2FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

(DIVISION 2)

DST18 v Minister for Immigration, Citizenship and Multicultural Affairs

[2023] FedCFamC2G 1182

File number(s):	SYG 2553 of 2020
Judgment of:	**CHIEF JUDGE ALSTERGREN**
Date of judgment:	14 December 2023
Catchwords:	**MIGRATION** – separate question – meaning of 'at the time of the referral' in s. 473CB(1)(c) of the *Migration Act 1958* (Cth) – separate question answered no
Legislation:	*Acts Interpretation Act 1901* (Cth) s. 33 *Migration Act 1958* (Cth) pt 7, 7AA ss. 5(1), 65, 473BA, 473CA, 473CB, 473CC, 473DA, 473DB, 473DC, 473DD, 473EA, 473GA, 473GB, 476
Cases cited:	*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 *AUS17 v Minister for Immigration and Border Protection* (2020) 269 CLR 494; [2020] HCA 37 *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29; [2019] HCA 34 *CNY17 v Minister for Immigration* [2017] FCCA 2731 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76; [2019] HCA 50 *CNY17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1568 *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39 *DST18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 1813 *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518; [2003] HCA 11 *Nguyen v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 206 *Othman v Minister for Immigration, Local Government and Ethnic Affairs* [1991] FCA 455 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217; [2018] HCA 16

	Republic of Turkey v Mackie Pty Ltd (No 2) [2021] VSCA 189
Division:	Division 2 General Federal Law
Number of paragraphs:	62
Date of last submissions:	10 November 2022
Date of hearing:	10 November 2022
Place:	Sydney
Counsel for the Applicant:	Mr Mostafa and Mr Reynolds
Solicitor for the Applicant:	Varess
Counsel for the First Respondent:	Mr Lenehan SC and Mr Kaplan
Solicitor for the First Respondent:	HWL Ebsworth Lawyers
The Second Respondent:	Submitting an appearance save as to costs

ORDERS

SYG 2553 of 2020

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**DST18** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	IMMIGRATION ASSESSMENT AUTHORITY Second Respondent

ORDER MADE BY: **CHIEF JUDGE ALSTERGREN**

DATE OF ORDER: **14 DECEMBER 2023**

THE COURT ORDERS THAT:

1. The separate question in the application in a proceeding filed by the first respondent on 17 June 2022 be answered as follows:

   Question: Following the issuing of a writ of mandamus to the second respondent (Authority) on 18 August 2020 to require it to determine according to law its review of the fast track reviewable decision made by a delegate of the first respondent (Minister) in respect of the applicant (Delegate's Decision), was material that came into the possession or control of the Secretary of the Department after the Delegate's Decision was referred to the Authority by the Minister under section 473CA of the *Migration Act 1958* (Cth) on 14 November 2017 capable of meeting the description in section 473CB(1)(c) of "any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review"?

   Answer: No.

2. Costs be reserved.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

CHIEF JUDGE ALSTERGREN:

INTRODUCTION

1 On 11 November 2020, the applicant filed an application in this Court pursuant to s. 476 of the *Migration Act 1958* (Cth) ('Act') seeking judicial review of a decision of the Immigration Assessment Authority ('Authority') dated 13 October 2020 ('Authority's Decision'). The Authority's Decision affirmed a decision of a delegate of the first respondent ('Minister') not to grant the applicant a protection visa. The Authority's Decision is the second unfavourable decision that the Authority has made in relation to the applicant. The first was made on 22 June 2018 which was quashed by this Court on 18 August 2020.

2 On 17 June 2022, the Minister filed an application in a proceeding which, with the applicant's consent, seeks the determination of the following separate question:

> Following the issuing of a writ of mandamus to the second respondent (Authority) on 18 August 2020 to require it to determine according to law its review of the fast track reviewable decision made by a delegate of the first respondent (Minister) in respect of the applicant (Delegate's Decision), was material that came into the possession or control of the Secretary of the Department after the Delegate's Decision was referred to the Authority by the Minister under section 473CA of the *Migration Act 1958* (Cth) on 14 November 2017 capable of meeting the description in section 473CB(1)(c) of "any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review"?

3 When the matter came before the Court, Mr Mostafa of Counsel appeared on behalf of the applicant and Mr Lenehan SC appeared on behalf of the Minister.

4 The Court had before it a Court Book filed 4 November 2022, which was marked as an Exhibit, as well as the applicant's written submissions filed on 26 September 2022, the Minister's written submissions filed on 20 October 2022, the applicant's further written submissions and a joint list of authorities both filed on 2 November 2022.

5 For the following reasons, I have determined that the separate question should be answered 'no'.

Background

6 The applicant is a citizen of Afghanistan. He entered Australia as an unauthorised maritime arrival on 10 July 2013.

7 On 9 November 2017, a delegate of the Minister made a decision, under s. 65(1)(b) of the Act, to refuse the grant of a protection visa to the applicant ('Delegate's Decision').[1]

8 On 14 November 2017, the Delegate's Decision was referred to the Authority pursuant to s. 473CA of the Act.

9 On 22 June 2018, the Authority affirmed the Delegate's Decision ('Authority's First Decision').

10 On 18 July 2018, the applicant filed an application in this Court seeking judicial review of the Authority's First Decision. That application, which was amended on 22 May 2020, was heard on 3 July 2020 and judgment was delivered on 18 August 2020.[2] The Court ordered that:

> 1. A writ of certiorari shall issue, removing the record of the Immigration Assessment Authority made on 22 June 2018 into this Court for the purpose of quashing it.
> 2. A writ of mandamus shall issue, requiring the Immigration Assessment Authority to redetermine according to law the review referred to it.

11 On 13 October 2020, the Authority again affirmed the Delegate's Decision. It is this decision which the applicant seeks to have this Court review.

Statutory Scheme

12 I respectfully adopt, with some variations, the Minister's summary of the statutory scheme relating to Part 7AA of the Act.[3]

13 Part 7AA of the Act provides for what the simplified outline in s. 473BA describes as "a limited form of review" of a "fast track decision" constituted by a refusal to grant a protection visa to an applicant designated to be a "fast track review applicant". It is not in dispute that the applicant is a "fast track review applicant". A "fast track decision" is, subject to presently immaterial exceptions, a decision to refuse to grant a protection visa to a fast track applicant, and the decision of the delegate here is, it is agreed, a "fast track reviewable decision".

14 The Authority's jurisdiction is enlivened by undertaking the duty imposed by s. 473CA, which provides:

[1] Court Book pages 88–103.
[2] *DST18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 1813.
[3] See also *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [13]–[38]; *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at [3]–[17]; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [2]–[8].

473CA Referral of fast track reviewable decisions

The Minister must refer a fast track reviewable decision to the Immigration Assessment Authority as soon as reasonably practicable after the decision is made.

15 Unlike reviews by the Administrative Appeals Tribunal under Part 7 of the Act (which also relates to protection visas) where it is the responsibility of the visa applicant to initiate a merits review, under Part 7AA it is the responsibility (or duty) of the Secretary to initiate merits review – achieved by way of the 'referral' under s. 473CA.

16 Noting its importance to the question, it is useful to outline s. 473CB in full:

473CB Material to be provided to Immigration Assessment Authority

(1) The Secretary must give to the Immigration Assessment Authority the following material (*review material*) in respect of each fast track reviewable decision referred to the Authority under section 473CA:

(a) a statement that:

(i) sets out the findings of fact made by the person who made the decision; and

(ii) refers to the evidence on which those findings were based; and

(iii) gives the reasons for the decision;

(b) material provided by the referred applicant to the person making the decision before the decision was made;

(c) any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review;

(d) the following details:

(i) the last address for service provided to the Minister by the referred applicant for the purposes of receiving documents;

(ii) the last residential or business address provided to the Minister by the referred applicant for the purposes of receiving documents;

(iii) the last fax number, email address or other electronic address provided to the Minister by the referred applicant for the purposes of receiving documents;

(iv) if an address or fax number mentioned in subparagraph (i), (ii) or (iii) has not been provided to the Minister by the referred applicant, or if the Minister reasonably believes that the last such address or number provided to the Minister is no longer correct—such an address or number (if any) that the Minister reasonably believes to be correct at the time the decision is referred to the Authority;

(v) if the referred applicant is a minor—the last address or fax number of a kind mentioned in subparagraph (i), (ii), (iii) or (iv) (if

any) for a carer of the minor.

> (2) The Secretary must give the review material to the Immigration Assessment Authority at the same time as, or as soon as reasonably practicable after, the decision is referred to the Authority.

17 The Authority's core function is to review the fast track reviewable decision that has been referred to it by the Minister: s. 473CC(1). If the Authority is satisfied that the criteria for the grant of a protection visa have been met, the appropriate decision is to remit the visa application to the Minister in accordance with such directions or recommendations as are permitted by the *Migration Regulations 1994* (Cth): s. 473CC(2)(b). If, however, the Authority is not so satisfied, the Authority will affirm the decision under review: s. 473CC(2)(a).

18 The conduct of a review by the Authority is governed by Division 3 of Part 7AA. It commences with s. 473DA(1), which provides that the Division, together with ss. 473GA and 473GB, are an exhaustive statement of the natural justice hearing rule in relation to reviews conducted by the Authority. The effect of this provision is that the common law hearing rule is excluded in entirety in relation to the conduct of a review.[4]

19 Section 473DB(1) provides that a review is to be conducted by the Authority having regard to the review material given under s. 473CB, and without accepting or requesting new information or inviting a referred applicant to an interview.[5] However, the Authority has a discretion, which must be exercised reasonably,[6] to get 'new information' – that is, information that was not before the Minister when a decision was made under s. 65 and which the Authority considers may be relevant: s. 473DC(1). If the Authority obtains new information, it is prohibited from considering it unless it is satisfied of the criteria in s. 473DD.[7]

20 The Authority must provide reasons for its decision: s. 473EA(1), and notify the referred applicant of its decision. After a decision is made, s. 473EA(4) of the Act provides that:

> *Return of documents etc.*
>
> (4) After the Immigration Assessment Authority makes the written statement, the Authority must:
>
> > (a) return to the Secretary any document that the Secretary has provided in relation to the review; and

[4] *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at [2], [29]–[33].
[5] *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (*Plaintiff M174*) at [22].
[6] *Plaintiff M174* at [21], [86], [90].
[7] *AUS17 v Minister for Immigration and Border Protection* (2020) 269 CLR 494 at [6], [11].

> (b) give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based.

The issue

21 In relation to whether s. 473CB is 're-exercised' following a remittal, both parties accept, on the facts of this particular case, that the duty in s. 473CB was required to be 're-exercised'.

22 I acknowledge that the Minister's position is that s. 473CB need only be re-exercised following a remittal *if* the documents have been returned to the Department under s. 473EA(4) of the Act (whereas the applicant's position is that the duty must be re-exercised regardless). That area of disagreement is a question for another day (and another matter). It is unnecessary to resolve it in this case. I only acknowledge this to make clear the extent to which the Minister accepted the requirement to 're-exercise'.

23 In light of the remarks of Edelman J in *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 (set out at [31] below), I accept that the duty in s. 473CB was required to be 're-exercised'.[8]

24 Where the real dispute lies, however, is what is meant by 'referred' in s. 473CB(1)(c).

CNY17

25 It is helpful to set out the litigation history of another fast track review applicant, CNY17. The judicial decisions relating to CNY17 are of some significance.

26 CNY17 arrived in Australia as an unauthorised maritime arrival, like the applicant. Similar to the applicant, he applied for a protection visa, which was refused by a delegate. On or around 23 March 2017, the delegate's decision was referred to the Authority.[9] Within the review material provided pursuant to s. 473CB(1)(c), were:[10]

> …48 pages comprised [of] formal letters from officers of the Department to the appellant concerning the provision to him of assistance in the preparation of his application for protection, the formal record of the conviction and the order and recognisance in the Magistrates Court of Western Australia in February 2016 for the offence of intentionally destroying or damaging Commonwealth property, a prosecution report to the Department by the Commonwealth Director of Public Prosecutions referring to that conviction, copies of emails passing between officers of the Department as well as between the Department and "WA Compliance Courts Prisons" concerning the custody and management of the appellant during the period

[8] I also acknowledge the references to s 33 of the *Acts Interpretation Act 1901* (Cth) made during oral submissions in support of this view.
[9] *CNY17 v Minister for Immigration* [2017] FCCA 2731 at [6].
[10] *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [33].

> from November 2015 to March 2016, and a departmental "Case Review" in relation to the appellant dated March 2016.

27 The Authority affirmed the decision not to grant CNY17 the visa. CNY17 applied for judicial review in the then Federal Circuit Court of Australia ('Federal Circuit Court'), arguing the decision was affected by apprehended bias as the Authority was in possession of irrelevant and prejudicial materials which were provided to it pursuant to s. 473CB(1)(c). The application to the then Federal Circuit Court was dismissed, and an appeal from that decision to the Full Federal Court of Australia was dismissed.

28 CNY17 appealed to the High Court of Australia ('High Court') who allowed the appeal,[11] and also ordered:

> (2) Set aside orders 1 and 2 made by the Full Court of the Federal Court of Australia on 21 September 2018 and order 1 made by the Full Court of the Federal Court of Australia on 12 October 2018 and, in their place, order that:
>
> (a) the appeal be allowed with costs; and
>
> (b) orders 1 and 2 of the Federal Circuit Court of Australia dated 8 November 2017 be set aside and, in their place, order that:
>
> (i) the decision of the Immigration Assessment Authority dated 12 May 2017 be quashed;
>
> (ii) the matter be remitted to the Immigration Assessment Authority differently constituted…

29 The majority of the High Court found that the Secretary's referral of irrelevant and prejudicial information to the Authority pursuant to s. 473CB gave rise to a reasonable apprehension of bias on the part of the Authority in determining whether or not to affirm the decision.

30 Justices Nettle and Gordon summarised a submission of the Minister, that quashing a decision and remitting the matter back to the Authority would place the Authority in an "impossible bind" because it would again be exposed to the prejudicial materials. Their Honours stated (at [106]):

> …That submission should not be accepted. Section 473EA(4) of the Migration Act requires the IAA to return to the Secretary those documents provided by the Secretary, after the IAA's review is complete. Moreover, the matter would be remitted to a differently constituted IAA. As a result, the "impossible bind" spoken of by the Minister would not arise.

31 Justice Edelman stated (at [143]):

[11] *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76.

> Since the Authority will have returned all materials to the Secretary, the new hearing will require the Secretary to re-exercise the task of considering which of the material that is in the Secretary's possession or control is relevant to the review.

32 I will herein refer to the High Court's decision as '*CNY17-High Court'*.

33 The High Court success was not the end of CNY17's litigation history.

34 After the High Court application, the matter was remitted to the Authority and, relevantly, the Secretary 're-exercised' the duty in s. 473CB. Significantly, included in the review material provided pursuant to s. 473CB(1)(c) was a copy of the High Court judgment. Self-evidently, the judgment post-dates the 'referral' to the Authority on 23 March 2017.

35 The Authority again affirmed the decision not to grant CNY17 the protection visa. CNY17 again sought judicial review in the then Federal Circuit Court. CNY17 again contended that there was a reasonable apprehension of bias, on this occasion on account of the Secretary providing the High Court judgment (which contained summaries of the irrelevant and prejudicial information). The then Federal Circuit Court dismissed the judicial review application.

36 CNY17 appealed to the Federal Court of Australia ('Federal Court') (I will herein refer to this decision as '*CNY17-Fed Court'*).[12] Her Honour Jagot J dismissed the appeal. In discussing the level of knowledge a fair minded lay observer may have, her Honour stated (at [36]-[41]):

> 36. Further, I consider that the fair-minded lay observer would be taken to understand that where a court makes an order setting aside a decision as unlawful, it is necessary that the decision-maker, on making the decision again, should comply with the law as determined by the court. This is a fundamental aspect of the rule of law (see, for example, *Church of Scientology Inc v Woodward* [1982] HCA 78; (1982) 154 CLR 25 at 70, cited in *SZGUW v Minister for Immigration and Citizenship* [2009] FCA 321; (2009) 108 ALD 108 at [17]). It follows that the fair-minded lay observer would be taken to understand that, in the ordinary course, it would be proper for the Secretary to consider that a judgment identifying illegality in a previous decision by the IAA about a person was relevant to the review in order to ensure that the IAA, in making the decision again, did not make the same error.
>
> 37. This does not mean that the provision of a judgment by the Secretary to the IAA for the purpose of a review can never give rise to a reasonable apprehension of bias where the judgment contains irrelevant and prejudicial material about the person the subject of the decision. Indeed, where a judgment concerns only the apprehension of bias by reason of the provision to the IAA of irrelevant prejudicial material and nothing else, the prudent administrative course would be for the Secretary not to provide that judgment to the IAA for the purpose of the new review. This is because it may be that the judgment identifies the irrelevant prejudicial material in such a way that the real possibility of a potential subconscious effect of the material in the

[12] *CNY17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1568.

> judgment on the decision-making of the IAA might not be able to [be] discounted. In such a case, provision of the judgment would negate the effect of an order such as the High Court made in the present case that the review be remitted to a differently constituted IAA.
>
> …
>
> 39 …while the hypothesised fair-minded lay observer "is a standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system" and thus is not posited to reason like a lawyer (*Charisteas v Charisteas* [2021] HCA 29; (2021) 393 ALR 389 at [21]), that hypothesised observer is to be attributed in the present case with knowledge of the key aspects of the statutory scheme (including, by operation of s 473DB(1), that the IAA must conduct its review "by considering the review material" provided under s 473CB) and the key aspects of the circumstances within which the second IAA decision was to be made. Those key aspects of the circumstances include that the IAA had to make the second IAA decision as a result of the High Court's decision in *CNY17 HCA*.
>
> 40. The fair-minded lay observer **would be attributed with knowledge of the fact that the effect of the orders of the High Court in *CNY17 HCA* was that the appellant's application had to be referred again by the Minister to the IAA for review under s 473CA of the Act**. Further, because s 473EA(4)(a) of the Act provides that after the IAA makes a written statement of its decision under s 473EA(1) of the Act, it must "return to the Secretary any document that the Secretary has provided in relation to the review", **it was also necessary that the Secretary exercise anew the duty under s 473CB(1) of the Act**.
>
> 41. As discussed, the fair-minded lay observer would be attributed with knowledge that while it was not necessary for the Secretary to give the IAA a copy of *CNY17 HCA*, the Secretary might do so on the basis that the IAA should be given a copy of any judgment potentially relevant to the IAA performing its functions. This is so even if, as in the present case, the judgment concerned what could not be done with respect to the appellant without vitiating any decision of the IAA on the ground of a reasonable apprehension of bias.
>
> (Emphasis added)

37 The applicant places some emphasis on the bolded passages above. He considers it dispositive. In oral submissions, the Minister submitted that:

(a) Her Honour's remarks at [41] are referring to matters of fact (i.e., what knowledge the hypothetical fair-minded lay observer would have), as opposed to propositions of law;

(b) The question in this matter was not in dispute in the matter before Jagot J, and therefore was not the subject of any submissions by the parties. Her Honour's statement could not therefore lay down a 'legal rule' of any precedential effect.[13] On this basis, it should not be considered the ratio of the case; and

[13] Citing *Coleman v Power* (2004) 220 CLR 1.

(c) Her Honour's summary of what the effect of the orders were, was not the effect of the orders. The High Court set aside the Authority's decision and remitted the matter to the Authority for reconsideration, it did not set aside the referral under s. 473CA.

38 It is relevant to note that in CNY17, the Secretary did, in fact, 're-exercise' s. 473CB(1)(c) and give documents which were considered relevant at the time of the 're-exercise', and which were not in the Secretary's possession or control at the time of the referral on 23 March 2017. Put another way, the Secretary acted entirely in accordance with how the applicant interprets s. 473CB(1)(c), and contrary to how the Minister interprets, and asks this Court to accept, s. 473CB(1)(c) should be interpreted.

39 The fact that it appears the Secretary has given documents pursuant to s. 473CB(1)(c) based upon a construction which is inconsistent with the Minister's submission is not a matter which ultimately determines the way the provision is to be construed. It has, however, created some difficulty for the Court as to how *CNY17-Fed Court* is to be applied.

Consideration

40 As I have stated above, the question before the Court is one of statutory construction, in particular of the phrase 'at the time the decision is referred to the Authority'. The question before the Court should be solved by reference to the text of the Act. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, the Court stated (at [47]):

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

What is the meaning of 'referred' in s. 473CB(1)(c)?

41 The text (of the provision and the statutory scheme) is clear in the Court's view.

42 Section 473CB(1)(c) of the Act contains an express temporal restriction that the Secretary must give to the Authority "any other material that is in the Secretary's possession or control and is considered by the Secretary **(at the time the decision is referred to the Authority)** to be relevant to the review". That is, s. 473CB(1)(c) of the Act is limited to relevant documents in the possession and control of the Department at the time of the 'referral' to the Authority. The

parties appear to accept, and agree, as much. The point of disagreement is what is meant by 'referral'.

43 The applicant contends that 'referral' also means 'remittal'. I acknowledge the applicant's submissions about the way in which 'remit' and 'refer' have been used interchangeably, and have been interpreted by the courts.[14] However, those cases are of little assistance. They refer to the use of the word in a judicial context, not in a statutory context.

44 The reference to 'referral' must, in my view, be read as the date of the s. 473CA referral. The word 'referral' cannot be substituted with 'remittal'. As the Minister submitted, 'referral' is a term that is utilised throughout Part 7AA and should only be understood as the referral under s. 473CA of the Act.

45 I also do not consider that the applicant's construction finds any additional support in the words of s. 473CB(2). If a matter is remitted, the Secretary 're-exercises' the duty in s. 473CB(1). It is not the case that the duty was never performed. The duty was performed, and (assumedly) performed as soon as reasonably practicable after the referral.

46 I also consider that construing the word 'referral' in s. 473CB(1)(c) as meaning the s. 473CA referral is consistent with the legislative regime and 'fair'. Construing the provision in the way contended does not mean that the Authority will not have or be able to obtain 'up-to-date country information'. New information can be considered by the Authority under s. 473DD, and the Authority can get this new information. In this regard, the Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth) provided that:

> 903. While section 473DB provides that the IAA is to conduct limited review by considering the review material provided to it by the Minister, there may be rare instances where on reviewing the review material, the IAA identifies the need to obtain new information that may be relevant to the fast track decision under review. For example, this could include a situation in which the IAA is alerted to a sudden and highly significant change of conditions in the referred applicant`s country of origin since the decision under section 65 was made. Accordingly, new subsection 473DC(1) would have the effect of providing the IAA with the discretionary ability to get that new information.
>
> …

[14] *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518; *Nguyen v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 206; *Othman v Minister for Immigration, Local Government and Ethnic Affairs* [1991] FCA 455; *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661; *Republic of Turkey v Mackie Pty Ltd (No 2)* [2021] VSCA 189.

> 907. New section 473DD provides that for the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless:
>
> the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and
>
> …
>
> 915. Examples of exceptional circumstances that may justify the consideration of new information may include, but are not limited to:
>
> a material change in the referred applicant`s circumstances which occurred after the Minister made the section 65 decision including a factual event, such as significant and rapidly deteriorating conditions emerging in the referred applicant`s country of claimed protection, for example, a change in the political or security landscape; or … [15]

47 In my view, Parliament expressly contemplated situations where there were changed circumstances and considered it was for the Authority, and not the Secretary, to seek out further information. Where there has been a change of circumstances (between the referral and a decision or following a remittal), it is a matter for the Authority to obtain the new information. As is well accepted, the Authority's discretion to obtain new information is subject to principles of reasonableness. Whilst reasonableness is fact dependent, it is hard to imagine a situation where there has been a change in circumstances/conditions of a country and the Authority would act reasonably in not obtaining new information. Where a considerable period of time has passed since the referral, the Authority ought to consider whether updated information is needed.

48 The applicant's submissions about the construction of the provision in this way (i.e., that 'referral' does not include remittal) leading to practical difficulties are also not persuasive:

(a) *First*, there is no evidence to suggest that the Secretary would not be able to identify what materials were in its possession and control at the time of the referral;

(b) *Second*, the applicant's reference to materials being 'lost' between the initial referral and the remittal overlooks that the material would have been transferred to and from the Department and Authority (different entities) following the referral, and on return

[15] See also, the 'Outline' which states '*… As a limited review body, other than in exceptional circumstances, the IAA is prohibited from considering any new information for the purposes of making a decision, irrespective of whether the IAA obtained it through its discretionary powers or an applicant provided it of their own volition. New information will only be considered if the IAA is satisfied that there are exceptional circumstances to justify the consideration of that new information. For example, exceptional circumstances may be found where there is evidence of a significant change of conditions in the applicant`s country of origin that means the applicant may now engage Australia`s protection obligations'.*

of the documents, and for the purposes of the Court proceedings (again, different entities). I consider it doubtful that a 'copy' could not be found. Further, if such was to occur, then the Authority is likely to be made aware of this and can consider how it would proceed;

(c) *Third*, the Secretary's state of mind is required to be formed at the time of the exercise (or re-exercise) of the duty in s. 473CA. It is not correct to say that the Secretary, on re-exercise, would need to 'recall' the state of mind from the date of the initial referral or decide what they thought they would have regarded as relevant at the time of the initial referral. I agree with the Minister that, upon ascertaining what material was in the possession and control of the Secretary at the particular period in time, it is but a short step for the Secretary to determine whether the material is relevant. As stated in *CNY17 – High Court* at [6] wherein Kiefel CJ and Gageler J explained:

> Compliance with the duty to provide such material to the Authority accordingly necessitates that the Secretary or delegate of the Secretary **turn his or her mind to the range of material that is in the Secretary's possession or control which pertains to the referred applicant** in order to determine whether or not to form that opinion in relation to the whole or some part of that material.
>
> (Emphasis added)

49 Finally, I do not consider that her Honour Jagot J's remarks in *CNY17-Fed Court* assist with the question I am asked here. I acknowledge her Honour states that the effect of the orders is for the matter to be 'referred again'. Accepting that to be correct, it does not change the answer to the question: s. 473CB is to be considered at the time of the referral. The referral is an executive act, not an act of the judiciary. Where her Honour's decision assists is with a different question than what I am asked: when the referral was made.

50 For these reasons, I consider that the phrase 'at the time the decision is referred to the Authority' is to be construed as at the time of the s. 473CA referral.

51 However, that is not the end of the matter here.

When was the matter referred?

52 The question arose as to whether, upon remittal, the matter is required to be 'referred' again under s. 473CA of the Act. The applicant submits, on the authority of *CNY17-Fed Court*, that it must, having particular regard to [40]-[41] of Justice Jagot's reasoning. It follows, in the applicant's submission, that the effect of the remittal was that another referral under s. 473CA

had to be made and therefore the 'time the decision is referred' means the time that the decision is referred again after the remittal.

53 I note that the question I am asked in this matter specifically states that the referral "under section 473CA of the *Migration Act 1958* (Cth)" was made "on 14 November 2017". The parties had an agreed fact that the referral under s. 473CA was on 14 November 2017. There was no suggestion that the matter was 're-referred', until the applicant's reply submissions where *CNY17-Fed Court* was raised.

54 Despite the parties not seeking to reframe the question (or taking objection to the argument which the applicant raised), in order to address the matter completely, I have considered this argument.

55 On the materials that are before me in the Court Book, the referral date was 14 November 2017.[16] This 'referral date' remained the same, even after the matter was remitted by the Court, as demonstrated in the evidence before the Court. The Acknowledgment Letter sent to the applicant on 22 September 2020 stated:[17]

> …
>
> This case was referred to the IAA on 14 November 2017.
>
> On 18 August 2020 a court remitted your case back to us for reconsideration.
>
> …

56 There is nothing to indicate that the matter was 'referred again' under s. 473CA, and the order of the Court itself could not be considered to have been the referral,[18] because, as I noted above, the referral is an act of the executive and not the judiciary.

57 Further, I also consider the order of his Honour Judge Driver different to those of the High Court, and which were the subject of her Honour's comments at [41] in *CNY17-Fed Court.* His Honour Judge Driver in this matter, ordered that:[19]

> 1. A writ of certiorari shall issue, removing the record of the Immigration Assessment Authority made on 22 June 2018 into this Court for the purpose of quashing it.
>
> 2. A writ of mandamus shall issue, requiring the Immigration Assessment

[16] Court Book pages 111 and 151.
[17] Court Book page 151.
[18] Section 473CA of the Act requires the 'Minister' to refer the matter.
[19] *DST18 v Minister for Immigration & Anor* [2020] FCCA 1813.

Authority to redetermine according to law the review referred to it.

58 Order 2 issued mandamus requiring the Authority to redetermine the "review referred to it". The "review referred to it" was the referral dated 14 November 2017, and the Authority was required to redetermine *that* referral. Nothing in his Honour's orders suggested that a new referral was required to be made.

59 Further, if there was a 'new referral' to be made, his Honour's orders had the effect of setting aside the Authority's decision made under s. 473CC. The Authority is required to conduct a review of that referral: s. 473CC(1). A 'new referral' would not exempt the Authority from having to conduct the review of the referral made on 14 November 2017.

60 For the above reasons, and in the absence of any evidence that the Minister re-referred the matter, the 'referral' for the purposes of s. 473CB(1)(c) was the referral dated 14 November 2017.

Conclusion

61 The separate question in the application in a proceeding filed by the first respondent on 17 June 2022 be answered 'no'.

62 The Court will hear the parties as to progression of the matter towards final hearing.

I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment of Chief Judge Alstergren.

Associate: JL

Dated: 14 December 2023