FEDERAL COURT OF AUSTRALIA

DKF17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 1963

|  |  |
| --- | --- |
| Appeal from: | *DKF17 v Minister for Immigration & Anor* [2019] FCCA 723  |
|  |  |
| File number: | NSD 999 of 2019 |
|  |  |
| Judge: | **THAWLEY J** |
|  |  |
| Date of judgment: | 21 November 2019 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from decision of Federal Circuit Court of Australia – judicial review of decision of Immigration Assessment Authority – where the appellant provided new information – application of s 473DD of the *Migration Act 1958* (Cth) – whether “exceptional circumstances” under s 473DD(a) of the *Migration Act 1958* (Cth) – whether the Authority was required to have regard to the matters contained in s 473DD(b)(i) or (b)(ii) when deciding whether “exceptional circumstances” exist – appeal dismissed  |
|  |  |
| Legislation: | *Acts Interpretation Act 1901* (Cth) s 25D*Migration Act 1958* (Cth) ss 5(1), 473BA, 473CA, 473CC, 473DB, 473DC, 473DD, 473EA, 473FA, 473GB  |
|  |  |
| Cases cited: | *AQU17 v Minister for Immigration and Border Protection* [2018] FCAFC 111*AOV18 v Minister for Home Affairs* [2018] FCA 1871*BVD17 v Minister for Immigration and Border Protection* (2018) 261 FCR 35*BVD17* *v Minister for Immigration and Border Protection* [2019] HCA 34*BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221*CHF16 v Minister for Immigration and Border Protection* (2017) 257 FCR 148*CVV16 v Minister for Home Affairs* [2019] FCA 1890*DKF17 v Minister for Immigration & Anor* [2019] FCCA 723*DLB17 v Minster for Home Affairs* [2018] FCAFC 230*DYS16 v Minister for Immigration and Border Protection* (2018) 260 FCR 260*East Melbourne Group Inc v Minister for Planning* (2008) 30 VAR 121*Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [(2012)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2012/764.html) 206 FCR 576*Jackson v Director-General of Corrective Services* (1990) 21 ALD 261*Ly v Minister for Immigration and Multicultural Affairs* [2000] FCA 15*Minister for Home Affairs v HSKJ* [2018] FCAFC 217*Minister for Immigration and Border Protection v AUS17* [2019] FCA 1686*Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111*Minister for Immigration and Border Protection v CQW17* (2018) 264 FCR 249*Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594*Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323*Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173*Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217*Stojic v Deputy Commissioner of Taxation* [2018] FCA 483*SZTMD v Minister for Immigration and Border Protection*(2015) 150 ALD 34*VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117  |
|  |  |
| Date of hearing: | 21 November 2019 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 41 |
|  |  |
| Counsel for the Appellant: | Mr PW Bodisco |
|  |  |
| Solicitor for the Appellant: | ABU Legal |
|  |  |
| Counsel for the First Respondent: | Mr G Johnson |
|  |  |
| Solicitor for the First Respondent: | HWL Ebsworth Lawyers |
|  |  |
| Counsel for the Second Respondent: | The second respondent entered a submitting notice save as to costs |

ORDERS

|  |  |
| --- | --- |
|  | NSD 999 of 2019 |
|   |
| BETWEEN: | DKF17Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | THAWLEY J |
| DATE OF ORDER: | 21 NOVEMBER 2019 |

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs.

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

REASONS FOR JUDGMENT

(Revised from transcript)

THAWLEY J:

1. This is an appeal from orders of the **Federal Circuit Court** of Australia made on 7 June 2019, dismissing an application for judicial review of a decision of the Immigration Assessment **Authority** made on 26 July 2017: ***DKF17*** *v Minister for Immigration & Anor* [2019] FCCA 723.
2. The Authority had affirmed a decision of a delegate of the then **Minister** for Immigration and Border Protection (now Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs) not to grant the appellant a Temporary Protection (subclass 785) visa.

# BACKGROUND

1. The background to this appeal may be found in the thorough and careful account provided by the primary judge: *DKF17* at [3] to [12]. Because of the confined nature of the appeal, it is not necessary for the background to be extensively repeated.
2. It is sufficient to record that, on review of the delegate’s decision by the Authority, the appellant had provided a submission and further material which the Authority accepted included “new information” within the meaning of s 473DC(1) of the *Migration* ***Act*** *1958* (Cth). However, the Authority was not satisfied that there were any exceptional circumstances to justify considering the new information. The Authority stated at A[3] to A[5]:

3. On 27 January 2017 the applicant’s representative provided a submission and accompanying material to the IAA. The IAA contacted the representative to advise that the submission appeared to relate to a different applicant. A further email was received on 30 January 2017 attaching a submission in respect of this applicant, in addition to the other material. I note that both the initial submission and the correct submission are more in the nature of statements, written in the first person and signed by the respective applicants. There are considerable similarities in the wording of some parts of these documents.

4. The (correct) submission refers to country information and makes claims in response to the delegate’s reasoning. Accompanying it are documents dating from 2007 and 2010 which purport to evidence the applicant’s role as Secretary of his local branch of the Bangladesh Student (Chatra) League. Also submitted were media articles, pre-dating the delegate’s decision, regarding a family who has members of both the Awami League and another party, and an article about intra party violence within the Chatra League. Apart from some elements of the submissions which repeat the applicant’s claims and explanations to the delegate and make what could be characterised as argument relating to the weight given by the delegate to certain information, I find that the submissions and the accompanying material are new information.

5. The submission and material purport to address adverse credibility findings made by the delegate regarding the applicant’s involvement with the Chatra League and particularly his claim to have held the role of secretary. It is evident from the recording of the TPV interview on 23 November 2016 that the applicant was clearly on notice that these claims were in doubt. Further, the applicant was told at that interview that if he did not give the Department of Immigration and Border Protection (the Department) all relevant information and his application was refused, he may not have another change [sic] to provide the information. He was advised on completion of the interview that he could send anything further to the delegate until the time a decision was made. Although the applicant did not have a migration agent present at the interview, he was represented in the TPV application by the same migration agent who now represents him before the IAA. I am not satisfied that there are any exceptional circumstances to justify considering the new information.

1. The appellant’s application for judicial review before the Federal Circuit Court included a ground of review to the effect that the Authority failed to take into account the matters referred to in s 473DD(b)(ii) when reaching the state of satisfaction required by s 473DD(a).
2. The Federal Circuit Court dismissed the application. The paragraph of its reasons upon which the appellant ultimately focussed particular attention in its ground of appeal as amended was J[71]. However it is convenient to set out a little more (footnotes omitted):

[67] The relevant passages of the Authority’s reasons are as follows:

a) at [4], the Authority noted that the New Documents comprised “documents dating from 2007 and 2010 which purport to evidence the applicant’s role as Secretary of his local branch of the Bangladesh Student (Chatra) League… media articles, pre-dating the delegate’s decision, regarding a family who has family members of both the Awami League and another party, and an article about intra party violence within the Chatra League”;

b) at [5], the Authority noted that “the submission and material purport to address adverse credibility findings made by the delegate regarding the applicant’s involvement with the Chatra League and particularly his claim to have held the role of secretary”;

c) at [5], the Authority also observes that “[i]t is evident from the recording of the TPV interview on 23 November 2016 that the applicant was clearly on notice that these claims were in doubt”;

d) at [5], the Authority notes that “the applicant was told at [the TPV] interview that if he did not give the Department of Immigration and Border Protection … all relevant information and his application was refused, he may not have another change [sic] to provide the information”; and

e) the Authority also observes at [5] that the applicant “was represented in the TPV application by the same migration agent who now represents him before the [Authority]”.

…

[69] The passage of the Authority’s reasons extracted at [67(a)] above is clearly referable to the matters in s.473DD(b)(i). The Authority makes no explicit finding in relation to s.473DD(b)(i) but it plainly had those matters in its mind when it made its assessment of exceptional circumstances.

[70] The Authority also considered the nature of the new information, that being information seeking to address the adverse credibility findings made by the delegate. So much is clear from the extracts of the Authority’s reasons that appear above at [67(a)] and [67(b)]. The applicant’s submission that “the Authority did not evaluate the significance of the relevant part of the new information” is in this respect incorrect. The Authority’s consideration of the factual context in which the new information arose is a matter that is properly taken into account in considering exceptional circumstances, either as a matter going to the matters in s.473DD(b)(ii) or otherwise as one of the “relevant circumstances” the Authority was bound to consider.

[71] The Authority’s use of the word “purports” in the passages at [67(a)] and [67(b)] above is significant. The word “purport” is defined by the Macquarie Dictionary to mean “to profess or claim”. The Oxford Dictionary defines “purport” as to “appear to be or do something, especially falsely”. I accept the Minister’s submission that the word is used in the Authority’s reasons to denote its doubts about the credibility of the New Documents. In this manner, on a fair reading the Authority considered, but did not make explicit findings in relation to, the matters in s 473DD(b)(ii) when it came to its conclusion in relation to exceptional circumstances.

1. In light of the matters the primary judge had referred to, the primary judge did not infer that the Authority adopted too narrow a construction of s 473DD(a): J[73]. To the contrary, his Honour concluded that, on a fair reading of its reasons, the Authority took into account all the relevant circumstances in arriving at the conclusion that there existed no exceptional circumstances to justify considering the new information and that the matter was not one where the Authority was “satisfied by reference to one matter only, that an applicant’s circumstances are not exceptional”, citing *BVZ16* at [9], and the Full Court of this Court in *CQW17* at [48] (the full case references are set out below).

# THE GROUND OF APPEAL

1. Leave was granted to the appellant at hearing to rely on one amended ground of appeal before this Court. Particular (a) of the amended ground was abandoned at the commencement of hearing:

His Honour in the court below erred in failing to find that the IAA had breached section 473DD of the *Migration Act 1958* (Cth) in dealing with submissions advanced by the Applicant and/or had failed to complete the task of jurisdiction embarked upon due to a misdirection as to section 473DD of the *Migration Act 1958* (Cth).

Particulars

a) [abandoned]

b) His Honour erred in holding, at [71] of the decision, that the use of the word “purport” was used to denote “doubts about the credibility of the New Documents” when the Authority’s reasons were neither evaluative nor conclusive.

1. This ground ultimately directs attention to the reasons of the Authority and the question whether it lawfully exercised its jurisdiction when reaching its state of satisfaction under s 473DD(a) that there were no exceptional circumstances which justified considering the “new information”.

# LEGISLATIVE CONTEXT AND PRINCIPLES

1. Section 473DD provides:

**Considering new information in exceptional circumstances**

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 ben, 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 operation of this provision has been considered in numerous cases, including: ***BVZ16*** *v Minister for Immigration and Border Protection* (2017) 254 FCR 221 (White J); *Minister for Immigration and Border Protection v* ***BBS16*** (2017) 257 FCR 111 (Full Court); *CHF16 v Minister for Immigration and Border Protection* (2017) 257 FCR 148 (Full Court); *DYS16 v Minister for Immigration and Border Protection* (2018) 260 FCR 260; ***Plaintiff M174****/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217; ***AQU17*** *v Minister for Immigration and Border Protection* [2018] FCAFC 111; *Minister for Immigration and Border Protection v* ***CQW17***(2018) 264 FCR 249 (Full Court); *AOV18 v Minister for Home Affairs* [2018] FCA 1871 (Colvin J);*DLB17 v Minster for Home Affairs* [2018] FCAFC 230; *Minister for Immigration and Border Protection v* ***AUS17*** [2019] FCA 1686 (Logan J); ***CVV16*** *v Minister for Home Affairs* [2019] FCA 1890 (Mortimer J).
2. The principles relevant for the purposes of the present appeal may be summarised in the following way:
3. The requirements of s 473DD(a) and (b) are cumulative; that is paragraph (b) contains a requirement additional to that in paragraph (a), applicable only where it is the referred applicant who gives or proposes to give new information to the Authority: *Plaintiff M174* at [31] (Gageler, Keane and Nettle JJ); [88] (Gordon J). Where it is the referred applicant who gives or proposes to give new information to the Authority, the Authority is prohibited from considering new information unless it is satisfied of the matters in both paragraph (a) and subparagraph(b)(i) or (ii): *CQW17* at [36]; *AQU17* at [13].
4. The phrase “exceptional circumstances” is not defined. What will amount to “exceptional circumstances” is inherently incapable of exhaustive statement and must depend on the particular circumstances of the visa applicant’s case: *Plaintiff M174* at [30]; *AQU17* at [14]. There may be a combination of factors which constitute “exceptional circumstances” when viewed together, or one factor of itself may be sufficient for “exceptional circumstances” to exist: *AQU17* at [13].
5. The word “exceptional” is not a term of art and is to be given its ordinary meaning; circumstances are “exceptional” if they may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon; to be exceptional a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered: *Plaintiff 174* at [30]; *AQU17* at [13].
6. The matters which the Authority may consider in reaching a state of satisfaction about “exceptional circumstances” to justify considering the new information are unconfined except by statutory context. They would often, perhaps usually, include matters relevant to the Authority’s satisfaction that the new information:
	1. could not have been provided to the Minister at the time of the s 65 decision (subparagraph (b)(i)); or
	2. is credible personal information which had not previously been known (subparagraph (b)(ii)): *CQW17* at [48]-[49], citing *BVZ16* at [9] and *BBS16* at [102]-[103].
7. Depending on the particular facts, a failure by the Authority to turn its mind to matters which are relevant to subparagraphs (b)(i) and (b)(ii) in determining whether it is satisfied that there are “exceptional circumstances” for the purposes of paragraph (a) may reveal jurisdictional error. However, that is not because those considerations are mandatory relevant considerations: *AUS17* at [23]. It is a misconception that matters relevant to (b)(i) and (ii) must, in all cases, be considered by the Authority in deciding whether “exceptional circumstances” exist under s 473DD(a): *AQU17* at [14]; *CVV16* at [24]. The circumstances which might indicate that matters relevant to ss 473DD(b)(i) and (b)(ii) should have been considered in reaching the state of satisfaction in (a) include the nature and cogency of the material and the place of the material in the assessment of the claims: *CQW17* at [52], referring to *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117 at [77]; *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [112]; see also: *CVV16* at [26].
8. The key underlying question is whether the Authority exercised its statutory function and did so lawfully. A failure to consider, when reaching the state of satisfaction under s 473DD(a), a matter which is also relevant to ss 473DD(b)(i) or (b)(ii) might demonstrate a misconception on the part of the Authority as to the meaning of “exceptional circumstances” or it might demonstrate a failure properly to exercise the jurisdiction under paragraph (a). That is because, in the particular circumstances of the case, the failure to consider that particular matter indicates a failure properly to exercise the jurisdiction under paragraph (a) or a misconception of the nature of the jurisdiction. It is not because of any failure to consider (b)(i) or (b)(ii) per se.
9. The appellant placed heavy reliance on s 473EA(1), which provides:

**Written statement of decision**

(1) If the Immigration Assessment Authority makes a decision on a review under this Part, the Authority must make a written statement that:

(a) sets out the decision of the Authority on the review; and

(b) sets out the reasons for the decision; and

(c) records the day and time the statement is made.

1. Section 473EA is to be read with s 25D of the *Acts* ***Interpretation Act*** *1901* (Cth): *BVD17 v Minister for Immigration and Border Protection* (2018) 261 FCR 35 at [47] (Full Court) (this point was not addressed on the appeal dismissed by the High Court). Section 25D of the *Interpretation Act* provides:

**Content of statements of reasons for decisions**

Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression “reasons”, “grounds” or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

1. In ***BVD17*** *v Minister for Immigration and Border Protection* [2019] HCA 34 at [16], the High Court confirmed the following two propositions which had not been controversial before it:
2. the decision in respect of which s 473EA requires a written statement is the decision under s 473CC(2) either to affirm or remit the decision referred to the Authority for reconsideration; and
3. the Authority is not required by s 473EA to give reasons for the exercise or non-exercise of a procedural power leading to that decision, such as that those conferred on the Authority by s 473DC(1) or s 473GB(3).
4. It is difficult to see that s 473EA could require reasons in respect of the Authority’s state of satisfaction under s 473DD(a) if, as the High Court stated in *BVD17* at [16], the Authority is not required by s 473EA to provide reasons in relation to the exercise or non-exercise of the discretion under s 473DC(1). Section 473EA does not impose an obligation to provide reasons in respect of the state of satisfaction under s 473DD(a); see also *AUS17* at [25], but note the observations of Mortimer J in *CVV16* at [28]‑[31]. Whether or not s 473EA does impose an obligation is of some significance because it affects the consideration both of what may appropriately be inferred where the Authority has chosen to provide reasons on the topic, and what may appropriately be inferred if it has said nothing.
5. Because s 473EA does not impose an obligation to provide reasons in respect of the Authority’s state of satisfaction under s 473DD(a), the reasoning in *Minister for Immigration and Multicultural Affairs v* ***Yusuf***(2001) 206 CLR 323 at [5], [9]-[10] (Gleeson CJ), [44] (Gaudron J) and [69] (McHugh, Gummow and Hayne JJ) is not directly applicable. That reasoning may be summarised as follows. Where there is an applicable statutory obligation to provide reasons (in *Yusuf,* s 430(1)), the Court is entitled to infer that a matter not mentioned in the reasons was not considered to be material. That is because the Court is entitled – by reason of the terms of the specific statutory obligation to provide reasons – to take the reasons as setting out the facts the Tribunal considered material to its decision, and as referring to the evidence it considered material to its findings. When it comes to assessing whether there has been jurisdictional error, inferences may be drawn from what the Tribunal referred to and from what is absent from the Tribunal’s reasons because the reasons disclose what was important and material to the Tribunal.
6. It should be noted that reasoning in that way – where the foundation for it exists – is not mandatory: *SZTMD v Minister for Immigration and Border Protection*(2015) 150 ALD 34 at [19]-[20] (Perram J); *Minister for Home Affairs v HSKJ* [2018] FCAFC 217 at [44] (Greenwood, McKerracher and Burley JJ).
7. In the present case, the Authority in fact gave reasons for its lack of satisfaction under s 473DD(a) that exceptional circumstances existed to justify considering the new information. Those reasons are to be treated as the real reasons – see: *Jackson v Director-General of Corrective Services* (1990) 21 ALD 261 at 264 (Holland AJ); ***East Melbourne*** *Group Inc v Minister for Planning* (2008) 30 VAR 121 at [228] (Ashley and Redlich JJA). However, those reasons are to be read in a practical common-sense manner and not to be construed with an eye keenly attuned to the perception of error: *Ly v Minister for Immigration and Multicultural Affairs* [2000] FCA 15 at [27] (Kenny J); *East Melbourne* at [228].
8. The zealousness which the principle in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-2 permits is protean, depending for example on the nature and qualifications of the decision-maker and the particular statutory context: *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [(2012)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2012/764.html) 206 FCR 576 at [36] (Flick J); *Stojic v Deputy Commissioner of Taxation* [2018] FCA 483 at [104] (Thawley J). The caution against over-zealous review might be seen to apply all the more where there is no statutory obligation to provide reasons.
9. The reasons in the present case are brief and in the nature of a statement intended to inform, rather than a formal statement of reasons for an administrative decision made in compliance with a statutory obligation prescribing the content of the reasons. That is not to deny that the reasons address an important procedural topic on which it is desirable to provide reasons; and that they are located in a document furnished pursuant to an obligation to provide reasons in respect of the ultimate decision on review. In such a situation:
10. inferences may be drawn from what the Authority said. However, the process of drawing such inferences must recognise the particular circumstances in which the reasons were provided, including that there was no statutory obligation to provide reasons setting out the material questions of fact and reference to the evidence on which those findings were based in respect of the particular procedural matter concerned (here, whether there were “exceptional circumstances” to justify considering new information) as opposed to requiring reasons for the decision to affirm or remit the decision referred to the Authority under s 473CA – see: *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [31]-[33] (French CJ and Keifel J), [66]‑[73] (Gummow J);
11. it is perhaps more difficult to draw an inference from what was *not* said by the Authority where there was no obligation to provide reasons or to set out the material questions of fact or a reference to the evidence on which those findings were based: ***Plaintiff M64****/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [25], [36] (French CJ, Bell, Keane and Gordon JJ). *Plaintiff M64* was a case in which there was no obligation at all to provide reasons and the relevant decision-maker provided a letter notifying the decision and which contained limited reasons. The context here is different. Here, there is an obligation to provide reasons in respect of the ultimate decision to affirm or remit the delegate’s decision; it is simply that there is no statutory obligation to provide reasons for procedural decisions taken along the way to the ultimate decision. That is a matter informing what inferences may appropriately be drawn from what was and what was not said by the Authority, and the application of the principles in *Plaintiff M64*.

# CONSIDERATION

1. The first question which arises is whether the Authority turned its mind to the matters, or the kinds of matters, in s 473DD(b)(ii). If it did, then the question of whether any failure to do so is indicative of jurisdictional error does not arise. That is because it could not be said that the Authority’s failure to consider matters relevant to paragraph (b)(ii) when considering whether there were “exceptional circumstances” for the purposes of paragraph (a), demonstrated a misconception of the meaning of “exceptional circumstances” or a failure to exercise the jurisdiction in the manner contended by the appellant.
2. The answer to this question depends on the appropriate inference to be drawn from what the Authority did and did not say.
3. Three matters, in particular, should be noted about the Authority’s reasons, extracted above.
4. *First*, the Authority had received a submission dated 27 January 2017 which attached documents apparently relevant to the appellant, but the submission itself, which took the form of a signed statement, was not signed by, or apparently about, the appellant. The “initial submission” was about a person of about the same age as the appellant who claimed to be a BNP member. The “correct submission” was signed by, and apparently about, the appellant. The appellant claimed to have been Secretary of his local Bangladesh Student (Chhatra) League, holding Awami League ideologies.
5. Parts of the “initial submission” and the “correct submission” were identical and parts substantially similar. There were also many differences of substance. The following two sentences of A[3] reveal that the Authority took those circumstances into account when considering what credibility to attach to the new information which had been provided:

I note that both the initial submission and the correct submission are more in the nature of statements, written in the first person and signed by the respective applicants. There are considerable similarities in the wording of some parts of these documents.

1. The Authority plainly had credibility issues in mind.
2. *Secondly*, attention must be paid to the nature of the documents provided. They were:
3. a document purporting to be a record of the appellant’s role as General Secretary of his local branch of the Chhatra League, dated 10 December 2007, signed by Moniruzzaman Monir, the President of the Kalihati Upazila Chhatra League;
4. a letter dated 12 January 2010, again signed by Moniruzzaman Monir, declaring that the appellant had been the Secretary of his local branch of the Bangladesh Student (Chhatra) League for two years between 2008 and 2010;
5. two media articles dated 3 June 2014 and 22 November 2014 in relation to political conflict in Bangladesh.
6. The first two documents were in similar format or printed on the same or similar letterhead. It is clear that the Authority was aware that the documents contained “personal information” (see s 5(1) of the *Act*) about the appellant because it stated at A[4]:

Accompanying [the submission] are documents dating from 2007 and 2010 which purport to evidence the applicant’s role as Secretary of his local branch of the Bangladesh Student (Chatra) League.

1. The media articles did not mention the appellant.
2. It is evident that the Authority was aware that the documents were being provided in relation to the credibility findings which had been made by the delegate, as the Authority stated at A[5]:

The submission and material purport to address adverse credibility findings made by the delegate regarding the applicant’s involvement with the Chatra League and particularly his claim to have held the role of secretary.

1. *Thirdly*, the fact that much of the discussion at A[3] to A[5] is about whether or not the documents could have been provided earlier should not overly distract. That was clearly an important consideration to the question of “exceptional circumstances” under s 473DD(a), as well as the consideration in paragraph (b)(i). Indeed, in the context of Part 7AA and its express objectives, it is hardly surprising that the issue of whether the documents could have been provided earlier received careful attention and significant weight. Those objectives include “providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)”: s 473BA; s 473FA(1). Section 473DB makes clear that the default position is that the Authority must conduct its review “without accepting or requesting new information”: s 473DB(1)(a). In that context it is to be expected that when considering s 473DD(a), there will be significant attention to the kinds of matters that are relevant also to s 473DD(b)(i), namely whether the documents could have been provided earlier. That should not lead to the automatic inference that other matters, such as those in s 473DD(b)(ii), have not been considered.
2. Provided the Authority correctly understood the statutory task and did not proceed on a false basis as to what “exceptional circumstances” meant, it was a matter for the Authority what weight it considered the various relevant matters should have in its determination of whether “exceptional circumstances” existed.
3. The appellant bears the onus of establishing jurisdictional error. I am not satisfied that the Authority did not turn its mind to the sorts of issues raised by s 473DD(b)(ii) when assessing whether or not there were “exceptional circumstances”, or that it misconceived the meaning of that term. Indeed, reading the reasons in accordance with the principles outlined above, it is clear that the Authority took into account the fact that the new information included personal information and it is equally clear that the Authority considered the reliability or credibility of that personal information.
4. To the extent that the appellant suggested that the Authority was required to make an express finding about whether the information was “credible personal information” within the meaning of paragraph (b)(ii), that proposition is inconsistent with *AQU17* at [16], where the Full Court stated:

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 Authority did not make any finding in express terms in respect of the s 473DD(b)(ii) requirement, the primary judge was correct to hold that the Authority, in substance, addressed as a factor bearing upon whether exceptional circumstances existed, whether the new information was credible information that, had it been known to the delegate, may have affected consideration of the appellant’s claims. It is not to the point that no express finding was made under s 473DD(b)(ii), as the exceptional circumstances test did not require an express finding to be made. The Authority plainly based its conclusion that exceptional circumstances did not exist upon its lack of satisfaction that the new information was credible.

1. The appellant attached significance to the fact that the Authority did not expressly refer to paragraph (b)(ii) of s 473DD. As mentioned, the Authority was not obliged to refer to that paragraph. More significantly, the Authority did not refer to s 473DD at all, yet the appellant does not, and could not sensibly, suggest that the Authority was not addressing s 473DD in its reasoning at A[3] to A[5].
2. By particular (b) of the ground of appeal, the appellant contended that the primary judge erred in concluding at J[71] that the Authority’s use of the word “purport” was intended to denote “doubts about the credibility of the new documents” when the Authority’s reasons were neither evaluative nor conclusive. The use of the word “purport”, read in the context of the reasons as a whole, indicates that the Authority was directing its attention to the reliability of the information which had been provided. On balance, I consider the word to have been used by the Authority in the same way as the primary judge considered it to have been used, namely as indicating some doubt on the part of the Authority about the credibility of the “new information”.
3. More importantly, whatever the precise meaning of the word “purport” as used by the Authority, it is to be inferred from the whole of A[3] to A[5], including in particular the Authority’s observations about the incorrect submission and its language including the word “purport”, that the Authority considered the sorts of issues that are raised by paragraph (ii) of s 473DD(b), including whether the “new information” was “credible personal information”. That consideration was given in the context of reaching a state of satisfaction under s 473DD(a) as to whether there were “exceptional circumstances” which justified considering the new information.
4. It follows that the Authority exercised the function of reaching a state of satisfaction about whether there were “exceptional circumstances” within the meaning of s 473DD(a) to justify considering the new material, and did so in a way which was not shown to be unlawful. In particular, the appellant has not established that the Authority misconceived the breadth of the concept of “exceptional circumstances”.
5. The appeal must be dismissed with costs.

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

Associate:

Dated: 26 November 2019