FEDERAL COURT OF AUSTRALIA

DEC17 v Minister for Immigration and Border Protection [2018] FCA 1679

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| Appeal from: | *DEC17 v Minister for Immigration and Anor*  [2018] FCCA 528 |
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| File number: | NSD 335 of 2018 |
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| Judge: | **STEWARD J** |
|  |  |
| Date of judgment: | 8 November 2018 |
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| Catchwords: | **MIGRATION –** appeal from a judgment of the Federal Circuit Court of Australia– whether primary judge erred in dismissing an application for judicial review – whether Immigration Assessment Authority made findings that were unreasonable or without logical or probative basis – whether Authority misconstrued its statutory duty by adopting an unduly narrow construction of s 473DD of the *Migration Act* *1958* (Cth) |
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| Legislation: | *Acts Interpretation Act 1901* (Cth)s 25D  *Migration Act 1958* (Cth) ss 36, 473DC, 473DD, 473DE, 473EA |
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| Cases cited: | *ADE17 v Minister for Immigration and Border Protection* [2018] FCA 282  *AQU17 v Minister for Immigration and Border Protection* [2018] FCAFC 111  *BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221  *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2  *DYS16 v Minister for Immigration and Border Protection* [2018] FCAFC 33  *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 92 ALJR 780  *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111  *Minister for Immigration and Border Protection v CQW17* [2018] FCAFC |
|  |  |
| Date of hearing: | 28 August 2018 |
|  |  |
| Date of last submissions: | 11 September 2018 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
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| Counsel for the Appellant: | Mr G Foster |
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| Solicitor for the Appellant: | Sentil Solicitor & Barrister |
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| Counsel for the First Respondent: | Mr J McGovern |
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| Solicitor for the First Respondent: | Clayton Utz |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | NSD 335 of 2018 |
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| BETWEEN: | DEC17  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | STEWARD J |
| DATE OF ORDER: | 8 NOVEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs, as agreed or assessed.

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

REASONS FOR JUDGMENT

STEWARD J:

## Introduction

1. The appellant is a Hindu Tamil man from Sri Lanka, who arrived in Australia on 13 October 2012. On 29 February 2016, he lodged an application for a Safe Haven Enterprise (subclass 790) visa. A delegate of the first respondent (the “Minister”) refused to grant that visa on 11 November 2016 and the matter was subsequently referred to the second respondent (the “Authority”) for review. On 19 June 2017, the Authority affirmed the decision under review. The appellant sought judicial review of the Authority’s decision in the Federal Circuit Court of Australia and on 27 February 2018, that application was dismissed. From the decision of the Federal Circuit Court of Australia, the appellant now appeals to this Court.

## Background

1. The appellant claims that if returned to Sri Lanka, he will be at risk of being harmed by the Sri Lankan authorities, including paramilitary groups such as the Karuna and Pillaiyan Groups, due to an imputed political opinion of support for the Liberation Tigers of Tamil Eelam (the “LTTE”) on the basis of his ethnicity, his area of origin, and because of a certain event which took place in 2003. In amplification, the appellant claimed (as summarised in the Authority’s reasons at [7]):

* He is a young, male, Hindu Tamil from Batticaloa District in the Eastern Province of Sri Lanka.
* He attended school in Batticaloa from 1991 until 2003. In 2003 on one occasion when he was by the roadside, he was stopped by the Sri Lankan army and taken to their camp nearby. At the camp he was interrogated by the army and some people speaking in Tamil whom he believed to be members of the People’s Liberation Organisation of Tamil Eelam (PLOTE). He was detained for two to three hours, accused of supporting the LTTE, kicked and beaten.
* He was released from the camp when his teachers, his mother and sister and some elders from the community came and sought his release. That same day he attended hospital to receive medical attention for bruising and swelling and spent the night with his father’s cousin who lived near the hospital. His father advised that the army and the PLOTE had come to his house looking for the applicant and demanding he hand him into the camp. The men said they would shoot the applicant if they saw him.
* About two weeks later, the applicant went to Colombo and stayed with a relative for a short time. He then lived and worked at a jewellery shop in Colombo as a goldsmith apprentice for approximately four years.
* The applicant experienced no encounters with the authorities while he was in Colombo but was told his father had been visited again by the army and PLOTE who were looking for him. His father had also received phone calls from people speaking in Tamil asking about the applicant’s location.
* In 2007, people from the Northern and Eastern Provinces were required to register with the police and were ordered to return to their home provinces. On 25 December 2007, the applicant left Colombo and returned to Batticaloa and stayed at his sister’s place which was next door to his parents.
* On 28 December 2007, his father received a phone call from some people threatening to kill the applicant. At midnight, his father received another threatening phone call and was visited by two armed men asking for the applicant. The men came into the house and searched for him. His father suspected the men were from the Karuna Group as the PLOTE were no longer active in the area. His father lodged a complaint with police.
* The applicant went into hiding and stayed at various places within his village. He attended the office of the UNHCR and the International Committee of the Red Cross (ICRC) to make a complaint. He applied for, and was issued with, a driving licence on 22 January 2008.
* In March 2008, the applicant’s father made arrangements with an agent for the applicant to depart Sri Lanka on a tourist visa to Thailand. He travelled on his own passport and flew to Bangkok where he stayed for about one month.
* While in Bangkok, he registered with the UNHCR. While in Bangkok he was arrested by the Thai police on suspicion of being in Thailand illegally. On presentation of his passport and valid visa, he was released. He decided to travel to Malaysia due to this experience.
* In April 2008, he flew to Kuala Lumpur, Malaysia. He registered with the UNHCR in about May 2009, was interviewed and was issued with a UNHCR card on 22 October 2010. He lived and worked in Malaysia until September 2012.
* In September 2012, he was concerned a change in the Malaysian government could mean he would be deported to Sri Lanka and so travelled illegally by boat to Indonesia.
* In October 2012, he departed Indonesia and travelled illegally by boat to Australia.

## The Minister’s Decision and the Authority’s Decision

1. The Minister had difficulties with the appellant’s creditworthiness. For example, in relation to the 2003 incident described above, in his visa interview, the appellant claimed that he had been taken to the army camp in a white van. When pressed about this, the appellant subsequently changed his evidence and claimed that the vehicle was a “normal, ordinary car”. He said that he had previously referred to a white van because such vans were commonly used in Sri Lanka. The Minister did not accept this explanation.
2. The Authority, whilst of the view that the appellant had embellished his claim about the 2003 incident, nonetheless accepted “having regard to the country information, that the [appellant] was taken for questioning by the army about supporting the LTTE, mistreated and released a short time later”. However, the Authority went on to find “given his release without conditions or charge, and the absence of evidence to support any links with the LTTE held by himself or other members of his family, [it was] satisfied he was not considered by the army to have any profile for LTTE involvement or support”. Moreover, the Authority rejected the appellant’s claim that the authorities continued to suspect him and look for him, in particular his claim that his father was told to hand him over or else he would be shot on sight. That was because, amongst other things, he had been abducted for only a short time and was not involved with the LTTE. Contrary to the appellant’s claims, the Authority was also of the view that he would have been only of initial interest to the army following his move to Colombo and rejected his claims that his father was visited by members of the People’s Liberation Organisation of Tamil Eelam (or PLOTE).
3. The Authority also found that the appellant had embellished his claim about an incident said to have occurred in 2007 (described above), largely because of inconsistencies in the evidence. One such inconsistency was that the father’s statement to police described a warning shot being fired whereas the appellant’s testimony did not mention hearing a warning shot. The Authority did accept that the appellant’s father was visited by two unknown men who were looking for him, but did not otherwise accept that they were men from the army or a paramilitary group, or that they had threatened to shoot or had fired a warning shot.
4. The Authority also relied on the appellant’s ability to leave Sri Lanka. It found at [29]:

I accept that the applicant’s visa and departure from Sri Lanka was facilitated by an agent. However, I have considerable doubt that during this time when the war was still ongoing, that had the applicant be considered to have been an LTTE supporter or sympathiser, he would not have been stopped and questioned at the airport when presenting his passport, notwithstanding that an agent was providing assistance and some money may have been paid to expedite the clearance process.

1. The Authority then considered the applicable country information, observing that the situation for Tamils had improved in recent times. It found at [34]:

For reasons already stated, I am satisfied that the applicant does not hold a profile that would attract the adverse attention of the authorities on return to Sri Lanka, including the PLOTE and paramilitary groups such as the Karuna and Pillayan Groups. Based on the country information and the personal circumstances of the applicant, I am not satisfied he will face a real chance of serious harm from the Sri Lankan army, the PLOTE or paramiltary groups such as the Karuna and Pillayan Groups for being a Hindu Tamil male originating from Batticaloa in the Eastern Province, or for being suspected and questioned about supporting the LTTE in 2003.

1. It also rejected a claim that the appellant would be exposed to a risk of harm because he would be returning as a failed asylum seeker. It accordingly found that s 36(2)(a) of the *Migration Act 1958* (Cth) (the “Act”) was not satisfied.
2. The Authority went on to consider s 36(2)(aa) and concluded at [43]:

For the reasons already stated, I have found that there is not a real chance the applicant will face serious harm from the Sri Lankan authorities or paramilitary groups such as the Karuna and Pillayan Groups on return to Sri Lanka as a young, male Hindu Tamil from the Batticaloa District in the Eastern Province, or for past suspected support of the LTTE. As ‘real chance’ and ‘real risk’ involve the same standard, it follows that based on the same information, and for the reasons stated above, I am also satisfied there is no real risk of significant harm on these bases if returned to Sri Lanka.

(Footnotes omitted.)

## Federal Circuit Court Proceedings

1. The primary judge considered both the originating application filed with the Federal Circuit Court on 14 July 2017 and an amended application, subsequently filed on 18 December 2017 with leave.
2. The originating application contained the following grounds (set out at [25] of the decision below):

Grounds of appeal and particulars

1. There is evidence and country information on Sri Lanka before the [Immigration Assessment Authority (the “IAA”)] to substantiate that a Tamil in my similar circumstances is still risk of serious harm at the hands of Sri Lankan authorities in Sri Lanka, especially on my arrival, but the IAA has declined to exercise its jurisdiction on central refugee claims.

2. The IAA s decision/reasoning seems to be mere speculation and there is country information before the IAA that I am still at risk of harm on my arrival.

3. The IAA declined its power to me when it reviewed my protection visa application because the IAA relied upon the DFAT Country Information Report – Sri Lanka 24 January 2017. This Report should have been put to me for my comments by way of Natural Justice.

4. I need a new review with the IAA.

5. I will provide further grounds of this judicial review and particulars of the grounds soon after a barrister’s opinion is obtained.

6. I respectfully seek the co-operation of this court in this respect.

1. The amended application contained the following grounds (set out at [20] of the decision below):

Grounds of the application

I have not retained a lawyer and barrister to represent me in this court yet.

I am now self-represented.

I need a copy of the Transcript of the Immigration interview CDs.

I propose to seek further legal advices once I have obtained [the] Transcript.

Particulars

The IAA has no basis to have ‘considerable doubt that I would not have heard that the shot being fired’: 46 of the IAA s decision.

I need a new review with the IAA.

I will provide further grounds of this judicial review and particulars of the grounds soon after a copy of the Transcript is obtained.

I respectfully seek the co-operation of this court in this respect.

1. The appellant also, so it would seem, relied upon submissions in the following form (set out at [34] of the decision below):

Grounds:

1. IAA erred in not being satisfied the applicant will be a risk of serious harm now or in the reasonably foreseeable future if returned to Sri Lanka.

2. IAA erred in finding the Applicant does not meet S 5 H(l) or S 36(2)(a) of the Migration Act

3. IAA erred in not being satisfied there is a real chance the applicant would face harm on return to [Sri Lanka] as a failed asylum seekers, now or in the reasonably foreseeable future, or that we face a real chance of persecution now or in the reasonably foreseeable future,

4. IAA erred in finding the Applicant does not have a well-founded fear of persecution within the meaning of S 5J;

5. IAA erred in finding there is not a real chance of harm to the applicant now or in the reasonably foreseeable future, for any LTTE links, for any imputed political opinion, as an ethnic Tamil from the East of Sri Lanka, as a returned Tamil asylum seekers of a combination of these if returned to Sri Lanka.

6. IAA erred in finding the Applicant does not meet S 36(2)(aa) of the Migration Act

7. IAA erred in affirming the Delegates decision not to grant the applicant a protection visa

8. IAA erred in not granting the applicant a protection visa, such errors amounting to errors in law.

Particulars

1. The IAA has doubted in Paragraph 25 of the IAA’s decision and reasons that I would not have hear a shot being fired. The IAA has no basis to leave a considerable doubt that I would not have heard a shot being fired.

2. The IAA has given greater importance to one piece of my claims that I was not stopped and questioned at the Sri Lankan airport when presenting my passport.

3. The IAA has filed to take into account that the agent was providing assistance and some money to expedite the airport clearance process: Paragraph 29 of the IAA’s decision and reasons.

4. On what basis and evidence has the IAA come to the conclusion that the pro-government militant groups including Karuna and Pilliyan groups are no longer operative in Sri Lanka against their opponents: Paragraph 32 of the IAA’s decision and reasons.

5. I understand that this court review is not a merit review and it cannot admit any new evidence but I have a good case on the facts before the IAA.

6. Dear Honorable Judge, please show mercy and compassion on me as I believe that the IAA’s decision is not lawful, is not fair and is not valid.

(Errors in the original.)

1. Each of these grounds was rejected by the primary judge in brief terms, and on the basis that the appellant was impermissibly seeking merits review, or that the appellant had incorrectly asserted that the Authority had failed to take some part of his claim into account.

## Appeal Grounds

1. At the commencement of the hearing before me, the appellant obtained legal representation and submissions were handed up on his behalf. I granted the appellant leave to rely on these submissions and to file an amended notice of appeal after the hearing. I also granted the Minister leave to file and serve supplementary written submissions concerning the Authority’s application of s 473DD of the Act within seven days of the hearing and the appellant leave to file and serve a reply within five days thereafter. I will return to the application of that provision.
2. The appellant’s amended notice of appeal set out two grounds appeal. The first ground is expressed in the following terms:

The Federal Circuit [C]ourt failed to find, in respect of the IAA (Respondent) that the Respondent declined its jurisdiction to me on the basis of grounds including the main grounds stated in my Federal Circuit Court Application and in my Court submission.

The second ground is expressed in the following terms:

Additional Grounds with leave:

The IAA

i. misunderstood the meaning and nature of S 473DD of the Migration Act, and/or

ii. misunderstood its own function and duty in respect thereof.

iii. as a result of which it arrived at a finding ‘*I am not satisfied there are exceptional circumstances to justify consider the information.’* at paragraph 5 of its decision which was unreasonable and /or without any logical or probative basis (see CIC15 v Minister for Immigration and Border Protection [2018] FCA 795 at [8]). As a result of these matters, the IAA has committed jurisdictional error.

iv. contrary to its obligations under S 473EA (1)) of the Migration Act, S 25D of the Acts Interpretation Act, and the general law, failed to explain the reasons why it came to a finding ‘*I am not satisfied there are exceptional circumstances to justify considering the information.’* at paragraph 5 of its decision. As a result, the IAA has committed jurisdictional error.

### Ground one of the amended notice of appeal

1. The first ground is in the same terms as originally pleaded in the notice of appeal filed 9 March 2018. The appellant also filed an affidavit in support on that date in which he deposed that he was self-represented (as he then was), that he disagreed with the Authority’s decision and the decision of the primary judge, and that he now relies upon the grounds before the Federal Circuit Court.
2. On its face, the first ground does not identify any appellable error in the judgment below. In written submissions and before me, counsel for the appellant pressed two potential errors in the decision below under the umbrella of this ground.
3. First, the appellant submitted that the primary judge’s finding on particular one of the amended application before his Honour was erroneous. The appellant sought to re-agitate that particular by submitting that there was no logical basis for the Authority’s finding at [25] that it had “considerable doubt that the appellant would not have heard shot being fired”. Relevantly, [25] is in these terms:

The applicant’s testimony in his application and during the visa interview, however, was consistent in stating that he was staying at his relative’s house next door during the incident. I note that he made no mention of hearing his name being called out by the men or hearing a shot being fired. While I accept that he may not have heard voices from the men outside, I have considerable doubt that he would not have heard a shot being fired. I consider the inconsistencies between the applicant’s account and his father’s statement to police in this respect to be very marked.

The Federal Circuit Court had rejected that ground at [21] of its reasons in the following terms:

In relation to particular 1, referring to the inconsistency between the applicant’s version of the events involving the men attending the father’s home in December 2007 and the firing of a shot, and the applicant’s version, the applicant took issue with that finding by the Authority in paragraph 25. This finding by the Authority was open on the information before the Authority and it cannot be said to be illogical or unreasonable. Particular 1 does not make out any jurisdictional error and in substance invites this Court to engage in an impermissible merits review.

1. The appellant submitted that, in order to make a finding that the appellant would not have heard a shot being fired, the Authority would have needed to be apprised of a number of matters, about which the Authority had no information, including, for example, the type of gun that may have been used and any potential impediments preventing the appellant from hearing the shot. The appellant submitted that the relevant finding at [25] was critical to the Authority’s decision and was both unreasonable and without logical or probative basis.
2. The findings as to the probability of a warning shot being fired were made in the context of an assessment of the appellant’s credibility. After expressing “considerable doubt” that the appellant would not have heard shot being fired, the Authority went on to find at [25]:

Having regard to my finding that the applicant was not considered to be of interest to authorities for LTTE support and the inconsistencies of his claims in comparison with this father’s statement to police, I am not satisfied that when the men attended at the house, they called out that the applicant was a friend and had a gift for them, or that they threatened to shoot him on sight and fired a warning shot.

1. In *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2, Kenny, Kerr and Perry JJ summarised the relevant principles concerning jurisdictional error when making findings as to credit at [30]:

(1) While findings as to credit are generally matters for the administrative decision maker, this does not mean that such findings as to credit are beyond scrutiny on judicial review: *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146 (***CQG15***) at [37]-[38] (the Court). The question of whether a credibility finding is tainted by jurisdictional error is a case specific inquiry, and is not assessed by reference to fixed categories or formulae (*ARG15* *v Minister for Immigration and Border Protection* [2016] FCAFC 174; (2016) 250 FCR 109 (***ARG15*)**at [83](b)). In each case it is necessary to analyse in detail what the decision-maker has decided: *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317;(2013) 212 FCR 99 (***SZRKT***) at [77] (Robertson J).

(2) Without derogating from the case specific nature of the inquiry, adverse credibility findings may involve jurisdictional error on recognised grounds such as legal unreasonableness or reaching a finding without a logical, rational or probative basis (*ARG15* at [83](d)). In this regard, Crennan and Bell JJ explained in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 (***SZMDS***) that:

135. … A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence ***or if there is no logical connection between the evidence and the inferences or conclusions drawn***.

(Emphasis added)

(3) By way of example, in *SZRKT* at [78], Robertson J considered that jurisdictional error may be established where a finding on credit on an objectively minor matter of fact constitutes the basis on which the decision- maker rejects the entirety of an applicant’s evidence and claims. …

(4) Findings or reasoning along the way to reaching a conclusion by the decision- maker that are illogical or irrational may establish jurisdictional error (*SZMDS* at [132] (Crennan and Bell JJ)). In this regard, with respect to the significance of an illogical or irrational finding as to credit to the administrative decision necessary to establish jurisdictional error, Wigney J explained in *Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516 (in a passage approved in *CQG15* at [60])that:

56 An irrational or illogical finding, or irrational or illogical reasoning leading to a finding, by the Tribunal that the review applicant was not a credible or honest witness may in some circumstances lead to a finding of jurisdictional error. That would particularly be the case where the adverse credibility finding was critical to the Tribunal’s decision that it was not satisfied that the applicant met the criteria for the grant of a visa. Whilst it is frequently said that findings as to credit are entirely matters for the Tribunal, such findings do not shield the Tribunal’s decision-making processes from scrutiny…

(citations omitted)

(5) A high degree of caution must, however, be exercised before finding that adverse findings as to credit expose jurisdictional error in order to ensure that the Court does not embark impermissibly upon merits review: *SZMDS* at [96]; *SZVAP* [(2015) 233 FCR 451] at [14]-[15]. As such, to establish jurisdictional error based on illogical or irrational findings of fact or reasoning, “*extreme*” illogicality must be demonstrated “*measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions*” (*SZRKT* at [148]; see also *SZMDS* at [135] and *CQG15* at [60]). Thus, “*[e]ven emphatic disagreement with the Tribunal’s reasoning would not be sufficient to make out illogicality*”: *CQG15* at [61].

1. It is difficult to be certain about how the finding at [25] fits into the Authority’s reasons. If the finding is that the appellant’s testimony was to be discounted because he failed to refer to a shot being fired, in my view, the finding of the Authority that it had “considerable doubt” that the appellant would not have heard such a shot has no probative basis. That is because the Authority found that it was not satisfied that any shot had in fact been fired. There was thus no shot which might or might not have been heard. Nevertheless, in my view, this mistake is not material: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 92 ALJR 780. It simply leads to the conclusion that the father’s report remains inconsistent with the appellant’s evidence, but for another reason, namely that it is the father who could not have heard any shot.If, however, the finding is that no shot had been fired, because, amongst other things, the appellant did not mention it, then it was open to the Tribunal to rely on that aspect of the appellant’s claims in making that finding.
2. Secondly, the appellant submitted that the primary judge’s finding on ground three of the original application before his Honour was erroneous. The Federal Circuit Court had rejected that ground at [28] of its reasons in the following terms:

In relation to ground 3, the Authority was entitled to take into account more recent country information under s 473DE(3)(a) of the Act without giving the applicant an opportunity to comment or respond on the same. No jurisdictional error is made out by ground 3.

1. The primary judge was correct in finding that the Authority was not required to put to the appellant the relevant country information report prepared by the Department of Foreign Affairs and Trade dated 24 January 2017, because that report fell within the exception in s 473DE(3)(a) concerning information which is not specifically about the appellant, but rather is about a class of persons of which the appellant is a member: see *ADE17 v Minister for Immigration and Border Protection* [2018] FCA 282 at [17].
2. For these reasons, the first ground of the amended notice of appeal is rejected.

### Ground two of the amended notice of appeal

1. The second ground concerns the Authority’s decision not to consider extracted text from a certain report, which the Authority considered to be within the meaning of “new information” as that term is defined in s 473DC(1) of the Act. At [5] of its reasons, the Authority found:

The submission also included extracted text from the Truth and Justice Project, “A still unfinished war: Sri Lanka’s survivors of torture and sexual violence 2009-2015”, dated 28 July 2015. The extracted text provides general information about the Sri Lankan security forces targeting of LTTE suspects, or those perceived as being connected to, or supporters of, the LTTE during the post-war period. The information was not before the delegate and I accept it is new information. The report was in existence prior to the delegate’s decision and no explanation has been offered about why this could not have been provided to the delegate before their decision or how it is considered credible personal information to the applicant. Accordingly, I am not satisfied that the extracted text could not have been provided prior to the decision made or includes material consisting of credible personal information that may have affected the consideration of the applicant’s claims. I am not satisfied there are exceptional circumstances to justify considering the information.

1. Under the Act, new information may be considered in exceptional circumstances pursuant to s 473DD, if the integers of that provision are satisfied. That section provides:

For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment 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.

1. The appellant submitted that the Authority misconceived its statutory obligation under subpara (a) of s 473DD and, by doing so, made findings which were unreasonable and/or without any logical or probative basis. He also contended that, contrary to s 473EA of the Act and s 25D of the *Acts Interpretation Act 1901* (Cth), the Authority had failed to give adequate reasons for its conclusion concerning the lack of exceptional circumstances. This alleged error with the Authority’s decision was not raised before the Federal Circuit Court.
2. The issue for determination is whether the Authority took an unduly narrow approach to the breadth of the phrase “exceptional circumstances” by confining itself, as contended for, to the matters in subparas (b)(i) and (b)(ii) of s 473DD. In *Minister for Immigration and Border Protection v CQW17* [2018] FCAFC 110, McKerracher, Murphy and Davies JJ said at [51]:

The expression ‘exceptional circumstances’ in subpara (a) has a broad meaning and it is not possible to state exhaustively what factors will be relevant or what the Authority must consider in a particular case: *Plaintiff M174* [[2018] HCA 16]at [30]. The Authority is obliged to consider all relevant circumstances, and as White J observed in *BVZ16* [(2017) 254 FCR 221] the matters in (b)(i) and/or (ii) will usually form part of the consideration.

1. An unduly narrow interpretation of “exceptional circumstances” for the purposes of s 473DD has been found to be capable of giving rise to jurisdictional error in a number of cases, including, for example, *BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221 and *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111.
2. The appellant submitted:

The IAA also referred to the issue of ‘**exceptional circumstances**’ at para [5] when it said: *‘I am not satisfied there are exceptional circumstances to justify considering the information.’* This is the only reference to ‘exceptional circumstances’ in respect of the new information being addressed.

It is submitted there is nothing to suggest the IAA considered any matters before coming to the conclusion that it was not satisfied. The IAA fails to explain how or why it did so, nor does it set out the basis or material relevant to that conclusion which it took into consideration. In light of the duty and obligation of the IAA to consider the specific aspect of S 473 DD, it is submitted that the IAA made its conclusion quite contrary to the above authorities and so committed a jurisdictional error.

It is submitted that 1st Respondent’s submissions fail to address this point altogether.

1. The Minister submitted that:

Having regard to the matters noted by the IAA in its consideration of the extracted text, it cannot be said that the IAA adopted an “impermissibly narrow” interpretation of the concept of “exceptional circumstances” or conflated “exceptional circumstances” with the question of whether the material could have been provided to the Delegate (cf *BVZ16* and *CHF16* [[2017] FCAFC 192])*.* Rather, as it was required to do, the IAA had regard to all of the relevant circumstances pertaining to the extracted text in the context of the Applicant’s claims more generally but was not satisfied exceptional circumstances existed.

(Footnotes omitted.)

1. The Minister also submitted that, because the Authority had found that s 473DD(b) was not satisfied, it was not material if it had failed properly to consider the issue of exceptional circumstances in s 473DD(a). That is because subparas (a) and (b) are cumulative and not conjunctive. Once it had been decided that s 473DD(b) was not satisfied, the new information could not be considered by the Authority regardless of whether there were or were not exceptional circumstances.
2. *BVZ16* and *BBS16* were cited with approval by McKerracher, Murphy and Davies JJ in *AQU17 v Minister for Immigration and Border Protection* [2018] FCAFC 111. In *AQU17,* the Court was satisfied, on the facts before it, that it was open to the Authority to decide that it was not satisfied that exceptional circumstances existed. At [14]-[17], the Court found:

As the plurality in *Plaintiff M174* [[2018] HCA 16] made clear, what will amount to exceptional circumstances is inherently incapable of exhaustive statement. Each case will be different to every other case and must be treated on its merits and the matters for the Authority to take into consideration must necessarily vary from case to case. It is a misconception that the factors in s 473DD(b)(i) and (ii) of the Act must, in all cases, be considered by the Authority in deciding whether “exceptional circumstances” exist as s 473DD(b) does not codify what constitutes “exceptional circumstances”. Rather, s 473DD(b) sets out the further preconditions that must also be met before the Authority can consider the new information cumulatively upon the precondition set out in s 473DD(a): *Plaintiff M174* at [31]. As *BVZ16*, *BBS16* and *CHF16* [[2017] FCAFC 192] illustrate, in many cases consideration of the factors in ss 473DD(b)(i) and/or (ii) may assist the Authority in deciding whether or not it is satisfied that exceptional circumstances exist but whether those factors will have bearing upon that decision will depend on the particular case.

In the present case, the question for the Authority was what, if anything, took the circumstances of the appellant’s case out of the usual or ordinary course to justify consideration of the new information. It was necessary for the Authority to examine whether there was anything about the new information or the appellant’s circumstances which meant that there were exceptional circumstances justifying consideration of the new information. The Authority referred to the fact that at the time of the interview it was expressly put by the delegate to the appellant that she could not understand why the [Criminal Investigation Department (“CID”)] did not come looking for him when he did not report back to them, as this was one of the conditions of his release and the Authority considered that the appellant had the opportunity at the interview to advise the delegate of the claim that he did not give the CID his real name. The Authority also referred to the fact that the new information was a contradictory account of what the appellant said had happened when he was detained by the CID in August 2011.

Contrary to the appellant’s submission, the Authority did not conclude that the s 473DD(a) requirement was not met solely upon an evaluation as to whether the new information was information that could have been provided to the Minister’s delegate.

…

Although the appellant argued that the Authority took too narrow a view as to what constitutes exceptional circumstances, the appellant was unable to point to any fact or matter materially bearing upon the Authority’s consideration as to whether it was satisfied of the requirement under s 473DD(a) that was not taken into account and, had it been taken into account, would have materially borne upon its consideration. In our opinion, it has not been shown that the Authority took an unduly restricted approach to the question of whether exceptional circumstances existed. The fact that a different account was put to the Authority would not, of itself, constitute “exceptional circumstances” to justify consideration of the new information. Nor, contrary to the appellant’s submissions, was the Authority obliged to evaluate the credibility of the new information or the significance of the new information to the appellant’s case beyond the consideration given, absent some feature or matter to cause, or which should have caused, the Authority to consider that there was something about the appellant’s case which made it unusual or out of the ordinary. Nor does it appear from the material that anything was put to the Authority about the appellant’s personal circumstances or reason for the later inconsistent account, which was potentially relevant to the issue of “exceptional circumstances”. In the present case, as the Authority reasoned, the new information was information which the appellant could have provided the delegate in response to direct questioning on the topic and was information which was inconsistent with the version of events he gave the delegate. In our opinion, it was open to the Authority to decide, having regard to those matters, that it was not satisfied that exceptional circumstances existed.

1. In the present case, the Authority did not make any express finding that the s 473DD(a) requirement was not met solely on the basis of the matters in subpara (b). In my view, a proper and fair reading of the Authority’s reasons at [5] reveals that the Authority did not confine itself to a consideration of the matters in subparas (b)(i) and (b)(ii). On the contrary, it is apparent that the Authority also considered the potential relevance of the new information when it said “the extracted text provides general information about the Sri Lankan security forces targeting of LTTE suspects, or those perceived as being connected to, or supporters of, the LTTE during the post-war period”. It follows that the conclusion reached about exceptional circumstances was a finding made by the Authority independent of its decision concerning the application of s 473DD(b).
2. The appellant has not identified any fact or matter that was not taken into account but which, if it had been considered, could have borne upon the Authority’s consideration as to whether the requirement under s 473DD(a) was satisfied in a material way. As the Minister correctly observed in his submissions, “[w]hat section 473DD(a) does *not* require is for the IAA ‘to be satisfied of the existence of a particular fact or facts’” (citing *DYS16 v Minister for Immigration and Border Protection* [2018] FCAFC 33 at [17]). In the circumstances, it was open for the Authority to conclude that it was “not satisfied there [were] exceptional circumstances to justify considering the information”.
3. The appellant did not separately attack the findings made about the application here of s 473DD(b). It follows that any errors alleged concerning the application of s 473DD(a), or the lack of application of that subpara, go nowhere, as each subpara of s 473DD is not conjunctive: *AQU17* at [13]. Even if the Authority had found that there were exceptional circumstances, it would not have been authorised to consider the new information in question because of its finding about the application of subpara (b). The alleged errors thus lacked sufficient materiality and were therefore not jurisdictional in nature: *Hossain.*
4. The same conclusion should be reached in relation to the complaint made about the adequacy of the reasons given in relation to the decision reached in relation to s 473DD(a). I agree that the reasons were probably inadequate. They did not sufficiently identify the material or factors which supported the conclusion reached by the Authority. But because of the finding made about the application of s 473DD(b), these criticisms are of no moment.
5. The second ground of the amended notice of appeal is, accordingly, also rejected.
6. The appeal is dismissed with costs as agreed or assessed.

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| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Steward. |

Associate:

Dated: 8 November 2018