IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M174 OF 2016**

BETWEEN: **PLAINTIFF M174/2016**

Plaintiff

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First Defendant

IMMIGRATION ASSESSMENT AUTHORITY

Second Defendant

FIRST DEFENDANT'S SUBMISSIONS

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PART I PUBLICATION

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

PART II ISSUES

2. In this matter, the plaintiff seeks judicial review of both: a decision by a delegate of the first defendant (the **Minister**) under section 65(1)(b) of the *Migration Act 1958* (the **Act**) to refuse to grant the plaintiff a protection visa; and a subsequent decision by the second defendant (the **Authority**) under section 473CC(2)(a) to affirm the delegate's decision. Relevantly, the plaintiff, a national of Iran, claimed to fear harm in that country on the basis of his adoption of a Christian faith since arriving in Australia. Neither the delegate nor the Authority were satisfied that the plaintiff had in fact adopted a Christian faith.

3. The issues that arise for determination in this matter are identified in the questions reserved by Nettle J on 17 May 2017 for the consideration of a Full Court.[1]

4. The first question is whether the delegate failed to comply with section 57(2) of the Act by failing to give particulars of certain information that she obtained from Reverend Brown, the Senior Pastor of the Syndal Baptist Church, to the plaintiff. The Minister submits that the answer is "no", because that information was not "relevant information" as defined in section 57(1).

5. The second question is whether any failure by the delegate to comply with section 57(2) of the Act has the consequence that there was no "fast track reviewable decision" (as defined in section 473BB) that was capable of referral by the Minister to the Authority under section 473CA, and therefore there was no decision for the Authority to review under section 473CC. The Minister submits that, having regard to the scheme of the Act (including section 69(1)), Parliament did not intend that the Authority has no jurisdiction to review a decision on the basis that the delegate did not comply with section 57(2).

6. The first and second questions are related. Strictly, the second question does not arise if the first question is answered "no". However, if any failure by the delegate to comply with section 57(2) of the Act does not have the consequence that there was no "fast track reviewable decision" that was capable of referral by the Minister to the Authority under section 473CA, then the first question is of no importance, because it is the decision of the Authority that will determine the plaintiff's rights.

7. The Minister submits that the second question should be answered irrespective of the answer given to the first question, because the second question (unlike the first) raises a matter of fundamental significance to the administration of Part 7AA of the Act. If

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[1] Special Case Book (**SCB**) 404 (Nettle J order), read with SCB 16 (questions in Special Case).

accepted, the plaintiff's argument on the second question would require either the Minister (before a referral) or the Authority (following a referral) to conduct a *de facto* review of the decision of the delegate under section 65(1)(b) of the Act for jurisdictional error. It would also mean decisions of the Authority could be challenged in litigation that focused exclusively on the decisions of, or steps taken by, delegates. If that were the law, there would be wide-reaching consequences for the administration of a large case load. For that reason, it is desirable in the public interest for this Court authoritatively to resolve these issues.

8. The third question is whether it was legally unreasonable for the Authority not to have exercised its power under section 473DC of the Act to get "new information" (as defined in section 473DC(1)) from the plaintiff or other persons about the his church attendance in Australia, or its power under section 473DD to consider any new information that it got. There is no substance to the plaintiff's submissions concerning this question, which not only assume that the delegate breached section 57, but also pay no regard to sections 473DC(2) or 473DD(b) of the Act.

PART III NOTICE OF A CONSTITUTIONAL MATTER

9. The Minister agrees with the plaintiff that notices are not required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

10. The facts by reference to which the questions reserved are to be answered are set out in the amended special case agreed by the parties under rule 27.07 of the *High Court Rules 2004* (Cth), and filed on 17 May 2017 (the **Special Case**).

PART V APPLICABLE PROVISIONS

11. The plaintiff's statement of applicable legislative provisions is incomplete in that does not include: section 69 of the Act, and section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**).

PART VI ARGUMENT

Legislative framework

12. Part 7AA of the Act was introduced on 18 April 2015 as part of a package of reforms designed to deal with what Parliament described as the "Asylum Legacy Caseload".[2]

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[2] The caseload was approximately 30,000 persons. See the Minister's second reading speech at Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10545 (**Second reading speech**). As at March 2017, there were approximately 11,887 fast track applicants who have applied for protection visas, but whose applications have not yet been finally determined: Special Case, [10].

As the simplified outline in section 473BA states, Part 7AA "provides a limited form of review of certain decisions ... to refuse protection visas to some applicants, including unauthorised maritime arrivals who entered Australia on or after 13 August 2012, but before 1 January 2014, and who have not been taken to a regional processing country".[3] The fast track regime was intended to introduce "rapid", "efficient" and "streamlined" processing of the relevant caseload.[4] The scheme seeks to achieve these objectives through the processes outlined below.

13. ***First***, in accordance with section 473CA of the Act, the Minister must refer a "fast track reviewable decision" to the Authority as soon as reasonably practicable after a decision is made under section 65 of the Act. Thus, unlike the scheme in Part 7 of the Act, a person whose visa application is rejected under section 65 need not apply for review of that decision.[5] Accordingly, Part 7AA uses the term "referred applicant" rather than "applicant" to describe such persons.

14. ***Secondly***, the "core function" of the Authority (under Part 7AA) is the same as that of the Tribunal (under Part 7), being to "arrive at the correct or preferable decision in the case before it according to the material before it".[6] The correct or preferable decision refers to the appropriate disposition under section 473CC (for the Authority under Part 7AA) or section 415 (for the Tribunal under Part 7). Parliament has chosen to give fewer dispositive powers to the Authority. In particular, Parliament has not given to the Authority the power to "set the decision aside and substitute a new decision". However, the Authority may remit the decision for reconsideration in accordance with such directions or recommendations as are permitted by regulation.[7] Of course, the content of the regulations, and the scope of the matters they permit the Authority to make directions or recommendations about, cannot inform the construction of the Act.[8]

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3 The applicants in question are described as "fast track applicants". Decisions by the Minister (or his or her delegate) to refuse to grant a protection visa to "fast track review applicants" (being "fast track applicants" who are not "excluded fast track applicants") are described as "fast track reviewable decisions".

4 Second reading speech, 10545; Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (**Explanatory Memorandum**), 2.

5 In a real sense, therefore, as the second reading speech explains at 10546, "[e]ligible fast-track review applicants will have their refusal cases *automatically* referred to the [Authority]" (emphasis added)

6 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [5], [10] (French CJ).

7 The Explanatory Memorandum states at [884]: "The power to remit a fast track decision with directions or recommendations will permit the IAA to review the substantive matters which must be satisfied before the visa application can be approved and, if these are decided in favour of the applicant, to then remit the case back to the Department to consider the more procedural criteria, which would not be appropriate for the IAA to deal with".

8 Cf. plaintiff's submissions, [46(d)], [63].

15. ***Thirdly***, Parliament has chosen to limit referred applicants' rights under Part 7AA to give (and the Authority's coordinate duties to receive and consider) material in support of their claims, by comparison to applicants' rights (and the Tribunal's coordinate duties) under Part 7. Parliament's use of the adjective "limited" to describe the Authority's review function (see sections 473BA and 473FA) reflects that choice.[9] Parliament has limited referred applicants' rights by exhaustively describing them. Thus, section 473DA(1) provides that "[Division 3], 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 [Authority]" (emphasis added). By using the "global reference"[10] emphasised, rather than the qualifying expression "in relation to the matters it deals with" used in provisions such as sections 51A and 422B(1),[11] Parliament has manifested its intention exhaustively to codify those requirements.

16. Relevant elements of the exhaustively codified scheme include the following:

16.1. Subject to Part 7AA, the Authority must review a fast track reviewable decision referred to it by the Minister under section 473CA by considering the "review material" provided to it by the Secretary under section 473CB. Subject to Part 7AA, it must do so: (a) without accepting or requesting "new information"; and (b) without interviewing the referred applicant: section 473DB(1). The plaintiff does not contend that the Authority failed to comply with this duty.

16.2. Subject to Part 7AA, the Authority may get any documents or information ("new 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: section 473DC(1), see also (3). However, importantly, the Authority does not have a duty to get, request or accept *any* new information "*in any ... circumstances*" (emphasis added): section 473DC(2). That is obviously relevant to the plaintiff's complaint that the Authority "unreasonably" did not exercise its power under section 473DC to get new information about his church attendance.

16.3. For the purpose of making a decision on the review, the Authority must not consider any new information unless: (a) it is satisfied that there are exceptional circumstances to justify doing so; and (b) the referred applicant satisfies the Authority that, in relation to any new information given or proposed to be given

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9 See the Explanatory Memorandum states at 9, [843], [891]-[894], [903]-[906], [920], [967]-[968].

10 In *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624 at [57], French J explained that the qualifying expression "the matters it deals with" in s 422B "imports a somewhat more specific limitation on the scope of procedural fairness than might have been achieved by a global reference to the conduct of reviews by the Tribunal". In section 473DA(1), Parliament has chosen to do precisely what French J stated that section 422B does not do.

11 See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [35]-[42].

by the referred applicant, the new information: (i) was not, and could not have been provided to the Minister before the Minister made the decision under section 65; or (ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims: section 473DD. Those limits are obviously relevant to the plaintiff's complaint that the Authority "unreasonably" did not exercise its power to consider certain "new information" that it got from the plaintiff.

17. ***Fourthly***, Parliament has provided that the Authority, in carrying out its functions under Part 7AA, is to pursue the objective of providing a mechanism of limited review that is "efficient, quick, free of bias and consistent with Division 3": section 473FA(1). By comparison, Parliament has provided that the Tribunal, in carrying out its functions under Part 7, is to pursue the objective of providing a mechanism of review that is "fair, just, economical, informal and quick": section 2A of the AAT Act.[12] Furthermore, there is no provision in Part 7AA that corresponds to section 422B(3), which requires the Tribunal, in applying Division 4 of Part 7, to "act in a way that is fair and just".

18. By the above measures, Parliament has sought to achieve a "fast track" review process for the relevant caseload. As a matter of deliberate decision, that process contains more limited rights than those available under Part 7.

QUESTION 1 – COMPLIANCE WITH SECTION 57 OF THE ACT

Section 57 – the scope of the obligation

19. The first question is whether the delegate failed to comply with section 57(2) of the Act by failing to give particulars of certain information that she obtained from Rev Brown, the Senior Pastor of the Syndal Baptist Church, to the plaintiff. To answer that question, it is first necessary to understand the scope of the obligation imposed on the Minister (and his or her delegate) by section 57.

20. Section 57 forms part of the code of procedure in Subdivision AB of Division 3 of Part 2 of the Act for dealing with visa applications. Section 57(2) provides that the Minister must: (a) give particulars of "the relevant information" to the applicant; (b) ensure, as far as was reasonably practicable, that the applicant understands why it is relevant to consideration of the plaintiff's visa application; and (c) invite the applicant to comment on it. Section 57(1) defines "relevant information" to mean:

> ... information (other than non-disclosable information) that the Minister considers:
>
> (a) would be the reason, or part of the reason:

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[12] Prior to its repeal by the *Tribunals Amalgamation Act 2015* (Cth), an equivalent provision was located in section 420(1) of the Migration Act.

(i) for refusing to grant a visa; or

...

(b) is specifically about the applicant or another person ...; and

(c) was not given by the applicant for the purpose of the application.

21. The plaintiff contends that certain "information" that the delegate got from Rev Brown on 13 November 2015 (as recorded in delegate's case note at SCB 280) was "relevant information" as defined in section 57(1), and that the delegate failed to comply with section 57(2) in relation to that "relevant information".

22. The Minister denies that what the delegate got from Rev Brown was "relevant information". To understand that submission, it is useful to start with the following propositions about the definition of "relevant information", by parity of reasoning with cases concerning similar provisions in section 359A and 424A of the Act:[13]

22.1. The operation of section 57 is to be determined "in advance – and independently – of the [Minister's] particular reasoning on the facts of the case".[14] Accordingly, in order for section 57 to be engaged, the information should contain "in [its] terms" a "rejection, denial or undermining" of the applicant's claims to satisfy the criteria for a visa.[15]

22.2. The word "information" in this context "does not encompass the [Minister's] subjective appraisals, thought processes or determinations". Accordingly, "[h]owever broadly 'information' be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies, or absence of evidence".[16]

22.3. "[I]nformation merely going to credibility is not within the section ... Lack of credibility in itself does not necessarily involve rejection, denial or undermining of an applicant's claims."[17]

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13 As to the similarity between ss 57 and 424A, see *Minister for Immigration and Multicultural and Indigenous Affairs v NAMW* (2004) 140 FCR 572 at [127]-[132] (Merkel and Hely JJ).

14 *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 (***SZBYR***) at [17].

15 *SZBYR* at [17]; *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 (***SZLFX***) at [22].

16 *SZBYR* at [18], citing with approval *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 476-477 (Finn and Stone JJ); *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [9].

17 *MZXBQ v Minister for Immigration and Citizenship* (2008) 166 FCR 483 at [29] (Heerey J), which was approved by the High Court in *SZLFX* at [25].

22.4. Thus, section 57 has "limited operation"; "its effect is not to create a back door route to merits review in the federal courts of credibility findings made by the [Minister]".[18]

22.5. Furthermore, "information" does not encompass "intermediate findings of fact" and "any process of comparison between the applicant's answers and the factual statements [of third parties] with which those answers were compared".[19] Nor do such "factual statements" of third parties themselves, "shorn of the analytical context in which they played their part", necessarily constitute "information". Such statements do not constitute "information" if
10 "[t]hey do not tend for or against [granting a visa] as pieces of information in their own right" and "[t]hey only have that significance when matched with answers given by the applicant".[20]

22.6. Finally, in order for section 57 to be engaged, the Minister must have actually formed the thought that the information "would" (not "could" or "might") be the reason, or part of the reason, for refusing to grant a visa.[21] And, although the operation of section 57 is to be determined in advance of the Minister's reasoning on the facts of the case, a court may look to the Minister's decision notice for evidence that the Minister in fact formed such a thought.[22]

Not "relevant information"

20 23. The plaintiff contends that the following information given by Rev Brown to the delegate on 16 November 2015 was "relevant information" (SCB 280):

23.1. "During the period of 2012 and 2013 [the plaintiff] was a regular attendee at the [Syndal Baptist Church] for a number of months." "The applicant stopped attending as he moved to another suburb."

23.2. "The [plaintiff] returned to Syndal Baptist Church early in 2015 and attended for a few weeks."

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18 *SZBYR* at [21].

19 *SZJBD v Minister for Immigration and Citizenship* (2009) 179 FCR 109 at [104] (Buchanan J, with whom Perram J agreed); *Minister for Immigration and Citizenship v Brar* (2012) 201 FCR 240 (***Brar***) at [67] (Full Federal Court).

20 *Ibid.* See also *Minister for Immigration and Citizenship v SZHXF* (2008) 166 FCR 298 at [10]-[13] (Full Federal Court); *SZSOG v Minister for Immigration and Border Protection* [2014] FCA 1053 at [26]-[28] (Rares J).

21 *SZLFX* at [24]-[25], citing with approval *SZKLG v Minister for Immigration and Citizenship* (2007) 164 FCR 578 at [33] and *MZXBQ* at [29]. See also, for example, *SZTGV v Minister for immigration and Border Protection* (2015) 229 FCR 90 (***SZTGV***) at [18] (Full Federal Court).

22 *SZLFX* at [26]. See also, for example, *SZNBE v Minister for Immigration and Citizenship* (2009) 112 ALD 114 at [31]-[40] (McKerracher J); *ATP15 v Minister for Immigration and Border Protection* (2016) 241 FCR 92 at [37] (Tracey and Griffiths JJ).

23.3. "The last time [Rev Brown] had context with the [plaintiff] was on the day he provided the letter of support to him (14 June 2015)."

24. For the following reasons, applying the principles outlined in paragraph 22 above, none of that information was "relevant information", and therefore the obligations in sections 57(2) were not engaged.

25. ***First***, none of the information given by Rev Brown contained "in its terms" a "rejection, denial or undermining" of the plaintiff's claim to have adopted Christianity in Australia (let alone to fear harm in Iran as a consequence). To the contrary, "if [the information] were believed, [it] would, one might have thought, have been a relevant step towards [granting a protection visa]".[23]

26. ***Secondly***, even if the information from Rev Brown as to the period during which the plaintiff attended the Syndal Baptist Church was considered by the delegate to go to the credibility of the plaintiff's claims, it was not thereby "relevant information". The delegate's analysis of or intermediate findings of fact with respect to the plaintiff's credibility (including any comparison between Rev Brown's information and the plaintiff's information) was not itself "information". And the information from Rev Brown as to the period during which the plaintiff attended the Syndal Baptist Church, "shorn of [such] analytical context", did not "tend for or against" the grant of the visa.[24]

27. ***Thirdly***, there is no evidence that the delegate herself formed the thought that any of that information "counted against" the plaintiff's claims.[25]

27.1. The mere fact that the delegate summarised Rev Brown's information (SCB 296 [47]) certainly does not signify that the delegate formed the thought that that information "counted against" the plaintiff's claims.[26]

27.2. To the contrary, the delegate's reasons suggests that the delegate considered that Rev Brown's statements were "corroborative" or "supportive" of the plaintiff's claim to have attended the Syndal Baptist Church for a period in 2012-2013 (SCB 297-298 [52], [56], see also SCB 323 [149]).

27.3. Rev Brown's information did not "satisfy" (i.e., persuade) the delegate that the plaintiff has a "continued genuine interest in the faith" (SCB 298 [56]). But

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23 *SZBYR* at [17].

24 Objectively, the fact that a person stops attending a particular church in a particular suburb when that person moves to another suburb does not signify that that person ceased to be a Christian. Notably, it was the plaintiff *himself* who told the delegate that he had attended no other church in Australia than the Syndal Baptist Church: SCB 277.

25 Cf. *SZLFX* at [26]; *SZBYR* at [17].

26 See, for example, *SZIOZ v Minister for Immigration and Citizenship* [2007] FCA 1870 at [75] (Besanko J).

that does not suggest that the delegate considered that Rev Brown's information was adverse. Rather, it suggests that Rev Brown's information (together with information the plaintiff himself gave) was insufficient to satisfy the delegate of the veracity of the plaintiff's claims regarding his Christian faith.

28. ***Finally***, while Rev Brown gave the delegate information that the plaintiff had ceased attending Sydnal Baptist Church in 2013, the plaintiff gave the delegate that same information, by giving the letter from Rev Brown dated 14 June 2015 to the delegate (SCB 102). That letter stated that the plaintiff "attended the Sydnal Baptist Church during 2012 and 2013 when he was living in Boronia". By clear implication, including having regard to the date of the letter, the plaintiff gave information that he *only* attended the Syndal Baptist Church during those years.[27] Accordingly, the exception to the definition of "relevant information" in section 57(1)(c) was engaged.[28] It is irrelevant to the operation of that exception that there might have been two sources (Rev Brown *and* the plaintiff) of that information.[29]

29. For any one or more of the above reasons, question 1 should be answered "no".

QUESTION 2 – JURISDICTION OF THE AUTHORITY

30. The second question is whether there was no "fast track reviewable decision" that was capable of referral by the Minister to the Authority under section 473CA, and therefore no decision for the Authority to review under section 473CC.

31. The question assumes that the delegate failed to comply with section 57 of the Act as alleged. On that basis, the plaintiff contends that the delegate's purported decision to refuse to grant a protection visa to him under section 65(1)(b) of the Act was "no decision at all".[30]

32. The plaintiff's submissions on question 2 invite the Court to hold that the scheme of the Act is such that, if a delegate fails to comply with section 57, that error has the consequence that the decision of the delegate is incapable of referral by the Minister

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27 The fact that the plaintiff, at other times, gave conflicting information (see, e.g., [40]) does not negate the fact that he also "gave" *this* information. It was the delegate's assessment that the plaintiff had given inconsistent information (see, e.g., [60]) that led, among other considerations, to the delegate not being satisfied that the plaintiff satisfied the criteria for a protection visa.

28 As to the meaning of "give", see *SZTGV* at [20]-[25] (Full Federal Court). See also, for example, *Brar* at [74], approving *Minister for Immigration and Citizenship v Chamnam You* [2008] FCA 241 (Sundberg J).

29 See, for example, *SZJCD v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 609 at [43] (Heerey J), cited with approval in *SZTGV* at [22(5)]; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [91] (Moore J, with whom Weinberg and Allsop JJ agreed).

30 Plaintiff's submissions, [40], invoking *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

to the Authority, or incapable of review by the Authority. If that is correct, the only remedy available to a person affected by such a decision of a delegate would be judicial review in this Court (given the exclusion of the Federal Circuit Court's jurisdiction with respect to primary decisions: s 476((2)(a)). That is a most unlikely intention to ascribe to Parliament, for it would deny any form of merits review to many applicants.

33. The plaintiff acknowledges, contrary to his argument on question 2, that a purported decision will "ordinarily have at least sufficient effect to enliven jurisdiction for a merit review process".[31] However, in an attempt at confession and avoidance, he (correctly) submits that the "legal ... consequences" of a purported decision will depend on the statute in question.[32] He then points to aspects of the scheme of "limited" review by the Authority under Part 7AA of the Act that are said to mean that the Act does not permit the Authority to "cure" any earlier denial of natural justice that has occurred in relation to an applicant.[33] On that basis, he simply asserts that "it could not have been intended ... that a purported decision by a delegate would be effective to enliven the Authority's power of review".[34]

34. These submissions should be rejected for several reasons.

35. Most fundamentally, the plaintiff's submissions fail to grapple with section 69(1), which relevantly provides that non-compliance by the Minister with Subdivision AB (which includes s 57) "*does not mean that a decision to grant or refuse to grant the visa is not a valid decision* but only means that the decision might have been the wrong one and might be set aside if reviewed" (emphasis added). One obvious effect of section 69(1) is that the power of the Authority to review a decision of a delegate is *not* contingent on the delegate having complied with Subdivision AB of Division 3 of Part 2 of the Act. The Full Court of the Federal Court was correct in holding that, section 69(1) "preserve[s] the validity of the delegate's decision, *at least* to

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31 Plaintiff's submissions, [43], referring to *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338 (***Brian Lawlor***) and subsequent cases.

32 Plaintiff's submissions, [43], referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1. See also, for example, *Ma v Minister for Immigration and Citizenship* [2007] FCAFC 69 at [27] (Full Federal Court); *SZKUO v Minister for Immigration and Citizenship* [2009] FCAFC 167 at [27] (Full Federal Court). In *State of New South Wales v Kable* (2013) 252 CLR 118 at [52], Gageler J observed: "[A] thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences."

33 Plaintiff's submissions, [46].

34 Plaintiff's submissions, [66].

allow merits review".[35] That conclusion is consistent with this Court's decision in *Miah* and other authorities.[36]

36. Section 69(1) is not referred to by the plaintiff. It is fatal to his argument on ground 2. Even if the delegate did breach section 57 (which is denied), the delegate's decision nevertheless had legal force *at least* sufficient to enliven merits review at the time that it was referred by the Minister to the Authority, and at the time that it was reviewed by the Authority. Noting that the only complaint made by the plaintiff about the delegate's decision is that she failed to comply with section 57, section 69(1) is sufficient to answer question 2 of the Special Case "no".

37. Quite separately from the effect of section 69(1), there are a number of other independent answers to the plaintiff's argument.

38. ***First***, as pointed out above, the function of the Authority is to consider whether the Minister's decision to refuse to grant the referred applicant a protection visa was the correct or preferable one. That is the "core function" of the Authority (which is the same as that of the Tribunal), which involves doing "over again" what the delegate did under section 65.[37] Section 57 imposes a *procedural constraint* on the delegate (not on the Authority or the Tribunal) in performing the delegate's function. But it is not the function of the Authority *or* the Tribunal to consider whether the delegate complied with the *procedural constraints* on the delegate. Its function to review the delegate's *decision*, and to do so by complying with the *different procedural restraints* that Parliament has chosen to impose on the Authority and the Tribunal respectively in conducting their reviews.

39. Accordingly, just as non-compliance by a delegate with section 57 is irrelevant to the jurisdiction and power of the Tribunal to review the delegate's decision, it is similarly irrelevant to the jurisdiction and power of the Authority to review the delegate's

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35 *SZGME v Minister for Immigration and Citizenship* (2008) 168 FCR 487 at [24] (Black CJ and Allsop J) (emphasis added).

36 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [41] and [47] (Gleeson CJ and Hayne J), [103] (Gaudron J, McHugh J agreeing); [204] (Kirby J) . See also *Minister for Immigration and Multicultural Affairs v Li* (2000) 103 FCR 486 at [80] (Full Federal Court); *Ullah v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 175 at [13(b)] (Tamberlin J); *Sevim v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 126 at [56] (Gray J); *Hossain v Minister for Immigration and Multicultural Affairs* [2001] FCA 42 at [10] (Emmett J); *Soondur v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 578 at [49] (Gray J, with whom Goldberg J agreed); *Minister for Immigration and Multicultural and Indigenous Affairs v WAIK* (2003) 79 ALD 152 at [29]-[31] (Full Federal Court); *El Ess v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 142 FCR 43 at [43] (Gray J); *SZIWV v Minister for Immigration and Citizenship* [2007] FCA 1338 at [34] (Lander J).

37 It is that core function which the Authority (like the Tribunal) does "over again": see, for example, *Minister for Immigration and Border Protection v SZVCH* (2016) 244 FCR 366 at [37] (Full Federal Court).

decision.[38] If it is apt to say that the plaintiff "is left with no remedy"[39] from the *Authority* with respect to a breach of section 57, the same would also be true of the plaintiff with respect to the *Tribunal*. For that reason, the distinctions sought to be drawn by the plaintiff between the two review bodies are immaterial.

40. ***Secondly***, and in any event, the Plaintiff is wrong to contend that the Authority has no power to "cure" any failure by the delegate to comply with the procedural constraint in section 57 of the Act. Where there is "relevant information" that the delegate does not give to an applicant under section 57, that information will inevitably be identified in the delegate's decision record, which the applicant will inevitably receive. The referred applicant could seek to give comments to the Authority on that information, which the Authority would have power to receive (section 473DC). In at least many cases, if a delegate did not give an applicant an opportunity to comment on any such relevant information, the Authority would have power to consider the applicant's comments (section 473DD). The precise application of that section, the operation of which turns on the satisfaction of the Authority of specified matters, is heavily fact dependent. Notably, the plaintiff, who was legally represented when dealing with the Authority, made no complaint to the Authority to the effect that the delegate failed to comply with section 57.

41. ***Thirdly***, there is nothing in the legislative text or context (including the extrinsic materials) that suggests that Parliament intended to depart from the established principle in the context of Parts 5 and 7 of the Act that non-compliance by the Minister with a procedural constraint under Subdivision AB does not render the Minister's decision incapable of merits review.

42. With respect to the legislative text, the Minister's duty to refer (section 473CA) and the Authority's decision to review (section 473CC) both turn on whether there is a "fast track reviewable decision". Importantly, that definition (which picks up the definition of "fast track decision" in section 5(1)) is not expressed to depend on whether the Minister's decision to refuse to grant a protection visa to a referred applicant was lawful, or even that it was made "under" the Act. The plaintiff identifies (at [66]) various other provisions in Part 7AA that refer to the decision of the Minister as having been made "under" section 65, but that is a slender textual basis for the departure from the standard principle that even jurisdictionally flawed decisions will ground merits review, particularly given that Parts 5 and 7 also refer in various provisions to reviewable decisions having been made "under" the Act: sections 336M, 338, 350, 408, 410.

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38 *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) 143 FCR 314 at [35]-[44] (Full Federal Court). See also *Uddin v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 149 FCR 1 at [50]-[55] (Wilcox and Branson JJ).

39 Cf. plaintiff's submissions, [66].

43. Nor is there anything in the legislative context that supports the plaintiff's position. To the contrary, that the plaintiff's argument, if accepted, would confound the clear intention of Parliament to establish a truly "fast track" review process, as is clearly apparent from the extrinsic materials for the amendments.[40]

44. If the Minister had no power to refer a decision affected by non-compliance with a procedural restraint (or indeed any jurisdictional error) to the Authority, and the Authority had no jurisdiction to review such a decision, then either the Minister or the Authority would have to scrutinise the decision-making process of the Minister for legal error as a jurisdictional precondition to any review by the Authority. In reality, the Authority would have to do so, because the Minister or his or her delegate, having made the primary decision, presumably (rightly or wrongly) considered that they had done so lawfully. Accordingly, on the plaintiff's argument, the Authority would be obliged in every case to engage in a *de facto* review of the validity of the delegate's decision, for every possible jurisdictional error, and regardless of whether the referred applicant had asserted any such error . Of course, the Authority could not definitively determine whether the delegate had made such an error.[41] And because there might often be an argument that delegate had made an error which the Authority failed to identify, the plaintiff's construction would trigger a substantial volume of litigation in this Court, being the only court with jurisdiction in relation to delegates' decisions.[42] And, in cases where this Court found that the delegate had made a procedural error that the Authority failed to identify, the whole process would restart. The Court should be very slow to conclude that that is how Parliament intended the "fast track" scheme to operate.

45. For any one or more of the above reasons, the answer to question 2 is "no".

QUESTION 3 – LEGAL REASONABLENESS

46. The third question is whether it was legally unreasonable for the Authority not to have exercised its power under section 473DC to get "new information" about the plaintiff's church attendance in Australia, or its power under section 473DD to consider certain new information that it got.

Applicable principles

47. Legal unreasonableness is an expression that may be used to describe a purported exercise of a statutory discretion that infringes the "framework of rationality" imposed by the legislation. The concept relates to the existence and scope of discretionary power, rather than the expediency of its exercise, and therefore

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40 See, for example: Second reading speech, 10545-10547; Explanatory Memorandum, 2, 8-9.

41 *Brian Lawlor* at 175 (Brennan J). See also *Bhardwaj* at [150].

42 See sections 476(2) and (4)(c), 476A, 484.

necessarily involves the construction of the relevant legislation.[43] Legal unreasonableness "is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment was reasonably open to the decision-maker".[44]

48. The existence and content of any "framework of rationality" that constrains the exercise of a statutory discretion is that indicated by the true construction of the legislation.[45] Where a discretion is "ill-defined", it is "necessary to look to the scope and purpose of the statute conferring the power and its real object".[46]

10 49. In considering whether a particular exercise of a discretion is legally unreasonable, it useful to distinguish, as a Full Court of the Federal Court did in *Minister for Immigration and Border Protection v Singh*,[47] between different species of review for legal unreasonableness: review that focusses on error in the *reasoning process*, and review that focusses on error in the *outcome* of the decision. Unreasonableness may be discerned from the *outcome* of the decision only where the decision "on a full consideration of the material that was before the [decision-maker], [may] be found to capable of explanation *only* on the ground of some … misconception".[48]

Section 473DC(1)

Scope of constraints

20 50. Section 473DC(1) confers a discretionary power on the Authority to get any documents or information that were not before the Minister when the Minister made the decision under section 65, if the Authority considers that such documents or information may be relevant ("new information"). Once that pre-condition is satisfied, the residual discretion to get the new information is "ill defined". The constraints on the exercise of the power are therefore to be ascertained by reference to the scope and purpose of the provision within the scheme of Part 7AA.

51. In this regard, two points made be made.

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43 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) at [29]-[30] (French CJ), [67] (Hayne, Kiefel and Bell JJ), [92] (Gageler J).

44 *Prior v Mole* (2017) 91 ALJR 441 (***Prior v Mole***) at [129] (Gordon J), citing *Li* at [30].

45 *Li* at [67].

46 *Li* at [67]. See also *Prior v Mole* at [130].

47 (2014) 231 FCR 437 at [44].

48 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 369-370 (Dixon J). Similarly, as the majority observed in *Li* at [76] the court may "infer that in some way there has been a failure properly to exercise the discretion 'if upon the facts [the result] is unreasonable or plainly unjust"; "[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification".

52. ***First***, section 473DC(2) provides that the Authority has no duty to get new information "in any … circumstances".

53. It follows that the mere fact of the non-exercise of the power conferred by section 473DC(1) (i.e., the *outcome*) could never correctly be impugned as "unintelligible". There can be no basis to infer, from the mere fact of the non-exercise of the power, that the non-exercise is explicable "only on the ground of some … misconception" (cf. *Avon Downs*), because the mere fact of the non-exercise of power will always, logically, be justifiable on the basis that there is no duty to exercise the power.[49]

54. ***Second***, the Authority might err in its reasoning process by, for example, engaging in an irrational process of reasoning in deciding whether or not to get "new information", or by making its decision on the basis of "private opinion", "humour", "caprice" or "malice".[50] But beyond such errors, the content of the constraint of legal unreasonableness is minimal. In particular, having regard to the particular values explicit and implicit in Part 7AA, constraints governing the exercise of discretions conferred on the Tribunal under Parts 5 and 7 of the Act cannot readily be transposed to the exercise of discretions conferred on the Authority by Part 7AA (including section 473DC(1)). That follows because:

    54.1. Part 7AA of the Act, particularly when read in the context of the extrinsic materials, evinces a particular imperative for speed and efficiency in the disposition of reviews. Additionally, or perhaps as an incident of that broader objective, it reflects Parliament's judgment that (exceptional circumstances aside) applicants ought to advance *all* of their claims, and *all* of their evidence in support of their claims, in the course of the original protection visa application process before the Minister.[51]

    54.2. The difference in the underlying values between Part 7AA (on the one hand) and Parts 5 and 7 (on the other hand) finds reflection in the different terms of the exhortations in section 473FA(1) (in Part 7AA), and sections 420(1) and (2) and 422B(3) (in Part 7). The Court must presume that the differences were deliberate, and seek to give effect to them. While Parliament has exhorted the Authority to "pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3", it has *not* indicated that the Authority should seek to "balance" or "weigh" these

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49 Cf. *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326 at [107] (Full Federal Court); *NAGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 395 at [9] (Full Federal Court).

50 Cf. *Li* at [24], citing *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 (Kitto J), who in turn paraphrased *Sharp v Wakefield* [1891] AC 173 at 179.

51 See, in particular, Explanatory Memorandum, [893], [920]; Second reading speech, 10546-10547.

objectives against "fairness" or "justice".[52] In effect, Parliament has declared that the scheme whereby referred applicants must generally advance all their claims and evidence in the visa application process *is* sufficiently "fair" and "just".

No unreasonableness by Authority

55. The plaintiff asserts that it was legally unreasonable for the Authority not to get "new information" from the plaintiff or other persons under section 473DC about the plaintiff's church attendance in Australia. However, he does little to explain why that is so, by reference to the legal framework in Part 7AA. Having regard to the framework outlined above, there is no foundation to his complaint.

56. In addition to the legal framework in Part 7AA, the plaintiff's submission must be assessed in the context of the information he gave to the delegate, and the explanations given to him about the "fast track" process and the importance of providing complete information in the first phase of the decision-making process.

    56.1. In the plaintiff's visa application, he gave information about his church attendance, including to the effect that he still (in August 2015) attended the Syndal church every Sunday (SCB 100). He also gave the letter from Rev Brown, which stated that the plaintiff attended Syndal church "during 2012 and 2013" (SCB 102), and a letter from a member of the Syndal church congregation. The plaintiff declared that the information in his visa application was complete, correct and up-to-date in every detail (SCB 39, 64).

    56.2. Before the interview, the Department advised the plaintiff that it was "important that you present all your claims for protection" then; "[i]f a refusal decision is made on your visa application and your application is reviewed, you may not be able to raise new claims to be considered at that review" (SCB 185).

    56.3. At the interview, the delegate specifically advised him that, if his application for a protection visa was refused, and the Authority reviewed it under the "fast track" scheme, the Authority "can only consider material provided to the Department in your application unless exceptional circumstances apply". "It's extremely important that you give the Department full and accurate protection claims as early as possible in the protection visa application process. This includes during this interview. If you do not give the Department all of your protection claims and any additional information you may have and your application is refused by the Department, you may not have another chance to provide these claims." (SCB 198-199)

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[52] Cf. *Li* at [31], [80], and [96]-[97].

56.4. At the interview, the delegate asked the plaintiff whether he wished to make any new or different claims (SCB 199-200). He said no. The delegate clearly indicated that it was sceptical of his claims to have attended church for the period and frequency that he had claimed (see in particular SCB 230-231, 237-240). The plaintiff indicated that he was content for the delegate to contact Rev Brown. The plaintiff did not indicate he wish to provide further information from Rev Brown (or anyone else) himself. At the end of the interview, he confirmed that he had put forward all of his claims (SCB 277). The plaintiff made no suggestion he wished to, but for some reason was unable to, provide letters of support from other members of the congregation.

57. Central to the plaintiff's complaint about the Authority not getting unspecified "new information" about his church attendance appears to be the alleged unfairness of the delegate not having afforded the plaintiff an opportunity to comment on "Reverend Brown Information". But there was no such unfairness. For the reasons outlined above, the delegate did not fail to comply with the relevantly codified aspect of the natural justice hearing rule in section 57 of the Act. Furthermore, there is no foundation for any implicit suggestion that it is legally unreasonable for the Authority to fail to identify an alleged non-compliance of section 57 (and then to get any "new information" to "cure" that non-compliance), especially when no non-compliance by the delegate is asserted to the Authority by the plaintiff (who was legally represented).

58. Furthermore, and in any event, because the "Reverend Brown Information" is set out in the delegate's decision record, and because the plaintiff received that decision record, the plaintiff had every opportunity to seek to give "new information" to the Authority in response, and the broader issue of his church attendance in Australia. He did so. The Authority "got" the "new information" that the plaintiff chose to give. It made no jurisdictional error by failing to get unspecified *further* information from the plaintiff. Insofar as the plaintiff's complaint is that the Authority acted legally unreasonably in failing to get further information by "interviewing" him, that has no foundation.

Section 473DD

59. Section 473DD prohibits the Authority from considering[53] new information for the purpose of making a decision in relation to a fast track reviewable decision unless:

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[53] There is a clear conceptual difference between a decision-maker "getting" information (section 473DC) and a decision-maker "considering" or "having regard to" information. Authorities regarding sections 359 and 424 of the Act have recognised this distinction. The former action ("getting") simply involves *obtaining* information: see, e.g., *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489 at [37], [45]. The latter action ("considering" or "having regard to") involves an intellectual process in relation to the information for the purpose of making a decision: see, e.g., *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at [57] (Sackville J).

(a) the Authority is satisfied there are exceptional circumstances to justify doing so; and (b) in relation to any new information given or proposed to be given by an applicant, two further conditions are satisfied. While section 473DD is expressed in prohibitive form, the Minister accepts that it impliedly requires the Authority to consider new information when satisfied that the requisite conditions are met.[54]

60. Neither of the conditions in section 473DD call for any discretionary judgment by the Authority. It is therefore inapt to frame the issue as whether it was "unreasonable" for the Authority not to exercise a "discretion" to consider new information (or to say that such a decision was "disproportionate"[55]).

10 61. As to the first condition, the Authority was *prohibited* from considering new information unless it was satisfied that there were "exceptional circumstances" to justify considering that information. The term "exceptional circumstances" is not defined in the Act. This was intended to "provide a reviewer of the Authority with discretion to ascertain what he or she thinks are exceptional dependent on the characteristics of each fast track reviewable decision".[56] An "exceptional circumstance" is a "circumstances which is as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered".[57]

20 62. The only claim that the plaintiff made *to the Authority* in support of his request to consider the information in Mr Zimmer's 2016 letter was that there were are "exceptional circumstances" because the plaintiff is a non-English speaker with a limited understanding of the protection visa process and he was not aware of the information he was required to provide (SCB 365). It was open to the Authority not to regard such claimed circumstances as exceptional.[58] The Authority did not act "unreasonably" by failing to consider the matters now raised by the plaintiff. Those complaints were not made to it before it nor raised squarely on the information it held. Further, even if the Authority had been satisfied that the circumstances were

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54 Cf. *Leach v The Queen* (2007) 230 CLR 1 at [38], applying *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 and *Mitchell v The Queen* (1996) 184 CLR 333.

55 Plaintiff's submissions, [82].

56 Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at [914].

57 See *R v Kelly* [2000] QB 198 at 208 (Lord Bingham of Cornhill LJ), cited with approval in *Maan v Minister for Immigration and Citizenship* (2009) 179 FCR 581 at 591 [51] (Full Federal Court).

58 The Explanatory Memorandum at [916] indicates that Parliament contemplated that the Authority might conclude that "exceptional circumstances" would *not* include "[a] general misunderstanding or lack of awareness of Australia's processes and procedures": Explanatory Memorandum, [916]. That is especially so where, as here, the process had been clearly explained to the plaintiff.

exceptional, that would have satisfied only s 473DD(a), but not the additional criteria in s 473DD(b).

63. Neither of the plaintiff's two specific complaints concerning the "consideration" of "new information" grapple with s 473DD(b).

64. ***First***, the plaintiff complains[59] that it was "unreasonable" for the Authority not to consider "new information" in a letter from Rev Brown dated 10 May 2016 (SCB 369). The "new information" is said to be information that, since the plaintiff stopped regularly attending the Sydnal Baptist Church in 2012-2013, "from 2014-2016 ... [the plaintiff] has come to services more occasionally".

10 65. That complaint is without merit. The Authority decided under section 473DD to consider the information in Rev Brown's letter to the extent that it described his "religious activities" (including church attendances) "during the period between the protection interview and now" (SCB 377 [11]). Insofar as the Authority did not decide to consider information in Rev Brown's 2016 letter about the plaintiff's church attendance in 2014 and 2015 (i.e., prior to the protection interview on 12 November 2015), that decision was clearly open to it. Indeed, it is difficult to see how the Authority could lawfully have decided otherwise, for it could lawfully consider that information only if satisfied that such information either (i) "could not have been provided" to the Minister before the Minister made the decision under
20 section 65; or (ii) "was not previously known": section 473DD(b).[60] The plaintiff's submissions fail to address those requirements (focusing, instead, exclusively on whether there were "exceptional circumstances" to satisfy section 473DD(a)).

66. ***Secondly***, the plaintiff complains that it was "unreasonable" for the Authority not to consider "new information" in the form of a letter from Ray Zimmer (a member of the congregation at the Syndal church) dated 11 May 2017 (SCB 370). Again, the animus for this complaint appears to be the alleged unfairness of the delegate not having afforded the plaintiff an opportunity to comment on "Reverend Brown Information".[61] But again, for the same reasons addressed in the previous paragraph, that complain is without substance having regard to section 473DD(b).

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59 Plaintiff's submissions, [73]-[76].

60 The Authority was not required to give reasons for why it considered, or did not consider, certain new information. See section 473EA of the Act, and compare *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [31]-[32] (French CJ and Kiefel J), [61]-[73] (Gummow J, with whom Heydon and Crennan JJ agreed); *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [25].

61 Plaintiff's submissions, [80].

QUESTIONS 4 AND 5 – RELIEF AND COSTS

67. By reason of the matters outlined above:

    67.1. the answer to Question 4 (what if any relief should be granted) is "none"; and

    67.2. the answer to Question 5 (who should pay the costs) is "the plaintiff".

68. The proposed answer to Question 4 is appropriate even if the Court were to find in favour of the plaintiff on question 1 (i.e., that the delegate failed to comply with section 57(2)). If the Court concludes in answer to question 2 that a delegate's decision can be a "fast track reviewable decision" that is reviewable by the Authority *even if* made in contravention of section 57, then, unless the Authority made a jurisdictional error in deciding to "affirm" that decision, then its decision determines the plaintiff's rights. In those circumstances, it would defeat the statutory scheme to grant relief with respect to the delegate's decision.

PART VII ESTIMATE OF TIME

69. The Minister estimates that he will require 2 hours for the presentation of oral argument in this matter

Date of filing: 31 July 2017

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