FEDERAL COURT OF AUSTRALIA

COE16 v Minister for Immigration and Border Protection [2019] FCA 1370

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| Appeal from: | *COE16 v Minister for Immigration and Border Protection* [2019] FCCA 246 |
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| File number: | NSD 255 of 2019 |
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| Judge: | **GRIFFITHS J** |
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| Date of judgment: | 28 August 2019 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia dismissing an application for judicial review of a decision of the Immigration Assessment Authority (**IAA**) – where the appellant contended the IAA erred in its consideration of new information provided by the appellant – where the appellant contended the IAA failed to consider, or consider properly, the appellant’s claims – no appealable error – appeal dismissed, with costs |
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| Legislation: | *Migration Act 1958* (Cth) ss 5H, 473DC, 473DD |
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| Cases cited: | *AQU17**v Minister for Immigration and Border Protection* [2018] FCAFC 111; 353 ALR 600  *AUH17**v Minister for Immigration and Border Protection* [2018] FCA 388  *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503  *BVZ16**v Minister for Immigration and Border Protection* [2017] FCA 958; 254 FCR 221  *COE16 v Minister for Immigration and Border Protection* [2019] FCCA 246  *DFC16**v Minister for Immigration and Border Protection* [2018] FCAFC 56; 259 FCR 460  *Hossain**v Minister for Immigration and Border Protection* [2018] HCA 34; 359 ALR 1  *Htun**v Minister for Immigration and Multicultural Affairs* [2001] FCA 1802; 233 FCR 136  *Minister for Immigration and Border Protection v CQW17* [2018] FCAFC 110; 162 ALD 427  *Minister of Immigration and Border Protection v BBS16*[2017] FCAFC 176; 257 FCR 111  *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1  *Plaintiff M174/2016**v Minister for Immigration and Border Protection* [2018] HCA 16; 353 ALR 600 |
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| Date of hearing: | 27 August 2019 |
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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 |
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| Category: | Catchwords |
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| Number of paragraphs: | 54 |
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| Counsel for the Appellant: | The appellant appeared in person with the assistance of an interpreter |
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| Counsel for the Respondents: | Mr J Kay Hoyle |
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| Solicitor for the Respondents: | Clayton Utz |

ORDERS

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|  | | NSD 255 of 2019 |
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| BETWEEN: | COE16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 28 August 2019 |

THE COURT ORDERS THAT:

1. The appellant has leave to rely upon grounds 4 and 5 of the notice of appeal.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs, as agreed or taxed.

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

REASONS FOR JUDGMENT

GRIFFITHS J:

1. This appeal is from orders of the Federal Circuit Court of Australia (**FCCA**). The judgment is reported as *COE16 v Minister for Immigration and Border Protection* [2019] FCCA 246. The primary judge dismissed the appellant’s judicial review challenge to a decision dated 18 August 2016 of the Immigration Assessment Authority (**IAA**). The IAA affirmed the delegate’s decision dated 17 June 2016 not to grant the appellant a Safe Haven Enterprise Visa (**SHEV**).
2. For the following reasons, the appeal will be dismissed, with costs.

## Summary of background facts

1. The appellant first arrived in Australia as an unauthorised maritime arrival on 26 September 2012. He applied for a Protection (Class XA) visa and provided a statutory declaration and supporting statement both of which were dated 8 August 2013. This visa application was invalid. The appellant then applied for a SHEV on 25 October 2015. He provided a further supporting statement dated 23 October 2015. The appellant was interviewed by the delegate on 29 March 2016. He provided a supplementary statement dated 4 April 2016. On 17 June 2016, the delegate refused to grant the appellant a SHEV.
2. The appellant’s case was referred to the IAA. By an email dated 24 June 2016, the appellant asked the IAA for a four week adjournment to allow him to provide further information. He also lodged a request dated 23 June 2016 to be provided with various documents relevant to his SHEV application. By letter dated 1 July 2016, the IAA informed the appellant that he had not provided any indication of the nature of the new information he wished to provide and his attention was drawn again to the IAA’s Practice Direction. The IAA refused to adjourn consideration of his SHEV application but said that further information received before a decision was made may be considered subject to it meeting the requirements of the *Migration Act 1958* (Cth) (the ***Act***). On 7 July 2016, the appellant provided the IAA with further written submissions with the new information he wished to provide (**IAA submission**).
3. The IAA submission stated why the appellant considered the delegate’s adverse findings to be wrong. The appellant claimed that he faced persecution if he were returned to Sri Lanka due to his political affiliation with the Tamil National Alliance (**TNA**). He referred to country information in support of that contention. He drew attention to an announcement dated 12 June 2016 (**TNA Announcement**) in which the TNA publicly stated that it no longer provided unconditional support to the Sri Lankan government, with the consequence that members and supporters of the TNA would, he claimed, be under “close scrutiny and persecution as was experienced previously”. The IAA submission also referred to additional country information relating to persecution of people with suspected links to the Liberation Tigers of Tamil Eelam (**LTTE**). The appellant repeated a claim made previously that he had assisted the LTTE with transportation after the tsunami.
4. In his IAA submission, the appellant also made submissions concerning his fear of persecution based on his ethnicity as a Tamil and status as a failed returned asylum seeker. He referred to supporting country information for both claims.
5. Finally, in the IAA submission, the appellant referred to the fact that in his interview he had named a number of TNA candidates whom he had supported and that the delegate had not been able to find information regarding two of those candidates (who were referred to in these reasons as Mr S and Mr R). He said that he had explained in his interview that the name he had given for Mr S was a nickname for the candidate and that the appellant did not know his real name. He added that research had indicated that Mr R was a candidate for the TNA and was elected in the 2012 Eastern Provisional council election, along with another person (Mr K). He added that Mr R “was also noted as being a TNA party leader in 2015”, and referred to supporting information from the internet.
6. The IAA affirmed the delegate’s decision. With reference to the IAA submission, the IAA described those parts of it which contained legal argument as not constituting “new information” within the meaning of s 473DD of the *Act*. To the extent that it contained country information that was not before the delegate, the IAA said at [4] that there had been non-compliance with the IAA’s Practice Direction because the appellant failed to provide reasons addressing the requirement in s 473DD(b) as to why that new information should be taken into account. The IAA stated that, without those reasons, it was not apparent why the appellant was not able to put that country information before the delegate. Furthermore, and in any event, the IAA said that it was not satisfied that there existed “exceptional circumstances” which justified it having regard to that country information.
7. The IAA then explained why it concluded that the appellant was not a refugee within the meaning of s 5H(1) of the *Act*. It did so by reference to various claims made by the appellant, which are now set out.

### (a) Claims based on association with Mr V

1. The appellant claimed that he was a Tamil and a Hindu in Sri Lanka and that he became involved in the TNA in 2004, including by printing election material for it. He claimed that he and a Mr V (who was also his cousin, brother-in-law and a village administrative officer), helped a relief committee do work after the tsunami, and that this brought Mr V (and the appellant) into contact with the LTTE. He claimed that in July 2005 unidentified people came searching for him and Mr V and he believed that the men were from the Criminal Investigation Department (**CID**). He claimed that he helped Mr V flee the country after a village administrator of a nearby village had been shot and killed by unknown people and that he was subsequently questioned by Sri Lankan authorities about Mr V’s whereabouts.
2. The IAA accepted all these claims but it did not accept that the Sri Lankan authorities harmed the appellant at that time nor was it satisfied that the appellant would suffer serious harm if he returned to Sri Lanka because of his relationship with Mr V. This was because there was no credible evidence that the appellant (or any of Mr V’s other relatives or friends) had been harmed by the Sri Lankan authorities in the past for that reason.

### (b) Claims based on past harm from non-government or paramilitary authorities and extortion

1. The IAA was not satisfied that the appellant was extorted, detained or held and assaulted by the Tamil Makkal Viduthalai Pulikai (**TMVP**), the Karuna group or any anonymous persons in the past or that his shop was damaged and equipment stolen. This was because it described the appellant’s evidence as vague and confused on this topic. It added that these claims of extortion and other harm were not raised spontaneously by the appellant and were prompted by the delegate’s questioning of him. After referring to country information regarding extortion of Tamil business people by the TMVP and the Karuna group, the IAA stated that the appellant’s claims of extortion, which were “vague and inconsistent”, were “another of many examples of the applicant exaggerating and fabricating evidence”.

### (c) Claims based on association with the TNA

1. The IAA accepted that the appellant owned a print shop business and that he supported the TNA prior to 2004. It accepted that his involvement with that body increased from that time when he printed materials relating to tsunami relief. It noted that, at his SHEV interview, the appellant spoke “with some detail… regarding the identity of some TNA politicians in his home province”. It said that country information referred to by the delegate confirmed that most of those identified politicians do exist and it noted further that in the IAA submission the applicant clarified that he referred to one of the politicians by a nickname only. The IAA noted the appellant’s contention in the IAA submission that his connection with the TNA was sufficient to ground a well-founded fear of serious harm.
2. The IAA was not persuaded by that contention. It accepted that the appellant used his print shop to print materials for the TNA at election times, and was accordingly a low-level supporter of the TNA, but it did not accept that Sri Lankan authorities had persecuted him because of his association with the TNA. The IAA expressed concerns with the authenticity of two reference letters provided by Mr K and Mr C (two TNA politicians) in support of the appellant’s claim.
3. Notwithstanding the IAA’s acceptance that in 2007 the appellant had been questioned and assaulted by the Sri Lankan Army several times, questioned about matters which included his support for the TNA and the LTTE and that he had been detained on one occasion for ten days, the IAA concluded that the Sri Lankan authorities had not personally targeted the appellant and that, in any event, these events took place prior to the end of the civil war in 2009. In addition, the IAA found it implausible that the authorities could not find the appellant because he could have been easily located at his workplace. Moreover, the IAA noted country information from the delegate’s reasons for decision to the effect that, since the 2015 elections, the TNA is now the official opposition in the national Parliament.

### (d) Claims based on imputed association with the LTTE and being a Tamil

1. The IAA set out in some detail in [21] and [23] to [27] of its reasons why it was not satisfied that the appellant faced a real chance of serious harm because of his association with the LTTE.
2. The IAA acknowledged that the appellant claimed that he would have problems in Sri Lanka because he is a Tamil and also that, despite the change in government, Tamils “remain vilified and persecuted in Sri Lanka. The IAA referred at [20] to DFAT reports which indicated that the overall situation for Tamils in Sri Lanka had improved since the end of the civil war in 2009. It referred to other country information which indicated that Tamil civilians who lived in some former LTTE areas, including Tamils who provided low-level support to the LTTE, might be monitored by Sri Lankan authorities but they “are at a low risk of being detained or prosecuted”. The IAA explained at [21] why it considered that the appellant’s past connection with the LTTE “is remote and at a very low level”, with the consequence that it found a person with his profile would not be subject to the level of questioning and monitoring by the authorities as claimed by him. The IAA also reviewed the appellant’s travel history in some detail and explained that it considered his ability to depart and willingness to return to Sri Lanka on multiple occasions undermined his claims that he was wanted by or in hiding from the Sri Lankan authorities. The IAA found the travel history also undermined the appellant’s claims he had been detained, was under reporting conditions or otherwise harmed by the Sri Lankan authorities at any time.
3. In summary, while the IAA accepted the appellants’ claims to some links with the LTTE, the IAA was not satisfied those links were sufficient to cause the appellant to be a person of concern to the Sri Lankan authorities.

### (e) Claims based on failed asylum seeker and illegal departure

1. The IAA gave detailed reasons at [29] to [40] why it was not satisfied that the appellant would face a real chance of significant harm as a failed asylum seeker or because of his illegal departure from Sri Lanka. In doing so, the IAA noted that the appellant had previously been ordered in August 2012 to pay a fine for attempting to leave Sri Lanka illegally. The IAA gave additional reasons at [46] and [47] as to why it considered that the appellant’s illegal departure did not provide a basis for complementary protection.

## The FCCA proceeding

1. The appellant was legally represented in the FCCA. He raised two grounds of judicial review in his amended originating application. Ground 1 was that the IAA failed properly to consider his claim that he will be imprisoned for a second offence of departing Sri Lanka illegally or an integer of those claims. The particulars were that the IAA failed properly to consider certain country information that was before it. Ground 2 was that the IAA incorrectly applied s 473DD of the *Act* in respect of his 7 April 2016 statement to the IAA (which apparently is an erroneous reference to the statement dated 7 July 2016). The particulars to ground 2 included a claim that the IAA had failed adequately to distinguish between which aspects of the IAA submission it could consider and those which failed to comply with s 473DD. Another particular was that the IAA, in considering whether information could have been made available to the delegate, failed to consider the fact that some of the new information in the IAA statement post-dated the SHEV interview on 29 March 2016.
2. Both grounds were rejected by the primary judge. As to ground 1, although the primary judge accepted that the IAA did not refer to country information in the form of a 2013 report by the Department of Foreign Affairs and Trade (**2013 DFAT Report**), his Honour was not prepared to find that the non-reference was because the IAA had not considered the 2013 DFAT Report. The primary judge placed particular emphasis on the fact that the IAA plainly considered that a subsequent report dated 2015 by DFAT carried more weight than the earlier report on the issue of the legal consequences for people who departed Sri Lanka illegally.
3. As to the second ground of review, which related to the IAA’s construction and application of s 473DD, the primary judge explained at some length why he rejected this ground. It related to two items of alleged “new information”, namely the TNA Announcement (in which the TNA stated that it would no longer provide unconditional support to the Sri Lankan government) and information provided by the appellant regarding the identity of TNA candidates whom he supported, including a Mr R (**R Identity Information**). That information is reflected in [14] of the FCCA’s reasons:

Research has indicated that [R] (TNA) was a candidate and elected in 2012 Eastern Provincial council election along with [K]. [R] was also noted as being a TNA party leader in 2015.

1. The appellant’s submissions below concerning these two items of alleged “new information” are summarised by the primary judge at [28] to [34] of his Honour’s reasons for decision.
2. At [35] to [42], the primary judge analysed various relevant authorities concerning s 473DD, including *Minister for Immigration and Border Protection v CQW17* [2018] FCAFC 110; 162 ALD 427; ***Plaintiff M174/2016*** *v Minister for Immigration and Border Protection* [2018] HCA 16; 353 ALR 600; ***BVZ16*** *v Minister for Immigration and Border Protection* [2017] FCA 958; 254 FCR 221 and *AQU17**v Minister for Immigration and Border Protection* [2018] FCAFC 111; 353 ALR 600.
3. The primary judge’s reasons for rejecting ground 2 may be summarised as follows.
4. The primary judge noted at [27] that the issue was made more complex by the publication of the Full Court’s decision in *Minister of Immigration and Border Protection v* ***BBS16*** [2017] FCAFC 176; 257 FCR 111 on the day of the hearing. The parties took advantage of an opportunity to file supplementary submissions on that decision.
5. The primary judge dealt separately with the two limbs of ground 2, relating as they did to the TNA Announcement and the R Identity Information. As to the TNA Announcement, the primary judge noted the appellant advanced two contentions. The first was that the IAA erred in respect of the TNA Announcement because it either did not consider whether there were exceptional circumstances for the purposes of s 473DD to justify considering that material or, if it did, it did not properly consider the material. The second contention was that the IAA erred because it had failed to consider both s 473DD(a) and (b), citing ***BVZ16***.
6. As to the R Identity information he noted the appellant’s contention that the IAA failed to refer to the new information provided in the IAA submission regarding the identity of Mr R. The appellant submitted that in light of the credibility issues and suggestions of exaggeration relied upon by the IAA, the new information he provided concerning Mr R ought to have been accepted and it supported his claim to be a low-level TNA supporter.
7. At [33] of his reasons for judgment, the primary judge identified three issues which arose under ground 2 in respect of the TNA Announcement:
8. Given the TNA Announcement was “new information” within the meaning of s 473DC, was it information that fell within, or could reasonably be considered to fall within, s 473DD?
9. Assuming the TNA Announcement did not fall within s 473DD, did that mean any error made by the IAA in construing or applying s 473DD was not such as to amount to jurisdictional error?
10. Assuming the TNA Announcement did fall within s 473DD, did the IAA receive the TNA Announcement, and if so, make an error of the kind identified in *BVZ16* or otherwise fail to consider or properly consider the TNA Announcement?
11. His Honour concluded at [43] that, consistently with the Minister’s submission, the TNA Announcement was not information which qualified as “personal information” for the purposes of s 473DD(b)(ii). He described the announcement that the TNA would no longer provide unconditional support to the government as information about the TNA, which was not an individual. The primary judge did not address s 473DD(b)(i) in any great detail as the appellant had not contended that the TNA Announcement was not, or could not have been, provided to the delegate before the delegate made his decision.
12. The primary judge then turned his mind to the question of the consequences or materiality of the IAA’s view that s 473DD did not apply to the TNA Announcement. His Honour regarded this issue as falling to be determined by reference to the plurality’s judgment in *Hossain**v Minister for Immigration and Border Protection* [2018] HCA 34; 359 ALR 1 and the requirement that an error be material. The primary judge’s conclusion and reasoning on the issue of materiality is reflected at [46] of the reasons for judgment (emphasis in original):

46. In my opinion s.473DD of the Act is to be interpreted as incorporating the threshold of materiality in the event of the Authority’s not complying with the implied condition that it must “*proceed by reference to correct legal principles, correctly applied*”. Further, any failure by the Authority to consider or properly consider the TNA Announcement, or any error the Authority may have made in purporting to apply s.473DD of the Act, was not material to its decision: had the Authority proceeded by reference to correct legal principles, correctly applied, it ought to have concluded that the TNA information was not new information to which s.473DD applied and, for that reason, was information it could not and would not have considered.

1. This was sufficient to dispose of ground 2 of the judicial review application. But the primary judge proceeded in any event to address and determine the appellant’s case on the assumption that, contrary to his earlier finding, s 473DD did apply to the TNA Announcement. His Honour made the following two *obiter* findings:
2. even though the appellant had not complied with the IAA Practice Direction, which presented the practical difficulties for the IAA referred to in [8] above, the primary judge was satisfied that the IAA had engaged with s 473DD(a) because it did consider whether there were exceptional circumstances and concluded that there were none; and
3. the IAA did not err in the way identified in *BVZ16* because the IAA viewed the appellant’s submission as containing both new and not new information (from which it could be inferred that it had read the IAA submission). There was nothing to suggest that the IAA was unaware of the dates of the relevant events, namely the date of the SHEV interview, the date of the delegate’s decision and the date on which the TNA Announcement was published.
4. As to the appellant’s claim that the IAA did not consider the R Identity Information because it made express reference only to that part of the IAA submission relating to Mr S and made no reference to the appellant having identified Mr R, the primary judge rejected this contention because:
5. it could be inferred that the IAA had read this part of the IAA submission (it might be noted that there is a typographical error in [50] because the reference at the end of the fifth line to “R” is plainly a reference to “S”);
6. the IAA had accepted that the appellant was a low-level supporter of the TNA, which suggested that the IAA “had accepted that R was in fact a TNA party leader in 2015”;
7. the IAA found that the appellant’s inability to identify Mr R during the SHEV interview did not count against his claim to be a TNA supporter; and
8. the alleged error was in any event immaterial because the appellant had not demonstrated how the identification of Mr R as a TNA leader was relevant to any claim by him which was not accepted by the IAA. Thus, having accepted that the appellant was a low-level supporter of the TNA, the primary judge said that it was immaterial even if the IAA had not considered the R Identity Information because consideration of that material could not have produced a different decision.

## The appeal proceeding in this Court

1. The appellant represented himself in the appeal, assisted by an interpreter. He claimed responsibility for drafting both the notice of appeal and his outline of written submissions.
2. In the course of his oral address, the appellant sought an adjournment for six months to enable him to collect sufficient funds to be able to retain a lawyer. The application was opposed by the Minister. The adjournment was refused and I indicated that I would give my reasons later. Those reasons are as follows. The appellant commenced the appeal more than six months ago. He has been aware of the hearing date for many months. He filed an outline of written submissions on or about 12 August 2019. He has had ample opportunity to retain legal assistance if he so wished and could. As noted above, he was legally represented in the FCCA. No affidavit was filed in support of the adjournment request. The Court has no evidentiary basis to determine whether or not the appellant is in a position to obtain sufficient funds to retain a lawyer within the requested six month period. For all these reasons, the request was refused. The appellant then indicated that he did not wish to supplement his notice of appeal or outline of written submissions.
3. His notice of appeal contains five paragraphs, each of which purports to be a ground of appeal. I will proceed on that basis even though, for example, ground 2 is simply a request for leave to rely on ground 3. Ground 1 is that the FCCA erred in finding that the IAA had failed properly to consider the appellant’s claims (it is assumed this ground has a typographical error and the word “not” has been omitted before the word “finding”). Grounds 3 and 4 substantially reflect grounds 1 and 2 below, however, the Minister also contends that leave is required in respect of ground 4 because it adds to the case run below by raising an issue concerning the grant of bail in Sri Lanka. Similarly, the Minister contends that ground 5 requires leave. The Minister opposed leave being granted on the grounds of lack of merit and he urged the Court to dismiss the grounds if leave were granted.
4. Ground 3 is that the FCCA erred in not finding that the IAA incorrectly applied s 473DD in respect of the IAA statement dated 7 April 2016 (which presumably is an erroneous reference to the IAA submission dated 7 July 2016).
5. Ground 4 is that the FCCA erred in not finding that the IAA failed properly to consider the appellant’s claim that he will be imprisoned for a second offence of departing Sri Lanka illegally or an integer of those claims. The particulars to ground 4 also raise other matters, including the issue of bail.
6. Ground 5 is that the IAA failed to consider “integer claims”, which are particularised as:
7. a failure to consider the appellant’s association and membership with Tamil Arasu Kadchi (**TAK**) and that the IAA simply restricted its assessment to his support for the TNA;
8. the IAA failed to consider the appellant’s religious claim as a Hindu in circumstances where this claim was raised in a letter dated 10 April 2013 from the President of the local temple Administration Board; and
9. the IAA failed to consider the appellant’s claim that he was a member of an Assisted Relief Committee.

## Consideration and determination

1. It is desirable to set out the terms of s 473DD of the *Act*:

**473DD 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 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 parties’ respective submissions are reflected in my reasons below.
2. For the following reasons, although I grant leave for the appellant to rely upon the expanded part of ground 4 of the notice of appeal, as well as ground 5, I consider that the appellant has established none of his grounds of appeal.

### Grounds 1 and 5 – failure to consider claims or integer claims

1. Unsurprisingly, the Minister accepted that a decision-maker may fall into jurisdictional error if he or she fails to address a claim or an integer of a claim, with reference to authorities such as *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 and *Htun**v Minister for Immigration and Multicultural Affairs* [2001] FCA 1802; 233 FCR 136 and ***DFC16*** *v Minister for Immigration and Border Protection* [2018] FCAFC 56; 259 FCR 460. Necessarily, however, each case turns on its own facts and circumstances, as stated in *DFC16* at [9].
2. The difficulty for the appellant, however, is that none of the matters which he describes as “claims” were clearly articulated by him (or squarely arose on the materials) or were an integer of any such claim. The applicant’s association and membership with the TAK was never presented as a separate basis for fearing persecution or as adding anything additional to his claim based on his association with the TNA. Rather as the TAK was a member party of the TNA, the applicant’s membership of the TAK was used to advance his claim of association with the TNA. That was the basis on which both the delegate and the IAA considered the claim, with both making express reference to the appellant’s membership renewal application form.
3. I accept the Minister’s submission that the letter from the President of the local temple administration board cannot properly be read as asserting a claim based on the appellant’s religion. While, the letter speaks to the appellant’s involvement in the temple community and by implication may disclose his religious identity as a Hindu, at no stage does it claim or provide the barest suggestion that the appellant would be persecuted in Sri Lanka on account of his religion. Moreover, at [18] of its reasons, the IAA said that because of the “vague information” in the letter, little weight was put on it in relation to **any** of the appellant’s claims. As to the claim of fear because of an imputed association with the LTTE, this claim was plainly addressed and rejected by the IAA. I accept the Minister’s submission that the appellant’s work with the relief committee was a minor factual component of a broader claim and did not of itself constitute an “integer” of his claim.
4. The IAA is required to consider claims which are either the subject of a clearly articulated argument which relies on established facts, or otherwise clearly and squarely emerges from the materials (see *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503 at [18] per Collier, McKerracher and Banks-Smith JJ). For the reasons given above, I do not consider that any claim concerning persecution on religious grounds was squarely raised or clearly emerged from the materials in this case. To the extent that any such claim was faintly raised, the IAA expressly stated at [41] that it was not satisfied that the appellant had a well-founded fear of persecution based on *inter alia* religion.

### Ground 3 – s 473DD

1. It is well settled that the requirements of s 473DD(a) and (b) are cumulative, in the sense that the pre-condition in (a) and, at least one of the conditions in (b)(i) or (ii) must be satisfied (*Plaintiff M174* at [31] per Gageler, Keane and Nettle JJ). The relevant requirements do not need to be considered in any particular order. If neither condition in s 473DD(b) is met, that is sufficient to trigger the s 473DD prohibition (see ***AUH17*** *v Minister for Immigration and Border Protection* [2018] FCA 388 at [33]). Consequently, as the Minister pointed out, even if the IAA erred in respect of one limb of s 473DD, it is unlikely that it would commit jurisdictional error as long as it properly considered and applied the requirements of the other limb.
2. *BBS16* establishes that what constitutes “exceptional circumstances” for the purposes of s 473DD(a) is inherently incapable of exhaustive statement, but it has a broad meaning (at [104]). Moreover, since there is no particular form to which the IAA must follow in assessing the matters in s 473DD, each case must necessarily be approached on its merits (*AUH17* at [32]). I also accept the Minister’s submission that because s 473DD(b) states that the “referred applicant satisfies the Authority that, in relation to any new information…”, applicants must provide an explanation as to why the conditions in s 473DD(b) are satisfied. There is no onus or burden, but there must be “some material by way of explanation” (see *AUH17* at [33]).
3. No appealable error has been established in respect of the primary judge’s finding that the TNA Announcement was information that was not “personal”, with the consequence that s 473DD(b)(ii) did not apply. As to the appellant’s claim that the IAA failed to consider that some of the new information post-dated the SHEV interview on 19 March 2016, although it was not contended formally before the primary judge, no appealable error been established in respect of the primary judge’s finding that the other limb of s 473DD(b) did not apply, because even though the announcement was made after the SHEV interview, it was information that could have been provided to the delegate before a decision was made on the SHEV application.
4. Nor has any appealable error been established in respect of the primary judge’s findings concerning the appellant’s claims regarding the R Identity Information. His Honour fully explained at [50] of his reasons for judgment why he rejected this claim and no appealable error is discernible.

### Ground 4 – risk of imprisonment

1. There is no substance in any contention that the IAA did not turn its mind to and consider the risk that the appellant might be imprisoned if he returned to Sri Lanka as an illegal departee, having regard to his previous conviction. The IAA at [34] to [41] gave specific and detailed consideration to the likelihood the appellant would be imprisoned for a second offence of departing Sri Lanka illegally and the integers of those claims. The IAA discussed country information on the issue in some detail as well as gave consideration to the appellant’s own previous experience of having been charged for departing Sri Lanka illegally using a fraudulent Italian visa.
2. To the extent that this ground contends there was no evidence for the IAA’s factual findings, the contention is similarly without substance. The IAA relied on country information, including DFAT reports, to reach its findings on the effect of this being a second offence for the appellant. The IAA’s findings on bail were to some degree based on the appellant’s own experience following his previous attempt to depart Sri Lanka illegally. Finally, with respect to the appellant’s claim that the IAA wrongly interpreted the relevant Sri Lankan law, the content of foreign law is a question of fact which must be proven. The IAA’s findings were based on the country information available to it.
3. Nor has any appealable error been established in respect of the primary judge’s reasons on this subject. The IAA was plainly aware of the material contained in the various DFAT reports and it relied upon that country information in making the finding that it did concerning bail at [38] of its reasons for decision.

## Conclusion

1. For these reasons, the appellant has leave to raise grounds which were not run below but the appeal will be dismissed, with costs.

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| I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 28 August 2019