judge proceeded upon the assumption that the certificate may not have been valid, the outcome turning on immateriality (see also the primary judge's findings at CAB 49-50 [51]-[53]). Neither Derrington J nor the primary judge saw the invalidity of the certificate as material so as itself to give rise to jurisdictional error.

19. His Honour granted leave to the Respondent to advance the second proposed ground of appeal and said that he upheld it: CAB 87 [62]-[63]. His Honour's reasoning in relation to that ground, however, was concerned not with whether the Authority's (asserted) exercise of its discretionary powers in ss 473GB(3)(a) and (b) miscarried on account of the certificate being invalid, but whether the certificate itself amounted to "new information" within the meaning of s 473DC(1) and whether particulars of the certificate had to be given to the Respondent in accordance with s 473DE(1) because (in his Honour's view) it was "new information". That became the determinative issue for his

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3 The Minister does not understand it to be in dispute that the (present) Respondent filed a Notice of Appeal and an Amended Notice of Appeal in the Federal Court of Australia on 27 February 2017 and 19 November 2019, respectively. No 'Further Amended Notice of Appeal' was filed.

4 Despite leave being refused, however, the Amended Notice of Appeal contains this ground.

Honour, but the terms of the ground itself did not raise it. All of this will be explained and addressed below.

20. Justice Derrington held that the certificate amounted to "new information" as defined and was, therefore, "required to [be] deal[t] with in accordance with Subdivision C [of Division 3 of Part 7AA]": CAB 85 [57]; see also at CAB 80 [40], 84 [55] and 86 [60]. At CAB 84 [55], his Honour said that information "in an invalid s 473GB certificate" (as well as in "accompanying material") "must necessarily be 'new information'…". (The last sentence of his Honour's reasons at CAB 85 [56] also seems to involve the idea that, at least absent coverage by a valid s 473GB certificate, information given to the Authority that was not before the delegate making the referred decision "must be treated as 'new information'".) In particular, the Authority was, his Honour held, required to give to the Respondent particulars of the certificate in accordance with s 473DE(1), as it was information that the Authority intended to take into account that was not before the delegate when a decision was made under s 65: CAB 68 [2], 85 [57]-[58], 86 [60]. Because the Authority did not give particulars as required (CAB 85 [57]-[58]), or "turn its mind to whether the requirements of s 473DE(1) were met" in relation to the certificate (CAB 86 [61]), its decision, Derrington J held, "was not made in accordance with the process put in place" by Subdivision C of Division 3 of Part 7AA of the Act (CAB 85 [58]), "did not have the characteristics of one which was reached in accordance with the essential requirements of Part 7AA …" (CAB 86-87 [61]) and was affected by jurisdictional error (CAB 85 [58], 86-87 [61]).

21. It was not disputed below, and was ultimately accepted by Derrington J (at CAB 70 [7] and 80 [39]), that the information which was the subject of the certificate, the identity assessment form, was before the Minister when a decision was made under s 65. That is to say, the identity assessment form did not come within s 473DC(1)(a). Accordingly, no question arises on this appeal as to whether the identity assessment form itself was new information and enlivened any obligation in Subdivision C of Division 3 of Part 7AA of the Act.

22. The basis upon which Derrington J upheld the Respondent's appeal, that the certificate itself comprised or contained "new information" and had to be dealt with in accordance with the provisions in Subdivision C of Division 3 of Part 7AA, was not raised by the

Respondent in his notice of appeal or in his written or oral submissions (as his Honour appears to have accepted in his later reasons published on 3 April 2019: CAB 95 [8]). Nor was it drawn to the parties' attention prior to the delivery of judgment dated 25 September 2018. Contrary to any suggestion otherwise in the penultimate sentence in [8] of Derrington J's reasons published on 3 April 2019 (CAB 95), the Minister had made no submissions prior to judgment as to whether the certificate itself amounted to, or contained, new information.

Part VI: Argument

Legislative scheme

10 23. The scheme of review established by Part 7AA of the Act was considered by this Court in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (***Plaintiff M174***) at 225-232 [13]-[38], *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 (***BVD17***) at 1094-1096 [3]-[17] and, most recently, in *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 (***CNY17***) at [2]-[8], [60]-[67] and [114]-[116]. For the purposes of this appeal, it suffices to mention the following aspects of the scheme.

24. Section 473CA imposes a duty on the Minister to refer to the Authority a "fast track reviewable decision" for review under Part 7AA. Following the referral, the Secretary of the Minister's department (**Secretary**) is required by s 473CB(1) to give to the Authority
20 particular categories of "review material". That material includes "any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review".

25. Division 3 of Part 7AA governs the manner in which the Authority is to conduct a review. It commences with s 473DA(1), the effect of which is that the provisions in Division 3 and ss 473GA and 473GB make exhaustive provision as to the requirements of the natural justice hearing rule in relation to the conduct of the review.[5] Section 473GB will be addressed shortly.

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5 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 (***BVD17***) at 1094 [2], 1098-1099 [29]-[34] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

26. Section 473DB(1) sets out what this Court has described as the "primary requirement"[6] or "primary obligation"[7] of the Authority, being to review the fast track reviewable decision that has been referred to it under s 473CA by considering the review material given to it under s 473CB without accepting or requesting new information and without interviewing the referred applicant. The duty in s 473DB(1) is expressed to be "[s]ubject to … Part [7AA]". Those provisions in Part 7AA which qualify that obligation are, relevantly, ss 473DC, 473DD and 473DE.

27. Section 473DC(1) confers a discretionary power on the Authority, which must be exercised within the bounds of reasonableness,[8] to get – that is to say, "seek out"[9] – "new information", which is defined in that subsection[10] as:

> *... any documents or information ... that:*
>
> *(a) were not before the Minister when the Minister made the decision under section 65; and*
>
> *(b) the Authority considers may be relevant.*

28. It can be seen, therefore, that s 473DC(1) imposes two conditions that must be fulfilled before information (which may or may not be contained in a document) can be said to be "new information".[11] Information falling within s 473DC(1)(a) will become "new information" "if and when the Authority considers that the information may be relevant".[12] However, as will be submitted below, what is asserted to constitute "new information" must still be "information" in the relevant sense.

29. If information meets the requirements of ss 473DC(1)(a) and (b), its consideration and disclosure are governed by ss 473DD and 473DE.

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6 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (***Plaintiff M174***) at 227 [22] per Gageler, Keane and Nettle JJ.

7 *BVD17* at 1096 [14]-[15] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

8 *Plaintiff M174* at 227 [21], 235-236 [49], 242 [71] per Gageler, Keane and Nettle JJ, 245 [86] per Gordon J, 249 [97] per Edelman J.

9 *Plaintiff M174* at 228 [23] per Gageler, Keane and Nettle JJ.

10 See s 473BB.

11 *Plaintiff M174* at 228 [24] per Gageler, Keane and Nettle JJ.

12 *Plaintiff M174* at 229 [27] per Gageler, Keane and Nettle JJ.

30. Section 473DD prohibits the Authority from considering new information unless it is satisfied that the precondition in subpara (a) is met. In cases where new information has been given, or is proposed to be given, by a referred applicant, he or she must also satisfy the Authority of the preconditions in subparas (b)(i) or (b)(ii). Section 473DD(b) operates "[c]umulatively upon the precondition set out in s 473DD(a)".[13]

31. If new information "has been, or is to be, considered by the Authority under s 473DD" *and* "would be the reason, or a part of the reason, for affirming the fast track reviewable decision", then, and only then, must the Authority give to the referred applicant particulars of the information, explain to him or her why it is relevant to the review, and invite him or her to give comments on it: ss 473DE(1)(a)-(c).

32. Section 473GB is in Division 6 of Part 7AA. It "operates to impose cumulative obligations and to confer supplementary powers on the Secretary and on the Authority where the Secretary gives to the Authority a document or information to which that section applies".[14] The section applies to a document if, relevantly, the Minister certifies (under s 473GB(5)) that disclosure would be contrary to the public interest for a specified reason that could form the basis for a claim by the Commonwealth for non-disclosure in a court: s 473GB(1)(a).[15] That claim may be founded upon public interest immunity.[16] If s 473GB applies to a document or information, then s 473GB(2)(a) requires the Secretary to notify the Authority that the section applies to it. Pursuant to s 473GB(2)(b), the Secretary may, but need not, give to the Authority any written advice that he or she thinks relevant about the significance of the document or information.

33. The performance of the duty in s 473GB(2)(a) enlivens the Authority's discretionary powers in s 473GB(3)(a) to "have regard to any matter contained in the document, or to the information" and s 473GB(3)(b) to "disclose any matter contained in the document, or the information, to the referred applicant" "if the Authority thinks it appropriate to do so having regard to any advice given by the Secretary under subsection (2)". Consistent with the analysis of Bell, Gageler and Keane JJ in *Minister for Immigration and Border*

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13 *Plaintiff M174* at 230 [31] per Gageler, Keane and Nettle JJ.

14 *BVD17* at 1095 [5] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

15 *BVD17* at 1095 [6] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

16 *BVD17* at 1104 [59] per Edelman J; *cf Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (***SZMTA***) at 438 [19] per Bell, Gageler and Keane JJ.

Protection v SZMTA (2019) 264 CLR 421 at 443 [39], if neither of the preconditions in s 473GB(1) is met in relation to a document or information, the section has no application to that document or information, the Secretary has no authority under s 473GB(2)(a) to notify the Authority that s 473GB applies in relation to it, and the Authority has no power to exercise the discretions in s 473GB(3). The incorrect notification, in those circumstances, will be invalid.[17] However, the mere provision of an invalid notification will not, of itself, vitiate the Authority's decision; the error must still be material in the sense that, had the Secretary's breach not occurred, the Authority's decision could realistically have been different.[18]

10 34. In the present case, no question arises on the findings of Derrington J as to whether the notification enlivened the powers in s 473GB(3) or as to how the certificate should have been dealt with (other than as new information in accordance with the provisions in Subdivision C of Division 3 of Part 7AA).

35. Section 473EA(1) imposes on the Authority a duty to prepare a written statement that sets out its decision on the review, sets out the reasons for its decision, and records the day and time that the statement is made. This duty is to be read with s 25D of the *Acts Interpretation Act 1901* (Cth). So read, s 473EA(1)(b) requires the Authority to set out its findings on material questions of fact and to refer to the evidence or other material on which they are based. It does not require the Authority to give reasons for the exercise or
20 non-exercise of procedural powers.[19]

The certificate was not new information

36. For the following reasons, Derrington J was in error to conclude that the certificate amounted to "new information" within the meaning of s 473DC(1).

37. *First*, the certificate was not "information" in the sense described in the chapeau to s 473DC(1). It stated nothing other than that:

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17 *cf SZMTA* at 443 [40] per Bell, Gageler and Keane JJ.

18 *cf SZMTA* at 445 [45], [48] per Bell, Gageler and Keane JJ.

19 *BVD17* at 1096 [16], 1100 [38]-[40] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ; *cf Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 606 [32] per French CJ and Kiefel J, 616-617 [69]-[70] per Gummow J, 623 [91] per Heydon J, 623 [92] per Crennan J.

a) s 473GB applied to the identity assessment form;

b) in the delegate's view, the identity assessment form should not be disclosed to the Respondent or his representative because disclosure would be contrary to the public interest because it was a departmental working document;

c) the Authority's use and disclosure of the document the subject of the certificate, or information contained in that document, was subject to ss 473GB(3) and 473GB(4); and

d) the certificate was made pursuant to s 473GB(5).

38. None of these statements could, in itself, be characterised as "a communication of knowledge about some particular fact, subject or event"[20] or "knowledge of facts or circumstances relating to material or documentation of an evidentiary nature".[21] The first and fourth statements essentially repeated the terms of ss 473GB(2)(a) and 473GB(5), the second purported to explain the reason why disclosure of the identity assessment form would be contrary to the public interest and the third directed the Authority's attention to ss 473GB(3) and (4). None was of a factual or evidentiary nature or had any bearing on the substantive merits of the decision being reviewed or the issues arising on the review.

39. If the ~~identity assessment form~~ certificate did not contain "information" in the requisite sense, it follows that it did not meet the condition in s 473DC(1)(a).

40. That is itself sufficient to allow the appeal and to make the orders sought by the Minister.

41. *Secondly*, Derrington J was wrong to hold or assume, at CAB 75 [28], that the certificate assumed the legal character of material provided by the Secretary to the Authority pursuant to s 473CB(1)(c) because it was, as a matter of fact, provided to the Authority with the review material. That error would be significant if it contributed to his Honour reaching the conclusion that the certificate was "new information".

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20 *Plaintiff M174* at 228 [24] per Gageler, Keane and Nettle JJ. See also *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 (***SZBYR***) at 1196 [18] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Minister for Immigration and Border Protection v CLV16* (2018) 260 FCR 482 at 493 [51] per Flick, Griffiths and Perry JJ.

21 *SZMTA* at 440 [28] per Bell, Gageler and Keane JJ.

42. A difficulty with Derrington J's reasoning in this respect is that it fails to appreciate the nature of the Secretary's duty in s 473CB(1)(c). As Kiefel CJ and Gageler J recently observed in relation to that provision (footnotes omitted) in *CNY17* (at [6]):

> *By operation of s 473CB(1)(c), the review material which it is the duty of the Secretary to give to the Authority also includes 'any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review.' To consider material that is in the Secretary's possession or control to be relevant to the review within the meaning of the provision, the Secretary (who can be expected ordinarily to act through a delegate), obviously needs to form the opinion that the material is capable directly or indirectly of rationally affecting assessment of the probability of the existence of some fact about which the Authority might be required to make a finding in the conduct of its review of the referred decision.*

43. In the present case, there was nothing in the evidence before Derrington J, or in the written statement of the Authority prepared pursuant to s 473EA(1), to suggest that the Secretary had formed the opinion that the certificate (or the notification) was capable directly or indirectly of rationally affecting the assessment of the probability of the existence of some fact about which the Authority might be required to make a finding in reviewing the Minister's delegate's decision. The certificate was not given pursuant to s 473CB(1)(c); rather, it was provided to the Authority with the review material in discharge of the Secretary's duty to notify the Authority, in accordance with s 473GB(2)(a), that s 473GB applied in relation to the identity assessment form.

44. The step under s 473GB(2)(a) has to be taken, at least as a matter of practicality, contemporaneously with the provision to the Authority, pursuant to s 473CB(1), of the document or information the subject of the notification. There are two reasons for this. *First*, by reason of the chapeau to s 473GB(2), it is only when a document or information the subject of a certificate is given to the Authority in discharge of an obligation cast by the Act (here, s 473CB(1)(c)) that the duty in s 473GB(2)(a) is enlivened. *Secondly*, if s 473GB(2)(a) is not complied with at the same time as the provision to the Authority of the material to which a notification relates, there is a real risk that the purpose of s 473GB may be frustrated by the Authority immediately acting without knowledge of the

notification and the existence of its powers in s 473GB(3). If the notification came after compliance with s 473CB(1), the Authority could, for example, have regard to the material the subject of the notification in an attempt to discharge its duty under s 473DB(1), unaware that s 473GB(3)(a) precludes it from doing so unless it "affirmatively exercises the discretion conferred on it by [that provision]".[22]

45. Justice Derrington purported to rely upon the statement of the plurality in *Plaintiff M174* at 228 [25] that "[t]here is no inherent dichotomy between new information which meets the two conditions set out in s 473DC(1)(a) and (b) and review material which the Secretary is required to give the Authority under s 473CB" to support his Honour's conclusion that the certificate came within s 473DC(1)(a) because it was created after the decision made under s 65: CAB 69 [6], 76-77 [32], 82 [47] and 84 [54]-[55]. However, the plurality there spoke not of a certificate issued by the Minister pursuant to s 473GB(5), or a notification given by the Secretary under s 473GB(2)(a), but of material which the Secretary is required to give in actual discharge of the duty imposed by s 473CB(1).[23] Neither the certificate nor the notification was required to be given, or in fact given, to the Authority pursuant to s 473CB(1).

46. *Thirdly*, even if the certificate came within s 473DC(1)(a), there was nothing in the evidence before Derrington J to suggest that the Authority "consider[ed]" that the certificate "may be relevant" (s 473DC(1)(b)), that is to say, relevant to the Respondent's claims for protection or the determination of the Authority's satisfaction about whether he satisfied the criteria for the grant of a SHEV.[24]

47. It is apparent from Derrington J's reasons, particularly at CAB 80 [39]-[40] and 84-85 [55]-[56], that his Honour considered that the certificate was new information solely because it was not before the Minister's delegate when a decision was made under s 65. In parts of his Honour's reasons, at CAB 78 [36] and 85 [57], reference is made to the Authority's statement, at [3] of its reasons for decision (CAB 9), that it "had regard to" the review material given by the Secretary in discharge of the duty in s 473CB. Even accepting, contrary to the Minister's submissions above, that the certificate met the

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22 *BVD17* at 1095 [10] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

23 *Plaintiff M174* at 225-226 [15], 227 [22], 228 [25].

24 *Minister for Immigration and Border Protection v AMA16* (2017) 254 FCR 534 at 558 [101] per Charlesworth J.

condition in s 473DC(1)(a) and formed a part of the "review material", the Authority's statement at CAB 9 [3] says nothing as to whether the Authority considered that the certificate may be relevant or material to the review for the purposes of s 473DC(1)(b). The requirement in s 473DB(1) is not one to consider the certificate as having substantive relevance for the purposes of s 473DC(1)(b); rather, it is "no more than that the Authority examine the review material provided to it by the Secretary in order for the Authority to form and act on its own assessment of the relevance of that material to the review of the referred decision".[25] In this way, the Authority may say that it has had regard to review material, yet "assess [it] as wholly irrelevant to the review and place no reliance at all on [it] in making its decision on the review".[26] What s 473DB(1) does not permit the Authority to do is to "fail or refuse to turn its attention to any of the review material that is given to it by the Secretary."[27]

48. Accordingly, the question whether or not the Authority has considered that specific review material may be relevant for the purposes of s 473DC(1)(b) requires something more than merely pointing to a bare statement that it has had regard to the material given to it pursuant to s 473CB(1). In the present case, the Authority made no reference to the certificate in its written statement of reasons. Given the content of the certificate, devoid as it was of anything of substantive relevance to the review, an inference should be drawn that the Authority did not consider the certificate to be relevant to the review (within the meaning of s 473DC(1)(b)).[28] To the extent that Derrington J held that the certificate fulfilled the criterion in s 473DC(1)(b) solely because the Authority said that it had regard to the review material given to it by the Secretary, his Honour erred.

49. In parts of Derrington J's reasons, his Honour appears to have conflated the status of the certificate with that of the identity assessment form. Thus, occasionally, Derrington J referred to the information in the identity assessment form (which was not before his Honour) as amounting to new information or as though particulars of such information

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25 *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 (***CNY17***) at [7] per Kiefel CJ and Gageler J.

26 *CNY17* at [7] per Kiefel CJ and Gageler J.

27 *CNY17* at [7] per Kiefel CJ and Gageler J.

28 *cf Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 331-332 [10] per Gleeson CJ, 337-338 [33]-[35] per Gaudron J, 345-346 [67]-[69] per McHugh, Gummow and Hayne JJ; *SZMTA* at 436 [14] per Bell, Gageler and Keane JJ, 463 [106] per Nettle and Gordon JJ.

had to be given to the Respondent: CAB 79 [38] and 85 [56]. However, given his Honour's acceptance, at CAB 80 [39], that the identity assessment form was before the Minister's delegate when a decision was made under s 65, no question arose below, and no question arises before this Court, as to whether the identity assessment form had to be treated in accordance with the new information provisions in Subdivision C of Division 3 of Part 7AA.

50. Similarly, at CAB 86 [59], Derrington J referred to, and rejected, a submission by the Minister (which was advanced despite the onus of proof being on the present Respondent)[29] that, even if the Authority erred in law by exercising the discretionary powers in s 473GB(3) despite the fact that the notification was invalid, any error was not jurisdictional because it was immaterial to the decision on review. His Honour did so on the basis that the identity assessment form was not in evidence and the Respondent "was not given the opportunity required under s 473DE(1)(c) to respond to the assertion by the Minister that the information in the [identity] [assessment] [f]orm rendered it of particular interest or veracity". Similar observations were made at CAB 74 [23]. The terms of the certificate did not, with respect, say anything to signify that the identity assessment form had some "particular interest or veracity". Also, it was never suggested by either party, or held by Derrington J, that the identity assessment form amounted to new information. Further, and moreover, because the identity assessment form was not "new information", it did not engage s 473DE(1) and s 473DA(2) operated to excuse the Authority from having to provide a copy of it (or particulars thereof) to the Respondent.

The certificate did not enliven the duty in s 473DE(1)

51. If the Court were to accept the Minister's submission that the certificate did not amount to new information as defined in s 473DC(1), it necessarily follows that the duty in s 473DE(1) was not enlivened in the present case. As the plurality observed in *Plaintiff M174* (at 228 [24]), "[t]he term 'new information' must be read consistently when used in ss 473DC, 473DD and 473DE". If material is not new information as defined in s 473DC(1), then it cannot be new information for the purposes of s 473DE(1). If that is so, then, contrary to Derrington J's reasons (at CAB 68 [2], 80 [40] and 86 [59]), the

29 *SZMTA* at 445 [46] per Bell, Gageler and Keane JJ.

Authority was not under a duty to give particulars of the certificate to the Respondent or otherwise to "turn its mind to whether the requirements of s 473DE(1) were met" (at CAB 86 [61]) or to show that it had done so.[30]

52. There are also other reasons why the certificate did not enliven the duty in s 473DE(1), each of which, if accepted, would be sufficient to justify the relief now sought.

53. At CAB 68 [2] and 86 [61], Derrington J proceeded on the basis that the duty in s 473DE(1) was enlivened in relation to the certificate because it met the definition of new information and was relevant to the review. However, the preconditions to the obligation in s 473DE(1) being enlivened are far more extensive than suggested by Derrington J. That subsection relevantly provides that the Authority must:

> *(a) give to the referred applicant particulars of any new information, but only if the new information:*
>
> *(i) has been, or is to be, considered by the Authority pursuant to s 473DD; and*
>
> *(ii) would be the reason, or a part of the reason, for affirming the fast track reviewable decision.*

54. Neither the condition in s 473DE(1)(a)(i) nor that in s 473DE(1)(a)(ii) was here met.

55. As to the first of those conditions, there was no evidence before Derrington J and nothing in the Authority's written statement of reasons to suggest that the certificate itself was, or was to be, considered by the Authority pursuant to s 473DD.

56. As to the second of those conditions, there was nothing in the certificate that would be the reason, or a part of the reason, for affirming the decision under review. Conformably with the duties in provisions such as ss 57(2)(a), 359A(1)(a) and 424A(1)(a), the condition in s 473DE(1)(a)(ii) will not be met unless the information, in its terms, contains a rejection, denial or undermining of the referred applicant's claims.[31] Adapting the words

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30 While the better view of Derrington J's reasons at CAB 86 [61] is that his Honour considered that the Authority was required to, but did not, perform its duty in s 473DE(1), if his Honour intended to say that there is a duty to consider whether the duty in s 473DE(1) is enlivened, he erred, as there is nothing in the text or context of the provision to support the implication of a duty to consider.

31 *cf SZBYR* at 1195-1196 [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at 513 [22] per French CJ, Heydon, Crennan, Kiefel and Bell JJ.

of the plurality in *Plaintiff M174* (at 223 [9]), to enliven the disclosure obligation, the information must, in its terms, "be of such significance as to lead the [Authority] to consider in advance of reasoning on the facts of the case that the information of itself 'would', as distinct from 'might', be the reason or part of the reason for [affirming the decision under review]". In the present case, the information in the certificate did not, in its terms, amount to a rejection, denial or undermining of the Respondent's claims. It was not, on any view, of dispositive relevance to those claims, let alone so adverse as to attract the duty in s 473DE(1).

Other matters

10 57. While the foregoing submissions, if accepted, are sufficient to impugn the judgment of Derrington J, given the discord between the basis upon which the appeal below was upheld and the terms in which the second ground of appeal was formulated or advanced, three further points should be made.

58. *First*, at CAB 79 [38(b)], Derrington J observed that it could be inferred that the Authority "believed its discretion in s 473GB(3) was enlivened, and it proceeded to undertake the review on that basis." His Honour did so, however, on the bases that the Authority "was required to treat either document [that is, the certificate and the identity assessment form] as containing 'new information'" and that it did not do so. The words "[i]t follows" in the sentence preceding CAB 79 [38(a)] support this construction of Derrington J's
20 reasons. Accordingly, if, as the Minister submits above, the certificate did not amount to new information and the duty in s 473DE(1) was not enlivened in relation to it, there would be no basis for the inference drawn by Derrington J.

59. *Secondly*, there is no warrant for the view, expressed by Derrington J at CAB 86 [59], that "the assertion of [a] claim [for public interest immunity] by the Minister" in respect of the identity assessment form "heightened [its] import". The identity assessment form was not in evidence below. Further, as to the ability to draw inferences, there was nothing in the certificate or other evidence before Derrington J to suggest that the identity assessment form was of "heightened" "import". The certificate suggested nothing other than that the document the subject of the notification pertained to the Respondent's identity. However,

as revealed by the Authority's findings at CAB 10 [6], the Authority took no issue with the Respondent's claimed identity.

60. *Thirdly*, at CAB 86 [61], Derrington J relevantly said the following:

> *Further, the Minister's submission that it could not be ascertained whether the [Authority] acted properly in relation to the invalid certificate cannot be accepted. First, it is clear that it did not give particulars of the new information to the appellant. It might therefore be supposed that, if it acted in accordance with the correct operation of Pt 7AA, it must have assumed that the Certificate was valid. If so, it therefore acted upon a fundamentally wrong premise in the consideration of the exercise of its powers. That too is likely to amount to a jurisdictional error. The [Authority] was mistaken as to the correct manner in which to deal with the information in the invalid Certificate. It must have incorrectly assumed that it was entitled not to disclose it to the appellant if it thought that it was relevant.*

61. The fact that the Authority did not give particulars of the certificate to the Respondent does not mean that it assumed that it was valid. Nor was there anything in the evidence below to suggest that the Authority "incorrectly assumed" that it was entitled not to give particulars of the certificate. The Authority's decision not to do so can be explained by its having considered that the certificate was not relevant to the review (given its contents) and did not meet the requirements of s 473DE(1).

Part VII: Orders sought

62. The Minister seeks the following orders:

1. *Appeal allowed.*
2. *Set aside order 2 made by the Full Court of the Federal Court of Australia on 25 September 2018 and, in its place, make the following order:*

   "2. The appeal be dismissed."
3. *Set aside order 1 made by the Full Court of the Federal Court of Australia on 3 April 2019.*

Part VIII: Oral argument

63. The Minister anticipates that he will require approximately one hour for the presentation of his oral argument in chief and in reply.

Dated: 10 February 2020

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ANNEXURE - LIST OF RELEVANT STATUTORY PROVISIONS

1. *Acts Interpretation Act 1901* (Cth) (compilation number 31, as at 11 July 2016): s 25D.

2. *Migration Act 1958* (Cth) (compilation number 131, as at 11 July 2016): ss 473BB, 473CA-473DE, 473EA and 473GB.