IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 174 of 2016

BETWEEN:

Plaintiff M174/2016
Plaintiff

and

Minister for Immigration and Border Protection
First defendant

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Immigration Assessment Authority
Second defendant

PLAINTIFF'S SUBMISSIONS

Filed on behalf of the plaintiff by:
Victoria Legal Aid
570 Bourke Street
Melbourne VIC 3000
Reference: 15X050432

Contact: Chelsea Clark
Telephone: 03 9280 3751
Facsimile: 03 9269 0210
E-mail: chelsea.clark@vla.vic.gov.au

PART I PUBLICATION

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

PART II ISSUES

2. The plaintiff, a citizen of Iran, applied for a temporary protection visa on the basis (inter alia) that he feared persecution for reason of his conversion to Christianity. He provided a letter of support from Reverend Brown, the pastor at a church the plaintiff attended. The Minister's delegate refused the visa. Prior to making that decision, the delegate conducted an interview with Reverend Brown in relation to the plaintiff's attendance at church. Reverend Brown provided information that suggested that the plaintiff had attended church less often than he claimed. The delegate did not inform the plaintiff of the information she received from Reverend Brown or invite him to comment on it. The delegate's decision was subsequently referred to the Immigration Assessment Authority, which affirmed the decision. The Authority had regard to the material that was before the delegate, but refused to have regard to certain additional information provided by Reverend Brown and others in relation to the plaintiff's church attendance, or to conduct interviews.

3. In those circumstances, the issues presented by the questions in the amended special case are:

   (a) Did the delegate fail to comply with s 57 of the *Migration Act 1958* (Cth) (the Act) in relation to the information received from Reverend Brown, and thus commit a jurisdictional error that rendered her decision no decision in law?

   The plaintiff contends the answer is "yes".

   (b) If the answer to (a) is "yes", did that failure have the consequence that the Authority had no jurisdiction to conduct a review and make a decision in relation to the plaintiff?

   The plaintiff contends the answer is "yes".

   (c) Alternatively to (a) and (b), in the circumstances was the Authority's failure to interview the plaintiff and/or its refusal to have regard to the additional information legally unreasonable?

   The plaintiff contends the answer is "yes" (if this question arises).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The plaintiff considers that a s 78B notice is not necessary.

PART IV DECISIONS SUBJECT OF SPECIAL CASE

5. No court has reviewed the delegate's decision or the Authority's decision.

PART V FACTS

The temporary protection visa application

6. The plaintiff is a citizen of Iran. He entered Australia on 11 October 2012. On 1 September 2015, he applied for a temporary protection visa.[1] At that time, he became a "fast track applicant" within the meaning of s 5(1) of the Act.

7. In support of his application for a temporary protection visa, the plaintiff made a statutory declaration dated 16 August 2015[2] and submitted a letter of support from Reverend Bill Brown of the Syndal Baptist Church dated 14 June 2015.[3]

8. In his statutory declaration the plaintiff claimed that, upon any return to Iran in the reasonably foreseeable future, he would face a real chance of serious or significant harm at the hands of the Iranian authorities and others on account of, among other things, his status as a convert to Christianity. In particular, the plaintiff stated that, since his arrival in Australia, he had regularly attended a Christian church, being the Syndal Baptist Church.[4]

9. On 12 November 2015, the Minister's delegate interviewed the plaintiff.[5] The plaintiff said he had regularly attended Syndal Baptist Church since his release from immigration detention in December 2012 and he continued to do so.[6]

10. On 13 November 2015, the delegate telephoned Reverend Brown of the Syndal Baptist Church to discuss the letter of support Reverend Brown had provided in relation to the plaintiff. The delegate's file note records that Reverend Brown told the delegate that the plaintiff stopped attending the Syndal Baptist Church in 2013, returned early in 2015 for a few weeks and, since then, had only attended once on 14 June 2015, at which time the plaintiff requested a letter in support of his visa application (the **Reverend Brown information**).[7]

11. Another file note made by the delegate records that, on 13 November 2015, the delegate telephoned the plaintiff to clarify whether he had attended any other churches aside from the Syndal Baptist Church and the plaintiff said he had not.[8]

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1 SCB P26-P167.

2 SCB P98-P101 and P103-P107.

3 SCB P102 and P167.

4 See SCB P105 [29]-[34].

5 SCB P191-P278.

6 See, for example, SCB P227-P228, P230 and P237.

7 SCB P280-P281.

8 See SCB P283.

12. At no time prior to making her decision did the delegate:

(a) give particulars of the Reverend Brown information to the plaintiff;

(b) ensure that the plaintiff understood why that information was relevant; or

(c) invite the plaintiff to comment on that information.

The delegate's decision

13. On 15 April 2016, the delegate made her decision to refuse to grant the plaintiff a temporary protection visa.[9]

14. In the record of her decision, the delegate stated that she did not accept that the plaintiff had genuinely converted to Christianity or would, on any return to Iran in the reasonably foreseeable future, be perceived by the Iranian authorities or others as a convert to Christianity.[10]

15. Among other things, in her decision record the delegate:

(a) referred to and set out the Reverend Brown information;[11]

(b) found that the plaintiff had ceased to attend church regularly in 2013 and had "only returned to Syndal Baptist Church in June 2015 to seek a letter of support";[12]

(c) noted that "his return to Syndal Baptist Church was shortly after the applicant [the plaintiff] was sent his invitation to apply for a PV";[13]

(d) found that the plaintiff had participated in services at Syndal Baptist Church "in order to falsely strengthen his claim for protection" and, in so finding, referred to, among other things, "the timing of his return to Syndal Baptist Church (June 2015)";[14] and

(e) as a result of that finding, stated that:[15]

> I therefore find that the applicant [the plaintiff] has engaged in conduct in Australia for the sole purpose of strengthening his claim to be a refugee and, as such, I have disregarded that conduct for the purposes of assessing his claims for protection.

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9 SCB P285-P328.

10 See SCB P298 [55], P301 [64], P322 [145] and P323 [148]-[151].

11 See SCB P296-P297 [46]-[47].

12 See SCB P298 [55]-[56], P301 [64]-[65] and P323 [148].

13 See SCB P323 [148].

14 See SCB P323 [149]-[150].

15 SCB P323 [150]. See also s 5J(6) of the Act.

The Authority's decision

16. On 19 April 2016, the Minister referred the delegate's decision to the Authority and informed the plaintiff of the referral.[16] At or around the same time, the Secretary to the Department of Immigration and Border Protection gave various documents to the Authority. Those documents included the delegate's file note of her interview with Reverend Brown on 13 November 2015 and the delegate's decision record.

17. On 13 May 2016, the plaintiff submitted additional documents to the Authority.[17] The plaintiff also requested that the Authority interview him, as well as Reverend Brown and members of the congregation at the Syndal Baptist Church. The additional documents included:

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 (a) a letter from Reverend Brown dated 10 May 2016 (the 2nd **Rev Brown letter**),[18] in which Reverend Brown stated that "from 2014-2016, and because he has been living firstly in Pascoe Vale and then in Broadmeadows, ... [the plaintiff] has come to services [at the Syndal Baptist Church] more occasionally"; and

 (b) letters from other members of the congregation at the Syndal Baptist Church,[19] one of which stated that, since the plaintiff had moved to another part of Melbourne, he "could not get there [the Syndal Baptist Church] as regularly as before but still made the effort when he could" (the **congregants' letters**).

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18. For the purposes of making its decision, the Authority had regard to some, but not all, of the information in the additional documents submitted to the Authority by the plaintiff.[20]

19. In relation to the 2nd Rev Brown letter the Authority:

 (a) had regard to information in the letter "in so far as it reiterates evidence provided to DIBP" and "[t]o the extent that the letter refers to the applicant's [the plaintiff's] church attendance in 2016";[21]

 (b) but did not take into account "further information" in the letter about the plaintiff's church attendance in 2014 and 2015.

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16 See SCB P334.

17 SCB P363-P373.

18 SCB P369.

19 SCB P370 and P372.

20 SCB P376-P379 [4]-[16].

21 See SCB P377 [11].

20. In relation to the congregants' letters, the Authority did not have regard to those letters because it was not satisfied there were exceptional circumstances to justify doing so. Thus it refused to take into account additional information in those letters about the plaintiff's church attendance in 2014, 2015 and 2016.[22]

21. The Authority also refused to interview the plaintiff "and his supporters from the church". It stated that:[23]

> ... The Act provides that new information may be obtained by the IAA, but makes clear that new information can only be considered in exceptional circumstances. Having listened to the protection interview and having regard to all the other material, I consider that the applicant has been given an opportunity to present his claims and respond to relevant issues.

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22. On 19 May 2016, the Authority made its decision to affirm the delegate's decision to refuse to grant the plaintiff a temporary protection visa.[24] In doing so the Authority did not accept that the plaintiff had genuinely converted to Christianity or would, on any return to Iran in the reasonably foreseeable future, be perceived by the Iranian authorities or others as a convert to Christianity.[25]

23. In so finding, the Authority took into account the Reverend Brown information.[26] Save for additional information from Reverend Brown about the plaintiff's church attendance in 2016, the Authority otherwise declined to take into account additional information lodged with the Authority about the plaintiff's church attendance in 2014, 2015 and 2016.[27]

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PART VI ARGUMENT

A. SUMMARY

24. In summary, the plaintiff contends as follows.

25. *First*, the delegate failed to comply with s 57(2) of the Act and, as a consequence, her decision was affected by jurisdictional error. It follows that the delegate's decision is, in law, no decision at all.

26. *Second*, the jurisdictional error affecting the delegate's decision had one or both of the following consequences:

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22 See SCB P377-P378 [12]-[13].

23 SCB P378-P379 [16] (footnote omitted).

24 SCB P375-P399.

25 SCB P388-P389 [58] and [61]-[62].

26 SCB P388 [56].

27 See paragraph 18 above.

(a) there was no "fast track reviewable decision" capable of referral by the Minister to the Authority; and/or

(b) there was no "fast track reviewable decision" capable of review by the Authority.

27. *Third*, and irrespective of any jurisdictional error affecting the delegate's decision, it was legally unreasonable for the Authority to decline to exercise its statutory powers to get or to consider additional information about the plaintiff's church attendance in 2014, 2015 and 2016, in circumstances where it was apparent that the plaintiff had not, before the delegate, been informed of, or had the opportunity
10 to comment on, the Reverend Brown information.

B. SPECIAL CASE QUESTION 1: DID THE DELEGATE FAIL TO COMPLY WITH S 57?

28. Subdivision AB of Division 3 of Part 2 of the Act sets out a "[c]ode of procedure for dealing fairly, efficiently and quickly with visa applications". Section 51A provides that Subdivision AB is "an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with".

29. Sections 56 and 57 are in Subdivision AB. Section 56 provides as follows:

> **56 Further information may be sought**
>
> (1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister
20 gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.
>
> (2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.

30. Section 57 of the Act provides as follows:

> **57 Certain information must be given to applicant**
>
> (1) In this section, *relevant information* means information (other than non-disclosable information) that the Minister considers:
>
> (a) would be the reason, or part of the reason:
>
> (i) for refusing to grant a visa; or
>
30 (ii) for deciding that the applicant is an excluded fast track review applicant; and
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> (b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and
>
> (c) was not given by the applicant for the purpose of the application.
>
> Note: *Excluded fast track review applicant* is defined in subsection 5(1).

(2) The Minister must:

(a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and

(c) invite the applicant to comment on it.

31. Section 57 of the Act is an important provision in the statutory code of procedure. It is one of the few provisions to impose obligations to afford procedural fairness to visa applicants.[28]

10 The Reverend Brown information was "relevant information" within s 57(1)

32. *First*, in accordance with s 57(1)(a), it is apparent from the material before this Court that the Minister's delegate considered that the Reverend Brown information would be part of the reason for refusing to grant a visa.

33. The delegate got the Reverend Brown information pursuant to s 56(1) of the Act.[29] It follows that, having regard to the terms of s 56(1), the delegate:

(a) considered that the Reverend Brown information was relevant; and

(b) having got the information under s 56(1), was obliged to "have regard to that information in making the decision".

34. Further, the delegate:

20 (a) referred to the Reverend Brown information in her reasons for refusing to grant the plaintiff a protection visa;[30] and

(b) having regard to those reasons, the delegate considered that the Reverend Brown information constituted a rejection, denial or undermining of the plaintiff's claim to be a person to whom Australia owed protection obligations and, in particular, his claim to face a real chance of serious or significant harm in Iran on account of his status as a Christian convert.[31]

35. It may be accepted that s 57(1) is directed to "evidentiary material or documentation" and not to the delegate's "subjective appraisals, thought processes

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28 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 261 [20]-[21] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

29 Paragraph 17 of the amended special case (SCB P14).

30 See SCB P296-P297 [46]-[47].

31 *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 235 ALR 609, 615-616 [17]-[19] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

or determinations".[32] But the plaintiff's case turns on "evidentiary material" provided by Reverend Brown to the delegate and recorded in her file note; the plaintiff does not assert that the delegate's reasoning process was "relevant information".

36. *Second*, in accordance with s 57(1)(b), it is plain that the Reverend Brown information was "specifically about" the plaintiff.

37. *Third*, in accordance with s 57(1)(c), for one or both of the following reasons, the Reverend Brown information was not "given by" the plaintiff for the purposes of his application:

(a) the information was given by Reverend Brown; and/or

10 (b) the plaintiff did not independently give the delegate the same information given by Reverend Brown; in particular, he had never given information that he stopped attending the Syndal Baptist Church in 2013, returned in 2015 for a few weeks and, since then, had only attended once on 14 June 2015, when he requested a letter supporting his visa application.

The delegate's failure to comply with s 57(2)

38. Once it is accepted that the Reverend Brown information was "relevant information" for the purposes of s 57, the Minister's delegate was obliged:

(a) to give particulars of the Reverend Brown information to the plaintiff;

(b) to ensure that the plaintiff understood why the Reverend Brown information

20 was relevant to consideration of the plaintiff's visa application; and

(c) to invite the plaintiff to comment on the Reverend Brown information.

39. Prior to making her decision, the delegate did not communicate at all with the plaintiff about the Reverend Brown information. Accordingly, the delegate failed to comply with s 57 of the Act. In a practical sense, the delegate denied the plaintiff a reasonable opportunity to be heard on the Reverend Brown information.

40. As a consequence of the delegate's failure to comply with s 57, the delegate's decision was affected by jurisdictional error.[33] The delegate's decision is therefore properly regarded, in law, as "no decision at all".[34]

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[32] *SZBYR* [2007] HCA 26; (2007) 235 ALR 609, 616 [18] and 617 [23] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). And see *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507, 513-514 [23]-[24] (French CJ, Heydon, Crennan, Kiefel and Bell JJ); *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 598 [9] (French CJ and Kiefel J).

C. SPECIAL CASE QUESTION 2: CONSEQUENCES OF DELEGATE'S JURISDICTIONAL ERROR FOR THE AUTHORITY'S REVIEW POWERS

41. Part 7AA of the Act provides for the "[f]ast track review process in relation to certain protection visa decisions", including, relevantly for present purposes "fast track reviewable decisions".

   (a) Section 473BB relevantly defines the term "fast track reviewable decision" to mean "a fast track decision in relation to a fast track review applicant". The parties agree that the plaintiff is and at all relevant times was a "fast track review applicant".[35]

10 (b) However, there is a dispute between the parties as to whether there was a "fast track decision" in relation to the plaintiff, and a dispute as to whether there was a "fast track reviewable decision" in relation to the plaintiff.

42. The plaintiff contends that the consequence of the delegate's jurisdictional error is that there was no "fast track reviewable decision" capable of being referred to the Authority, or capable of being reviewed by the Authority.

43. It may be accepted that a purported decision may have, or be given, some legal effect by the statutory regime under which the decision-maker was purporting to act.[36] In particular it may be accepted, as the Full Court of the Federal Court held in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*,[37] that a
20 purported decision will ordinarily have at least sufficient effect to enliven jurisdiction for a merits review process. However, the legal and factual consequences of the decision, if any, will depend upon the statute in question.[38]

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33 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 321-324 [77] and [83]-[84] (McHugh J), 345-346 [173] (Kirby J) and 354-355 [206]-[208] (Hayne J).

34 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-615 [51] (Gaudron and Gummow JJ); and see 618 [63] (McHugh J), 644-647 [149]-[153] and [155] (Kirby J), and 649 [163]-[164] (Callinan J).

35 Paragraph 13 of the amended special case (SCB P13).

36 *Bhardwaj* (2002) 209 CLR 597, 604-605 [12]-[13] (Gleeson CJ), 616-617 [54]-[60] (Gaudron and Gummow JJ), 618 [63] (McHugh J), and 647 [153] (Hayne J).

37 [1979] FCA 21; (1979) 24 ALR 307. *Brian Lawlor* has been followed in a series of decisions of the Full Court of the Federal Court: see *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344, and the authorities discussed there at 353-354 [30]-[32] (Finn, Mansfield and Gyles JJ). Those cases concerned merits review by the Administrative Appeals Tribunal (the AAT), the Refugee Review Tribunal (the RRT) and the Migration Review Tribunal (the MRT).

38 *Jadwan Pty Limited v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1, 16 [42] (Gray and Downes JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388-389 [91] (McHugh, Gummow, Kirby and Hayne JJ).

44. In this case the plaintiff contends that the reasoning in *Brian Lawlor* and related cases has no application in the context of the statutory regime governing the Authority's merits review of fast track decisions. In each of those cases the review scheme in question provided for "full merits review". As the Full Court of the Federal Court explained in *Zubair*, in relation to the MRT:[39]

> The review process applicable to the Tribunal is a full merits review. ... [T]he Tribunal is given powers under s 349 to exercise all the powers and discretions that are conferred by the Act on the person who made the decision. It may affirm the decision, vary it, or remit the matter for reconsideration with directions or recommendations, or may set aside the decision and substitute a new decision. The only limit upon its power is that it may not, by varying or setting aside a decision and substituting a new decision, make a decision that is not authorised by the Act or the regulations (s 349(4)). That is similar to the review powers of the Administrative Appeals Tribunal (AAT): see AAT Act, s 43. In that context it has been held that the review by the AAT is available even though the decision-maker at first instance may have made a decision which is legally ineffective.

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45. Significantly, on a "full merits review", the merits review body will have the power to "cure" any jurisdictional error affecting the original decision (such as a breach of natural justice).

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46. The nature and scope of the review function conferred on the Authority pursuant to Part 7AA of the Act is different. It is not "full merits review". Rather, as recognised in s 473BA, it is a "limited form of merits review". In summary:

(a) Part 7AA does not provide for the Authority to exercise all the powers and discretions conferred by the Act on the person who made the decision the subject of review, thus the scheme does not place the Authority "in the shoes of" the delegate;

(b) the Authority has limited powers to get further material, beyond the material that is provided to it by the Secretary to the Department;

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(c) the regime does not permit the Authority to "cure" any earlier denial of natural justice that has occurred in relation to an applicant; and

(d) the Authority has no power to set aside a fast track reviewable decision and substitute a new decision, and the power conferred on it to remit a decision with directions is capable of being, and has been, limited by regulations.

As a consequence of these features, the Authority has no general ability to "cure" a jurisdictional error by the original decision-maker.

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[39] *Zubair* (2004) 139 FCR 344, 352-353 [28] (Finn, Mansfield and Gyles JJ).

47. Further, in *Brian Lawlor* the majority considered significant the purposes of the scheme in issue, being to give affected persons "an effective appeal ... against the decision on questions of fact and of law",[40] and to further "good government".[41] Those purposes justified an interpretation of the statutory regime as conferring jurisdiction on the AAT even in relation to purported decisions. Neither purpose is advanced by the Part 7AA "fast track review" regime.

48. The relevant features of Part 7AA are addressed in more detail below.

The merits review regime for "fast track reviewable decisions"

Initiation of review

10 49. The first way in which the fast track review process departs from the merits review regimes of the AAT, RRT and MRT is the way in which the fast track review process is initiated. A fast track review applicant does not, despite what that title might suggest, apply to the Authority for review of a fast track decision. Rather, s 473CA provides that the Minister must refer a fast track reviewable decision to the Authority as soon as reasonably practicable after the decision has been made. It is not a process that confers a right of review that is exercised by an individual.

Material on which review is based — limited power to get new material

50. The second difference between "full merits review" and the fast track review process concerns the material on which the review is to be based.

20 51. In the first instance, the Authority receives material from the Secretary of the Department. Section 473CB provides that, at the same time as any referral or as soon as reasonably practicable after it, the Secretary must give to the Authority the "review material" as set out in that section. Pursuant to s 473(CB)(1), the review material relevantly comprises:

(a) a statement that sets out the the decision-maker's findings of fact and refers to the evidence on which those findings were based, and the reasons for the decision;

(b) material provided by the applicant to the decision-maker before the decision was made; and

30 (c) any other material in the Secretary's possession or control that is considered by the Secretary to be relevant to the review.

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40 *Brian Lawlor* [1979] FCA 21; (1979) 24 ALR 307, 314 (Bowen CJ).

41 *Brian Lawlor* [1979] FCA 21; (1979) 24 ALR 307, 334-5 (Smithers J).

52. The review material is not required to include all of the material considered by the original decision-maker in making his or her decision (this is expressly recognised by s 473DA(2) of the Act).

53. The Authority does have a power to get further information, but its powers in that regard are limited. Division 3 of Part 7AA of the Act contains provisions for the conduct of review by the Authority. Section 473DA relevantly provides that Division 3 "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule" in relation to reviews conducted by the Authority.

54. Pursuant to s 473DB of the Act the conduct of the review is, in the ordinary course, confined to a review on the papers and, in particular, the review material. That section relevantly provides as follows:

> **473DB Immigration Assessment Authority to review decisions on the papers**
>
> (1) Subject to this Part, the Immigration Assessment Authority must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:
>
> (a) without accepting or requesting new information; and
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> (b) without interviewing the referred applicant.

55. In the words of s 473FA(1), the Authority "is to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)". This may be contrasted with the purpose identified in *Brian Lawlor*, discussed above, directed to "review by an independent Tribunal ... by reference to standards of good government".

56. Notwithstanding that the terms of s 473DB direct that the Authority should decide the review without accepting or requesting new information, ss 473DC permits the Authority to get new information. That section relevantly provides as follows:

> Subject to this Part, the ... Authority may, in relation to a fast track decision, 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.

57. Section 473DC(2) provides that the Authority does not have a duty to get new information. Pursuant to s 473DC(3) the Authority may invite a person to give new information in writing or at an interview.

58. Having got new information, the Act constrains the Authority's ability to consider that new information. Section 473DD provides that the Authority must not consider any new information unless:

(a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and

(b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority 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.

59. If the Authority gets new information, s 473DE(1) provides for the giving of that information to a referred applicant, and provision of an opportunity to comment on it, in certain circumstances.

60. Again, the difference between the limited powers of the Authority to get, and to consider, new information may be contrasted with the "full merits review" undertaken by the AAT, the RRT and the MRT. Those tribunals had conferred upon them the same powers as the original decision-maker.[42] There is no such general conferral of power on the Authority.

Power of the Authority to decide the review

61. The final, significant difference between the fast track review scheme and "full merits review" is to be found in the limited powers the Authority has to decide the review. In that regard, s 473CC provides as follows:

473CC Review of decision

(1) The Immigration Assessment Authority must review a fast track reviewable decision referred to the Authority under section 473CA.

(2) The Immigration Assessment Authority may:

(a) affirm the fast track reviewable decision; or

(b) remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation.

62. It is notable that there is no power in the Authority to substitute its own decision for that of the original decision-maker.

42 See, for instance, ss 349 and 415 of the Act.

63. Further, although the Authority may give directions to the decision-maker if it remits the decision, s 473CC(1)(b) provides that the terms on which any decision might be remitted for reconsideration are to be governed by regulations. That aspect of the regime permits the executive branch to restrict, potentially to a significant extent, the directions or recommendations that the Authority might lawfully make. In this regard, reg 4.43 of the *Migration Regulations 1994* (Cth) presently provides that certain directions are permissible directions, and that certain directions are not permissible directions.

Consequences of limited nature of merits review for the Authority's jurisdiction

10 64. The circumstances in which any review may lawfully occur before the Authority are informed by a proper construction of the provisions of the Act. As Kiefel J observed in *Shi v Migration Agents Registration Authority*, in relation to the Administrative Appeals Tribunal "[t]he jurisdiction of the Tribunal, a statutory tribunal, depends upon there having been a decision made which it is authorised to review".[43] In this case, in order for the Authority's jurisdiction to be enlivened there must be a "fast track reviewable decision" capable of being referred to it pursuant to s 473CA.

65. The referral of a fast track reviewable decision is obligatory. The subject-matter of any review by the Authority concerns, in particular, whether or not Australia owes protection obligations to a person.[44] Further, and having regard to the narrow and
20 confined nature, scope, conduct and outcome of any review by the Authority, the Authority has very limited power on any review to "cure" any jurisdictional error affecting a decision purportedly made under s 65 of the Act.[45]

66. Having regard to those matters, and particularly the Authority's very limited power on any review to "cure" any jurisdictional error, it could not have been intended, in the absence of clear words to the contrary, that a purported decision by a delegate would be effective to enliven the Authority's power of review. Such a construction of the Act would leave a person affected by a decision vitiated by jurisdictional error with no avenue for redress. In this case, the delegate breached s 57 of the Act; that breach was not "cured" by the Authority; and yet (on the Minister's case) the
30 Authority's decision cannot be impugned or set aside on the basis of the delegate's error. The plaintiff is left with no remedy. A conclusion that the Act intended, in effect, to deprive an affected person in these circumstances of the right to natural

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43 (2008) 235 CLR 286, 324 [132].

44 See s 36(2) of the Act.

45 Cf *Zubair* (2004) 139 FCR 344, 352-354 [28] and [32] (Finn, Mansfield and Gyles JJ). See also *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57, 98-102 [146] (McHugh J); *Twist v Randwick Municipal Council* (1976) 136 CLR 106 and *Brian Lawlor* [1979] FCA 21; (1979) 24 ALR 307.

justice should not be lightly reached.[46] No "plain words of necessary intendment" to that effect appear in the Act. Indeed, various provisions in Part 7AA refer to a decision made by the Minister "under section 65", supporting the proposition that what is required is a decision lawfully made, not a purported decision.[47]

67. Given the delegate's decision is affected by jurisdictional error and, in law, "no decision at all", that purported decision cannot be a "fast track reviewable decision" for the purposes of the Act. As a consequence, the Minister had no power to refer that purported decision under s 473CA and the Authority had no power to review that purported decision under s 473CC. It follows that the Authority's decision is
10 also affected by jurisdictional error.

D. SPECIAL CASE QUESTION 3: UNREASONABLENESS

68. Alternatively, and irrespective of whether the delegate's decision was affected by jurisdictional error, the Authority's failure to exercise its powers to get and to consider new information concerning the Reverend Brown information was legally unreasonable in circumstances where the delegate had failed to provide the plaintiff with the Reverend Brown information and an opportunity to comment on it. On that basis, the Authority's decision is affected by jurisdictional error.

69. The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.[48] Here, the Authority was required to exercise its
20 powers to get and consider new information reasonably. It failed to do so.

70. In this regard:

(a) the Reverend Brown information related to the nature and extent of the plaintiff's church attendance in 2014, 2015 and 2016 and was adverse, credible, relevant and significant because it constituted a rejection, denial or undermining of the plaintiff's claims (in particular, his claims that he had attended the Syndal Baptist Church since December 2012 and continued to attend that church);

(b) the Reverend Brown information was taken into account by the delegate;

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46 See, for example, *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J); *Saeed* (2010) 241 CLR 252, 259 [13]-[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

47 See ss 473DA, 473DC, 473DD. And see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 488 [19] and 495 [41] (Gleeson CJ) and 505-506 [75]-[77] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Zubair* (2004) 139 FCR 344, 352-353 [28] (Finn, Mansfield and Gyles JJ). Cf *Brian Lawlor* [1979] FCA 21; (1979) 24 ALR 307, 337-339 (Smithers J).

48 *Li* (2013) 249 CLR 332, 362 [63] (Hayne, Kiefel and Bell JJ) and 370-371 [88]-[92] (Gageler J).

(c) the delegate did not afford the plaintiff an opportunity to comment on or respond to the Reverend Brown information;

(d) the Authority was obliged to consider the Reverend Brown information because that information was given to the Authority as part of the review material (see s 473DB(1));

(e) the Reverend Brown information was taken into account by the Authority;[49]

(f) on the review before the Authority, the Reverend Brown information was not "new information" because it was before the delegate when she made her decision (see s 473DC(1)), thus s 473DE did not require the Authority to give the plaintiff an opportunity to comment on that information;

(g) the plaintiff lodged additional information with the Authority, including additional information from Reverend Brown and other members of the congregation of the Syndal Baptist Church, about the nature and extent of his church attendance in 2014, 2015 and 2016;

(h) among other things, the additional information given by the plaintiff to the Authority responded to the Reverend Brown information;

(i) save for some of the additional information from Reverend Brown, and only insofar as that additional information concerned the nature and extent of the plaintiff's church attendance from 12 November 2015 onwards, the Authority refused to consider the additional information given by the plaintiff about the nature and extent of his church attendance in 2014, 2015 and 2016;[50]

(j) the plaintiff also requested that the Authority interview him, Reverend Brown and other members of the congregation of the Syndal Baptist Church;

(k) the Authority refused to interview the plaintiff, Reverend Brown and other members of the congregation on the basis that the plaintiff "had been given an opportunity to present his claims and respond to relevant issues";[51] and

(l) given the Authority's refusal to consider all of the additional information given by the plaintiff about the nature and extent of his church attendance in 2014, 2015 and 2016, the plaintiff was not "given an opportunity to present his claims and respond to relevant issues".

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49 See, for example, SCB P376 [4], P387 [51] and P388 [56].

50 SCB P377 [11].

51 SCB P378-P379 [16].

Failure to get new information

71. The Authority had a statutory power, in s 473DC, to get new information, including by way of an interview. The Authority refused to get new information from the plaintiff or others by conducting an interview.[52] Its decision lacks an evident and intelligible justification, particularly given that it declined to consider further information provided in the 2nd Rev Brown letter and the congregants' letters. The Authority did not refer to the fact that the plaintiff had not had an opportunity to respond to the Reverend Brown information before the delegate. In those circumstances the decision to refuse to exercise its statutory power under s 473DC
10 was legally unreasonable.

Failure to consider new further information provided to the Authority

72. It was also legally unreasonable for the Authority to refuse to consider additional information provided to it by the plaintiff about the nature and extent of his church attendance in 2014, 2015 and 2016. Again, the Authority failed to take into account that the plaintiff had not had any opportunity before the delegate to comment on or respond to the Reverend Brown information.

Reverend Brown's further information

73. In respect of the additional information from Reverend Brown about the nature and extent of the plaintiff's church attendance in 2014, 2015 and 2016, the Authority
20 relevantly stated that:[53]

> The letter dated 10 May 2016 from Rev. Brown largely re-states the content of his June 2015 letter. In so far as it reiterates evidence provided to DIBP, the information is not new information and I have had regard to it. It contains the further information that the applicant attended church "occasionally" over the period from 2014 to 2016. To the extent that the letter refers to the applicant's church attendance in 2016, this is new information which was not before the Minister and which may be relevant because it concerns the applicant's attendance at church after the protection interview and after the delegate's decision. ... I consider that there are exceptional circumstances which justify consideration of new information
30 about the applicant's religious activities during the period between the protection interview [on 12 November 2015] and now.

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52 Although the method of getting information by interview is discretionary, there may be cases where an interview is necessary to accord procedural fairness, or in order to discharge the review function or to reach the requisite state of satisfaction: *Saeed* (2010) 241 CLR 252, 261 [20] and 270 [54]-[55] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

53 SCB P377 [11] (emphasis added).

74. Implicit in this passage is the proposition that the "further information" from Reverend Brown about the plaintiff's church attendance in 2014 and 2015 (prior to 12 November 2015) was not "new information", and would not be considered.[54]

75. However, that further information from Reverend Brown was not before the Minister's delegate. That further information was therefore capable of constituting "new information" if the Authority considered that it may be relevant. That is so even if it related to matters in existence prior to the plaintiff's interview with the Minister's delegate on 12 November 2015.

76. The Authority wrongly assumed that it was unnecessary for it to determine, pursuant to s 473DD of the Act, whether or not there were exceptional circumstances to justify considering the further information in the 2nd Rev Brown letter about the plaintiff's church attendance in 2014 and 2015.

Further information from other members of the congregation

77. In respect of the additional information in one of the congregants' letters, the Authority relevantly stated that:[55]

> The letter ... states that the applicant [the plaintiff] lived with ... [the letter's author] for about six months from late 2012 until 2013. It states that the applicant regularly attended church with ... [the letter's author] until he [the plaintiff] moved away and it was difficult to get there by public transport so he attended less often. It appears to refer to the applicant's religious activity before the protection interview and the Minister's decision, and does not specifically refer to developments after either the protection interview, or the Minister's decision. ... I am not satisfied there are exceptional circumstances justifying consideration of this information. ... I am prevented from considering this information.

78. The Authority's reasons support the proposition that it failed to consider:

(a) the lack of any opportunity given by the delegate to the plaintiff to respond to the Reverend Brown information; or

(b) how the congregant's letter might be a response to the Reverend Brown information.

79. The purpose of ss 473DC and 473DD is to enable the Tribunal to obtain and to have regard to relevant information even where that information was not before the

54 The Authority referred to the 2nd Rev Brown letter in its reasons at [54] and [56] (SCB P387-P388). However, it does not appear from those paragraphs that the Authority considered the information provided by Reverend Brown in relation to the plaintiff's attendance at church in 2014, or all of the information about 2015.

55 SCB P378 [13]; cf SCB P370.

original decision-maker (albeit that the power to consider is circumscribed). However:

(a) in relation to the information about the plaintiff's church attendance in 2014 and 2015 in the 2nd Rev Brown letter, the Authority failed to consider whether exceptional circumstances warranted its consideration; and

(b) in relation to the information about the plaintiff's church attendance in 2014, 2015 and 2016 in the congregant's letter, the Authority considered that there were no exceptional circumstances.

80. In relation to each class of information, the plaintiff contends that the delegate's failure to put to him the Reverend Brown information constituted, or was at least capable of constituting, the necessary exceptional circumstances. Where he had had no proper opportunity to respond to that information before the delegate, it was legally unreasonable for the Authority to deny him the opportunity to respond fully in the fast track process — in particular, it was unreasonable for the Authority to decline to consider further information provided by Reverend Brown himself, that explained or expanded upon the earlier information he had provided. At the least, it was legally unreasonable for the Authority not to take into account, in its assessment of the existence of any exceptional circumstances, the delegate's failure to invite the plaintiff to respond to the Reverend Brown information.

81. Further, and having regard to the scope and purpose of the power to get and consider new information in ss 473DC and 473DD, the plaintiff contends that the Authority "gave excessive weight — more than was reasonably necessary — to its conclusion" that the plaintiff had had an opportunity to present his case.

82. That is particularly so when the plaintiff had *not* had a full opportunity to present his case to the delegate, and in light of what was at stake for the plaintiff.[56] The Tribunal's disproportionate response in refusing to get and consider new information leads to a conclusion of unreasonableness.[57]

83. The plaintiff relies upon the Authority's failure to get new information, and its failure to consider new information provided to it, both independently and cumulatively. Taken together, it is apparent that the plaintiff was shut out from an opportunity to properly respond to the Reverend Brown information. As a consequence, the Authority acted unreasonably and its decision is affected by jurisdictional error.

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[56] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 451 [77] (Allsop CJ, Robertson and Mortimer JJ).

[57] *Li* (2013) 249 CLR 332, 369 [60] (Hayne, Kiefel and Bell JJ).

PART VII LEGISLATION

84. The applicable statutory provisions (as at all relevant times) are set out in the annexure. They remain in force, in that form, at the date of these submissions.

PART VIII ORDERS SOUGHT

85. In relation to Question 4 in the Special Case, concerning relief, the plaintiff seeks writs of certiorari to quash both the delegate's decision and the Authority's decision, a writ of mandamus to require the Minister to consider and determine the plaintiff's visa application according to law, and an order for costs.

86. In the alternative the plaintiff contends that, even if there was no jurisdictional error by the Authority:

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(a) he is entitled to certiorari in relation to the delegate's decision (and the existence of the Authority's decision to affirm it does not preclude that);

(b) the delegate's decision was not "supplanted" by the decision of the Authority (because of its limited merits review role explained above);[58]

(c) rather, the effect of the Authority's decision was simply to affirm the delegate's decision and to render it effective — and if the delegate's decision is now quashed, there was no decision for the Authority to affirm;

(d) there is, therefore, no valid decision in relation to the plaintiff's application and he is also entitled to mandamus directed to the Minister.

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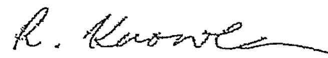
PART IX TIME ESTIMATE FOR ORAL ARGUMENT

87. The estimated time for the plaintiff's oral argument is two hours.

Dated: 23 June 2017



KRISTEN WALKER
Telephone: 03 9225 6075
E-mail: k.walker@vicbar.com.au
Facsimile: 03 9225 8668

RICHARD KNOWLES
Telephone: 03 9225 8494
E-mail: rknowles@vicbar.com.au
Facsimile: 03 9225 8668

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58 *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222, 240-242 (Barwick CJ).