Federal Court of Australia

ANS17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 559

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **O'BRYAN J** |
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| Date of judgment: | 18 May 2022 |
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| Catchwords: | **MIGRATION** – appeal from the Federal Circuit Court of Australia – where Immigration Assessment Authority (**IAA**) affirmed a decision of a delegate of the Minister refusing to grant a Temporary Protection visa – where ground of review not raised before primary judge – leave to advance ground on appeal refused in circumstances where no explanation provided for failure to raise the ground below and where ground had no substantive merit – whether IAA denied the appellant procedural fairness by limiting length of submissions in accordance with Practice Direction issued under s 473FB of the *Migration Act 1958* (Cth) – no procedural unfairness – where the primary judge refused a request for leave to amend the appellant’s application to raise a further ground of review – where appellant sought to agitate ground of review on appeal – appellant required to demonstrate error in primary judge’s exercise of discretion – where no discernible error in primary judge’s exercise of the discretion – appeal dismissed  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 24(1A)*Migration Act 1958* (Cth) ss 5H(1), 36(2), 473DD, 473FB*Federal Circuit Court Rules 2001* (Cth) r 7.01  |
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| Cases cited: | *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109*AVQ15 v Minister for Immigration and Border Protection* (2018) 266 FCR 83*BXU16 v Minister for Immigration and Border Protection* [2018] FCA 1897*CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496*CWX18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 673*DAO16 v Minister for Immigration and Border Protection* (2018) 258 FCR 175*DGZ16 v Minister for Immigration and Border Protection* (2018) 258 FCR 551*House v The King* (1936) 55 CLR 499*Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002* (2003) 73 ALD 1*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224*Minister for Immigration v Eshetu* (1999) 197 CLR 611*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588*W375/01A v Minister for Immigration and Multicultural Affairs* (2002) 67 ALD 757  |
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| Division: |  |
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| Registry: | New South Wales |
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| National Practice Area: |  |
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| Number of paragraphs: | 44 |
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| Date of hearing: | 16 May 2022  |
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| Counsel for the Appellant: | The appellant appeared in person  |
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| Solicitor for the First Respondent: | HWL Ebsworth Lawyers |
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ORDERS

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|  | NSD 452 of 2020 |
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| BETWEEN: | ANS17Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| order made by: | O'BRYAN J |
| DATE OF ORDER: | 18 MAY 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

1. This is an appeal from a decision of the Federal Circuit Court of Australia (now the Federal Circuit and Family Court of Australia (Division 2)) made on 19 March 2020 dismissing an application for judicial review of a decision of the Immigration Assessment Authority (**Authority**). The Authority had affirmed a decision of a delegate of the first respondent (**Minister**) refusing to grant the appellant a Temporary Protection (subclass 785) Visa (**TPV**).
2. The appeal is by way of rehearing under s 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth). Accordingly, the Court must determine whether the Federal Circuit Court was correct to find that the decision of the Authority was not affected by jurisdictional error: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541.
3. By his notice of appeal, the appellant relies on three grounds of review in the following terms:

1. The Court below erred in finding that the Immigration Assessment Authority (IAA) had failed to properly consider the Applicant's claims under s36(2)(a) and s36(2)(aa) of the Migration Act ("the Act").

2. The Authority denied procedural fairness to the Applicant.

3. The Authority's rejection of the Applicant's claims about threatening phone calls based on his failure to mention them at the entry interview was illogical and irrational, or alternatively the rejection of those claims gives rise to an apprehension of bias.

1. The appellant is self-represented and did not file any written submissions in support of the grounds of appeal. The appellant appeared at the hearing of the appeal with the assistance of an interpreter, however he was unable to advance substantive oral submissions in support of his grounds of appeal. The appellant made a brief submission to the effect that his home area in Pakistan had suffered recent violent events, which I understood to be a submission regarding the risk of harm that he would face should he return to Pakistan. As such, the submission was directed to the merits of the Authority’s decision which is beyond the jurisdiction of the courts in judicial review.
2. For the reasons that follow, I consider that there is no error in the decision of the Federal Circuit Court and I dismiss the appeal.

## Relevant factual background

1. The appellant is a citizen of Pakistan. He was born in a village near the city of Parachinar in the district of Upper Kurram Agency, in Kurram Agency, one of the tribal agencies making up the Federally Administered Tribal Areas (**FATA**) in Pakistan. He arrived in Australia on 23 March 2013 as an unauthorised maritime arrival, aged 36.
2. On 5 May 2013, the appellant participated in an entry interview with an officer of the Department, with the assistance of an interpreter in the Urdu language. The primary judge made the following findings with respect to the entry interview (at PJ [3] and [82]):

3. … At the interview, the applicant was informed that the officer required “information about [the applicant and his] arrival in Australia” (at CB 111). Further, that the

“interview [was his] opportunity to provide any reasons why [he] should not be removed from Australia” and “that if the information [he gave] at any future interview [was] different from what [he told them] now, this could raise doubts about the reliability of what [he] said”.

The applicant confirmed that he understood what the officer and interpreter had said to him (CB 112).

…

82. While the entry interview was plainly not focused on refugee determination, the applicant was asked simple questions relevant to his fears in Pakistan to which he responded (at CB 122 see also above at [5]):

1. “Q. Tell me why you left Pakistan…

Probably you are aware of the security situation in Kurram Agency. It is not safe. We can not work outside. If we travel out of Parachinar, because of being Shia, we get targeted and slaughtered. There is no safety. In Peshawar I had a good job but even in Peshawar, people who were coming from my background were targeted and many lost their loves. That is why I took this risky journey to either make it safely or just finish it.”

2. “Q. How long has it been dangerous for you in Pakistan?

In 2007 it started. The security has got worse. And especially, my job was to drive around. We were taken out of our cars and butchered on the roadside. Even in Parachinar, there are bomb blasts around.”

3. “Q. So if this has been happening since 2007, why have you decided to leave in 2013?

Even then I wanted to get out of there but travelling towards here required heaps of money. I did not have that money at that time. Now that I have arranged the money I have made the travel.”

4. “Q. Were there any specific incidents that happened to you that made you decide to leave?

One time I was travelling from my village to go back to my duty in Peshawar. There is a place called Alizai. After where the danger starts, our car was stopped by the security because another car was already ahead of us, to go to the Sunni territory. We were told to hold there until they find out what happens to the first one. Then later on we heard the news that the first car was shot with the rocket and then we decided to return back to our area.”

5. “Q. Any other incidents that have happened to you?

Well that was the incident where I survived. The other incidents happening in Peshawar. I was witnessing the people getting injured and dead bodies.”

6. “Q. Are there any other reasons, that we have not already spoken about, why you left Pakistan?

No.”

1. The appellant applied for a TPV which was received by the Department on 17 May 2016. In his application, the appellant claimed to fear being killed by the Taliban because he is a Shia Muslim. In response to a question in the application form whether the appellant experienced harm in Pakistan, the appellant stated that he was employed as a driver for the Population Welfare Department and he received a phone call from an unknown number with the caller stating that “we know that you belong Parachinar and you are Shia” and threatening to kill the appellant.
2. On 29 September 2016, the appellant attended an interview with the Minister’s delegate. The primary judge referred to the following part of the delegate’s reasons for decision, which set out the appellant’s claims made during the interview (at PJ [10]):

During the TPV interview when the applicant was asked why he left Pakistan he articulated the following:

* The applicant stated that he received three phone calls from an unknown number in which the callers said they knew he was from Parachinar, he must leave his government job or he will be killed. The first call was received in possibly March or April 2012, the second about 20 days later and the third about one month later. The applicant stated he did not take the first call seriously, but after the second one he told the police seeking help. They advised him to change his phone number, which he did, but after one month he received more threat calls. It was after the third phone call that the applicant handed in his resignation.”
1. On 12 October 2016, the delegate refused the TPV application.
2. On 14 October 2016, the delegate’s decision was referred to the Authority for review.
3. On 17 October 2016, the Authority notified the appellant by email that the delegate’s decision had been referred to the Authority for review. This email also enclosed a copy of the “*Practice Direction for Applicants, Representatives and Authorised Recipients*” (**Practice Direction**), which is a direction given under s 473FB of the *Migration Act 1958* (Cth) (**Act**). Relevantly, the Practice Direction contained the following statements:

**Submissions and new information**

20. For the purposes of the review, you may provide a written submission on the following:

* why you disagree with the decision of the Department
* any claim or matter that you presented to the Department that was overlooked.

21. Any submission must be concise. It should identify and address the issues you want us to consider in our review. Your submission should be no longer than 5 pages and should be provided to us within 21 days of your case being referred to us by the Department. We may return longer submissions. If we return your submission we will give you a short deadline by which to provide a revised submission that complies with this direction. If you do not comply with that deadline we will make our decision without the benefit of your submissions.

22. We can only consider new information (information that was not before the Department) in very limited circumstances as set out in section 473DD of the Migration Act. We must be satisfied that there are exceptional circumstances to justify considering the new information provided by either you or the Department.

23. If you want to give us new information, you must also provide an explanation as to why:

* the information could not have been given to the Department before the decision was made, or
* the information is credible personal information which was not previously known and may have affected consideration of your claims, had it been known.

24. Your explanation should be no longer than 5 pages and must accompany any new information you give to us.

25. All documents that are not in English should be translated into English by a translator with a 'Translator' level accreditation from the National Accreditation Authority for Translators and Interpreters (NAATI). Both the documents and the translations should be provided.

26. Any new information you give to us that we have not requested of you, must be given to us within 21 days of the date on which your case was referred to us by the Department. Any new information given to us by the Department that has not been requested, must also be given to us within 21 days of the referral.

27. We may separately invite you to provide new information or to comment on new information that may be adverse to your case.

* If we invite you to provide new information, you must provide that information within the period specified in the invitation.
* If we invite you to make comments on new information, you must provide those comments within the period specified in the invitation.

28. Reviews will generally be completed within six weeks of referral from the Department.

1. Email and telephone correspondence ensued between the Authority and the appellant and his representative concerning an extension of time for the filing of a submission. On 9 November 2016, the Authority emailed the appellant’s representative, noting that the original 21 day time for submissions would have expired on 4 November 2016, but advising that a decision would not be made before 16 November 2016. The email contained the following additional statements:

Any submission should be received by that date and should be no more than 5 pages in length. Any new information that is received prior to a decision being made may be considered subject to it meeting the requirements of s.473DD of the Migration Act 1958.

Please note that under the Practice Directions, new information must be accompanied by an explanation as to why the new information could not have been given to the Department before the decision under review was made, or why it is credible personal information which was not previously known and may have affected the consideration of the claims. The IAA can only consider new information in limited circumstances.

1. Although not stated expressly, the implication of the email was that the appellant was still able to file a submission and/or provide new information that would be considered by the Authority.
2. On 16 November 2016, the appellant’s representative provided a submission to the Authority of six pages in length.
3. On 13 January 2017, the Authority affirmed the decision under review.

## Reasons of the Authority

1. The Authority concluded that the appellant does not meet the requirements of the definition of refugee in s 5H(1) of the Act and therefore does not satisfy s 36(2)(a) (at reasons [87]). The Authority also concluded that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the appellant will suffer significant harm and, accordingly, the appellant does not meet s 36(2)(aa) (reasons at [91]).
2. Significantly, the Authority found that:

78. Having regard to the range of information before me, I place particular weight on DFAT’s assessment that there is a low level of sectarian violence overall in the FATA and a low level of generalised violence in Kurram Agency in view of the recent and credible nature of the report, and its specific consideration of the situation in Kurram Agency. While I accept that incidents of violence may occur in Parachinar from time to time, I am not satisfied that there is a real chance that the applicant would suffer serious harm in or near Parachinar on the basis of his identity as a Turi Shia from a village near Parachinar who was previously a driver, or as a result of the security situation in or near Parachinar or Upper Kurram Agency.

1. The Authority also considered whether the appellant might suffer harm as an unsuccessful Shia Turi asylum seeker returning from Australia and concluded as follows:

85. I am not satisfied that there is a real chance of harm to the applicant now or in the foreseeable future as an unsuccessful Shia Turi asylum seeker who would be returning to his village near Parachinar after living in Australia, a western country, for approximately four years.

86. I have considered whether the applicant, as a Shia Turi from a village near Parachinar who is a former government employee and driver for the Family Planning Branch of the Population Welfare Department, and as a Shia Turi who will be returning to a village near Parachinar as an unsuccessful asylum seeker after living in Australian for approximately four years, faces a real chance of harm. I am not satisfied that any combination of the applicant’s circumstances would combine to expose the applicant to a real chance of harm in or near Parachinar.

1. The Authority also made findings with respect to two specific claims made by the appellant of threatened harm in Pakistan. The first concerned an incident in 2009 which the Authority accepted as follows:

**2009 Road incident**

26. The applicant claims that in 2009, while travelling from his village near Parachinar to return to his work in Peshawar, he turned back after being advised by members of the security forces that the car ahead had been attacked. In view of information before the delegate regarding past levels of sectarian violence, the security situation in FATA, and past incidents of violence on roads on the key road from Parachinar road to Thal, I accept this occurred and that the attack was probably perpetrated by a Sunni militant group targeting Shias from Parachinar.

1. The second concerned threatening phone calls received by the appellant, which the Authority did not accept. The Authority’s consideration of that claim is lengthy, but it is relevant to set it out in full:

**Threatening telephone call(s)**

27. The applicant’s evidence regarding the threatening telephone calls he claims to have received has varied. He did not mention that he had received any threatening phone calls in the entry interview conducted on 5 May 2013. He said he left Pakistan because of the security situation in Parachinar and Peshawar and had wanted to leave Pakistan since 2007 but it took a long time to arrange the significant sum of money required to travel to Australia.

28. In his TPV application the applicant mentioned that he received ‘phone call from unknown number’ in which the caller said he knew the applicant was a Shia from Parachinar and threatened to kill him. No date was mentioned. He indicated that he did not seek assistance regarding the call or calls because he believed the Government could not protect him given they could not ensure their own security.

29. In the TPV interview conducted on 29 September 2016 the applicant indicated that he had received three threatening calls beginning in approximately March or April 2012 and ending a little less than two months later. The applicant said the caller knew he was from Parachinar and that he worked for the government. The caller threatened that he would kill the applicant unless he left his government job. The applicant said that the caller, who seemed to be the same person on each occasion, did not identify himself or indicate which organisation he represented, but he thought the caller could have been a Sunni displaced from the Parachinar area by sectarian conflict who was seeking revenge on the applicant as a Shia from Parachinar. He suggested that the caller could have been such a person who had joined a militant group and said that Sunnis sought revenge by harming Shias from Parachinar both physically and financially.

30. The applicant claimed in the TPV interview that after the second call he spoke to his colleagues and ‘other officers’ to seek their help. They told him to change his number and he did so, but received a third call on his new number. At this point, he decided to leave Pakistan. He explained that the phone calls were the main reason he left Pakistan. He advised that he did not have a reason other than this for leaving Pakistan, as this was a sufficient reason in view of the deaths of other Shias, including business people and government officials, following similar phone calls. He claimed that he knew a Shia man whose son had been killed after the man received threatening phone calls.

31. The delegate held significant concerns regarding the inconsistency of the applicant’s evidence about these phone calls. To a large extent I share these concerns, although I do not agree with the delegate that there is any necessary inconsistency in the applicant’s evidence as to whether or not he sought assistance in relation to the calls in Pakistan. The delegate appears to have understood the applicant’s statement during the TPV interview that he spoke to ‘other officers’ about the calls to mean that the applicant spoke to police officers. Having reviewed the recording of the interview, I am satisfied that the applicant intended to refer to colleagues or other governmental employees rather than police officers, and that this statement is not necessarily inconsistent with the applicant’s statement in his TPV application that he did not seek assistance from the government.

32. However, I share the delegate’s more significant concerns regarding the applicant’s failure to refer to the phone calls in any way during his entry interview. The applicant’s omission of any reference to the threatening calls is difficult to reconcile with the claim made in the TPV interview that these calls were the central reason for his departure from Pakistan. I note that in his entry interview the applicant said that he left Pakistan because of the security situation in Pakistan. When, in the entry interview, he was asked whether he had experienced any specific incidents that made him want to leave Pakistan, the applicant referred to the 2009 incident in which the vehicle ahead of the vehicle in which the applicant was travelling was attacked. The interviewing officer asked the applicant whether he had experienced any other incidents, to which the applicant replied that the 2009 incident was the one ‘he had survived’ but he had also seen bodies and people being injured in Peshawar. The interviewing officer asked if there were any other reasons for the applicant’s departure from Pakistan. The applicant replied there were not.

33. At the beginning of the entry interview the interviewing officer advised the applicant that interview was intended to gather information about the applicant and his arrival in Australia, and the interview was the applicant’s opportunity to provide any reasons why he should not be removed from Australia. The applicant was advised that he was expected to give correct answers to the questions asked and that if he provided different information in future interviews it may raise doubts about the reliability of his evidence. When the interviewing officer asked the applicant whether he understood this advice, the applicant confirmed he did.

34. When asked, during the TPV interview, about his omission of any reference to the threatening phone calls in the entry interview, the applicant explained that he thought he had mentioned the calls in the entry interview but he was experiencing stress and tension at the time of the entry interview as a result of his long and dangerous journey to Australia and his worry about his wife and children, and this may have affected his thinking at the time. I accept that the applicant was distressed by his separation from his family in Pakistan at the time of the entry interview. I also accept that the applicant’s journey to Australia was long (around three month’s duration) and involved considerable danger to the applicant. However, the interview took place over forty days after the applicant’s arrival in Australia, and I think it is highly probable that the applicant would have largely recovered from the effects of his journey by the time of the interview.

35. The recording of the entry interview suggests that the applicant responded to questions without hesitation or apparent confusion during the entry interview, and the applicant did not mention any issues with his physical or mental health. The applicant was able to recall details such as his children’s dates of birth without difficulty. I note that the applicant indicated that he had been in contact with his family to let them know he was safe. There is no evidence before me of any illness, including mental illness, suffered by the applicant at the time of the entry interview.

36. I do not accept that any residual impact of the applicant’s long journey, or understandable distress in relation to his family, provides an adequate explanation for the complete omission of any reference in his entry interview to incidents which the applicant claims were the catalyst for his departure from Pakistan.

37. The applicant’s representative submits that the IAA should have regard to the uncertainty the applicant felt regarding the length of his period of detention in Australia, the passage of time since he left Pakistan, his poor understanding of the process due to his limited education and rural background, the fear he has experienced, and the mental health concerns associated with leaving his wife and children in Pakistan in conflict with the Pashtun tribal code.

38. I accept that the applicant has had a limited education and that he comes from a rural area in Pakistan. However, I note that the applicant is literate and lived in Peshawar, where he worked as a government driver, for over ten years prior to his departure from Pakistan. As discussed, the applicant appeared to answer questions during the entry interview appropriately and without hesitation. He indicated he understood the interpreter and that he understood that any later change in his evidence might give rise to concerns in relation to his evidence. I accept that the applicant may have had a limited understanding of the complex process of applying for a protection visa in Australia in his circumstances. However, I do not consider that a full understanding of that process was required to respond accurately to the questions asked in the entry interview and I do not accept that the applicant’s education and background prevented him from effectively participating in the entry interview or explains the absence of any mention of the threatening calls.

39. As discussed, I accept that the applicant was distressed by his separation from his wife and family at the time of the entry interview. I have some reservations however, with regard to the applicant’s representative’s claims that the applicant experienced ‘mental health concerns’ associated with the claimed breach of the Pashtun tribal code resulting from leaving his wife and children in Pakistan. The applicant’s representative has not provided any information in relation to the particular aspect of the Pashtun tribal code that the applicant is claimed to have breached by travelling to Australia and leaving his wife and children in his home village near Parachinar.

40. The applicant previously lived and worked in Peshawar in Pakistan for over ten years, while his wife and family continued to live in Parachinar, a city the applicant described as being a long way away from Peshawar. The Pashtun tribal code does not appear to have prevented the applicant from living in a location distant from that of his wife and children in the past. The applicant’s wife and children were living in the applicant’s home village at the time of the entry interview, and continue to live there. Many of the applicant’s relatives also live there, including his maternal uncles, who the applicant indicated are able to assist the applicant’s wife and children if required. In view of the availability of family support in the village, the applicant could not be said to have abandoned his family and left them without support. Country information before the delegate indicates that a very high proportion of family incomes in Kurram Agency are from remittances from family members working elsewhere. I consider the practice of leaving Kurram to seek work in other locations to be very common, and I do not accept that any breach of the Pashtun tribal code caused the applicant such a degree of distress that it prevented him from participating effectively in the entry interview.

41. I accept that the applicant felt a degree of anxiety regarding his detention in Australia. I also accept that he felt fear prior to his departure from Pakistan as a result of the security situation and sectarian violence in Pakistan. However, as discussed, the recording of the entry interview suggests the applicant participated in the entry interview effectively. The applicant did not mention that these or any other factors were adversely affecting him during the interview and there is no evidence before me of any mental or other illness suffered by the applicant. I do not accept that fear or anxiety felt by the applicant as a result of these factors prevented him from participating effectively in the entry interview.

42. With regard to the claimed impact of the passage of time on the applicant’s evidence, it is not evident how this would lead the applicant to omit mention of matters that were said to have occurred relatively recently before his departure from Pakistan and add to his claims over time. I do not accept that any problems of recollection due to the passage of time can provide an adequate explanation for the applicant’s omission of any reference to the threatening phone calls in the earlier entry interview.

43. While I accept that the applicant experienced a degree of stress and anxiety related to a range of matters during the entry interview, having regard to the evidence, I do not accept that any of these factors, whether considered separately or cumulatively, prevented the applicant from participating effectively in the entry interview.

44. The applicant’s representative also argues that the IAA should place limited weight on evidence provided by the applicant in the context of the entry interview as it was not conducted for the purposes of assessing his claims for protection. I accept that entry interviews are not intended to gather the evidence necessary to assess an applicant’s claims for protection and that their brief and highly structured format may not allow applicants to present their case fully. For this reason, I agree it may be appropriate to place limited weight on minor omissions in evidence provided in entry interviews, or minor inconsistencies with later evidence. However, I consider the absence of any evidence in relation to the claimed threatening phone calls to be a significant omission in view of the applicant’s later claim that these calls were the reason for his departure from Pakistan, and the interviewing officer’s advice to the applicant that the entry interview was an opportunity to provide any reasons as to why he shouldn’t be removed from Australia and that it was important to provide accurate and consistent information.

45. Having regard to the evidence before me, in particular the omission of any reference to the phone calls in the entry interview, the several opportunities afforded to the applicant during the entry interview to raise any matters related to his departure from Iraq, and the delegate’s clear advice concerning the importance of providing accurate and consistent information, I do not accept that the applicant received any threatening phone calls. It follows that I do not accept that the applicant resigned from his position as a government driver because of these threats.

46. In view of the applicant’s failure to mention the alleged threats in his entry interview, and his statement, also in his entry interview, that he had wanted to leave Pakistan since 2007 but it took a long time to arrange the money, I consider it highly probable that the applicant decided to leave Pakistan in 2007 and resigned from his position when he had accumulated the sum required to finance his travel to Australia. I do not accept that the applicant resigned from his position as a driver because of any events related to his employment that occurred in the period from 2007 to 2013.

## Reasons of the Federal Circuit Court

1. In his application for judicial review in the Federal Circuit Court, the appellant initially raised a single ground of review that he was denied procedural fairness. That ground is the same as the second ground of appeal raised in this proceeding. The contention is that the Authority’s Practice Direction, which limits submissions to 5 pages, results in procedural unfairness. The primary judge rejected that ground on the basis of the decision of the Full Court in *DGZ16 v Minister for Immigration and Border Protection* (2018) 258 FCR 551 (***DGZ16***). His Honour concluded (at PJ [35]):

… In similar circumstances to the current case, the Full Court found that that part of the Practice Direction that limited submissions to the IAA was not inconsistent with the Act, or an unreasonable exercise of the power conferred by s.473CB of the Act (see at [106]-[107] of *DGZ16*).

1. At the hearing before the primary judge, the appellant sought leave to amend his application to raise a second ground, that the Authority’s rejection of the claims about threatening phone calls was illogical and irrational, or alternatively gives rise to an apprehension of bias. That ground is the same as the third ground of appeal raised in this proceeding. The application for leave to amend had been foreshadowed by a draft amended application dated 11 February 2020 and was the subject of written submissions dated 21 February 2020.
2. The Minister opposed the grant of leave on the basis that there was no explanation for the delay in bringing forward the proposed amendment and the proposed new ground lacked merit (PJ [38] and [39]). The Minister did not claim any prejudice arising from the amendment (PJ [40]). The primary judge refused the application for leave to amend on the basis that the new ground lacked merit (PJ [40]). Nevertheless, the primary judge considered the substantive submissions made by the parties with respect to the new ground, and ultimately found that the Authority’s rejection of the appellant’s claims concerning the phone calls was not illogical or irrational and did not give rise to an apprehension of bias.

## First ground of appeal

1. By the first ground of appeal, the appellant contends that the primary judge erred “in finding that the Immigration Assessment Authority had failed to properly consider the Applicant’s claims under s 36(2)(a) and s 36(2)(aa)” of the Act. There appears to be an obvious typographical error in the ground, and I infer that the appellant in fact contends that the primary judge erred in failing to find that the Authority had failed to properly consider the appellant’s claims.
2. No such ground of review was raised before the primary judge. Accordingly, the appellant requires leave to advance the ground on appeal. The Minister opposes leave, submitting that the appellant was represented before the primary judge and has offered no explanation why the ground was not raised below, and further submitting that the ground lacks merit because no particulars have been provided in respect of the claims that the Authority failed to properly consider.
3. The principles concerning the grant of leave are well known. In *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588, the Full Court summarised the general approach to be taken in considering whether to grant leave in the context of migration matters as follows (at [48]):

… 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.

1. The Minister’s submissions should be accepted. No explanation was provided for the failure to raise the ground below and, in the absence of particularisation, the ground has no substantive merit. I therefore refuse leave to advance the first appeal ground.

## Second ground of appeal

1. By the second ground of appeal, the appellant contends that the Authority denied the appellant procedural fairness because the appellant’s representative was limited to making submissions of no more than five pages due to the Practice Direction. The ground further alleges that the Practice Direction, insofar as it purports to limit submissions to no more than five pages, is beyond the power given in s 473FB of the Act to make directions.
2. As noted above, the primary judge dismissed this ground of review on the authority of *DGZ16*. In my view, his Honour was correct to do so. In *DGZ16*, the Full Court considered the same passage of the Practice Direction that is in issue in this case, and held that it was not inconsistent with the Act or an unreasonable exercise of the power conferred by s 473FB (at [107]). The Full Court found that:
3. on the terms of the Practice Direction, the five page limit was only applicable to submissions concerning the Minister’s reasons for decision, and the five page limit did not apply to the provision of new information to the Authority or the explanation for the provision of new information for the purposes of s 473DD (at [99]-[100]);
4. the Practice Direction did not say that the Authority would not consider submissions longer than five pages (although the Practice Direction indicated that the Authority may send them back, implicitly, unread), and in a particular case an applicant may request the Authority that he or she may provide a written submission which is longer than five pages (at [101]-[102]);
5. the Practice Direction does not directly inhibit the ability of an applicant to address the issues in his or her case, as the submission is intended to be directed to why the applicant disagrees with the decision of the Department or any claim or matter the applicant presented to the Department that was overlooked (at [104]); and
6. the evident or intelligible justification for the submissions being no longer than five pages is to encourage, legitimately, submissions that are concise (at [106]).
7. There is nothing in the circumstances of the present case which indicate that the Practice Direction occasioned procedural unfairness to the appellant. In that regard, it can be noted that the submission that the appellant’s representative provided to the Authority on 16 November 2016 was six pages in length, and yet the Authority considered the entirety of the submission. Before the primary judge, the appellant did not adduce any evidence that he would have provided lengthier submissions had it not been for the Practice Direction, nor as to the content of any such submissions.
8. For those reasons, I reject the second ground of appeal.

## Third ground of appeal

1. The third ground of appeal seeks to agitate the proposed ground of review that was the subject of a leave to amend application before the primary judge. By that ground, the appellant contends that the Authority’s rejection of his claims about threatening phone calls was illogical and irrational, or alternatively the rejection of those claims gives rise to an apprehension of bias.
2. The decision of the primary judge to refuse leave to amend was a discretionary decision made under r 7.01 of the then *Federal Circuit Court Rules* *2001* (Cth). There appears to be some disagreement in the authorities whether the decision should be characterised as interlocutory or final for the purposes of s 24(1A) of the *Federal Court of Australia Act 1976* (Cth). In *BXU16 v Minister for Immigration and Border Protection* [2018] FCA 1897, Lee J concluded that such a decision was interlocutory in nature, requiring leave to appeal (at [2]). However, in *CWX18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 673, Gleeson J concluded that, if the refusal of leave to amend results in the dismissal of the application to review, the refusal finally disposes of the rights in the proceeding and is therefore final in nature (at [17]-[19]). In the present case, the Minister took no point that the appellant required leave to appeal on this ground. In the circumstances, and in the absence of argument, it is unnecessary to determine that question and I will proceed on the basis that, if leave is required, it is not opposed.
3. However, as the refusal of leave to amend is a discretionary decision, the appellant is required to demonstrate an error in the exercise of that discretion in accordance with the principles explained in *House v The King* (1936) 55 CLR 499 (***House v King***) at 505. It is not apparent from the primary judge’s reasons that, in refusing leave to amend, his Honour acted upon a wrong principle, or allowed extraneous or irrelevant matters to guide or affect his decision, was mistaken as to the facts or failed to take into account some material consideration. As noted earlier, in refusing leave to amend, the primary judge took into account the potential prejudice to the Minister, any explanation for the delay in bringing forward the amendment and the merits of the ground. All are relevant considerations (although delay in seeking the amendment may have little significance in migration matters where it may be inferred that the applicant has limited funding for or access to legal assistance and where no prejudice to the opposing party or inconvenience to the court is caused). Nevertheless, as error may also be inferred from the result (the refusal for lack of merit), it is necessary to consider the primary judge’s assessment of the merits of the ground.
4. The finding of the Authority that is challenged is the rejection of the appellant’s claim to have received three threatening phone calls. Ultimately, the Authority concluded that the claim lacked credibility because the appellant had failed to make the claim in his entry interview, but the claim became a central aspect of his TPV application.
5. Credibility findings are not immune from judicial review, but to establish jurisdictional error it is ordinarily necessary to show that the findings were legally unreasonable, for example by being based on illogical or irrational findings or inferences of fact: *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 626 per Gleeson CJ and McHugh J and at 657 per Gummow J; *Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002* (2003) 73 ALD 1 at [5] per Gleeson CJ; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224 at [37]-[38] per Gummow and Hayne JJ. However, judicial review does not involve mere merits review – it is not enough for the question of fact to be one on which reasonable minds may differ: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [96] and [130] per Crennan and Bell JJ; *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109 at [47].
6. The principles which guide judicial review of findings concerning credibility have been discussed by the Full Federal Court in a number of recent decisions, including *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496 at [59]-[60]; *DAO16 v Minister for Immigration and Border Protection* (2018) 258 FCR 175 at [30]; *AVQ15 v Minister for Immigration and Border Protection* (2018) 266 FCR 83 (***AVQ15***) at [41]. Those principles include the following:
7. Whether or not a credibility finding is affected by jurisdictional error is a case specific enquiry and should not be assessed by reference to fixed categories or formulae.
8. Even if an aspect of reasoning, or a particular finding of fact, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reason or finding of fact was immaterial, or not critical, to the ultimate conclusion or end result (such as, for example, where it is by one of several findings that independently may have led to the ultimate decision).
9. Considerable caution must be exercised before concluding that errors in an adverse credibility assessment result in the decision being affected by jurisdictional error, in order to avoid judicial review transgressing into the impermissible area of merits review.
10. The Court has explained on many occasions why differences, or even inconsistencies, in claims made over time by persons seeking asylum must be assessed fairly and reasonably and without a presumption that the person has been dishonest in respect of the claims. In *W375/01A v Minister for Immigration and Multicultural Affairs* (2002) 67 ALD 757 the Court observed (at [15]):

As anyone with even a passing familiarity with litigation will know, to have to give a decision-maker three or more separate versions of the basis for a claim is an invidious position to find oneself in, even in the case of an honest witness. All the more so when the accounts have been provided by a person who speaks no English and who has required the assistance of an interpreter. It is inevitable that each version will be slightly different, and may even be very different once the impact of the interpreter is taken into account.

1. In *AVQ15*, the Full Court explained (at [23], [27]-[28]):

23 A decision-maker is entitled to rely upon inconsistencies in assessing a visa applicant’s credibility but it is important that the process be conducted fairly and reasonably, taking into account that the assessment of the reliability, and credibility, of accounts given by asylum seekers is well recognised as involving a number of particular features and considerations, and calls for a careful and thoughtful approach.

…

27 Secondly, the term “inconsistency” should be used with appropriate caution and an appreciation of the danger of using labels or formulae which mask the need for deeper analysis. As we have noted above, adverse credibility findings might be based on a variety of matters, including inconsistencies between, for example, evidence or claims made at different stages of the decision-making process or differences between oral evidence and contemporaneous documents. In some circumstances a visa applicant may raise a claim for the first time at an advanced stage of the decision-making process and the failure to raise the claim previously may well be relevant to credibility, but that is not to say that this is correctly described as an inconsistency.

28 Thirdly, even where it is reasonably open to find that a person has given inconsistent evidence, the decision-maker needs to assess the significance of that inconsistency and the weight to be given to it. This requires consideration of, for example, the significance of the inconsistency having regard to the person’s case as a whole and whether the inconsistency is on a matter which is central to the person’s case or is at its periphery and involves an objectively minor matter of fact. It also requires the decision-maker to remain conscious of the particular challenges facing asylum seekers in giving accounts of why they fear persecution, including that they may have to give multiple accounts, using interpreters, and that they may reasonably expect an interview or a review process will provide an opportunity for them to elaborate on, or explain, the narratives they have previously given. Consideration should also be given to whether there is an acceptable explanation for the person having given inconsistent evidence such that the fact of the inconsistency should attract little, if any, weight. How all these matters are weighed and evaluated in a particular case is a matter for the decision-maker, but a failure by the decision-maker to appreciate the particular nature of the task, or to perform it reasonably and fairly, may be the subject of judicial review.

1. In the present case, I do not discern any error in the primary judge’s assessment of the overall merits of this ground of review. The reasons of the Authority, reproduced earlier, demonstrate careful consideration of the differences in the appellant’s claims to fear harm over time. At reasons [27], the Authority noted that the appellant’s evidence regarding the threatening telephone calls he claims to have received has varied. The choice of the word “varied” is significant. The Authority demonstrated an awareness that the appellant’s evidence was not inconsistent (see reasons [31]), but did vary. At reasons [32], the Authority identified the concern that the appellant had failed to refer to the phone calls in any way during his entry interview, and yet in the TPV interview the calls were identified as the central reason for his departure from Pakistan. The Authority gave consideration to whether there was an explanation for this difference, and first considered the manner in which the entry interview had been conducted (see reasons [31]-[33]). Next, the Authority considered the appellant’s explanation for the difference (see reasons [34]).
2. Minds may differ about the Authority’s overall assessment of the credibility of the appellant’s claims concerning the threatening phone calls. A reasonable assessment of the overall circumstances might have been that the appellant did not appreciate, at the time of the entry interview, the level of detail or specificity about incidents of harm being sought by the interviewer, and only provided greater specificity in the context of a later, more thorough, interview process. However, that does not render the Authority’s assessment irrational or legally unreasonable. In my view, the finding made by the Authority was open to it.
3. In those circumstances, there is no basis on which to conclude that the decision of the primary judge, refusing leave to amend, was affected by *House v King* error. Accordingly, appeal ground three must be rejected.

## Conclusion

1. In conclusion, and for the reasons given above, the appeal should be dismissed with costs.

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| I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan. |

Associate:

Dated: 18 May 2022