IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S 46 of 2019

BETWEEN:

BVD17
Appellant

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

10 **IMMIGRATION ASSESSMENT AUTHORITY**
Second Respondent

REPLY

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

2. MS [5] is distracting and impermissibly seeks to invite attention to a review of the merits of the decision.

3. MS [15] altogether ignores AS [17(c)(i)].

4. The assertion in MS [19] that the appellant's submissions are erroneous is itself erroneous. The appellant's submissions are correct.

20 5. MS [20] adopts an unthinking transplantation of the reasoning in *SZMTA* in relation to s 438(3)(a) to s 473GB(3)(a) and does not grapple with the matters identified at AS [23]. Perhaps it is correct that the IAA cannot consider certificate material except through s 438(3)(a), whether or not the certificate material is review material or new information. But even if that is so, that does not undermine the appellant's arguments on either ground, nor does it assist the Minister's case.

6. The final sentence of MS [20] does not make sense. It is not explained why disclosure of the existence of the certificate to the appellant could not have been intended prior to the favourable exercise of the discretion under s 473GB(3)(b).

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7. The materiality submission in MS [21] is misconceived. The materiality of the error is shown in the possibility of the appellant having advanced submissions in favour of a possible exercise of s 473GB(3)(b), which if exercised, would have disclosed the supposed omission from the brother's protection visa file.

8. As to MS [30], it is correct that s 473EA did not extend to require the IAA to give reasons for procedural decisions made along the way, but the Minister's suggested consequence does not follow for the reasons set out in AS [52]-[58].

9. MS [33], alleging a misconception by the appellant, is itself misconceived. A decision-maker is ordinarily bound by – and confined to – the reasons given for the
10 decision in question, whether or not given pursuant to an obligation.[1]

10. MS [34] is tendentious. It presumes an answer favourable to the Minister on a point it disputes and does not assist the Court in any way.

11. MS [37] is misconceived. First, the Minister can be expected to take care in drafting the certificate, and secondly, the IAA can be expected to take care in how it discloses to an applicant the existence of a certificate. But in any event, it is hard to see why this observation affects the resolution of this appeal. In any event, the fact that the appellant's brother made a protection visa application (which is disclosed by the certificate) is not confidential – he is in Australia on a protection visa, which is a matter of public record.

20 12. MS [39]-[46] are misdirected. The appellant's submissions show that in relation to the reasoning regarding the supposed omission from the brother's protection visa file, the analysis was not all one way, and that the appellant might have been in a position to advance information to better inform the IAA in the performance of the review function. The fact that the IAA held other concerns about the appellant's case is irrelevant – those other concerns might have been diminished if it had not reasoned in the manner that it did in relation to the supposed omission from the brother's protection visa file.

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[1] *East Melbourne Group v Minister for Planning* (2008) 23 VR 605, [308]-[310] (Ashley and Redlich JJA) and the cases there cited.

13. As to MS [48], AS [48] proceeds from the detailed factual assumptions set out in AS [45]-[47]. It is not asserted in a vacuum.

Dated: 13 May 2019

Angel Aleksov

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