FEDERAL COURT OF AUSTRALIA

GGD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 1463

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| Appeal from: | *GGD18 v Minister for Home Affairs* [2019] FCCA 444 |
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| File number(s): | NSD 437 of 2019 |
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| Judge(s): | **THAWLEY J** |
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| Date of judgment: | 9 September 2019 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia – leave to raise grounds of judicial review not raised in Federal Circuit Court Australia – application to introduce fresh evidence on appeal – whether failure to consider important evidence – whether failure to perform review contemplated by statute – no jurisdictional error identified – appeal dismissed |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 25D  *Migration Act* *1958* (Cth) Part 7AA, ss 473CA,  473EA, 476 |
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| Cases cited: | *AAM15 v Minister for Immigration and Border Protection* (2015) 231 FCR 452  *AYY17 v Minister for Immigration and Border Protection*[2018] FCAFC 89  *BVD17 v Minister for Immigration and Border Protection* (2018) 261 FCR 35  *Bondelmonte v Bondelmonte* (2017) 259 CLR 662  *Carrascalao v Minister for Immigration and Border Protection*(2017) 252 FCR 352  *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112  *EKN17 v Minister for Immigration and Border Protection* [2019] FCA 1135  *ETA067 v Republic of Nauru* (2018) 92 ALJR 1003  *GGD18 v Minister for Home Affairs* [2019] FCCA 444  *Han v Minister for Home Affairs* [2019] FCA 331  *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225  *Islam v Cash* (2015) 148 ALD 132  *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291  *Minister for Home Affairs v Buadromo* (2018) 362 ALR 48  *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323  *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262  *Singh v Minister for Home Affairs* [2019] FCAFC 3  *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365 |
|  |  |
| Date of hearing: | 28 August 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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ORDERS

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|  | | NSD 437 of 2019 |
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| BETWEEN: | GGD18  First Appellant  GGE18  Second Appellant  GGF18  Third Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | THAWLEY J |
| DATE OF ORDER: | 9 SEPTEMBER 2019 |

THE COURT ORDERS THAT:

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

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

REASONS FOR JUDGMENT

THAWLEY J:

1. In this appeal from orders of the Federal Circuit Court of Australia (**FCCA**), dismissing their application for judicial review of a decision of the Immigration Assessment **Authority**, the appellants seek leave to raise grounds of judicial review which were not put to the FCCA and to introduce fresh evidence. They do not assert any error of law on the part of the FCCA. For the reasons which follow leave should not be granted to raise the new grounds and the appeal must be dismissed with costs.

# BACKGROUND

1. The facts may be set out briefly given the confined nature of the appeal.
2. The first appellant was from a small village in an outermost province of Iran. Her father died when she was 13. The appellant’s paternal grandfather became the head of her family. He was her guardian. He wanted the appellant to marry one of her first cousins on her father’s side in order to keep the family name within the bloodline.
3. The first appellant, however, fell in love with the second appellant. The second appellant and his family visited the first appellant’s family to ask the grandfather for the first appellant’s hand in marriage. The grandfather refused. He stated that the first appellant was to marry her cousin.
4. In her statutory declaration which accompanied her application for a Safe Haven Enterprise Visa (**SHEV**), the first appellant described the following altercation between her cousin and the second appellant at her university:

One day, at the end of my second year of university, [the second appellant] came to visit me at the university. My cousin was the driver of the university mini bus (it was a shuttle transport for the university students) at the time. When he dropped the students off he saw me with [the second appellant] and saw that I was smiling. My cousin pushed me aside so that he could confront [the second appellant] and I hit my head badly. I believe I lost consciousness because everything went black and I cannot remember anything. My cousin fought with [the second appellant] and injured him with a knife. It was normal for bus drivers to carry a baton and knife.

1. The second appellant described the same incident in his statutory declaration:

One day, at the end of her second year of university, I went to visit her at her university. Her cousin, who drove the shuttle bus, saw us speaking. He confronted me and we started fighting. He had a knife and he stabbed me (it was normal for bus or truck drivers to carry batons or knives). I went to the police to report the incident; however the police treated me like I was the person in the wrong.

1. When the first appellant’s grandfather learned of the incident, he set a date for the marriage between the first appellant and her cousin. The first and second appellant thereupon decided to marry in secret. They were married on 31 March 2011. There was a question about whether this marriage was legal or effective, although nothing in the appeal turns on that fact. In her statutory declaration, the first appellant stated that she thought their marriage was legally effective but, by the time she made her statutory declaration, had concerns in that regard, seemingly because of advice she had received from her lawyers.
2. The first and second appellant lived in their respective family homes for about a year after their wedding before moving in together in about March 2012 in a town about an hour’s drive from the first appellant’s mother’s house.
3. About three months later, the first and second appellant went to visit the first appellant’s mother. The first appellant gave the following account in her statutory declaration of what occurred:

After three months of being away, I called my mother. She was very scared for us. She was worried that the people would talk. I told her that I had married [the second appellant] and that we weren’t living in sin. I didn’t tell her exactly where I was. She said that wherever I was, I shouldn’t visit her because I wouldn’t be safe. Everyone in the town knew that I was supposed to marry my cousin and when I left, it looked like I was escaping my family and their wishes.

Approximately one week after I spoke to my mother on the phone, we went to visit her. I needed to see her - I missed her too much. We visited her at night. My cousin came to the house and a fight started between my mother, brother and my cousin. My cousin had heard that I was come to visit my mother and he wanted to come into the house to confront me (and possibly kill me to restore the family’s honour) but my brother stopped him from coming in. Luckily he didn’t see me and [the second appellant]. We ran out of the house to my neighbour’s yard and hid there. We could hear the fight that was happening in my mother’s house. We made it home later that night.

1. She also gave the following account of harassment involving her husband’s shop and violence towards her younger brothers:

My father’s family started to harass us. They broke the windows of [the second appellant]’s shop. [The second appellant] had the windows fixed, only to have them broken again by my father’s family. After the second time that they broke the windows of the shop, I called my mother to speak to her about the harassment. She told me not to visit anymore because my father’s family were threatening to kill me. They had also started hitting my two younger brothers (they were much younger - they were still in school). My mother made me promise not to visit the town.

1. The first appellant gave the following evidence at [42] of her statutory declaration concerning honour killings:

My father’s family said that I had dishonoured the family. Honour killings were accepted in our town. I knew another girl who was engaged to be married. Her fiancé’s family, however, accused her of having a boyfriend. They invited her over and left her with her fiancé, who hanged her. Her fiancé only spent a short amount of time in goal [sic] and then he was freed. Because they accused her of having had a boyfriend, they smeared her name, so the honour killing was ‘justified’. Incidents and stories like this used to happen in our town and all over Iran.

1. The first and second appellants both referred in their statutory declarations to the first appellant’s family attacking the second appellant’s mother’s house. The second appellant’s mother ultimately moved to a town some 700km away. However, the first appellant’s family found her there and, according to the second appellant’s statutory declaration, beat the second appellant’s brother so badly that he almost died.
2. The first and second appellant then decided to leave Iran, neither of them considering they had any real alternative. They travelled first to Malaysia, then Indonesia and ultimately Australia, arriving in Christmas Island on 30 September 2013.
3. The first and second appellants had a daughter in 2014. She is the third appellant.
4. On 28 October 2016, the appellants lodged applications for SHEVs. Their statutory declarations, referred to earlier, were made in support of these applications. The first and second appellants also attended an interview with a delegate after lodging the applications (**SHEV interview**).
5. The transcript of this interview had not been placed before the FCCA. The appellants sought to introduce the transcript on this appeal as fresh evidence. There are two aspects of the SHEV interview of particular relevance. First, the first appellant gave the following evidence of a threat by her father’s family to pour acid on her:

He was saying that they have threatened that they will throw acid on you, then my mother heard it and she came and grabbed the phone from him and she didn’t let him to finish what he was saying.

1. This evidence was recorded and addressed in the delegate’s decision.
2. Secondly, the second appellant gave evidence in relation to the windows of his shop being broken. This included:

Twice, they broke the windows of my shop.

…

The first time, I wasn’t that suspicious. I thought maybe a child or something through [sic] this or just broke it by accident. But the second time, even I made the complaints. Even we had somebody was guarding at night time and I asked him, they said they didn’t see anybody at night time. But in the morning, it was all broken.

…

The second time, the police came for investigation. He came to the shop and they saw the rock, really big. The police said it’s not a child’s job to do that.

1. The second appellant had also said:

I said to the police that is the second time they broke my glasses [shop windows], but I don’t know who they are.

1. The second appellant answered “yes” to the question: “Although you suspected that it was her family, you didn’t actually know that?”
2. A delegate of the Minister for Immigration and Border Protection refused to grant visas to the appellants on 23 May 2018. Nothing in the appeal turns on the delegate’s reasoning.
3. The delegate’s decision was referred to the Authority under s 473CA of the *Migration* ***Act*** *1958* (Cth). It was common ground on this appeal (unlike the position before the FCCA) that the refusal decision was a “fast track reviewable decision” within the meaning of Part 7AA of the Act.
4. On 29 October 2018, the Authority affirmed the delegate’s decision not to grant the appellants protection visas.
5. The appellants sought judicial review in the FCCA. Their application was dismissed on 26 February 2019: *GGD18 v Minister for Home Affairs* [2019] FCCA 444. The appellants relied on five grounds before the FCCA:
6. First, the appellants were not “unauthorised maritime arrivals” and were therefore not “fast track applicants”. The basis of this argument was an assertion that the appointment of Christmas Island as a proclaimed port was invalid.
7. Secondly, it was asserted that the Authority erred in finding that there were not exceptional circumstances to justify considering certain new information.
8. Thirdly, it was asserted that the Authority failed to respond to a substantial, clearly articulated argument relying upon established facts that the appellants feared they might be victims of an honour killing if they returned to Iran.
9. Fourthly, it was said that the Authority misapplied s 5J(3)(i) of the Act by finding that the appellants should modify their behaviour so as to avoid a real chance of persecution.
10. Fifthly, it was asserted that the Authority erred by failing to distinguish the appellants’ claims as non-practicing Muslims and apostates under the refugee criterion from the complementary criterion.
11. It is not necessary to explain those grounds further or detail the reasoning of the FCCA for dismissing them given that the appellants do not assert any error in that court’s decision. The appellants now rely exclusively upon grounds not advanced before that court.

# THE APPEAL

1. As modified in oral submissions, the appellants’ first proposed ground was that the Authority “failed to consider important evidence, and thereby constructively failed to perform a review” because it did not consider:
2. evidence of actual past harm, namely the first appellant being knocked unconscious and the second appellant being stabbed; and
3. claimed threats of acid attacks.
4. The appellant abandoned a case, which had initially been proposed, relying upon an alleged failure to consider evidence of attacks on the first appellant’s brothers.
5. The second proposed ground was that the Authority failed to consider important evidence and argument, and thereby constructively failed to perform a review, because it did not consider the second appellant’s evidence and argument about why he considered those who broke his shop windows were from his wife’s father’s family.
6. The principles relevant to whether leave should be granted to raise on appeal grounds which were not relied upon in a judicial review application of the kind presently appealed from were set out by Bromwich J in ***Han*** *v Minister for Home Affairs* [2019] FCA 331 at [8]-[18]. I gratefully adopt his Honour’s analysis.
7. One important consideration is the merit of the ground which the appellant seeks leave to raise. However, as Bromwich J observed, merit alone cannot dictate the outcome. Otherwise the application turns on the success or failure of the new ground, making leave a mere formality: *Han* at [9].
8. A second consideration arises from a consideration of the legislative scheme for judicial review and appeal. The FCCA has jurisdiction to conduct judicial review of a migration decision under s 476 of the Act. An appeal from such a decision lies to this Court. The appellants in the present case do not rely upon any error on the part of the FCCA. Rather, in substance the appellants seek for this Court to conduct judicial review of the decision of the Authority for a second time on different grounds than were advanced before the FCCA. This Court has power to entertain new grounds of judicial review raised for the first time on appeal. However, a consequence of permitting such a course is that the appeal which the statute contemplated would be available from a judicial review decision is effectively denied – cf: *AAM15 v Minister for Immigration and Border Protection* (2015) 231 FCR 452 at [14] (Perram J). It is no answer to say that the High Court might grant special leave to appeal from this Court’s decision.
9. Another consideration is how significantly the new point departs from the case as conducted below: *Han* at [18]. In this respect, it is relevant to have regard to whether the appellant was legally represented and whether the decision not to argue a ground might have been the deliberate product of a forensic decision – cf: *Han* at [20]. The fact that an appellant seeks to introduce fresh evidence on appeal in order to argue the new ground is also relevant as is the question whether the respondent would have conducted its case differently had the new grounds been raised below.
10. It is convenient to consider first the merit of the new proposed grounds.

## First proposed ground

1. In order to conduct a review of the kind contemplated by Part 7AA, the Authority had to engage in a real and genuine consideration of the “reviewable decision” and the “review material”: *EKN17 v Minister for Immigration and Border Protection* [2019] FCA 1135 at [61]-[62]. The consideration which it had to give to those matters was a “proper, genuine and realistic consideration”; the Authority had to engage in an “active intellectual process” directed at that which it was obliged to review: *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292 (Gummow J); ***Carrascalao*** *v Minister for Immigration and Border Protection*(2017) 252 FCR 352 at [45]; *Bondelmonte v Bondelmonte* (2017) 259 CLR 662 at [43]; ***Singh*** *v Minister for Home Affairs* [2019] FCAFC 3 at [30].
2. To say that there was an insufficient “active intellectual process”, or a failure to give “proper, genuine and realistic consideration” to the “review material” or the issues, is a statement of conclusion. It is reached by analysis of what the Authority did or failed to do. There are different ways in which a failure to engage with the “review material” or issues might lead to a conclusion that there was jurisdictional error or of which it might be said that there was a failure to give “proper, genuine and realistic consideration”. What is important is that the judicial review applicant has demonstrated that what the Authority did or failed to do amounted to a failure to exercise jurisdiction or a (purported) exercise of jurisdiction in a manner which the statute did not authorise. What the Authority did or failed to do may be demonstrated directly or by inference, in particular from the content of the review material before the Authority and the Authority’s statement of decision made under s 473EA of the Act.
3. In *Singh*, the Full Court observed at [37]:

In determining whether the decision-maker had an active intellectual engagement, the following matters are relevant:

(1) First, the degree of consideration which is necessary for the jurisdiction to have been exercised, and exercised in a manner which is authorised, is affected by the centrality of the matter, which it is said was not engaged with, to the issues and the prominence the matter assumed.

(2) Secondly, in examining the reasons of the decision-maker to determine whether there was a lack of intellectual engagement:

(a) the reasons should not be scrutinised “minutely and finely with an eye keenly attuned to the perception of error”: *Carrascalao* at [45], quoting *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** (1996) 185 CLR 259 at [30];

(b) it is necessary to read the reasons in light of the whole case as it was before the Tribunal, which might have involved more issues than are raised, and more evidence than is, before courts on judicial review and subsequent appeal. The failure to mention a particular paragraph of a particular piece of evidence should be analysed by reference to the whole of the material before the Tribunal and its prominence assessed by reference to all of the issues and the way in which the matter was conducted in the Tribunal; and

(c) a conclusion that the decision-maker has not engaged in an active intellectual process “will not lightly be made and must be supported by clear evidence, bearing in mind that the judicial review applicants carry the onus of proof”: *Carrascalao* at [48].

### First matter: the university altercation

1. The first matter the appellants asserted was overlooked or not properly considered concerned past harm asserted to have occurred before the first and second appellants married, at the end of the first appellant’s second year of university.
2. The appellants first referred to the following sentence in A[43] of the Authority’s reasons:

… I have not accepted that the applicants were harmed by the first applicant’s family in the past …

1. The appellants then pointed to the evidence referred to at [5] and [6] above and contended that the Authority could not have had regard to that evidence given that the evidence indicated actual harm to both the first and second appellants, contrary to the conclusion at A[43].
2. In the context of setting out the appellants’ claims, the Authority stated at A[13] (emphasis added):

The first applicant grew up in [Village H] and the second applicant grew up in [Town A]. The first and second applicant met when the first applicant was still in high school and dated in secret. Eventually, when the first applicant was in her first year at university, the second applicant and his family asked her family if they could marry. However, her paternal grandfather refused because the first applicant was to marry her cousin in order to keep the family name within the bloodline. They continued to date in secret and on one occasion the second applicant was injured with a knife by the first applicant’s cousin, who saw them talking. After this, the first applicant’s grandfather set a date for the marriage. The first and second applicants claim that they got married secretly on 31 March 2011. They did not tell their families they were married and continued to live in their respective homes. In March 2012, they started living together in Ahwaz, but did not tell their families where they were living.

1. In that passage, the Authority expressly acknowledged the claim that the second appellant was injured by the first appellant’s cousin with a knife.
2. At A[33], the Authority stated (emphasis added):

While I do not accept the claims regarding the validity of the marriage, I accept that the first applicant’s extended family may have opposed her marriage to the second applicant. I accept that the first applicant’s cousin went to her mother’s house on the occasion when the first applicant visited her mother after her marriage. However, I note that on the applicants’ evidence he did not see the applicants or cause them any harm because they got away and hid next door. I accept that there may have been an altercation between the second applicant and the first applicant’s cousin at her university before they were married, but note that there is no evidence that the cousin caused the applicants any other harm. I also accept that the windows of the second applicants’ shop were broken on two occasions, but on the evidence before me, I am not satisfied that they were broken by the first applicant’s family given that the second applicant admits that he does not know who broke the windows, and that he can only speculate that they were broken by the first applicant’s family.

1. In that passage, the Authority accepted that the first appellant’s cousin caused harm on that occasion, but did not cause “any other harm”. In other parts of its judgment, the Authority addressed the various claims of harassment and violence by the first appellant’s family and rejected that there was any actual harm by them.
2. The better reading of the Authority’s reasoning is that it accepted that the cousin caused harm during the altercation at the university, but not otherwise; and it rejected that the first appellant’s family caused harm to the appellants. Whilst it is true that the first appellant’s cousin might well fall within the meaning of ‘the father’s family’, I do not read the sentence emphasised above from A[43] as rejecting that the cousin caused harm during the incident referred to at A[13] and A[33]. Rather, the Authority concluded that the first appellant’s father’s family had not caused harm; the first appellant’s cousin had caused harm, but only during the incident at the university.
3. The Authority expressly stated that it read the statutory declarations and it referred extensively to them. It also expressly stated that it considered the content of what was said at the SHEV interview. I am not satisfied that the Authority did not actively consider and engage with what was said in respect of the incident at the university.
4. The Authority did not refer to the evidence of the first appellant that she may have lost consciousness as the cousin pushed past her to get to the second appellant. However, I would not infer from that omission that the Authority overlooked her evidence. The main thrust of the claim was that the cousin attacked the second appellant with a knife. In order to get to him, the cousin pushed the first appellant aside and she was injured. It was not necessary for the Authority to refer to every aspect of the incident in its reasons.

### Second matter: acid attacks

1. The Authority referred to the threats of acid attacks at A[41], where it stated:

The first applicant’s grandfather died of a stroke after they left Iran. The first applicant claims that her father’s family believe that she is the reason for his death, and that this is another reason for her father’s family to kill her and the second and third applicants. She also claims that brother has told her that her uncles have threatened to throw acid on her on the day that she returns. However, he did not provide any further information to the first applicant as her mother entered the room.

1. The Authority also referred to country information which indicated that women in Iran are vulnerable to violence including by acid attacks. It stated at A[42]:

The applicants claim that they will be victims of an honour killing if they return to Iran, or subjected to violence from the first applicant’s family. I have had regard to the country information about honour killings and violence against women in Iran. Honour killings are described as a murder committed or ordered by a relative as a punishment to a family member who is seen (or suspected) to have damaged the family’s reputation by their actions, which can include refusal of an arranged marriage and choosing one’s own spouse without the family’s approval. The country information also states that there are no reliable statistics on the prevalence of ‘honour killings’ in Iran. DFAT and the Finnish Immigration Service report that honour killings are an established phenomenon in many of Iran’s outermost provinces, particularly in areas where state infrastructure is scarce and tribal traditions strong. While honour killings can take place in all kinds of families from different social classes and educational backgrounds, the likelihood of honour killings is likely to decrease with education, urbanisation, and access to social services. The Finnish report provides that honour killings most commonly take place among ethnic minorities living near Iran’s borders, while the 2016 DFAT report provides that honour killings are likely to be a rare occurrence among Persian Iranians. I have also had regard to the country information that Iran has an unwritten law of honour and shame, and that families may perceive a woman’s refusal to a marriage that has been arranged for her or a woman’s desire to divorce a man chosen for her as a shameful blow to their honour. Women in Iran may also be vulnerable to violence, including acid attacks.

1. The Authority considered the appellant’s evidence concerning the threat of an acid attack: at A[41]. It considered country information which addressed violence towards women in Iran including honour killings: at A[42]. However, it ultimately concluded that the first appellant’s family did not have any intention to harm the appellant: at A[43]. The appellants have not shown that the Authority failed to consider the first appellant’s claims with respect to the threat of acid attacks. This ground has insufficient prospects of success to permit it being raised.
2. In the context of the argument concerning the threat of an acid attack, the appellants submitted that the Authority failed to consider evidence that an honour killing had taken place in the first appellant’s father’s village. This issue had not been raised by the appellants as an independent proposed ground of appeal. However, both parties addressed the issue in written and oral submissions in connection with the ground concerning the threat of an acid attack.
3. As mentioned earlier, the first appellant’s statutory declaration included:

My father’s family said that l had dishonoured the family. Honour killings were accepted in our town. I knew another girl who was engaged to be married. Her fiancé’s family, however, accused her of having a boyfriend. They invited her over and left her with her fiancé, who hanged her. Her fiancé only spent a short amount of time in goal and then he was freed. Because they accused her of having had a boyfriend, they smeared her name, so the honour killing was ‘justified’. Incidents and stories like this used to happen in our town and all over Iran.

1. It was common ground that there was no specific reference in the Authority’s reasons to this evidence. The argument about whether this evidence was overlooked or properly considered also centred on the Authority’s reasoning from A[41] to A[43].
2. The Authority’s reasons at A[41] and A[42] are set out at [47] and [48] above. A[43] was in the following terms:

While the first applicant is from a small village in an outermost province of Iran, I note that both applicants give their ethnic group as Persian/Farsi, and do not fall within a minority ethnic group where the country information indicates honour killings are more likely to occur. I have also had regard to the fact that the applicants were not the victims of an honour killing or violence in the year that they lived together in [Town A], even though the first applicant’s family knew where the second applicant worked. While I accept that the family were not in favour of the marriage, I do not accept that the family have any intention to harm the applicants because of it. I note that the family did not locate the applicants’ home in [Town A] during the year they lived there, which suggests that the family were not actively searching for the applicants or interested in causing them harm. I have not accepted that the applicants were harmed by the first applicant’s family in the past. I have not accepted that the first applicant’s uncle worked for the Sepah. For all of these reasons, I am not satisfied that the applicants face a real chance of harm from the first applicant’s extended family in Iran, or from the authorities, either now or in the reasonably foreseeable future. I do not accept that they face a real chance of harm from an honour killing. Given this finding, I do not accept that their daughter faces a real chance of harm as a child whose parents are killed.

1. The process of reasoning at A[43] commenced with an acceptance that the first appellant was from an outermost province of Iran where honour killings were an “established phenomenon”: at A[42]. The Authority then proceeded to identify various matters which lead it to reach the ultimate conclusion that, nevertheless, there was not a real chance of harm from an honour killing. Thus, the Authority observed that the first and second appellants gave their ethnic group as Persian/Farsi at A[43], amongst whom country information indicated honour killings were a “rare occurrence”: at A[42]. It noted that they did not fall within a minority ethnic group where the country information indicated honour killings were more likely to occur: at A[43]. It also referred to the fact that the first and second appellants lived together in Town A without being harmed, even though the first appellant’s family knew where the second appellant worked: at A[43].
2. Section 473EA(1) of the Act 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 25D of the ***Acts Interpretation Act*** *1901* (Cth) 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. There was no dispute that s 25D of the *Acts Interpretation Act* applies to s 473EA of the Act– cf: *BVD17 v Minister for Immigration and Border Protection* (2018) 261 FCR 35 at [47].
2. It follows that the Authority’s written statement of decision under s 473EA had to “set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based”.
3. A decision-maker is not necessarily obliged to make a finding of fact with respect to every claim or issue raised by an applicant: *Minister for Home Affairs v* ***Buadromo*** (2018) 362 ALR 48 at [46]. As the Full Court noted in *Buadromo* by way of example, a finding of fact may not be required if the claim is irrelevant or if it is subsumed within a claim or issue of greater generality. It might not be required if it was not material to the line of reasoning employed.
4. A failure to set out a finding on some question of fact *may* indicate that no finding was made on the matter and that it was not considered material: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5], [10] (Gleeson CJ); at [69] (McHugh, Gummow and Hayne JJ); *Buadromo* at [47]. On the other hand, it may justify the inference that the evidence was overlooked.
5. In *ETA067 v Republic of Nauru* (2018) 92 ALJR 1003 at [14], Bell, Keane and Gordon JJ emphasised that there is a distinction “between an omission indicating that a tribunal did not consider evidence (or an issue raised by it) to be material to an applicant’s claims and an omission indicating that a tribunal failed to consider a matter that is material”. Their Honours stated at [13]:

The absence of an express reference to evidence in a tribunal’s reasons does not necessarily mean that the evidence (or an issue raised by it) was not considered by that tribunal. That is especially so when regard is had to the content of the obligation to give reasons which, here, included referring to the findings on any “material questions of fact” and setting out the evidence on which the findings are based. There was no obligation on the Tribunal to refer in its reasons to every piece of evidence presented to it.

1. The latter point was also emphasised by the Full Court said in *Buadromo* at [48]:

Generally, an obligation to give reasons does not require a “line-by-line refutation of the evidence of the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the tribunal”. The tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 74 ALJR 405 at [65]‑[67] per McHugh J).

1. There are several possibilities of what should be made of the failure by the Authority to refer to the first appellant’s evidence that honour killings were accepted in her village or to the example of the honour killing that she gave. Ultimately however, I am not satisfied that the Authority overlooked the first appellant’s evidence or failed to engage with it in a genuine and real way.
2. Section 25D of the *Acts Interpretation Act* only requires reference to the evidence on which material findings of fact were based. It follows that the degree to which reference should be made to relevant evidence must be assessed from the perspective of the material finding of fact concerned. Whether the statutory obligation to refer to the evidence on which a material finding of fact was based has been complied with depends on all of the circumstances. It is relevant to consider the importance of the particular material fact to the claims made and to the decision-maker’s reasoning process and whether the fact was disputed or the subject of conflicting evidence. A failure to comply with a statutory obligation to refer to the evidence on which a material finding of fact was based does not, of itself, establish jurisdictional error – cf: *Islam v Cash* (2015) 148 ALD 132 at [22] (Flick J).
3. The Authority accepted that the first appellant was from a small village in an outermost province at A[43], where honour killings were an established phenomenon: at A[42]. This was a finding which was material in the Authority’s reasoning to its ultimate conclusion. The finding was likely based on the first appellant’s evidence in her statutory declaration set out at [52] above, read with the country information referred to at A[42]. The Authority referred to the first appellant’s statutory declaration and expressly indicated that it had taken it into account – cf: *Carrascalao* at [131]; *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112 at [70]. The Authority’s statement in that regard accords with the inference otherwise to be drawn from the Authority’s reasons which reveal a conscientious taking into account of the review material – compare: *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [38].
4. The Authority’s reasons should be understood as accepting the first appellant’s claim that she was from a part of Iran where honour killings occurred. The example of an honour killing given by the first appellant should be understood as subsumed by a finding of greater generality or implicitly accepted in the Authority’s acceptance of her more generally expressed claim. Accordingly, it was not necessary for the Authority to refer to the example of an honour killing which had been given by the first appellant or to make an express finding about it. There was no jurisdictional error because it was not established that the Authority failed to engage with the review material in this regard.
5. The first new ground of judicial review lacks sufficient merit to warrant leave being granted to raise it on appeal.

## Second ground: shop windows

1. In relation to the second proposed ground, the appellants relied on an asserted failure to consider evidence and also relied upon the principle that a failure to evaluate a clearly articulated submission of substance might amount to jurisdictional error – cf: ***SZSSC*** *v Minister for Immigration and Border Protection* (2014) 317 ALR 365 at [75]-[82] (Griffiths J); *AYY17 v Minister for Immigration and Border Protection*[2018] FCAFC 89 at [18] (Collier, McKerracher and Banks-Smith JJ).
2. The appellants submitted, correctly, that the Authority concluded at A[33] that the windows of the second appellant’s shop had been broken on two occasions. The second appellant had claimed, as had the first appellant, that this was done by the first appellant’s father’s family.
3. The appellants attack as inaccurate the Authority’s conclusion that the second appellant “admits that he does not know who broke the windows, and that he can only speculate that they were broken by the first applicant’s family”. The last sentence of A[33] was:

… I also accept that the windows of the second applicants’ shop were broken on two occasions, but on the evidence before me, I am not satisfied that they were broken by the first applicant’s family given that the second applicant admits that he does not know who broke the windows, and that he can only speculate that they were broken by the first applicant’s family.

1. The appellants, relying upon the transcript of the SHEV interview (which it sought to introduce as fresh evidence), submitted that the second appellant:

* explains that he did not have any enemies in the area where his shop was located and that there was no one else with a motive to act in that way but for the wife’s father’s family;
* explains that he wasn’t suspicious following the first attack but that the second attack made it inherently less likely that it was a random crime, including because he could exclude the possibility that it was just children being naughty since the police had told him that the nature of the damage was such that it could not have been done by children; and
* accepts the interviewing officer’s proposition that – as a matter of *inference or deduction*, and not bare speculation – he reasoned that it was the wife’s father’s family who broke those windows.

1. The appellants’ submission continued that, contrary to the Authority’s analysis, the second appellant’s admission was not that he did not know who the attackers were, but rather “his admission was that he didn’t see who attacked the shop but otherwise had credible reasons to think that it was the wife’s father’s family”.
2. This submission makes too much of the Authority’s use of the word “speculate”. It may be accepted that there is a difference between speculation and inference. For example, the terms might be used to distinguish between, on the one hand, a factual finding legitimately reached by a process of reasoning from accepted primary facts and, on the other, a conclusion of fact which is mere speculation and thus not open. To make a finding of fact based on inference, it must be reasonably open on the material; it cannot be mere conjecture or speculation: ***Seltsam*** *Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at [84] (Spigelman CJ). If there are no proved or agreed facts from which the inference can be made, the process of inference fails and what is left is mere speculation: *Seltsam* at [87].
3. However, the reasons of an administrative decision-maker are not to be parsed and analysed with a fine tooth comb. What the Authority meant by the last sentence of A[33] is sufficiently clear: the second appellant could not definitively state that it was his wife’s father’s family who had broken the shop windows even though he had reasons which led him to believe it was one or other or some of them. The Authority evidently did not agree that the reasons which led the second appellant to conclude that the windows were broken by the wife’s father’s family were sufficient for it also to reach that conclusion. The Authority considered the second appellant’s conclusion amounted to no more than what it described as speculation. The Authority did not err by failing to set out the reasons why the second appellant reached the conclusion that it was his wife’s father’s family which had broken the windows. Whether the Authority was right or wrong in describing the second appellant’s conclusion as speculation rather than inference, it exercised its jurisdiction of review by actively considering the claim, argument and evidence.
4. The second new ground of judicial review lacks sufficient merit to warrant leave being granted to raise it on appeal.

# Conclusion

1. Leave should not be granted to raise the new proposed grounds. I have reached that conclusion taking into account the fresh evidence which the appellants sought to introduce.
2. The appeal must be dismissed with costs.

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| I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Thawley. |

Associate:

Dated: 9 September 2019