FEDERAL COURT OF AUSTRALIA

ASO18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 1909

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| Appeal from: | *ASO18 V Minister for Home Affairs & Anor* [2019] FCCA 1403 |
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| File number: | NSD 932 of 2019 |
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| Judge: | **SNADEN J** |
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| Date of judgment: | 19 November 2019 |
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| Date of publication of reasons: | 25 November 2019 |
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| Catchwords: | **MIGRATION** – protection visa – appeal from the Federal Circuit Court of Australia (the “**FCCA**”) – application for judicial review of a decision of the Immigration Assessment Authority (the “**IAA**”) – whether the IAA decision was affected by jurisdictional error – whether the IAA reached a conclusion unsupported by evidence – whether the IAA decision has “become” unreasonable – whether the IAA failed to address a material contention –whether leave should be granted to advance on appeal a ground not advanced below – additional ground without merit – leave refused – judgment delivered *ex tempore* – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 5AA, 5H, 36, 473CA, 473DC, 473DD, 473FA, 476  |
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| Cases cited: | *ASO18 v Minister for Home Affairs & Anor* [2019] FCCA 1403*BHP17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1211*BJK17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCAFC 171*CCQ17 v Minister for Immigration and Border Protection* [2018] FCA 1641*DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91*Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332*Minister for Immigration v SZMDS* (2010) 240 CLR 611*Plaintiff S111/2017 v Minister for Immigration and Border Protection* (2018) 263 FCR 310*SZLPH v Minister for Immigration and Border Protection* (2018) 266 FCR 105*SZTAP v Minister for Immigration and Border Protection* (2015) 238 FCR 404 |
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| Date of hearing: | 19 November 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 |
|  |  |
| Number of paragraphs: | 46 |
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| Counsel for the Appellant: | The Appellant appeared in person with the assistance of an interpreter |
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| Solicitor for the First Respondent: | Ms K Evans of Sparke Helmore Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |
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ORDERS

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|  | NSD 932 of 2019 |
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| BETWEEN: | ASO18Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | SNADEN J |
| DATE OF ORDER: | 19 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 of the appeal, to be fixed by way of a lump sum.

4. Within 14 days, the parties file any agreed proposed minutes of orders fixing a lump sum in relation to the first respondent’s costs.

5. In the absence of any such agreement:

(a) within 21 days, the first respondent file and serve an affidavit constituting a Costs Summary in accordance with paragraphs 4.10 to 4.12 of the court’s *Costs Practice Note* (GPN-COSTS);

(b) within a further 14 days, the appellant file and serve any Costs Response in accordance with paragraphs 4.13 to 4.14 of the *Costs Practice Note* (GPN-COSTS); and

(c) in the absence of any agreement having been reached within a further 14 days, the matter of an appropriate lump sum figure for the first respondent’s costs be referred to a Registrar for determination.

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

REASONS FOR JUDGMENT

(Revised from transcript)

# SNADEN J:

1 Before the court is an appeal against a judgment of the Federal Circuit Court of Australia (hereafter, the “**FCCA**”). The appellant charges the FCCA with having erred by dismissing with costs an application that he made to that court for prerogative relief under s 476 of the *Migration Act 1958* (Cth) (hereafter, the “**Act**”): *ASO18 v Minister for Home Affairs & Anor* [2019] FCCA 1403 (Judge Humphreys; hereafter, the “**FCCA Judgment**”). That application (hereafter, the “**Judicial Review Application**”) challenged a decision of the second respondent (hereafter, the “**Authority**”), which affirmed an earlier decision of a delegate of the first respondent (hereafter, the “**Minister**”) not to grant an application that the appellant made under the Act for a safe haven enterprise visa.

# BACKGROUND

2 The appellant is a Hindu Tamil and a citizen of Sri Lanka. He hails from Batticaloa, in Sri Lanka’s Eastern Province. He came to Australia on 14 November 2012, arriving by boat as an unauthorised maritime arrival (within the meaning since attributed to that phrase by s 5AA of the Act).

3 By an application dated 27 November 2016, the appellant applied for a safe haven enterprise visa (hereafter, the “**Visa Application**”). In support of that Visa Application, the appellant contended (by way of a statutory declaration) that, if returned to Sri Lanka, he faced relevant persecution or harm because of one or both of the following, namely:

(1) his familial connection to the Liberation Tigers of Tamil Eelam (hereafter, the “**LTTE**”) and, in particular, the fact that:

(a) his grandfather, a member of the LTTE, was killed in 1990 during the civil war;

(b) after the death of his grandfather, his father assumed care of the appellant’s uncle, to whom I shall hereafter refer to as “**J**”;

(c) J had joined the LTTE and subsequently became its financial officer (or treasurer);

(d) in or around June 2011, representatives of the Sri Lankan Criminal Investigation Department (hereafter, the “**CID**”) visited the appellant in search of J, and threatened the appellant’s father;

(e) the CID officers assaulted the appellant’s father and detained him in a Sri Lankan Army camp, returning him the next day “badly beaten”;

(f) in May 2012, CID officers again visited the appellant and searched his house, after which, they took the appellant to their camp and interrogated him (including by means of physical mistreatment) about the whereabouts of his father, J, and some weapons and money;

(g) the appellant thereafter spent five months in hiding in Colombo and did not leave his house;

(h) in early October 2012, the appellant left hiding in Colombo to meet with a people smuggler—and, while he was out, CID officers went to the house in Colombo in which he had been hiding and asked for him;

(i) after the appellant’s arrival in Australia, his mother told him that whilst he was in Colombo, CID officers had come looking for him and his father on two separate occasions, and had also visited his mother, presumably in search of the appellant, after he had departed Sri Lanka; and

(j) since the appellant has been in Australia, he has shared pro-Tamil sentiment on social media; and also because

(2) the appellant is a young Tamil, who departed Sri Lanka illegally by boat.

4 On 16 February 2017, the appellant attended an interview with a delegate of the Minister to discuss his Visa Application (hereafter, the “**Delegate Interview**”). On 5 May 2017, the delegate dismissed the Visa Application. That decision (hereafter, the “**Delegate’s Decision**”) was then referred to the Authority for review in accordance with s 473CA of the Act (hereafter, the “**IAA Review**”).

5 On 8 February 2018, the Authority upheld the Delegate’s Decision. By the Judicial Review Application and this appeal from the FCCA Judgment, the appellant alleges that that decision (hereafter, the “**Review Decision**”) was the product of jurisdictional error, which this court is asked to correct on appeal through the grant of prerogative relief.

# THE REVIEW DECISION

6 In determining the IAA Review, the Authority concluded that the appellant had not established that either of the two bases (above, [3]) upon which his Visa Application was based entitled him to a safe haven enterprise visa. Largely, it did not accept the factual narrative that the appellant advanced to that end. In its Review Decision, the Authority made the following observations (references omitted):

10. The [appellant] has claimed that in 1990 his paternal grandfather was killed while fighting for the LTTE against Sri Lankan government forces. After his grandfather’s death the [appellant]’s father assumed responsibility for Uncle J, who then joined the LTTE as a teenager. I accept that Uncle J then became the LTTE’s financial officer in Batticaloa district, but that the [appellant]’s father did not have any LTTE involvement himself. The [appellant]’s evidence on these matters was consistent between his written SHEV statement and responses at SHEV interview and I accept these claims. The [appellant] explained that he was very young when Uncle J joined the LTTE, and I accept his evidence that during the war he only saw him once, in 2007, when they went to visit the LTTE camp. I have also had regard to a picture which the [appellant] claims is of him as a young boy, standing next to Uncle J who is holding a rifle. I also consider it plausible that the [appellant]’s father and Uncle J continued to have some contact during the war although the [appellant] is not aware of the details.

11. I accept in June 2011 the CID came to the [appellant]’s family home searching for Uncle J, and that when the [appellant]’s father told them he did not know where Uncle J was, the CID threatened him. I accept that in January 2012 Uncle J arrived at the family home with two other people whom the [appellant] did not know. I accept the [appellant]’s evidence that the situation between his father and Uncle J was very tense, and Uncle J and his companions left shortly afterwards.

12. I accept that some days later, in late January 2012, the CID arrived at the [appellant]’s home searching for Uncle J and his hidden money and weapons. I am prepared to accept that when the [appellant]’s father said he didn’t know where Uncle J was, the CID assaulted him and took him to their camp. I also accept that the [appellant] and his mother attempted to report his disappearance to the police but that no action was taken. I accept that his father was released the next day and told the [appellant] the CID had interrogated him about Uncle J and the money and weapons they thought Uncle J possessed. I accept that during the course of his interrogation the [appellant]’s father was seriously mistreated and that the CID made threats to kill him and the [appellant].

13. I have significant concerns with the remainder of the [appellant]’s claims. The [appellant] has claimed that his father returned to the family home on the night of his release, but that when the family woke up in the morning he had disappeared. The [appellant] claims that neither he, nor any other member of his immediate family, has had contact with his father since he left but that his departure meant that the [appellant], as the eldest son in the family, became the CID’s target.

14. In the [appellant]’s arrival interview, which was held eight weeks after his arrival in Australia, the [appellant] has given a different account of his father’s whereabouts. Firstly, when asked for his father’s details, the [appellant] indicated that he currently resided in the family home, for which he gave an address, and that his father is currently working as a fisherman. Secondly, when asked who made the arrangements for his travel to Australia, the [appellant] responded that his father did, via a smuggler, two days prior to the [appellant]’s departure. During the SHEV interview the delegate put these inconsistencies to the [appellant] for comment and he responded that during his arrival interview he had been nervous and confused, he had just left his family behind; and in fact it was his mother, not his father, who had arranged his journey to Australia.

15. I have had regard to the [appellant]’s explanation, as well as the fact that the [appellant] was seventeen years old at the time of his arrival interview; however these factors do not alleviate my concerns. I have listened to the audio recording of the arrival interview, during which an independent observer was present throughout because of the [appellant]’s status as a minor, and note that he gave full and accurate responses regarding other aspects of his background, family composition and history in Sri Lanka. I do not consider it credible that the [appellant] would state that his father was not missing or deceased, provide his father’s address, and make several references to his father arranging his journey to Australia, if in fact his father was missing and his mother was the person who had made the arrangements. On the evidence I am not satisfied the [appellant]’s father was in hiding from January 2012 onwards.

16. The [appellant] has claimed that in March and May 2012 the CID came to his house, asking for his father, and upon finding that he was not there, on the second occasion took the [appellant] to their camp instead. During the SHEV interview the [appellant] advised the delegate that at the camp the CID interrogated him about his father, Uncle J, and the money and weapons they believed Uncle J possessed. The [appellant] also told the delegate that he was physically mistreated and threatened with death. The [appellant] showed the delegate a scar on his back which he stated was the result of being beaten with palm fronds. The [appellant]’s evidence to the delegate regarding these events, although largely consistent with his written SHEV statement, lacked detail and was unconvincing. While I am prepared to accept that the [appellant] has a scar on his back, I do not accept that he sustained this scar while in the custody of the CID. Given I have found the [appellant]’s father was not in hiding from January 2012, I do not accept that the CID were unsuccessfully searching for him in March and May 2012, and that they took the [appellant] in his place.

17. The [appellant] has claimed in May 2012 he lived with a family friend in Colombo for five months to avoid the ongoing attention of the CID in Batticaloa. The [appellant] claimed that during those five months he did not leave the residence where he was staying, to avoid being detected by the CID. However at the end of the five months the [appellant] left the house in order to meet a smuggler, who was arranging his trip to India. While the [appellant] was away from the residence the CID arrived searching for him. This prompted the [appellant] to travel back to Batticaloa and hide in his local church for several weeks until he could depart Sri Lanka by boat in late October 2012. I do not consider it credible that on the only occasion which the [appellant] exited the house where he was hiding, the CID came looking for him.

18. The delegate asked the [appellant] if anything had happened to his family since his departure for Australia and he responded that the CID came on one occasion to question his mother regarding his and his father’s whereabouts but after she told them that they had both gone to Australia, the CID have not returned. The delegate put to the [appellant] that it was not credible that the CID have not targeted his mother or his younger brother for the information regarding the location where Uncle J hid his money and weapons, if they were still interested. The [appellant] responded it is because his mother is a woman and his brother, who was fourteen at the time of the [appellant]’s SHEV interview, is too young. Given the [appellant] has claimed that the CID were targeting him throughout 2012, while he was only seventeen, I consider his response lacks credibility.

19. Overall, given the significant inconsistencies in the [appellant]’s evidence regarding the events he claims occurred in 2012, I do not accept that his father went into hiding and is still missing, or that in his absence the CID detained, interrogated and physically mistreated the [appellant] instead. I do not accept that the [appellant] went to Colombo because he was having issues with the authorities in Batticaloa, or that he was in hiding there. I do not accept that while he was in Colombo the CID came looking for him, and that this prompted him to return to Batticaloa and hide until his departure for Australia. I also do not accept that while the [appellant] was in Colombo the CID came looking for him on two occasions or that after the [appellant]’s departure from Sri Lanka the CID have asked his mother about him.

20. I am prepared to accept that in January 2012 the CID detained the [appellant]’s father overnight and threatened to kill him and the [appellant]; however the [appellant]’s father was released the next day and there is no credible evidence before me that the CID ever approached the family again. I consider any threats that the CID made were for intimidation purposes only. Six years have now elapsed and in the circumstances I do not accept that the [appellant] or his father are persons of interest to the Sri Lankan authorities.

21. At the end of the SHEV interview the [appellant] showed the delegate several videos on his mobile phone, regarding what he identified as the ongoing police brutality against Tamils in Sri Lanka. The video audio was not in English, however the interpreter was able to provide a very brief summary of their contents, which included an incident where the police threatened a group of Tamil civilians at gunpoint, and another concerning a protest over land confiscation. The [appellant] explained that this did not occur in his village, but in a neighbouring village, and that the videos show Tamils are still being discriminated against, and how important it is that the international community help them.

22. The [appellant]’s representative then noted that the [appellant] had posted these videos to his Facebook page. The [appellant] then handed the delegate his phone and it appears that she examined his Facebook page. In the delegate’s decision, in relation to the [appellant]’s Facebook page, she noted “minimal activity and no posts regarding the situation for Tamils in Sri Lanka since 2015”; however the evidence that she based this on was not contained in the referral materials to the IAA and I have given no weight to this finding. In the representative’s post SHEV interview written submission to the delegate, he stated that the [appellant] cannot afford to have his Facebook page, or the videos, translated. To date the [appellant] has not provided any screenshots of his Facebook profile or posts to show his pro-Tamil or anti-government sentiments. In any event, the country information before me does not indicate that the Sri Lankan authorities are monitoring the individual Facebook accounts of individual asylum seekers overseas, and I [am] not satisfied the [appellant] would be targeted on this basis.

23. The 2012 United Nations High Commissioner for Refugees (UNHCR) Guidelines, issued around the time the [appellant]’s departure from Sri Lanka, did not specify individuals of Tamil race as requiring protection at that time, for that reason alone. Furthermore, in the UNHCR’s opinion, individuals originating from an area where the LTTE were previously active, such as the [appellant], did not require protection solely on that basis unless there were additional, relevant factors which may have given rise to a profile of risk.

24. I note the UNHCR identified at that time, amongst other risk profiles, those who with familial LTTE links, or those who provided the LTTE with material support, as potentially in need of protection. Country information before the delegate also indicates that the majority of Tamil civilians in the Eastern Province had some degree of contact with the LTTE in their daily lives. I have accepted that the [appellant]’s grandfather was an LTTE combatant and Uncle J was a financial officer for the LTTE in Batticaloa District. I have also accepted that Uncle J was a person of adverse interest to the Sri Lankan authorities after the war, and that the CID searched for him at the [appellant]’s family home in June 2011 and January 2012. I accept that on the second occasion they detained the [appellant]’s father overnight, physically mistreated him, and threatened him and the [appellant]. However, for the reasons discussed above, I have not accepted that the CID have targeted the [appellant] because of his familial LTTE connections, or any other reason. In any event, I am satisfied that the Sri Lankan authorities have not approached the [appellant]’s father since January 2012.

25. Approximately five years have now passed since then, and since the publication of the UNHCR Guidelines. The country information before me indicates the situation in the north and east of Sri Lanka, although fragile, has continued to improve. The LTTE is a defunct organisation and the Sirisena government has replaced the military governor of the Northern Province with a civilian administration as a confidence-building measure to address the grievances of the Tamil community. The monitoring of individual citizens in the north and east of the country, while still occurring, has reduced. There are no restrictions on freedom of movement throughout the entire country, and significant military checkpoints in the north have been dismantled. There has been international criticism however, including from the UN Special Rapporteur on human rights and counter-terrorism, that the pace of progress has been too slow, particularly with regards to bringing the perpetrators of war crimes to justice, and the failure to dismantle the Prevention of Terrorism Act continues to give the Sri Lankan authorities sweeping powers to detain individuals without charge.

26. In 2016 the UK Home Office assessed that: “A person being of Tamil ethnicity would not in itself warrant international protection. Neither in general would a person who evidences past membership or connection to the LTTE unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a ‘stop’ list at the airport.” The evidence before me does not suggest that being a young Tamil male from the east, with familial LTTE connections, is sufficient.

…

28. I am not satisfied that the [appellant] is, or will be, of interest to the Sri Lankan authorities because of his status as a young Tamil male from the east with scarring, his familial LTTE connections, the CID’s previous interactions with his father, or the [appellant]’s pro-Tamil posts on Facebook. Based on the [appellant]’s personal circumstances, and the greatly improved country information, I find the [appellant] does not face a real chance of harm for any of these reasons, should he return to Sri Lanka.

*Returning Asylum Seeker from Australia – Illegal Departure*

29. I accept the [appellant] departed Sri Lanka illegally in October 2012 and sought asylum in Australia.

30. I note DFAT assesses the risk of mistreatment for the majority of returning asylum seekers to be low and the country information before me does not support a finding that the [appellant] will be imputed with an anti-Sri Lankan government political opinion simply because he, a Tamil, sought asylum in Australia, a western country. I have found the [appellant] is not of any interest to the authorities, and overall I am not satisfied that the [appellant] faces a real chance of harm on account of him having sought asylum in Australia.

31. The [appellant] departed Sri Lanka without a passport and, as noted in the delegate’s decision, persons who depart Sri Lanka illegally (‘illegal departees’) can be penalised under the Immigrants and Emigrants Act ([I&E] Act) upon return. Country information before the delegate indicates that persons who have departed Sri Lanka illegally may face penalties that can include imprisonment and fines although in practice, penalties are applied to such persons on a discretionary basis and can be paid by instalment, with the accused then free to go.

32. Illegal departees who are charged under the I&E Act can remain in police custody at the airport for a short period after arrival, and should a magistrate not be available before this time – for example, because of a weekend or public holiday – may be held at a nearby prison. Whether such a loss of liberty, such that that the [appellant] may face under the I&E Act processing, would constitute serious harm is a qualitative judgment, involving the assessment of matters of fact and degree; as well as an evaluation of the nature and gravity of that loss of liberty.

33. With reference to the [appellant]’s particular circumstances, I have found he was not of interest to the authorities at the time of his departure from Sri Lanka, or that he was anything other than an ordinary illegal departee. While I accept the [appellant] has shared pro-Tamil material on Facebook, for the reasons discussed above I am not satisfied that the Sri Lankan authorities would target him for that reason upon arrival in Sri Lanka. Accordingly, while I accept there is a real chance the [appellant] will be questioned, fined, and held briefly as part of the re-entry process, I do not accept he would face greater scrutiny or penalty upon return than other illegal departees. On the evidence before me I am not satisfied that any routine questioning at the airport upon return, which all illegal departees undergo, amounts to serious harm.

34. I am also not satisfied that the payment of a fine, or being held in detention for a period of up to 24 hours at the airport, or possibly a nearby prison for a brief period, cumulatively amounts to serious harm. Country information indicates that the [appellant] may experience poor conditions if imprisoned for this brief period, as the result of ageing prison infrastructure, overcrowding and shortage of sanitary and other basic facilities. However I am not satisfied that such conditions of themselves, in this case, constitute serious harm as defined by the Act.

35. If the [appellant] pleads not guilty, he will be released on his own personal surety. I note in some cases a family member is required to collect illegal departees who are released, or to act as a guarantor if personal surety is not granted. There is no evidence before me to suggest a member of the [appellant]’s family would not be available to go to Colombo, or act as guarantor, if this is indeed required.

7 The Authority went on to conclude that the appellant lacked a well-founded fear of persecution, by reason of which he did not meet the requirements of the definition of “refugee” in s 5H(1) of the Act. That, in turn, compelled it to conclude that he did not satisfy one of the two relevant criteria that he needed to satisfy in order to qualify for the grant of a safe haven enterprise visa (namely, the criteria provided for by s 36(2)(a) of the Act).

8 The Authority then went on to consider the other criterion: the so-called “complementary protection” criterion for which s 36(2)(aa) of the Act provides. The Authority made the following observations:

42. I accept the [appellant] has familial LTTE connections and that in 2011 and 2012 the CID interrogated his father about these. I also accept that the [appellant] has shared pro-Tamil material on his Facebook page. However I have not accepted that the [appellant], an asylum seeker and a young Tamil male from the east with scarring, would face a real chance of harm in relation to these reasons upon return. For the same reasons I also find there is not a real risk he will suffer significant harm.

43. I have accepted the [appellant] would be returning to Sri Lanka as an asylum seeker who left the country by boat, and will be subject to a process under the I&E Act. Country information cited above indicates if he pleads guilty he will be fined, which he can pay by instalment. If he pleads not guilty he will be granted bail immediately on the basis of personal surety, or with a family member acting as a guarantor, pending a hearing. I accept that in any of these scenarios he may be held in detention for a short period. On the evidence before me I am satisfied the [appellant], who was an ordinary passenger on a people smuggling venture, does not face a real risk of a custodial sentence.

44. DFAT has reported that detainees are not subject to mistreatment during processing at the airport. The [appellant] may be required to spend approximately 24 hours in police custody at the airport, or possibly a nearby jail, to resolve his offences under the I&E Act. Country information before the delegate indicates that Sri Lankan prison conditions do not meet international standards due to old infrastructure, gross overcrowding, and a shortage of sanitary and other basic facilities. I am not satisfied this, or the imposition of a fine, would amount to the arbitrary deprivation of life, the death penalty or torture. I am also not satisfied there is an intention to inflict pain or suffering, severe pain or suffering, whether physical or mental, or cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I find there is not real risk of significant harm on this basis.

9 The Authority went on to conclude that the appellant did not satisfy the complementary protection criterion for which s 36(2)(aa) of the Act provides. It followed that the Authority was of the view that the appellant could not satisfy either of the two criteria upon which his Visa Application turned. That being so, it affirmed the Delegate’s Decision.

# THE JUDICIAL REVIEW APPLICATION

10 By his Judicial Review Application to the FCCA, the appellant advanced a number of grounds by which he alleged that the Review Decision was liable to prerogative relief as the product of jurisdictional error. Only the following three of those grounds are relevant to the present appeal (errors original):

**Ground 1**

1. The Immigration Assessment Authority (hereinafter referred as ‘**IAA**’) erred in its finding at [paragraph 35] without evidence that the [appellant] has the support of his family to assist him with any fine that is imposed which is an unfounded assumption and is a jurisdictional error.

**Particulars:**

a) Mortimer J observed in *ARK16 v Minister for Immigration and Border Protection* [2018] FCA 825 at [41] (in considering whether there had been a denial of procedural fairness in that case), “the circumstances of families are many and varied, and no stereotypical assumptions can be made about whether a family member is able (and willing) to provide assistance” of a substantial kind.

b) The IAA said [at paragraph 35] of its decision “If the [appellant] pleads not guilty, he will be released on his own personal surety. I note in some cases a family member is required to collect illegal departees who are released, or to act as a guarantor if personal surety is not granted. There is no evidence before me to suggest a member of the [appellant]’s family would not be available to go to Colombo, or act as guarantor, if this is indeed required.”

c) The [appellant] states the IAA’s finding and assertion is ludicrous to state that the [appellant]’s impecunious family members could act as guarantors or pay the fines to enable the [appellant]’s release which is an unfounded assumption.

a) The findings and the conclusion reached by the IAA at [paragraph 35] involved an unfounded factual assumption about the nature and extent of support that the [appellant] was able to obtain from his family members in Sri Lanka. (*See DHK16 v Minister for Immigration and Border Protection* [2018] FCA 1353).

**Ground 2**

2. The change of government and the new information of the country information the Immigration Assessment Authority’s decision has become legally unreasonable. (*See Australian Retailers Association v Reserve Bank* 2005 FCA 1707 at [457]-[459]).

**Particulars:**

a) The delegate’s decision was dated 9 October 2018 claimed that “I have been to Sri Lanka and there was no problem” during the interview on 17 September 2018. The [appellant] in his Statutory Declaration [at paragraph 12] dated 29 October 2018 complained about this which was submitted to the Immigration Assessment Authority.

b) The political situation was drastically changed on 26 October 2018 and the return of the Mahinda Rajapaksa which was not taken to consideration by the delegate. Rajapaksa’s administration was accused of serious human rights violations during the final stages of the conflict between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE). It is a matter of record that the Sri Lankan military indiscriminately attacked civilians, hospitals and schools, executed prisoners and interned thousands of Tamils with widespread use of torture and sexual violence. Thousands of Tamils and other minorities with links to the Tigers were also forcibly disappeared. For a beleaguered Tamil population in the north and east of the country, the concern will be that history could repeat itself with the threat of further discrimination and violence looming. With no real accountability processes for previous crimes committed, Rajapaksa’s return could see Tamil activists and perceived dissidents targeted once again. Rajapaksa is the leader of the opposition and opposes any move to grant rights or to address the grievance of the Tamils.

c) The new Report of the UN Rapporteur Ben Emmerson QC dated 23 July 2018 (**Emmerson Report**) in support of the [appellant’s] protection claims in Australia.

d) According to the 2018 Emerson report, Tamils also experience pervasive and insidious forms of stigmatisation.” at [para 55] of the said report.

e) The Special Rapporteur was told about the surveillance of Tamil civil society, including women’s groups and of fear of reporting alleged human rights violations and sexual violence to the authorities. [para 55] of the said report.

f) The Special Rapporteur said “When viewed side by side with the figures that show that Tamils have been, and still are, overwhelmingly and disproportionately affected by the operation of the Act (PTA), a figure emerges of widespread institutional stigmatisation of a single community. [para 56] of the said report.

g) The Special Rapporteur said in his conclusion “The Tamil community remains stigmatised and disfranchised, while the trust of other minority communities is being steadily eroded.

h) In 2017, the Supreme Court of Sri Lanka ordered the State to pay over Rs. 2 million each to the parents of two Tamil youths tortured and killed in police custody by Batticaloa police, following the filing of a Fundamental Rights case. In this case the petitioners cited the former OIC of Batticaloa Police and four others as respondents. The petitioners stated that their deceased sons’ arrest, detention is wrongful and illegal and that they were subjected to torture and killed that their fundamental rights guaranteed by Article 11, 13(1), 13(4) and 17 of the Constitution was violated by the respondents. The [appellant] is also from Batticaloa in Sri Lanka.

i) According the above new information as there is a material change in the [appellant’s] circumstances which occurred after the Minister made a decision under s 65 of the *Migration Act* 1958 as the significant and rapidly deteriorating conditions emerging in the referred [appellant’s] country of claimed of protection, such as a change in the political and/or security landscape.

**Ground 3**

3. The change of security and human rights and the prevailing violence due to the recent bomb attacks in Sri Lanka and the new information of the country information the Immigration Assessment Authority’s decision has become legally unreasonable. (*See Australian Retailers Association v Reserve Bank* 2005 FCA 1707 at [457]-[459]).

**Particulars:**

a) The Sri Lankan Police and the Armed Forces are totally engaged in the operation against the Islamic subversive elements in a continuing battle in the whole of the Sri Lankan Island and it is unrealistic to believe the Sri Lankan Police would give protection to the [appellant] at present or in the near future.

b) Unwillingness to seek protection will be justified for the purposes of Article 1A(2) where the state fails to meet the level of protection which citizens are entitled to expect according to international standards“ (*See MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [27]-[29]).

c) The joint judgment in *S152/2003* refers to the obligation of the state to take reasonable measures“ to protect the lives and safety of its citizens, including an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system or a reasonably effective police force and a reasonably impartial system of justice, indicating that the appropriate level of protection is to be determined by ,,international standards, such as those considered by the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245.

d) According the above new information as there is a material change in the [appellant’s] circumstances which occurred after the Minister made a decision under s 65 of the *Migration Act* 1958 as the significant and rapidly deteriorating conditions emerging in the referred [appellant’s] country of claimed of protection, such as a change in the political and/or security landscape. Filing to consider the material change in the [appellant]’s claims if he were to return to Sri Lanka which is a jurisdictional error.

11 The FCCA dismissed all three of those grounds of review. By grounds one to three in the present appeal, the appellant charges the FCCA with error in having done so. It is not necessary to recite why it was that the FCCA rejected the appellant’s contentions on those fronts. If it is the case that the Review Decision was not the product of jurisdictional error as was (and still is) alleged, then the FCCA will have been correct to have so decided and the appellant’s challenges to those conclusions will fail. If the Review Decision *was* attended by any of those species of jurisdictional error, then the FCCA will have erred by concluding otherwise and the corresponding appeal grounds will succeed. Either way—and subject to what is said below about the additional ground upon which the present appeal proceeds—it is upon the Review Decision that this court’s attention must focus.

# THE APPEAL TO THIS COURT

12 One additional ground presents for determination in this appeal, namely (errors original):

[4.] The Federal Circuit Court Judge Humphreys would have held that the Immigration Assessment Authority (“the IAA”) has overlooked considering matters into the reasonably foreseeable future in a manner which constitutes jurisdictional error.

**Particulars**

a) The IAA said “I accept has familial LTTE connection and that in 2011 and 2012 the CID interrogated his father about these. I also accept that the [appellant] has shared pro-Tamil material on his facebook page. However I have not accepted that the [appellant], an asylum seeker and a young Tamil male from the east with scarring, would face a real chance of harm in relation to these reasons upon return. For the same reasons I also find there is not a real risk he will suffer significant harm.” at [para 42].

b) The political and security situation in Sri Lanka has been fluid over the last 10 years. Where the political and security situation in a country is fluid, it is important for the decision-maker to consider the situation for the [appellant] into the reasonably foreseeable future on his or her return to the receiving country.

c) Where a decision-maker with such a statutory obligation fails to refer to a matter in its reasons for decision, it is open to a court on a judicial review application to find that the decision-maker overlooked the issue in a manner constituting jurisdictional error. For example, in *Minister v Yusuf* (2001) 206 CLR 323 at [69]. See also Kalala v Minister (2001) 114 FCR 212 at [23].

d) It was legally unreasonable for the IAA not to exercise its power under s 473DC(3) to invite the [appellant] to comment are affected in part by the fact that the role of the IAA is to conduct a “review” where it must make the correct and preferable decision. In relation to these points, see *Minister v Singh* (2014) 231 FCR 437 at 447 the Full Court.

e) *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16 the High Court while confirming the Immigration Assessment Authority’s powers under ‘fast track’ review process; broadens legal unreasonableness by emphasising that the Authority must exercise its review powers within the bounds of legal reasonableness, expanding this as a ground of appeal in the process.

f) The relevant question is whether the [appellant] has a present fear of a risk of harm in the reasonable future. A past lack of fear or trepidation is not necessarily inconsistent with well-founded fear of future harm. Cf *SAAD v MIMIA* [2003] FCAFC 65 (Cooper, Carr and Finkelstein JJ, 11 April 2003) at [38]; *Selliah v MIMIA* [1999] FCA 615 at [40].

13 In order that he might pursue the fourth ground, the appellant must first be granted leave to do so. The fourth ground has two dimensions: it alleges a failure of the Authority to consider the risk of harm to the appellant in the future were he to return to Sri Lanka; and also that the Review Decision was legally unreasonable insofar as the Authority did not exercise the discretion conferred upon it under s 473DC of the Act to get new information from the appellant.

14 Before I turn to address the four grounds that the appellant seeks to agitate here, I should make reference to an application that he made (or appeared to make), for the first time during his oral reply submissions, for an adjournment so that he could seek legal advice. I declined to grant an adjournment and I should state now, albeit briefly, why I did so.

15 The appellant said that he had only received the appeal book, which the Minister prepared, a week prior to the hearing of the appeal. It was, so he said, delivered to (or, perhaps, received by) his neighbour, who only provided it to him more recently. Why that might be so is unclear. There is nothing before me that suggests that the appeal book was provided in anything other than the ordinary fashion, pursuant to directions that were made by a registrar in July of this year. It was, to put it politely, too late in the piece for the appellant to seek, during oral submissions in reply, an adjournment to permit him to explore the possibility of securing legal advice or representation.

16 Moreover, for the reasons that follow, the grounds of appeal that the appellant here prosecutes are, again politely, not of sufficient merit to warrant any belief that the provision of an adjournment might assist the appellant in succeeding on his appeal. In those circumstances, I did not indulge the appellant’s request with a favourable exercise of the court’s discretion to grant an adjournment.

17 A further administrative issue arose at the hearing of the appeal. The Minister sought an order recognising a recent change to the name of his department. There was, quite properly, no objection from the appellant on that front and it is appropriate that such an order be made.

# GROUND ONE: FAMILY CAPACITY TO ACT AS GUARANTOR

18 The appellant’s first appeal ground concerns the prospect that he might be remanded into custody upon his return to Sri Lanka. It alleges that, insofar as it found that members of the appellant’s family might serve as guarantor in order to secure his release, the Authority reached a conclusion unsupported by evidence and, thereby, committed jurisdictional error. The appellant did not advance any submissions in favour of this ground but I proceed upon the assumption that it was not abandoned.

19 In *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91 (“***DCP16***”; Beach, O’Callaghan and Anastassiou JJ), the court addressed a very similar submission (albeit one that was advanced within the rubric of legal unreasonableness). There, the Authority had made factual findings materially identical to those that present here: specifically, that the appellant would likely be charged upon returning to Sri Lanka, might subsequently be remanded in custody for a short period and might require a family member to act as guarantor in order to secure his release from custody. Their Honours observed:

97 Further, as to a family member acting as a guarantor, contrary to the appellant’s submission the Authority did not make any assumption that a family member *would* act as guarantor. The country information was that the appellant *may* be required to have a family member act as guarantor and that is all the Authority said. The question of whether a family member *would* act as guarantor was not critical to the Authority’s decision (*SZTAP v Minister for Immigration and Border Protection* (2015) 238 FCR 404 at [79] per Robertson and Kerr JJ).

98 On the question of the guarantee, the Authority was dealing with a triply contingent hypothetical. First, the appellant had to plead not guilty. If he pleaded guilty, he would be fined, with the fine able to be paid by instalments; no guarantee question would arise. Second, if he pleaded not guilty, he could be released on his own personal recognizance. In that eventuality, no guarantee would be required. Third, the guarantee question would only arise if he pleaded not guilty and his own personal recognizance was not sufficient. Now in that eventuality, and given that no immediate payment of money would be required from a guarantor, it might be expected that a family member may act as guarantor to secure the appellant’s release. But all of this is in the realm of a hypothetical which the Authority did not need to speculate about or discuss in detail.

20 Later, their Honours considered the issue against the backdrop of materiality, observing:

101 Further and in the alternative, even if there was any implicit finding that a family member could act as guarantor, this is not a critical finding because the Authority’s finding was only that a family member *may* be required to act as guarantor. Therefore, even if that implicit finding were in error, there would not be any realistic possibility that the Authority would have reached a different decision absent the error.

102 Generally, we consider that the Authority’s treatment of the guarantee question is unremarkable in the generality with which it has been expressed.

103 Finally, and as the Minister pointed out, the Authority gave independent reasons for rejecting the appellant’s claims on this point. With refugee claims, it found that the brief period of detention would not amount to “serious harm”. Further, it found that detention under immigration laws is pursuant to a law of general application applied in a non-discriminatory manner, meaning there was no “persecution” ([20]). With complementary protection, it again found that the appellant would only be detained for a short time ([26]). The death penalty, arbitrary deprivation of life and torture were not relevant in circumstances where possible poor prison conditions during any possible brief period of detention would be due to overcrowding, poor sanitation and lack of resources ([27]), and there was no intention to inflict pain, suffering or extreme humiliation. Further, the finding that detention would only be for 3 to 4 days did not depend on whether there was a guarantor. Accordingly, based on this short detention, the prison conditions could not amount to “significant harm” within s 36(2A) ([27]). Such findings provide an independent basis for the Authority’s rejection of the appellant’s claims concerning his illegal departure from Sri Lanka.

21 The same observations may be made in the present case. Here, the Authority did not conclude that any member of the appellant’s family would need to pay money in order to secure his release from custody. It is not apparent that any of them would need to, even in the event that a guarantee was required: *SZTAP v Minister for Immigration and Border Protection* (2015) 238 FCR 404 (Robertson and Kerr JJ, with whom Logan J agreed). Even that possibility rose no higher than to the level of a “triply contingent hypothetical” of the kind to which the full court referred in *DCP16*. The Authority’s observation was not critical to the Review Decision. Even if it amounts to error, it is not of sufficient materiality to constitute jurisdictional error. I respectfully adopt the observations recited above.

22 The appellant’s first ground of appeal must be dismissed.

# GROUND TWO: THE REVIEW DECISION HAS “BECOME” UNREASONABLE

23 In substance, the appellant’s second ground of appeal is that circumstances in Sri Lanka have changed since the Review Decision was made, such that it is now not safe for the appellant to return to Sri Lanka. Insofar as it proceeded, as it did, upon the opposite premise (namely, that the appellant could return to Sri Lanka without relevant risks of persecution or harm), the Review Decision is said to be tainted by legal unreasonableness in the sense identified by the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (“***Li***”) (French CJ, Hayne, Kiefel, Bell and Gageler JJ).

24 It may readily be accepted that, in conducting the IAA Review, the Authority was obliged to exercise its statutory powers reasonably. In order that it might be susceptible to review as the product of legal unreasonableness (and, by extension, of jurisdictional error), an administrative decision must qualify as one at which no rational or logical decision maker could have arrived: *Minister for Immigration v SZMDS* (2010) 240 CLR 611, 647-648 [130] (Crennan and Bell JJ). A decision will not be impugned as legally unreasonable simply because it is one about which different minds might form different views: *Plaintiff S111/2017 v Minister for Immigration and Border Protection* (2018) 263 FCR 310, 328 [66] (Perry J, with whom McKerracher and Charlesworth JJ agreed). At issue, in all cases, is whether the decision in question was within the “decisional freedom” of the person or body in whom the exercise of the relevant statutory power was entrusted: *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, 171 [62] (Allsop CJ, Griffiths and Wigney JJ).

25 The unreasonableness of which the appellant, by this ground, complains is twofold. First, he points to the fact that, since the Review Decision was made, Sri Lanka has undergone a change in government. Second, he cites a number of findings contained within a report produced in July 2018 by United Nations Special Rapporteur, Ben Emmerson QC. In oral submissions before me, the appellant stressed that those circumstances meant that, were he to return to Sri Lanka, he would be abducted and killed.

26 In *BHP17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1211 (Kerr J; hereafter, “***BHP17***”), the court considered an appeal ground couched in materially identical terms. His Honour made the following observations:

86 The Minister…submits that the Appellant appears to be contending that it is open to this Court to find that the IAA’s decision to be affected by jurisdictional error on the basis of information since obtained that was not before the decision maker. [Counsel for the Minister] submits that that contention relies on a misreading of *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707; 148 FCR 446 (***Reserve Bank***).

87 With respect to *Reserve Bank*, the Minister submitted at [24]:

First, in that case the Court noted that the ordinary rule was that material not before the decision-maker was not admissible in proceedings for judicial review (and, it may be inferred, even more so in a case on appeal from a judicial review decision). Secondly, to the extent that the case may be read as an exception to that principle it is very limited. In *Reserve Bank* reliance was placed on the decision in *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 539-540. That latter case states that where an issue goes to a legal error relevant to the exercise of a decision-maker’s jurisdiction then it may, depending on the type of error, be appropriate to admit evidence not before the decision-maker (because the jurisdiction is based on the actual state of affairs). In *Reserve Bank*, the material in question was expert evidence addressing a certain state of affairs (and whether or not it actually existed). Those matters were jurisdictional facts: *Chandra v Webber* (2010) 187 FCR 31 (*Chandra*) at [40]-[43].

88 The Minister submitted that no such situation arose in the present appeal: the decision maker was required to reach a state of satisfaction based on the material available. The IAA’s jurisdiction was not predicated upon the existence of a particular state of affairs, it was predicated upon the actual state of affairs that existed at the time of the decision. The contention that material relevant to factual circumstances that arose after the making of the decision could support a finding of jurisdictional error by this Court is contrary to authority. In that regard, the Minister cited *Charlie v Minister for Immigration and Border Protection* [2018] FCA 607 at [36], *Chandra v Webber* [2010] FCA 705; 187 FCR 31 at [40]-[43], and *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185; 247 FCR 500.

…

89 The Minister’s submissions must be accepted. The Ground (as explained by its particulars) relies on a misreading of the principles discussed in ***Reserve Bank***.

90 The task of judicial review in the FCCA and the task of this Court on appeal are both limited to the identification of legal error. By reason of the existence of s 474 of the Act, only a flaw amounting to jurisdictional error can lead to a finding of invalidity.

91 There will be circumstances in which new evidence properly may be adduced even in such a judicial review proceeding – for example, to prove conduct if it has been alleged a decision is vitiated by fraud. Other examples are discussed by Abraham J in *AQK17 v Minister for Immigration and Border Protection* [2019] FCA 1176 at [26]. However those few instances are limited and exceptional. None apply in the present instance.

92 It is not suggested in the particulars of the Grounds of Appeal that the IAA’s decision was legally unreasonable by reason of the IAA’s failure to anticipate a change of government in Sri Lanka or that that government would pursue the policies the Appellant alleges it is pursuing. In any event, there is no basis for such a contention on the materials before this Court. Absent legal error, it is not open to the Court to quash the IAA’s earlier decision.

27 His Honour’s reasoning applies equally in this case and I respectfully adopt it. The Review Decision cannot be impugned as legally unreasonable on account of the Authority’s failure to take account of information that it did not have; and, indeed, did not exist at the time that its decision was made.

28 That is not to say that the appellant is without options. In *BHP17*, Kerr J made the following observations about the measures available to an appellant that seeks to avoid returning to his or her country of origin on the strength of changed circumstances:

94 As events subsequent to Tiananmen Square are a clear illustration, the Executive Government and/or the relevant Minister have powers capable of being drawn on to shield those who might otherwise be required to return to a country where it is accepted that a person faces a real risk of persecution by reason of changed circumstances. Successive Australian Governments have committed themselves to act on the basis that no-one will be refouled (returned) to a place where they reasonably fear persecution. That remains so irrespective of the exhaustion of a person’s legal avenues of appeal.

95 It will be for the Appellant to make such a case to the executive arm of government should he be so advised.

29 Again, I respectfully adopt those observations.

30 The appellant, I say with respect, has misunderstood the nature of the present proceeding. It is not for this court to make an assessment of whether or not he might be subjected to relevant persecution or harm were he to return to Sri Lanka. At issue is the more central question as to whether or not the assessment that the Authority made on that score was one that it had jurisdiction to make. That is not a question that turns simply upon whether or not it ought to have accepted that the appellant could not safely return to Sri Lanka. Although the court well understands why the appellant sought to impress upon it his view that his return to Sri Lanka would subject him to relevant forms of persecution and harm, that is not a basis upon which the Review Decision can here properly be impugned.

31 The appellant’s second ground of appeal must also be dismissed.

# GROUND THREE: EXTENSION OF GROUND TWO

32 Ground three appears to, again, charge the FCCA with failing to hold that the Authority erred by not taking into account information that was not available to it—and did not exist—at the time that the Review Decision was made. For the reasons identified above at [23]-[29] in respect of the second appeal ground, those circumstances disclose no jurisdictional error.

33 The appellant’s third ground of appeal must also fail.

# GROUND FOUR: FAILURE TO ADDRESS A MATERIAL CONTENTION

34 The appellant’s fourth ground of appeal—which he requires leave to agitate, having not pressed it before the FCCA—charges the Authority with having failed to address his contention that he would be subjected to significant harm if he were returned to Sri Lanka. In addition, the appellant complains that it was unreasonable for the Authority not to obtain from him new information concerning his Visa Application. The Minister opposed the appellant’s being granted leave to press proposed appeal ground four.

35 In *SZLPH v Minister for Immigration and Border Protection* (2018) 266 FCR 105 (Besanko, Gleeson and Burley JJ), the court considered the circumstances in which an appellant might be granted leave to argue a ground on appeal that was not the subject of consideration at first instance. The court observed (at 112-114):

28 The appellant acknowledges that proposed grounds (1) and (2) are new grounds raised for the first time on appeal. Thus, the proposed amended notice of appeal does not in substance engage with the decision of the FCCA but rather focuses on that of the delegate. The appellant requires the leave of this Court to rely on them. The relevant principles for deciding whether to grant leave to raise a ground of challenge for the first time on appeal are set out in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 238 FCR 588 at [46]-[48], as follows:

[46] … Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O’Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 at [20]-[24] and [38].

[47] In *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

[48] The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

The statement of principle in *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220 at [89]-[90] is to similar effect.

29 In *MZYPO v Minister for Immigration and Citizenship* [2013] FCAFC 1, the Full Court addressed an application for leave to raise on appeal matters not put to the Federal Magistrates Court of Australia, where the appellant had been unrepresented and put on no submissions at all. The Full Court said (at [66] to [68]):

[66] In our opinion, if there was some merit in grounds 2 and 3, this would be a case where it would be expedient in the interests of justice to allow the grounds to be put for the first time.

[67] However, we do not mean to say that appellants in administrative law matters of the kind with which this Court is concerned are entitled to think that they can put forward any new argument that occurs to their legal advisers on the appeal, whether or not it has been put before the Court at first instance.

[68] All arguments, which an applicant wishes to put before the Court, must be put before the Court at first instance to be dealt with by that Court. The parties in a proceeding are entitled to expect that the opposing party, if an applicant, will have put all arguments upon which that applicant claims to be entitled to any relief or, if a respondent, will have put all defences upon which that respondent relies for dismissing the application. The Full Court is entitled to have the benefit of the reasons for judgment of the Court at first instance in respect of all arguments, in conducting its rehearing of the appeal. Although on this application we are inclined to decide the application by reference to the merits of the proposed new grounds, it cannot be thought that this Court should proceed on that basis in all cases. If the Court were compelled to consider an application of this kind by reference to whether or not the application would succeed, then that would have the *de facto* result that an appellant could raise any ground the appellant liked without reference to the arguments put before the Court at first instance.

36 Here, the appellant’s explanation for having not advanced this ground before the FCCA was, I say with respect, difficult to follow. In oral submissions, he indicated that he *did* stress to the primary judge that he would be subjected to relevant persecution or harm were he to return to Sri Lanka. I have no doubt that that is so; but it remains the case that the ground now sought to be agitated was not agitated below, at least not in the style that it presently assumes. The most likely explanation for why that is so is that it did not occur to whomever assisted the appellant with the preparation of his Judicial Review Application. I note, on that score, that the appellant indicated that he had received such assistance.

37 Whether that amounts to a basis sufficient to warrant a grant of leave may be doubted. As a self-represented litigant, the appellant should (and would) ordinarily be afforded the benefit of that doubt. However, for the reasons that follow, the proposed appeal ground is without merit and the question of whether the appellant should have leave to agitate it can (and will) be determined on that basis.

38 The proposed appeal ground must fail for the simple reason that the Authority *did* address the question of whether or not the appellant might be subjected to relevant harm whilst detained: Review Decision, [22], [28], [38], [40], [45]-[46]. The appellant’s complaint seems to be more that the Authority did not accept that that fear was well-founded. Even assuming that it was wrong to reject that contention, as the appellant before me carefully reiterated, that would not bespeak jurisdictional error.

39 I turn, then, to consider the charge that the Review Decision was legally unreasonable insofar as the Authority declined to exercise its discretion under s 473DC of the Act to get new information from the appellant. Sections 473DC and 473DD provide as follows:

**473DC Getting new information**

(1) Subject to this Part, the Immigration Assessment Authority may, in relation to a fast track decision, get any documents or information (***new information***) that:

(a) were not before the Minister when the Minister made the decision under section 65; and

(b) the Authority considers may be relevant.

(2) The Immigration Assessment Authority does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances.

(3) Without limiting subsection (1), the Immigration Assessment Authority may invite a person, orally or in writing, to give new information:

(a) in writing; or

(b) at an interview, whether conducted in person, by telephone or in any other way.

**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.

40 It may readily be accepted that the Authority’s powers under s 473DC of the Act must not be exercised in a manner amounting to legal unreasonableness. In *BJK17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCAFC 171 (Middleton, Bromberg and Snaden JJ), the court made the following observations about the state of the relevant law:

41 Powers conferred by statute must, ordinarily, be exercised reasonably: *Li*, 351 [29]-[30] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ), 370 [88]-[89] (Gageler J). The power conferred upon the Authority by s 473DC to get “new information” is subject to that requirement: *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 353 ALR 600 (“***M174***”), 607 [21], 613 [49], 618 [71] (Gageler, Keane and Nettle JJ), 620-621 [86] (Gordon J), 624 [97] (Edelman J); *DPI17 v Minister for Home Affairs* (2019) 366 ALR 665 (“***DPI17***”), 667 [36] (Griffiths and Steward JJ), 689 [91] (Mortimer J). There are no fixed categories of circumstances by reference to which a failure to exercise, or consider exercising, the discretion might be impugned as legally unreasonable: *CCQ17 v Minister for Immigration and Border Protection* [2018] FCA 1641, [42] (Thawley J). Rather, an assessment of whether, in any given case, the exercise or non-exercise of the discretion is attended by legal unreasonableness must, of necessity, be case-specific: *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 445 [42] (Allsop CJ, Robertson and Mortimer JJ). A decision will not be impugned as legally unreasonable simply because it is one about which different minds might form different views: *Plaintiff S111/2017 v Minister for Immigration and Border Protection* (2018) 263 FCR 310, 328 [66] (Perry J, with whom McKerracher and Charlesworth JJ agreed).

42 In *DPI17*, this court considered the boundaries of legal unreasonableness within which the Authority is constrained when exercising power under Pt 7AA of the Act. Griffiths and Steward JJ, referring to the plurality judgment in *M174*, listed (at [35]) six relevant propositions, namely that:

(1) as stated in the simplified outline of Pt 7AA in s 473BA of the *Act*, Pt 7AA provides “a limited form of review” of a “fast track decision” which is constituted by a refusal to grant a protection visa to an applicant who is statutorily designated to be a “fast track applicant” (at [1]);

(2) the task of the IAA in conducting a review of a fast track reviewable decision is not to correct error on the part of the Minister or a delegate, but rather the IAA “is engaged in a de novo consideration of the merits of the decision that has been referred to it.” The IAA must consider the application afresh and determine for itself whether the criteria for the grant of the visa have been satisfied (at [17]);

(3) the various powers conferred upon the IAA by Div 3 of Pt 7AA (including s 473DC) are conferred on the implied condition that they are to be exercised within the bounds of reasonableness, as explained in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 (*Li*) (at [21]);

(4) the term “new information” must be read consistently when used in ss 473DC, 473DD and 473DE “as limited to ‘information’ (which may or may not be recorded in a document), in the ordinary sense of a communication of knowledge about some particular fact, subject or event, that meets the two conditions set out in s 473DC(1)(a) and (b).” These two conditions are that the information was not before the Minister or delegate when the protection visa decision was made, and the IAA considers the information to be relevant (at [24]);

(5) although there is no general requirement for the IAA to give to the applicant material provided to the IAA by the Secretary (s 473DA(2)), there is nothing in Pt 7AA to preclude the IAA from giving the whole or some part of that material to the applicant in the context of exercising the power under s 473DC(3) to invite the giving of new information and s 473DA(2) does not address what may be required of the IAA in particular circumstances in order to exercise that power reasonably ([26]); and

(6) s 473DE is concerned to ensure that the referred applicant has an opportunity to address new information that has been, or is to be considered by, the IAA under s 473DD and that would be the reason, or a part of the reason, for affirming the fast track reviewable decision (at [35]).

43 Their Honours then (at [37]) added a further four observations on that theme:

…First, legal unreasonableness is “invariably fact dependent and requires evaluation of the evidence” (see *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437 (*Singh*) at [47] per Allsop CJ, Robertson and Mortimer JJ and see also *SZVFW* at [84] per Nettle and Gordon JJ). Secondly, the correct approach is to apply the relevant general principles to the particular factual circumstances of the case and not to engage in an analysis which merely involves identifying particular factual similarities or differences between individual cases (*Singh* at [48] and *Haq* at [32]). It may well be that, for this reason, the appellant made clear that, on the appeal, he did not rely on *DFW16*. As Thawley J pointed out in *CCQ17 v Minister for Immigration and Border Protection* [2018] FCA 1641 (*CCQ17*) at [42], there are no fixed categories of circumstances in which it would be legally unreasonable to fail to consider the discretion in s 473DC. Thirdly, having regard to the clear terms of s 473DA (which provides that Div 3 of Pt 7AA and ss 473GA and 473GB are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to IAA reviews), the starting point for analysis in a case such as this which raises the ground of legal unreasonableness is not through a “natural justice lens” (*DGZ16* at [69] and [72] per Reeves, Robertson and Rangiah JJ). Fourthly, as Thawley J correctly stated in *CCQ17*, merely because there has been a failure to consider the exercise of the power in s 473DC does not of itself involve error, let alone a jurisdictional error.

41 I adopt those observations.

42 The issue, in the present case, is whether the Authority’s failure to get, or consider getting, “new information” was outside of its “decisional freedom”: *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, 171 [62] (Allsop CJ, Griffiths and Wigney JJ). If the only course reasonably available to the Authority in the circumstances that confronted it was to get or consider getting new information from the appellant, then its failure to do so will bespeak legal unreasonableness and its ultimate decision might be impugned as the product of jurisdictional error. The task, as Thawley J put it in *CCQ17 v Minister for Immigration and Border Protection* [2018] FCA 1641,[51], is to:

…evaluate the failure to see whether it has the character of being legally unreasonable, perhaps in lacking a rational foundation or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking in common sense.

43 The difficulty for the appellant on this score is that it is not apparent that—and the appellant, despite patient invitation, was not able to identify during his oral submission a reason why—it should be thought that the Authority, had it been acting reasonably, had no option other than to exercise the discretion conferred upon it by s 473DC of the Act.

44 The information that the appellant, in oral submissions before me, said that the authority ought to have obtained from him concerned the fate of two students that, he said, had been shot and killed by Sri Lankan authorities. With respect, I do not accept that there is any reason why it must be thought that the only course reasonably open to the Authority in the circumstances that here present was to invite, or consider inviting, the provision of additional information (whether about that subject matter or any other). The Authority was obliged to discharge its function in a manner consistent with the statutory objective of providing a mechanism of limited review that was (amongst other things) efficient and quick: the Act, s 473FA(1). It may well be that the Authority, had it been so inclined, could have turned its mind to whether it ought to exercise its discretion to get new information, including information about students or young people that have been mistreated or worse at the hands of the Sri Lankan state. Its failure to do or consider doing so, though, cannot be impugned as plainly unjust, arbitrary, capricious, irrational, or lacking in evident or intelligible justification. It was within the Authority’s “decisional freedom”.

45 Leave to press this ground of appeal, then, is refused on the basis that, were it granted, the ground would surely fail.

# CONCLUSION

46 None of the grounds of appeal is made out. The appeal will be dismissed with costs.

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| I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Snaden. |

Associate:

Dated: 25 November 2019