Federal Court of Australia

SZQKE v Minister for Immigration and Border Protection [2021] FCA 833

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| Appeal from: |  |
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| File number(s): |  |
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| Judgment of: | **DAVIES J** |
|  |  |
| Date of judgment: | 26 July 2021 |
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| Catchwords: | **MIGRATION** – Independent Treaties Obligations Assessment (**ITOA**) – duty to put appellant on notice of information and sources of information – whether there was a denial of procedural fairness in failing to put country information to the appellant for comment during an ITOA interview – appeal dismissed**PRACTICE AND PROCEDURE** – application for leave to adduce fresh evidence on appeal – new evidence that constitutes a departure from the case below where appellant was represented – new arguments not raised below – change of position left unexplained – consideration of the question of materiality in an application for judicial review – appellant failed to show how fresh evidence would have produced a different result at first instance – application refused  |
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| Legislation: |  *Federal Court of Australia Act 1976* (Cth) s 27*Migration Act 1958* (Cth) s 476A*Federal Court Rules 2011* (Cth) r 36.57  |
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| Cases cited: |  *AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804;(2015) 231 FCR 452*CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; (2019) 375 ALR 47*Coulton v Holcombe* [1986] HCA 33;(1986) 162 CLR 1*Han v Minister for Home Affairs* [2019] FCA 331*Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) CLR 123*Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 *Minister for Immigration v SZQRB* [2013] FCAFC 33*Moore v Minister for Immigration and Citizenship* [2007] FCAFC 134; (2007) 161 FCR 236 *MZAPC v Minister for Immigration and Border Protection*[2021] HCA 17*Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128; (2013) 139 ALD 1*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588  |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 35 |
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| Date of hearing: | 30 June 2021  |
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| Counsel for the Appellant: | Mr S Prince SC and Ms S Brenker |
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| Solicitor for the Appellant: | Michaela Byers |
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| Counsel for the First Respondent: | Mr B Kaplan |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The Second Respondent filed a Submitting Notice |

ORDERS

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|  | NSD 265 of 2020 |
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| BETWEEN: | SZQKEAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentSECRETARY OF THE DEPARTMENT OF IMMIGRATION AND BORDER PROTECTIONSecond Respondent |

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| order made by: | DAVIES J |
| DATE OF ORDER: | 26 july 2021 |

THE COURT ORDERS THAT:

1. The interlocutory application to adduce further evidence on appeal be dismissed.
2. The appeal be dismissed.
3. The appellant is to pay the costs of the first respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DAVIES J:

# Introduction

1. The appellant has appealed a decision of the Federal Circuit Court of Australia (**FCC**) dismissing his application for judicial review of an adverse Independent Treaties Obligations Assessment (**ITOA**) conducted by an officer (**assessor**) in the department of the first respondent (**the Minister**).
2. The appellant is a citizen of Afghanistan who arrived at Christmas Island as an irregular maritime arrival on 11 January 2010. The procedural history of the appellant’s protection visa application following his arrival in Australia is lengthy, but need not be traversed. It is sufficient to record that the assessor who conducted the ITOA was not satisfied that the appellant has a well-founded fear that he would be persecuted for reasons of his Shia religion, Hazara ethnicity or imputed political opinion or that there is a real risk he will suffer significant harm in Afghanistan, if he returned to Afghanistan and, thus, was not a person to whom Australia has non‑refoulement obligations. The assessor’s lack of satisfaction was based in part on country information taken from the sources referenced at footnotes (**fn**) 80 to 89 and 97 of the ITOA report.

# the assessor’s report

1. The appellant’s home province was Bamiyan and amongst other things, the assessor considered whether there is a real chance that the appellant would face persecution throughout Afghanistan because he is a Shia Hazara. The assessor concluded that an objective consideration of the country information did not support a finding that “simply being a Shia Hazara” would create a real chance that he would face persecution throughout Afghanistan. In forming that view, the assessor took into account that the appellant may need to travel on the roads in and out of Bamiyan if he were to return to Afghanistan and “in that context … considered the issue of road security in Afghanistan, in particular for Shias and Hazaras”. The country information considered by the assessor included reports of Hazaras being killed in Afghanistan by the Taliban. That country information was taken from the sources cited at footnotes 80–89 to the following passages:

I have considered a number of reports of Hazaras being killed in Afghanistan in recent years by the Taliban. For example in August 2012 there were reports of eleven Hazaras being killed in two incidents a week apart in Jalrez district of Maidan Wardak province and of five Hazaras being taken off a bus and shot in Andar district of Ghazni province in October 2012. It has also been reported that the roads to Bamiyan through Maidan Wardak and Parwan have become more dangerous with a [sic] ‘tens’ of Hazaras being killed in Ghorband district in Parwan as well as in Jalrez.80

Regarding the reports of the killings in Jalrez, The Kabul Press reported on the first killings that the district administrator had claimed the five men had worked at a foreign forces base, although the dead men's families denied this.81 No information about the backgrounds of the victims of the second reported incident in Jalrez in August 2012 or the reasons for the killings could be located. An investigation on the killings in Andar found that contrary to the first reports that all five were Hazaras, the deceased were three Hazaras and two Tajiks and that they had been employed building a new police station in Waghaz district.82

This is consistent with other reports of attacks on Hazaras in the past. For example, in the case of the nine or eleven (depending on the source) Hazaras killed in Uruzgan province in June 2010, whi1e an initial report on the killings initially stated the men were killed because they were Hazara and Shi'as a Taliban spokesman later stated they were killed after meeting with foreign forces in Tarin Kowt to discuss setting up a local militia against the express instructions of the Taliban not to do so.83

More recently, an analysis of recent claims of killings and/or abductions of Hazaras in various parts of Afghanistan done by the Afghanistan Analysts Network (AAN) also showed in most cases the reasons people were killed or kidnapped were for reasons other than simply being Hazara or Shias (such asassociations with government or foreign forces), that the reports had been exaggerated or misrepresented or in some cases that the persons affected were actually not Hazaras.84

This is not to say that Hazaras face no risk of harm on account of their religion or race while travelling through insurgent or insecure areas. I note that the killings of a Hazara wedding party of 16 while travelling through Ghor province from Kabul to Mazar‑e‑Sharif in July 2014 appears to be because of their race/religion.85 I note however that the commander responsible was reportedly captured by Afghan security forces in October 2014 and was described by Tolo Press as 'notorious'.86 I also accept that the 30 people who were kidnapped in February 2015 in Zabul province by reportedly foreign fighters from Uzbekistan,87 may have been taken on account of being Shias *although* the AAN report indicated there was no evidence that race or religion was the reason for the kidnapping.88 On this point however I also note that the majority of those kidnapped were subsequently released after negotiations for the release of prisoners held by the Afghan government.89

80 CX298002, “'Taliban attack kills five Afghan civilians”, Press TV, 27 October 2012; CX300421, “Road dangers and the rising threat of renewed ethnic violence”, EurasiaNet, 6 November 2012; CX275944, ''Kabul-Bamyan highway insecurity impedes Eid travel, residents say”, Pajbwok Afghan News - Afghanistan, 7 November 2011

81 CX305045, “The Taliban terrorists killed five Hazaras in Maidan Province”, Kabul Press, 27 July 2012

82 CX299253, “The Nightmare Scenarios”, *International Herald Tribune,* 1 November 2012

83 CX245508, “Police find 11 beheaded bodies in Afghan south”, Reuters, 25 June 2010; CX245566, “Taliban Kill 9 Members of Minority in Ambush”, *New York* *Times,* 25 June, 2010

84 CXBD6A0DE5323: “Hazaras in the Crosshairs? A scrutiny of recent incidents”, Afghanistan Analysts Network, 24 April 2015

85 CXIB9ECAB8314: “Families of Taliban's Victims in Ghor Search for Answers”, Tolo News, 27 July 2014

86 CXIB9ECAB8310: “Taliban leader held in murder of German tourist, 14 civilians in Ghor”, Khaama Press, 22 October 2014

87 CXBD6A0DE6745: “19 kidnapped passengers freed”, Pajhwok Afghan News – Afghanistan, 11 May 2015

88 CXBD6A0DE5323: “Hazaras in the Crosshairs? A scrutiny of recent incidents”, Afghanistan Analysts Network, 24 April 2015

89 CXBD6A0DE6745: “l9 kidnapped passengers freed”, Pajhwok Afghan News – Afghanistan, 11 May 2015

1. The assessor accepted that some roads in and out of Bamiyan can at times be dangerous, however noted that country information in a Department of Foreign Affairs and Trade (**DFAT**) report of March 2014 indicated that locals with knowledge of the area were generally able to travel without serious incident.The assessor also noted that DFAT report stated that the main targets on the roads were ‘those employed by or with direct links to the Afghan Government or international community – regardless of ethnicity’.
2. Under the heading “Assessment of claims”, the assessor accepted that there is insecurity on the roads in and out of Bamiyan at times and that travellers need to take precautions when travelling but, considering the country information, found that the risk to Hazaras being seriously harmed or killed while travelling on the roadsin and out of Bamiyam on account of their race or religion, or because they are imputed as being pro-government or pro-foreign forces because they are Hazaras, was remote rather than real and the risk to travellers, including Hazaras, being seriously harmed due to general insecurity on the roads was remote rather than real.
3. The assessor also considered the issues that the appellant may face returning as a failed asylum seeker. In that context, the assessor had regard, amongst other things, to an October 2014 UK Home Office Country of Origin Report on Afghanistan (**UK Home Office Report**), footnoted at fn 97. The assessor stated that:

The October 2014 UK Home Office Country of Origin Report on Afghanistan talked of the economic challenges facing some returnees, as well as issues for returnees who had left Afghanistan at a very young age or had been born outside of Afghanistan. It makes no mention of adult returnees who departed Afghanistan as adults facing harm because they are imputed with certain religious or political opinions due to their residenceabroad.

**FCC DECISION**

1. The appellant’s application for review by the FCC alleged that the assessor fell into jurisdictional error in failing to put country information to the appellant for comment and denied the appellant procedural fairness “in accordance with the Full Federal Court judgment in *Minister for Immigration v SZQRB* [2013] FCAFC 33”. The ground was particularised as follows:

a. The [appellant] was interviewed on 15 June 2015 and a transcript of the interview has been filed;

b. In the findings section of the ITOA assessment the assessor relied on country information that was not put to the [appellant] for comment at the interview. The assessor considered;

i. A number of reports of Hazaras being killed in Afghanistan in recent years by the Taliban at footnotes 80-89;

ii. [not pressed]

iii. Economic challenges facing returnees at footnote 97.

1. In written submissions in support of the ground, the appellant argued that he was denied procedural fairness because the assessor did not put to him:
	1. the source of the items of country information referenced at footnotes 80 to 89. It was submitted this was a denial of procedural fairness because the information in these “unquestioned media sources” formed the majority of information relied on by the assessor in his decision and he was not given an opportunity to address and make meaningful submissions as to the credibility or reliability of the sources; or
	2. the substance of the contents of the UK Home Office Report footnoted at fn 97, which the assessor relied on as part of his process of reasoning to find, adverse to the applicant's interests, that while there may be economic challenges facing some returnees, there were no challenges based on religious or political opinion. It was submitted this was a denial of procedural fairness the assessor used that report to refute the appellant’s claim that as a person who had lived abroad and had sought asylum abroad he would face risk of harm if he returned to Afghanistan.
2. After the hearing, the parties, as directed by the Court, filed a “Scott Schedule-like” table setting out the appellant’s contentions and the Minister’s response with respect of each of the subject footnote references. This table formed the basis for the FCC’s consideration of the appellant’s claim of denial of procedural fairness. By way of summary, the appellant’s case was that:
	1. the country information taken from the documents cited at footnotes 80 and 97 was not put to the appellant;
	2. the country information taken from the documents cited at footnotes 81, 82, 83, 85 and 86 was adverse to the appellant’s interests and should have been put to the appellant but was not put to him;
	3. the sources footnoted at 81, 85 and 86 were not disclosed to the appellant but should have been disclosed to him to enable him to comment on the reliability of those sources; and
	4. the country information supported by the document at footnote 89 was put to the appellant but the source was not and the appellant should have been given an opportunity to comment on its reliability.
3. No contention was advanced by the appellant concerning the passages supported by footnotes 84, 87 and 88. The table set out that this country information was put “in a general sense”.

## Footnote 80

1. The primary judge held that the failure to put the country information to the appellant that was taken from the document cited at fn 80 did not constitute a denial of procedural fairness because the information was not shown, and did not appear to be, adverse to the appellant’s interests; the FCC stated “if anything” the information was supportive of his claims to fear persecution because of his ethnicity.

## Footnote 81

1. The primary judge held that procedural fairness did not require the assessor to disclose the country information taken from the document cited at fn 81 to the appellant. The primary judge reasoned that the issue there under consideration was whether Hazara ethnicity was sufficient on its own to attract a risk of harm that would engage Australia’s non-refoulement obligations and that “the passage supported by footnote 81 served only to identify the issue relevantly under consideration, and was not relied on by the Assessor in reaching his conclusion on that issue” ( (**FCC Decision**), [23]).
2. The primary judge also held that, as the information supported by fn 81 formed no part of the assessor’s reasoning, “no practical unfairness was suffered by the [appellant] because its details were not supplied to him” (FCC Decision, [27]) and the non-disclosure of the source of the document referred to in fn 81, therefore, did not amount to a denial of procedural fairness.

## Footnotes 82 to 89

1. The primary judge applied the same reasoning in respect of fn 81 to those items of country information footnoted at 82 to 89 and concluded for the same reasons that no denial of procedural fairness attached to the fact that “the Assessor did not put to the [appellant] the details of the documents cited in footnotes 82 to 89 or so much of the information they contained as was referred to in the Scott Schedule” (FCC Decision, [30]).

## Footnote 97

1. In respect of the passage supported by fn 97, the appellant had submitted (FCC Decision, [32]) that:

The Assessor referred to this report …stating that the report talked about some economic challenges facing some returnees, as well as issues for returnees who had left Afghanistan at a very young age or had been born outside of Afghanistan. The Assessor stated that the report made no mention of adult returnees who departed Afghanistan as adults facing harm. The Assessor concluded that since such a person was not mentioned in the report meant that there was no harm to such a person. This country information was not put to the applicant for comment.

1. The primary judge held that “procedural fairness did not require the Assessor to give to the [appellant] notice of any conclusion he might draw from the absence from the [UK Home Office Report] of evidence concerning persons such as him” (FCC Decision, [35]). His Honour stated at [36] that the assessor’s comment “was no more than an observation on the absence of evidence of a sort, which, if presented, would clearly have been relevant to the [ITOA]” and it was not the task of the ITOA assessor “to prompt or elicit from the [appellant] an elaboration of his claim which he chose not to make himself” (FCC Decision, [36]). Finally, the primary judge found at [37] that this report played no part in the assessor’s conclusion that the appellant’s ability to subsist would not be threatened on return “[c]onsidering [the appellant’s] skills, assets and community ties to Bamiyan”.

# the appeal

1. The Notice of Appeal raised one ground of appeal as follows:

The Federal Circuit Court of Australia erred in finding there was no denial of procedural fairness in failing to put country information to the appellant for comment during an ITOA interview under the non-statutory processing regime.

**Particulars**

a. The Federal Circuit Court of Australia applied the wrong test in [16] requiring the undisclosed information in the ITOA process to be adverse to the appellant's interests; and

b. The Federal Circuit Court of Australia erred in finding there was no practical unfairness in not disclosing country information referred to in ITOA decision record:

i. The country information was material to the decision as it was cited and referred to in the decision record;

ii. The country information was not disclosed to the appellant and kept in isolation from the evidence discussed at the ITOA interview;

iii. In failing to put the country information to comment, the departmental officer has failed to ask the questions necessary to gather the evidence required to perform the task of assessing Australia's non-*refoulement* obligations with respect to the appellant.

1. The appellant also sought leave to adduce fresh evidence pursuant to s 27 of the *Federal Court of Australia Act 1976* (Cth) (***Federal Court Act***) and r 36.57 of the *Federal Court Rules 2011* (Cth). The fresh evidence comprises the documents referred to in footnotes 80–89 and 97 of the ITOA report and an email exchange between Professor William Maley and the appellant’s solicitor on 24–25 September 2020, forwarding an email from Qayoom Suroush to Timor Sharan dated 5 May 2015 (**Suroush email chain**). The appellant’s solicitor, Michaela Byers, explained in an affidavit in support of the application that the FCC hearing had preceded the High Court’s decision in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 (***SZMTA***), and the documents were not put into evidence because the view had been taken at the time that “it was not appropriate to explore the merits of the case”. *SZMTA* has since established that where materiality is in issue in an application for judicial review, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof and in order to inform curial determination both of how the decision maker “in fact acted” and as to whether a breach is material (in the sense that compliance could realistically have resulted in a different decision), evidence of the content of the document or information is relevant and admissible. It was argued that the evidence now sought to be adduced is relevant and admissible and had those documents been before the primary judge, the outcome would likely have produced a different result.
2. The Minister opposed the application to adduce fresh evidence and contended that the appellant’s case on appeal was broader than the case advanced below as the appellant now seeks to argue:
	1. that procedural fairness required the assessor to disclose the identity of each of the sources of the country information cited at fn 80-89, whereas in the Court below that claim was not pressed in relation to the reports listed at fn 80, 83, 84, 87 and 88;
	2. that the substance of the country information referred to in the documents cited at fn 84, 87 and 88 was not put to the appellant, whereas in the Court below the appellant conceded that the country information was put in a general sense; and
	3. that the assessor presented a one-sided view of the article referred to in fn 84 and 88 entitled “Hazaras in the Crosshairs? A scrutiny of recent incidents” published by the Afghanistan Analysts Network dated 24 April 2015 (**AAN Article**) and did not fairly present the information, whereas in the Court below the appellant conceded that the substance of that article had been put and no argument was advanced that it was not put fairly.
3. Section 27 of the *Federal Court Act* confers a discretion to receivefresh evidence on appeal. There are no fixed rules governing the exercise of such discretion, however it will generally be exercised favourably to the party seeking to adduce it if, first, it could not have been adduced below by the exercise of reasonable diligence and, secondly, had it been adduced, the evidence would be likely to have produced a different result: *Moore v Minister for Immigration and Citizenship* [2007] FCAFC 134; (2007) 161 FCR 236, 238–240 [4]–[7] (Gyles, Graham and Tracey JJ); *Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128; (2013) 139 ALD 1, 3 [7] (Jagot, Barker and Perry JJ).
4. The evidence now sought to be relied on could have been adduced below, however in view of the developing authority subsequent to the FCC Decision in this matter, I am prepared to accept that Ms Byers gave a satisfactory explanation as to why the footnoted documents were not put into evidence by the appellant in the FCC proceeding. Whilst it is now well established that non-compliance with the requirement for procedural fairness does not constitute jurisdictional error unless the breach is material to the decision, the jurisprudence on the content of materiality and the onus of proof had not developed at the time of the FCC hearing. *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) CLR 123 (***Hossain***) was handed down 6 days after the FCC hearing, but neither party sought to bring *Hossain* to the attention of the FCC. In any event, as the High Court stated in *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 (***MZAPC***) at [34]–[35], *Hossain* did not examine the onus of proof of materiality in an application for judicial review of an administrative decision. Occasion both to examine the content of materiality and to consider the onus of proof first arose for consideration by the High Court in *SZMTA*, which was not handed down until after the FCC decision. Since *SZMTA*, there have been two more High Court cases that have considered that issue: *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; (2019) 375 ALR 47 (***CNY17***) and *MZAPC.*
5. In *SZMTA*,the majority held that a breach is material to a decision only if compliance could realistically resulted in a different decision and that the question of materiality of the breach is an ordinary question of fact, in respect of which the applicant for judicial review bears the onus of proof. Subsequently in *CNY17* (59, [47]), Kiefel CJ and Gageler J referred to the determination and materiality by a Court as involving “a question of counter‑factual analysis to be determined by the court as a matter of objective possibility as an aspect of determining whether an identified failure to comply with a statutory condition has resulted in a decision that has in fact been made being a decision that is wanting in statutory authorisation”. In *MZAPC*, the High Court stated that “the counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was in fact breached cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made” ([38]). Their Honours continued that like other counterfactual questions in civil proceedings as to what could have occurred – as distinct from what would have occurred – had there been compliance with a legal obligation that was in fact breached, whether the decision that was in fact made could have been different had the condition been complied with falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities. That onus requires the plaintiff in an application for judicial review to prove on the balance of probabilities all of the historical facts necessary to enable the Court to be satisfied of the realistic possibility that a different decision could have been made had there been compliance with that condition.
6. Having regard to the law as it now stands, the documents which the appellant now seeks to put into evidence would be admissible. Moreover, the development of the law subsequent to the FCC decision is a point in favour of the reception of the fresh evidence. However there are three reasons why the application to adduce the fresh evidence should be refused.
7. The first reason concerns the documents other than the AAN Article (footnoted at fn 84 and 88) and the UK Home Office Report (footnoted at fn 97). Aside from those two documents, the Court was not taken to any of the other documents to show how those documents, if they had been before the FCC, were likely to have led to a different decision by the FCC and such a conclusion is not evident just on the face of the documents themselves. Absent being taken to any part of those documents to demonstrate why it may be so, the appellant has failed to satisfy me that those documents, had they been adduced, would be likely to have produced a different result.
8. The second reason concerns the AAN Article. The Court was taken to that article in detail and the submission was made that the country information used by the assessor from that article was taken out of context and the information was not fairly presented. It was submitted that had the information been fairly presented with an opportunity to know what information was to be relied on at the hearing, the appellant could have undertaken enquiries including getting information from the author himself about the way in which his research had been misunderstood by the decision-maker. It is in this context that the Suroush email chain is sought to be received into evidence, as the Suroush email chain includes an email from the author explaining his article to an Afghan academic. However, not only was it not argued below that the assessor did not fairly present the information from that report, the appellant accepted that the information contained in that report was put to the appellant “in a general sense”. The argument sought to be advanced requires the leave of the Court to advance because it is a new argument, but to grant leave to the appellant to run this new point on appeal would be to permit him to depart from his case below that the substance of the AAN Article was put to him. The change of position was left unexplained, though it may be inferred it was because of a change of counsel. However that is not cogent reason in itself to warrant the admission of the document into evidence now to enable the appellant to put an argument that flies in the face of the submissions made below concerning that document. Also, to permit the point to be agitated for the first time on appeal would subvert the evident purpose of s 476A of the *Migration Act 1958* (Cth) (***Migration Act***), which circumscribes this Court’s original jurisdiction to review migration decisions: *AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804;(2015) 231 FCR 452, [14]; *Han v Minister for Home Affairs* [2019] FCA 331 at [20(4)]. I do not think it is in the interests of justice to permit the new argument to be advanced in the circumstance where the appellant was represented below and the point now sought to be raised is contrary to the case put below: *Coulton v Holcombe* [1986] HCA 33;(1986) 162 CLR 1; *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588, 598 [46] (Kiefel, Weinberg and Stone JJ). The new argument, in any event, is of doubtful merit.
9. The new argument fixes upon the section of the article headed “Yet the fear is real”. That section follows the author’s summation that:

Scrutinising the individual incidents which activists and media are citing, there seems to be, for now, no evidence that Hazara are being systematically targeted …

The author continues that:

However, the reaction to the reporting – and sometimes the reporting itself – clearly shows that Hazaras feel very vulnerable …

The balance of the article considers why, in the author’s view, Hazaras feel vulnerable about their safety.

1. It was submitted that the credence which the author gave to the genuineness of the fear that Hazaras feel as to what will happen in the future was a serious caveat to the author’s observations and if the article had been put fairly to the appellant, with an opportunity to know what information was to be relied on at the hearing, the appellant could have undertaken inquiries, including getting information from the author which, it was submitted, as the Suroush email chain evidenced, would be in support of the appellant’s application. There are two responses. First, it does not appear that the assessor mischaracterised or misunderstood the article. The article expressly stated that the author had examined the incidents in detail to see if there was a new trend of targeting Hazaras and found “little to back up a notion of a new trend of ethnic targeting” but did say “the reporting points to how vulnerable many Hazaras feel”. In the ITOA, the assessor stated that the AAN Article contained an analysis of “recent claims of killings and/or abductions of Hazaras … showed in most cases the reasons people were killed or kidnapped were for reasons other than simply being Hazara …” but, consistently with the substance of the AAN Article, went on to say that “this is not to say that Hazaras face no risk of harm on account of their religion or race while travelling through insurgent or insecure areas”. Secondly, the transcript of the assessor’s interview with the appellant recorded that the assessor put to the appellant, for his consideration and comment, that an AAN analysis of the reported claims of Hazaras being targeted and killed or kidnapped on the roads in Afghanistan showed that in nearly all cases, people were killed or kidnapped for reasons other than because they were Hazaras or Shia. That summary accorded with, and did not take out of context, what the article said. Accordingly, I do not think the claim that the assessor did not fairly present the information from that report has substance. It follows that the application to adduce the AAN Article and the Suroush email chain as evidence supporting that argument is also refused.
2. The third reason concerns the UK Home Office Report. The document that the appellant seeks to put into evidence is not the document footnoted at fn 97 – referred to as a United Kingdom Home Office report dated 21 October 2014. It is common ground that such a document does not exist. There is however a UK Home Office 2013 report (**2013 Report**), which the appellant seeks to adduce in evidence to support the submission that the report contained material that was highly probative for the complementary portion of the appellant’s claim and a misleading and selective representation of the true nature of the report was relied on by the assessor. There are four responses to this argument.
3. First, it does not appear that the appellant raised in the Court below that the document footnoted at fn 97 does not exist. The appellant now seeks to argue that given that reference is wrong, there is no way of knowing what document or report was ultimately relied on by the assessor and “such a state of affairs is clearly unsafe”. That argument is new and requires leave.
4. Secondly, the argument now sought to be advanced that a misleading and selective representation of the true nature of the report was relied on by the assessor is also a completely new argument, which requires the leave of the Court to advance. The contention which was put by the appellant below (FCC Decision, [32]) was that:

The Assessor stated that the report made no mention of adult returnees who departed Afghanistan as adults facing harm. The Assessor concluded that since such a person was not mentioned in the report meant that there was no harm to such a person. This country information was not put to the applicant for comment.

No explanation was given as to why the argument now sought to be raised was not below, though again it may reasonably be inferred that new counsel has thought up a new point.

1. Thirdly, the proposed new argument fails to engage with what in fact the assessor said which was that the ITOA report “[made] no mention of adult returnees who departed Afghanistan as adults facing harm *because they are imputed with certain religious or political opinions due to their residence aboard”* (emphasis added) (ITOA report, p 32). The assertion of misleading and selective representation does not, however, relate to anything contained in the report related to returnees who departed Afghanistan as adults facing harm “because they are imputed with certain religious or political opinions due to their residence aboard”. Senior counsel sought to address this by arguing that a fair reading of the material in the 2013 Report “paints a different picture to the picture that has been taken from it”. However, it is difficult to see how a claim of denial of procedural fairness can be made out without first establishing that the 2013 Report was in fact the source relied on by the assessor, which was not done.
2. Fourthly, it was not put that the 2013 Report did actually mention anything about returnees who departed Afghanistan as adults facing harm “because they are imputed with certain religious or political opinions” and accordingly, the 2013 Report does not need to be in evidence in order to support the argument that was put below.
3. That leaves the appeal itself for consideration. It was contended by the appellant that the FCC erred by finding that the country information that was not provided to the appellant for comment did not involve a breach of the duty to accord procedural fairness because, as the FCC reasoned, the relevant information “served only to identify the issue relevantly under consideration, and was not relied on by the Assessor in reaching his conclusion on that issue…” (FCC Decision, [24]). It was submitted that the same error continued to his Honour’s conclusion that “because the information … played no part in the Assessor’s reasoning, no practical unfairness was suffered … because its details were not supplied to him” (FCC Decision, [27]). There is substance in the submission as put because, contrary to what the FCC held, it was in fact expressly stated by the assessor in his report that he based his adverse assessment having considered “the country information discussed above” which included the passages supported by the documents footnoted at fn 80–89. However, that is not the appeal ground. Rather the appeal ground is that the FCC applied the wrong test in requiring the undisclosed information in the ITOA process to be adverse to the appellant’s interests and erred in finding that there was “no practical unfairness” in not disclosing that country information. In written submissions, it was contended that the items of country information that were not put to the appellant was set out in fn 80–89 and 97 – that is, the identity of the sources of the country information, not the country information itself. The appellant did not elaborate as to why procedural fairness required the assessor to identify the source of the country information, not just the country information itself, other than to argue that the sources of the information were principally from news sources and, as such, the appellant should have been provided with the opportunity to make submissions on the reliability of those sources. I reject that submission. No submission was put below that any of the sources of country information referred to in fn 80–89 and 97 was unreliable nor has the appellant identified anything about the credibility or the reliability of the information taken from those sources, such that procedural fairness required the assessor to have identified where the information came from.
4. There is also no substance to the ground that the FCC was in error in finding “no practical injustice” from the non‑disclosure of information. True it is that the FCC so held on the basis that the passages to which the appellant referred in connection with the subject footnotes “did not form part of the Assessor’s reasoning on that question”, which, with respect, was in error. However, in support of the ground the appellant only made submissions in relation to the non-disclosure of two items of country information, both of which are dealt with above, namely the author’s caveat in the AAN Article and extracts from the 2013 Report. It does appear that the author’s caveat in the AAN Article was not disclosed to the appellant as such. However, the non‑disclosure of the author’s caveat would amount to jurisdictional error only if the information had the potential to have borne on the decision in a manner helpful to the applicant: *MZACP*, [64]. It has not been demonstrated how that might be so. Critically, there was nothing in the author’s caveat that would indicate that the appellant faces a real risk or real chance of harm as a result of his Hazara ethnicity. As to the information referred to in the 2013 Report upon which the appellant now relies, the difficulty facing the appellant is that it has not been established that this report was, in fact, relied on by the assessor. Unless it was relied on by the assessor, a breach of procedural fairness cannot arise for not putting information to the appellant that was not information before the assessor.
5. There will be an order that the application to adduce fresh evidence be refused and an order that the appeal be dismissed.

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| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Davies. |

Associate:

Dated: 26 July 2021