IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S46 of 2019

BETWEEN:

BVD17

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Form of submissions

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

Part II: Issues arising on the appeal

2. This appeal raises the following issues:
   a. Whether the failure of the Second Respondent (**the Authority**) to inform the Appellant that it had received a notification under s 473GB(2) of the *Migration Act 1958* (Cth) (**the Act**), or a certificate under s 473GB(5) of the Act (**Certificate**), was a jurisdictional error; and
   b. Whether the Authority failed to consider the exercise of its discretion, conferred by s 473GB(3)(b) of the Act, to disclose to the Appellant any matter contained in the documents or information covered by the Certificate and, if it did so fail, whether that was legal unreasonableness amounting to jurisdictional error.

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Part III: Section 78B Notice

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required to be given.

Part IV: Factual Matters

4. As stated at [7] of the Appellant's Submissions (**AS**), the Delegate had before her a file relating to the Appellant's brother's offshore protection visa assessment. It should be noted that the Delegate's decision-record refers to that file, by way of footnotes, as something taken into account by her in the assessment of the Appellant's application. The parties were agreed that the material the subject of the Certificate was before the Delegate when her decision was made (see the judgment (**J**) of the Full Court ([2018] FCAFC 114 at [24] (Core Appeal Book (**AB**) 60). The Certificate was in the Appeal Book before the Full Court, which described it at J [8]-[9] (AB 55-56).

5. The Full Court described the Authority's reasoning at J [10]-[11] (AB 56-57). It also made reference to those reasons at J [54], [58]-[59] (AB 68-70). The First Respondent (**the Minister**) has addressed the aspects of the Authority's reasoning that he submits are relevant (especially in relation to Ground of Appeal Two) at [38]-[43], below. However, it should be noted that **AS [9](b)** does not properly reflect the entirety of what the Authority said at [18] (AB 8) of its reasons (in which the Authority refers to the omission of certain matters from the Appellant's brother's protection claims). In particular, the Appellant refers to the Authority's statement (in relation to that omission) that it "*find[s] it significant...*", but omits reference to the Authority's statement that it gave that omission only "*some weight*". When the Authority's reasons are read as a whole, it is apparent that what is recorded at [18] (AB 8) was one of many matters taken into account by the Authority at [14]-[30] (AB 7-10) of its reasons, including others which were given "*significant weight*", and the Authority's view that the Appellant's *own* evidence about his abduction by the Karuna Group was "*vague and unconvincing*" – suggesting, in the Authority's view, "*that he was not abducted by the Karuna Group or in hiding for seventeen months*" (at [19]-[24], especially [24]) (AB 8-9).

6. The Minister also notes that there is no suggestion in this case that the Certificate was invalid (and no finding of invalidity was made by the Full Court or the Federal Circuit

Court of Australia). The primary Judge noted, at [35] ([2017] FCCA 3046) (AB 42), that the Appellant's submissions conceded that it was not contended that the Certificate was invalid.

Part V: Argument

Ground One

7. This ground alleges that the Authority's decision was affected by jurisdictional error because the Authority failed to notify the Appellant of the fact that there was, before it, a Certificate under s 473GB. The Full Court does not address the issue raised by Ground One because no such argument, or any other natural justice argument, was pressed by the Appellant in the Full Court.

8. The Appellant argues (**AS [30]** and **[38]**) that there is an implied obligation on the Authority to disclose the existence of a certificate to a review applicant. That is not so. Section 473GB generally, or s 473GB(3)(b) specifically, read according to its terms and in context, does not, expressly or impliedly, impose any requirement upon the Authority to the effect contended for by the Appellant. The scope and purpose of s 473GB(3)(b), shown by its unambiguous terms, is to provide a discretion to the Authority, "*if the Authority thinks it appropriate to do so having regard to any advice given by the Secretary under sub-section (2)*", to "*disclose any matter contained in the document or information to the referred applicant*". The "*document or information*" is not the "*certificate*", or the existence of a certificate. There is no provision for the disclosure to the Appellant of the certificate, or the existence of the certificate, in s 473GB. Also, although s 473GB(3)(b) requires the Authority, before it may disclose (if it thinks appropriate) the "*document or information*" to the referred applicant, to have "*regard to any advice given by the Secretary under subsection (2)*", there is no counterpart, or other provision, requiring the Authority to consider any submissions from an applicant. The clear inference is that the Authority need not hear from the Appellant at all in relation to the exercise of that discretion.

9. The Appellant's argument does not take sufficient account of the effect of s 473DA(1), or the absence of an equivalent to s 422B(3). Also, *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 92 ALJR 252 does not assist the

Appellant, on account of the differences between Part 7 and 7AA of the Act, including the very different terms of ss 473DA and 422B.

10. Section 473DA(1) provides that "*This Division, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority*". There is a significant textual difference between that provision and s 422B(2), which uses the more narrow words "*in relation to the matters they deal with*".

11. The effect of the broader phrase in s 473DA(1) is indicated by the observations made in *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624 at [57] (per French J, as his Honour then was) and *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427 at [9] per Emmett, Kenny and Jacobson JJ. In those passages, their Honours expressed the view that the statement in s 422B(1) that Division 4 is to be taken to be exhaustive of those aspects of the requirements of procedural fairness "*in relation to the matters it deals with*" imports a "*somewhat more specific limitation upon the scope of procedural fairness than might have been the case by a global reference to the conduct of reviews by the Tribunal*" (*SZMOK* at [9], emphasis added).

12. Here, s 473DA(1) makes such "*global*" reference to the "*reviews conducted by the Immigration Assessment Authority*". By force of s 473DA(1), Division 3 of Part 7AA, together with ss 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Authority – not merely in relation to particular matters. As a result and noting also the absence from Part 7AA of an equivalent to s 422B(3), there is no room for any procedural fairness obligation, to disclose the existence of a certificate, to be implied into s 473GB, or into s 473GB(3)(b) specifically. Section 473DA, in terms and read in the context of Part 7AA, has the "*plain words of necessary intendment*"[1] to exclude natural justice, sufficient to distinguish *SZMTA* and produce a different result in the present case. The Full Court of the Federal Court of Australia was correct to conclude in *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176;

[1] *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

(2017) 257 FCR 111 at [100] that a referred applicant's procedural fairness entitlement in relation to the existence of a certificate, and the material covered by it, is "*exhaustively stated in s 473GB(3)*" (see also at [97]).[2]

13. The effect of s 473DA(1) may be contrasted with the effect of the more narrow formulation in s 422B(2). In *SZMTA* at [34], Bell, Gageler and Keane JJ held that "*[i]mportantly, s 422B is not framed in a way that excludes procedural fairness, which it refers to as the 'natural justice hearing rule' from the conduct of the review*". At [35], their Honours explained how the provisions referred to in s 422B(1) and (2) are made an exhaustive statement of the requirements of procedural fairness "*in relation to the 'matters' with which they deal*", those "*matters*" being "*the discrete subject matters of the provisions*". Their Honours also held, at [37], that, in relation to s 438, the subject-matter of that provision "*is confined to how the Tribunal is to treat documents and information to which s 438 applies*" and it did *not* extend "*to the prescription of any consequences, for procedural fairness, of the Secretary providing a notification to the Tribunal under the section*". As a consequence, s 422B(2) did not exclude an obligation on the Tribunal to inform the review applicant of the existence of notification. The broader formulation in s 473DA(1), read with s 473GB, *does* have that effect.

14. Also, as noted above, there is no provision equivalent to s 422B(3) in s 473DA, or in Part 7AA more generally. That supports the proposition that no natural justice requirement is to be read into s 473GB(3). Section 422B(3) was an important part of the reasoning of Bell, Gageler and Keane JJ in *SZMTA*, at [36] (and also at [99] per Nettle and Gordon JJ). Contrary to **AS [37]**, the difference between s 422B and 473DA, and the absence of s 422B(3), cannot simply be ignored. (See also *Minister for*

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[2] Contrary to the suggestion at **AS [23]** and also footnote 14, including that *BBS16* is wrongly decide, the Authority does have a discretion whether to consider material covered by a certificate. The document or information covered by the Certificate in this case was before the delegate and was part of the review material, but the requirement in s 473DB(1) that the Authority must review the decision referred to it under s 473CA by considering the review material provided to the Authority under s 473CB is expressed to be "*subject to this Part*", which includes s 473GB(3). The Authority *does* have the discretion to consider material covered by a certificate: see *SZMTA* at [23] and s 473GB(3)(a). Also, *BBS16* is correct, at [92]-[93], to conclude that a certificate itself is not "*new information*", because, although the certificate was not before the delegate when she made the decision under s 65 of the Act, there is no indication that the Authority considered the certificate itself to be relevant to whether the delegate's decision should be affirmed or remitted under s 473CC. It accordingly would not be "*new information*" within s 473DC(1)(b).

Immigration and Citizenship v Li (2013) 249 CLR 332 at 360-361 [56]-[57] (Hayne, Bell and Kiefel JJ) and 372 [96] (Gageler J) and *SZMOK* at [16]-[18]).

15. Further, the giving of a notification under s 473GB(2) does not alter the procedural context in which the Authority conducts its review in the way described in *SZMTA* at [30]-[31] where a s 438 Certificate is issued. Although the Authority is not prohibited from considering submissions made by a referred applicant, there is no equivalent in Part 7AA to s 423, which confers upon a review applicant an *entitlement* to give a statutory declaration or written arguments that he or she wishes to have considered. *SZMTA* at [31] held that the entitlement under s 423 extended to presentation of a legal or factual argument in writing, to contest that s 438 applied to a document or information, or to argue for a favourable exercise of the discretion in s 438(3) – and that the meaningful exercise of that entitlement depended upon the applicant being aware that notification had been given. The same entitlement is not provided for in Part 7AA.

16. Contrary to **AS [30]** and **[39]-[40]**, the Appellant was not, by reason of non-disclosure of the existence of the certificate, "*deprived*" of a meaningful procedural opportunity to take steps to persuade the Authority to exercise its discretion under s 473GB(3)(b). Being "*deprived*" of an opportunity assumes that there was such an opportunity, which has been taken away. The Appellant's case is that he should have been informed "*that there is before it a certificate*" (cf. **AS [30]; [38]**). However, merely being told that there exists a certificate (or that there are documents before the Authority covered by a certificate) does not tell the Appellant anything *about* the Certificate or more importantly, the document(s) covered by the Certificate or the way in which that material might be relevant to the Authority's review. **AS [40]** does not deal with this difficulty. It is asserted by the Appellant that he might be able to advance arguments or new information in support of the exercise of discretion under s 473GB(3)(b) in his favour. However, mere awareness that there existed a certificate could not have alerted the Appellant to the issue of what had not been said by his brother, or what significance the Authority might attach to that omission.

17. The Appellant supports his argument on this ground by various preliminary observations about the operation of Part 7AA. At **AS [18]**, the Appellant refers to "*systemic features*" of Part 7AA of the Act. In relation to **AS [18](c)**, it is plain that the Legislature did envisage that a referred applicant might be unaware of material before the Authority, which is taken into account in reaching its decision. The very existence of the discretion in s 473GB(3)(b) bears that out. Also, the obligation imposed on the Secretary in s 473CB(1)(c) of the Act may capture material "*in the Secretary's possession or control and is considered...to be relevant to the review*", but which was not before the delegate at the time of his or her decision.[3] Where such material may be "*new information*" (cf. the definition in s 473DC(1)), it may be taken into account by the Authority (if satisfied of the matters in s 473DD), and the obligation on the Authority contained in s 473DE may, but will not necessarily, be engaged (e.g because of the application of s 473DE(3), including sub-par (3)(b)).[4] The Certificate itself is not "*review material*" as described in s 473CB(1), although, at least as a matter of practicality, the Certificate had to be given to the Authority at or soon after the time of providing the review material to the Authority.[5]

18. In fact, as noted in [4], above, the material covered by the Certificate in this case was before the Delegate. Applying s 473DA(2),[6] the Authority was not *required* to give that material to the Appellant, but had the *discretion* to do so, pursuant to s 473GB(3)(b) of the Act, to be exercised in a legally reasonable manner.

19. **AS [19]** refers to s 473DB of the Act (which contains the "*primary rule*"[7] that the Authority's review be conducted on the review material provided under s 473CB, without accepting or requesting new information and without interviewing the referred applicant). The Appellant says that the s 473DB(1) "*command is expressly made subject to other parts of the Migration Act*" (emphasis added). That is, with respect,

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[3] Cf. *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 92 ALJR 481 at [25] per Gageler, Keane and Nettle JJ.
[4] Cf. *Plaintiff M174/2016* at [27], and the definition of "*non-disclosable information*" in s 5 of the Act.
[5] The requirement to give a notification under s 473GB(2) only arises when, in compliance with a requirement under the Act, the Secretary gives a document or information to the Authority to which s 473GB applies. So much is apparent from the terms of s 473GB(2). The Secretary must, as a matter of practicality, notify quickly when the obligation does arise, lest the Authority deals with the document or information prior to the notification being received and is unaware of the Certificate.
[6] Cf. *Plaintiff M174/2016* at [26].
[7] Cf. *Plaintiff M174/2016* at [22].

incorrect. The "*command*" in s 473DB(1) is expressed to be "*subject to this Part*" (emphasis added) – ie. Part 7AA of the Act. That is significant, because, while Part 7AA of the Act contains "*exceptions*" to the primary rule in s 473DB(1) (cf. 473DC, 473DD and 473DE),[8] s 473DB(1) is also to be considered in light of provisions in Part 7AA such as s 473DA(1) and (2), 473DC(2) and 473FA(1).

20. At **AS [23]**, the Appellant describes s 473GB(3)(a) as a "*curious*" provision, because s 473DB(1) requires the Authority to consider review material (which, in this case, encompasses the material covered by the Certificate). However, this overlooks the true effect of s 473GB(3)(a), as described by Bell, Gageler and Keane JJ in *SZMTA* in relation to the similarly worded s 438(3)(a). At [23], their Honours observed that implicit in the conferral of the discretion in s 438(3)(a) is that the Administrative Appeals Tribunal "*has no power to have regard to the information or to any matter contained in the document for the purpose of making a decision on the review unless the discretion is affirmatively exercised*". So too in relation to s 473GB(3)(a). In **AS [24]**, the Appellant also refers to the discretion in s 473GB(3)(b), but as observed above, that provision is speaking of the documents or information itself (which is covered by a certificate) – rather than the existence of the certificate. The fact that there is a discretion to disclose the document or information does not, in terms, say anything about disclosure of the existence of the certificate, or of the certificate itself. Also, disclosure of the certificate may inform an applicant as to the nature or content of the documents or information subject to the certificate and it could not have been intended that a referred applicant be so informed prior to the exercise of the discretion under s 473GB(3)(b).

21. Part 7AA does not confer any entitlement upon a referred applicant to be informed of the existence of a notification under s 473GB, or to be heard as to how the discretions in s 473GB(3) are to be exercised. Alternatively, even if there was a natural justice requirement for the Authority to inform the existence of the certificate, its breach of such requirement was not material in the present case for the reasons given above, particularly at [16]. In the circumstances of this case, mere knowledge that there

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[8] Cf. *Plaintiff M174/2016* at [22].

existed a certificate would not have conferred a realistic prospect of a more favourable decision on the review.[9]

Ground Two

22. This ground alleges that the Full Court erred in failing to find that the Authority's decision is affected by legal unreasonableness. However, the ground now advanced in this Court is precisely confined. In particular, the Appellant's allegation of legal unreasonableness is premised on two propositions:
    a. *First*, the Authority failed to consider whether to exercise its discretionary power under s 473GB(3)(b) of the Act (and that the Full Court was wrong to refuse to infer that the Authority did fail to consider the exercise of its discretion at all (cf. **J [56]**); and
    b. *Secondly*, the failure to consider whether to exercise the discretionary power under s 473GB(3)(b) was legally unreasonable.

23. The Appellant makes clear, however, that he does *not* allege that (if the Authority *did* consider the exercise of the power in s 473GB(3)(b) – contrary to his argument) the exercise of that discretion by the Authority was legally unreasonable (**AS [61]**). Accordingly, if the Appellant cannot establish error by the Full Court in not inferring that the Authority failed to consider the exercise of its discretion in s 473GB(3)(b), Ground Two must fail. No such error is shown and the Ground cannot succeed.

24. The Applicant bears the onus of establishing jurisdictional error, which includes establishing a proper basis for the drawing of inference(s) necessary to make out an alleged jurisdictional error: see *SZMTA* at [41] and [46] per Bell, Gageler and Keane JJ; *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 at [67] per Gummow J, at [91] per Heydon J, at [92] per Crennan J.

25. Section 473EA of the Act deals with the Authority's "*decision and written statement*". Section 473EA(1) provides:

> *(1) If the Immigration Assessment Authority makes a decision on a review under this Part, the Authority must make a written statement that:*

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[9] Cf. *SZMTA* at [45]-[48].

(a) sets out the decision of the Authority on the review; and
(b) sets out the reasons for the decision; and
(c) records the day and time the statement is made.

26. The words "*the decision*" in 473EA(1)(b) refer to the final and operative "*decision*" made by the Authority on the review, pursuant to s 473CC of the Act – see the opening words of s 473EA(1) ("*...decision on a review under this Part*") and s 473EA(1)(a) ("*...decision of the Authority on the review*"). The reference to "*decision*" in s 473EA(1)(b) does *not* extend to procedural decisions or steps that may be made or taken by the Authority in the course of the review. Here, the Appellant's case relates to the exercise of a procedural discretion under s 473GB(3)(b) of the Act (cf. other procedural decisions that might be made by the Authority, such as under s 473DD). Such a decision will be made prior to the decision on the review and will not, of itself, be a reason for affirming the reviewable decision, or remitting the reviewable decision, in accordance with s 473CC.

27. The Minister accepted before the Full Court that section 25D of the *Acts Interpretation Act 1901* (Cth) (**the Interpretation Act**) applied to s 473EA(1) of the Act: see J [47] (AB 67-68).[10] Section 25D of the Interpretation Act requires that "*written reasons for [a] decision...shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based*". Nothing in that provision could have required the Authority to set out reasons as to the exercise (or not) of its discretionary power in s 473GB(3)(b) – that exercise of discretion not being a "*finding on [a] material question of fact*" or "*evidence or other material on which those findings were based*". The Full Court was correct to so conclude: J [48] (AB 68).

28. The Minister's construction of s 473EA(1) (set out at [26], above) is supported by the reasoning in *SZGUR*. That judgment concerned the obligation pursuant to s 430(1) of the Act[11] and whether the (then) Refugee Review Tribunal had failed to consider the review applicant's agent's request that the Tribunal arrange an independent assessment

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[10] See also *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136; (2017) 254 FCR 534 at [74](b) per Griffiths J (Dowsett and Charlesworth JJ agreeing); *Minister for Immigration and Border Protection v EEI17* [2018] FCAFC 166 at [49] per McKerracher, Gleeson and Burley JJ; *BCQ16 v Minister for Immigration and Border Protection* [2018] FCA 365 at [42]-[43] per Thawley J.
[11] In relation to reviews conducted under Part 7 of the Act. See also s 368(1) in relation to reviews conducted under Part 5 of the Act.

of his client's mental health. French CJ and Kiefel J (as her Honour then was) held, at [31]-[32], that s 430 did *not* require the Tribunal to "*make reference, in its reasons, to the disposition of a request from an applicant for a medical examination or for any other investigation*". Gummow J held, at [69], that s 430(1)(b) of the Act did not create any requirement on the Tribunal to record "*generally 'what it did'*" on the review, "*does not require the Tribunal, in every case, to describe or state the procedural steps taken by it in reviewing the relevant decision*", and that "*the statute does not require the Tribunal to disclose procedural decisions taken in the course of making its 'decision on a review'*".[12] Heydon J (at [91]) and Crennan J (at [92]) agreed with both judgments.

29. Thus, provisions such as ss 430(1) and 473EA(1) are limited in what they require: see *SZGUR*, above; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [67]-[69] per McHugh, Gummow and Hayne JJ. Applying *SZGUR*, s 473EA(1) is limited to requiring the Authority's reasons for the decision on the review, rather than procedural decisions or steps taken, or general descriptions of "*what it did*" on the review. The fact that the Authority does not refer in its reasons to a procedural discretion or matter does not mean that it was not considered: *SZGUR* at [31]-[32] per French CJ and Kiefel J. Further, an inference "*should not lightly be drawn*" that the Authority did not do something, not being a matter which it was required to set out in its written reasons: *SZGUR* at [70] per Gummow J. Another important aspect of *SZGUR* is the distinction there drawn between a matter not being considered and a matter not being considered to be material. See again *SZGUR* at [31] per French CJ and Kiefel J. While, as there explained, *Yusuf* might enable an inference to be drawn that a matter not mentioned in a s 430 statement was not considered to be material (see also *SZMTA* at [14]), that does not mean that a matter not mentioned in a s 430 statement was not considered at all.

30. The Full Court was, accordingly, correct to conclude that s 473EA did *not* extend to require the Authority to give reasons for procedural decisions made in the course of the review[13] and thus that the absence of reference to the exercise of the s 473GB(3)(b)

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[12] See also per Gummow J at [70].
[13] See also *BCQ16* at [45], [49]-[50]; *EEI17* at [49].

discretion did not give rise to an inference that its exercise was not considered by the Authority: J [47], [49] (AB 67-68). There is therefore no evidence that the Authority did not consider the exercise of its discretion under s 473GB(3)(b) and, the Appellant carrying the onus of proof,[14] the ground must fail.

31. **AS [52]-[58]** alleges that the Full Court was wrong to not infer that the Authority had not considered the exercise of its discretion under s 473GB(3)(b). Nothing there stated by the Appellant, or otherwise, shows error by the Full Court in reaching that conclusion.

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32. **AS [52]** alleges that the Authority "*should be understood as having chosen to address everything that it thought was relevant to the exercise of its power, procedural and substantive*". That is because the Authority did not confine itself in its written statement "*only to those matters which it was obliged to address*" or the "*minimal requirements*" imposed on it[15], as it, at [1]-[3] (AB 4-5) of its reasons, "*addressed the procedural history of the matter and the information before it*".

33. The "*understanding*" which the Appellant contends for is misconceived. Simply because the Authority might exceed the "*minimal requirements*" of s 473EA in some
20 way does not, logically, lead to the "*understanding*", or an inference, that the Authority has chosen to address in its reasons *everything*, procedural or substantive, that is relevant to any aspect of the conduct of its review – such that anything not mentioned by the Authority should be found by the Court to have been not considered, or not done by it. Again, s 473EA(1) does not extend to procedural decisions that do not form part of the reasons for the decision to affirm, or remit, the referred decision. The Appellant refers to no authority supporting the "*understanding*" for which he contends. It is contrary to this Court's reasoning in *SZGUR* and *Yusuf* – discussed above.

34. Also, contrary to the Appellant's argument, it is readily apparent that the Authority has
30 *not* "*chosen to address everything that it thought was relevant to the exercise of its power*" in its reasons. The Authority had regard to the material covered by the

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[14] See [24], above.
[15] These statements appear to be an acceptance that s 473EA does *not* require reasons to be given in relation to procedural decisions or steps.

Certificate and its power to do so depended upon it having affirmatively exercised its discretion under s 473GB(3)(a): see *SZMTA* at [23] per Bell, Gageler and Keane JJ, considering the similarly worded provision in s 438(3). Notwithstanding, the Authority did not refer to that exercise of discretion in its written statement (there being no obligation to do so). This demonstrates that the Authority was not seeking in its reasons to refer to or explain all of its procedural considerations including those under s 473GB(3).

35. Contrary to the Appellant's argument at **AS [56]**, the fact that the exercise of the discretion in s 473GB(3)(b) would have been "*directed to an important issue on the review*" (which is not conceded – see further below) does not lead to the "*understanding*" contended for – particularly in circumstances where no obligation is imposed on the Authority by s 473EA(1) to include, in its written statement, reasons in relation to the exercise of procedural discretions antecedent to the decision on the review.

36. **AS [57]** contends that the fact that the Authority did not disclose the existence of the Certificate "*tends to suggest*" that it did not consider the exercise of the discretion in s 473GB(3)(b). That, with respect, simply does not follow. The fact that the Authority did not reveal the existence of the Certificate simply does not mean that it did not turn its mind to the exercise of the discretions conferred by s 473GB(3). Also, **AS [57]** incorrectly presupposes an obligation to disclose the existence of the Certificate before exercising the discretion under s 473GB(3).

37. Also, contrary to what is suggested in **AS [57]**, it is not apparent that the Authority had the power to give the Certificate to the Appellant. A certificate may itself tend to disclose the documents or information covered by it – or the nature or substance of that material. It would defeat the purpose of the conferral of the discretion in s 473GB(3)(b) if the Authority were, in advance of deciding how to exercise that discretion, required or empowered to so disclose the documents or information covered by the certificate, or its nature or substance. Here, the Certificate squarely identified that it covered the Appellant's brother's claims – being information (as the Certificate stated) which had been given in confidence (see J [8]-[9]) (AB 55-56).

38. The manner in which the Authority reasoned on the Appellant's claims to fear harm does not support an inference that the Authority failed to consider the exercise of its discretion in s 473GB(3)(b) of the Act. As the Full Court observed, at J [55] (AB 69), "*an inference might equally be drawn that the Authority did so, but considered that it had sufficient information regardless to reject the Appellant's claims*". That is especially in circumstances where the Authority plainly had real concern about the veracity and credibility of the Appellant's *own* account and evidence of the alleged abduction and detention (see the Authority's reasons at [19]-[24]) (AB 8-9).

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39. The Appellant claimed to fear harm from the Karuna Group because he had escaped from them. He also claimed to fear persecution from the Sri Lankan Army and Criminal Investigations Department, because of his Tamil ethnicity or his imputed political opinion as a Liberation Tigers of Tamil Eelam (**LTTE**) supporter (see the Authority's reasons at [4] (AB 4-5), especially the first and last dot points). The Authority concluded (at [26]) (AB 9) that the Appellant had "*fabricated his own claims to have been of interest to the Karuna Group, the CID, the SLA or any other authority*". It was further not satisfied that the Appellant had any adverse profile with those groups (at [26]) (AB 9), "*or that he has ever been abducted, detained, mistreated*
20 *or otherwise harmed by any of these groups*" (also at [26] (AB 9)), or that he had a profile which would lead to him being targeted for reasons connected to his other family members (at [26], see also [30]) (AB 9-10). The Authority's reasoning, in coming to those conclusions, is set out primarily at [7]-[28] (AB 6-10). The Authority's reasons must be read as a whole (cf. *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165 at [14] per Gleeson CJ), and it is plain that the Authority held many concerns with the Appellant's claims, and his credibility, that led to the conclusion identified above.

40. As the Full Court observed (J [54]), the evidence as to the brother's claims was only
30 one matter relied on by the Authority (at [18]) (AB 8) – which was given "*some weight*" – in not accepting the Appellant's claim to have been abducted and detained by the Karuna Group, and more generally that he did not have an adverse profile as claimed.

41. *First,* while the Authority was "*prepared to accept*" that the Appellant's mother had been detained by the authorities in 2012, the Authority did not accept the Appellant's claim that his mother is "*routinely harassed*". The Authority observed, at [14]-[15] (AB 7-8), that the Appellant's evidence about this latter issue had changed over time, and was inconsistent.

42. *Secondly*, the Authority considered, at [16]-[25] (AB 8-9), the Appellant's claim to have been abducted by the Karuna Group in 2008. The Authority there identified a range of concerns about this claim, in addition to the absence of any mention of it in the summary of the Appellant's brother's claims (referred to at [18]) (AB 8). The Authority gave "*some weight*" to the lack of documentary evidence supporting this claim (in distinction to other claims that had been advanced) (at [17]) (AB 8). The Authority also held concerns about the Appellant's own evidence in support of this claim (at [19]) (AB 8). Those included that he had "*provided little detail of his claimed detention in 2008*" (at [20]) (AB 8); that his evidence about his detention and subsequent time in hiding was "*vague and unconvincing*" and he provided "*few specifics...even when pressed by the delegate*" (at [24]) (AB 9); and that it was "*difficult to accept*" the Appellant's claim that he would stay with his aunt, or remain in the same village for 17 months (at [24]) (AB 9). The Authority considered that, "*viewed together*", the Appellant's "*evidence suggests to me that he was not abducted by the Karuna Group or in hiding for seventeen months*" (at [24]) (AB 9).

43. *Thirdly*, the Authority considered that the fact that the Appellant could negotiate checkpoints as he did "*indicates...that he did not have a profile with the Sri Lankan authorities as he has claimed*" (at [25]) (AB 9). Further, the Authority gave "*significant weight*" to the Appellant's ability to enter and leave Sri Lanka and obtain a passport without incident, which suggested that he had no adverse profile with the authorities, directly or through family members (at [27]) (AB 9-10).

44. The matters identified at **AS [53]-[57]** do not "*fortify*" (cf. **AS [53]**) the drawing of the inference the Appellant contends for.

45. **AS [54]** alleges that "*most*" of the Appellant's claims had been accepted which "*objectively tended*" to increase the probability that the Appellant "*was, as claimed a person with an imputed LTTE connection*". However, as described above, the Authority plainly had real concern with much of what the Appellant raised, and his credibility. Moreover, whether or not there was a real chance that the Appellant would be imputed as having LTTE connections was for the Authority itself to determine (and of which it was not satisfied) – rather than some "*objective*" analysis or test. Also, insofar as **AS [54]** suggests that the "*finding of fabrication*" was "*significantly influenced*" by the brother's claims not having referred to the Appellant's alleged abduction, the Authority's use of the word "*significant*" at [18] (AB 8) is tempered by its context. As explained above, what the Authority said at [18] (AB 8) was *one* of many matters relied on, to which it said (at the end of [18] (AB 8) it gave "*some weight*". Those other matters included the Authority's real concern with the credibility of the *Appellant's* own evidence about the matter (see especially at [24]) (AB 9).

46. **AS [55]** asserts that the above omission (from the brother's claims) of the Appellant's own alleged harm was "*only probative if it was unexplained*", and that the Authority "*could not justifiably infer*" that it was unexplained without hearing from the Appellant. That is not so. As the Full Court observed, at J [58] (AB 69), the Appellant had knowledge of what had happened to his brother in 2007 and 2009 and his travel and movements. There was nothing before the Authority suggesting that the Appellant's brother had had no contact with the Appellant or his family from 2007 onwards, and the Appellant's own case was that his brother had been in communication with the family in 2012 (including in assisting with the release of his mother from custody). There was no reason for the Authority to assume that the brother would not have known, either in 2008 or when making his own claims, of the Appellant's detention in 2008, if that event had occurred – and there was nothing illogical or irrational[16] in the Authority proceeding on the basis that family members, including the brother, would have some knowledge of the Appellant's circumstances. The Appellant further alleges that the Authority "*ought to have known that the Appellant may well be able to provide an explanation of the omission*". However, the Appellant points to no

[16] Cf. *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131], [135] per Crennan and Bell JJ; [78] per Heydon J.

evidence to support his submission. The Appellant's submission that any explanation given by the Appellant "*would have been highly relevant*" is no more than speculation.

47. The Full Court was correct to refuse to infer that the Authority had failed to consider whether to exercise its discretion under s 473GB(3)(b). For that reason, Ground of Appeal Two must fail.

48. In **AS [48]**, the Appellant attempts to posit a general rule that, if the Authority "*knows*" that an applicant has not been provided with an opportunity to comment on information adverse to their claims, it is legally unreasonable not to consider the exercise of a "*procedural discretion*" to allow them to do so. That should be rejected. A finding of "*legal unreasonableness*" is "*invariably fact dependent*",[17] which does not lend itself to enunciation of such general propositions. Rather, each case must be considered in its own circumstances. Reasonableness may capture a range of choices[18] and it is not apparent why the Authority could not reasonably have chosen to take into account as it did the absence of mention by the brother of the Appellant's claimed 2008 abduction, without seeking further comment from the Appellant, in the circumstances of the present case – with or without regard to the Authority's impressions of the evidence as revealed by its reasons. That is especially so where Part 7AA of the Act envisages that the Authority may reach a different conclusion on materials that are before it and the delegate, without notifying or putting that to the referred applicant for comment. There is no general equivalent in Part 7AA to ss 360 or 425: see *DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12; (2018) 258 FCR 551 at [69]-[76] per Reeves, Robertson and Rangiah JJ.

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[17] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 92 ALJR 713 at [84] per Nettle and Gordon JJ.
[18] Cf. *SZVFW* at [82] per Nettle and Gordon JJ, citing *Li* at [105] per Gageler J.

Part VII: Oral presentation

49. The Minister estimates that 75 minutes will be required for the presentation of his oral argument.

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