FEDERAL COURT OF AUSTRALIA

BVD17 v Minister for Immigration and Border Protection [2018] FCAFC 114

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| Appeal from: | *BVD17 v Minister for Immigration and Border Protection* [2017] FCCA 3046 |
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| File number | NSD 31 of 2018 |
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| Judges: | **FLICK, MARKOVIC AND BANKS-SMITH JJ** |
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| Date of judgment: | 25 July 2018 |
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| Catchwords: | **MIGRATION** – where certificate issued under 473GB of *Migration Act 1958* (Cth) – where appellant unaware of certificate – whether Immigration Assessment Authority failed to consider exercising discretion to disclose information – alternatively whether Immigration Assessment Authority considered but failed to exercise discretion to disclose information – where adverse inference drawn from information – whether legally unreasonable in circumstances |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 25D  *Migration Act 1958* (Cth) ss 430, 430(1), 473(3)(b), 473BA, 473CB, 473DA, 473DB, 473DB(2), 473EA, 473EA(1), 473EA(1)(b), 473GB, 473GB(2)(b), 473GB(4), Pt 7AA |
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| Cases cited: | *BCQ16 v Minister for Immigration and Border Protection* [2018] FCA 365  *Minister for Immigration and Border Protection* *v AMA16* [2017] FCAFC 136  *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176  *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210; (2017) 253 FCR 475  *Minister for Immigration and Border Protection v DZU16* [2018] FCAFC 32; (2018) 253 FCR 526  *Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516  *Plaintiff M17/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 |
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| Date of hearing: | 21 May 2018 |
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| Date of last submissions: | 30 May 2018 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Counsel for the First Respondent: | Mr G Johnson SC and Mr N Swan |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | | NSD 31 of 2018 |
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| BETWEEN: | BVD17  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  **IMMIGRATION ASSESSMENT AUTHORITY**  Second Respondent | |

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| JUDGES: | FLICK, MARKOVIC AND BANKS-SMITH JJ |
| DATE OF ORDER: | 25 JUly 2018 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the first respondent's costs to be assessed if not agreed.

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

REASONS FOR JUDGMENT

# THE COURT:

1. This appeal raises for consideration the question of whether it was unreasonable for the Immigration Assessment Authority (Authority) to take into account information provided by the appellant's brother in drawing an inference adverse to the appellant in its reasons, without first disclosing such information to the appellant. The information was the subject of a Certificate (Certificate) issued to the Authority by a delegate of the Minister for Immigration and Border Protection under s 473GB(2)(a) of the *Migration Act 1958* (Cth) (Act). The question arises in the context of the fast track review regime under Pt 7AA of the Act.

## Background

1. The appellant is a citizen of Sri Lanka who first arrived in Australia as an unauthorised maritime arrival on 13 October 2012.
2. On 31 March 2016 the appellant made an application for a Safe Haven Enterprise (Class XE) visa. The appellant claimed that he feared harm because he had escaped the Karuna Group, because of his Tamil ethnicity and because of his imputed support of the Liberation Tigers of Tamil Eelam. He also claimed to fear harm from the Sri Lankan Army and the Criminal Investigation Department. Of particular relevance was his claim that he was abducted by the Karuna Group in 2008 and had remained in hiding for 17 months.
3. The delegate refused the appellant's application.
4. It is apparent that a file described as 'Offshore Humanitarian Visa Assessment File of [appellant's brother]' was amongst the materials before the delegate. The delegate refers to the file in the decision record, although only by way of footnote.

## Before the Authority

1. The matter was referred to the Authority for review.
2. The Secretary of the Department provided to the Authority 'review material' in accordance with s 473CB of the Act, including a copy of the delegate's decision record.
3. Another delegate issued the Certificate, which is dated 30 September 2016. The Certificate provides that s 473GB of the Act applies to documents, or information contained in them, titled (relevantly):

GAN095 – Claims from Offshore File of Family Member [appellant's brother] contained in PDF Portfolio [identification number].

1. By the Certificate the delegate notified the Authority that :

In my view, this document or information should not be disclosed to the referred applicant or the referred applicant's representative because:

(a) the document or any matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence.

1. On 3 April 2017 the Authority affirmed the delegate's decision to refuse the visa. In summary, the Authority accepted that the appellant's family had faced issues with groups such as the Karuna Group, the Criminal Investigation Department and the Sri Lankan Army. However, it found that the appellant had fabricated claims that he was of interest to such groups. In forming this view, the Authority noted that it did not accept that the appellant had been detained by the Karuna Group and was not satisfied that he had a profile with any of the identified groups. The Authority was satisfied that there was not a real chance of the appellant being seriously harmed by those or other groups and that he otherwise did not meet the requirements of the definition of 'refugee' in s 5H(1) of the Act, and did not meet s 36(2)(a) of the Act. For effectively the same reasons, the Authority found that the applicant did not meet the requirements for complementary protection under s 36(2)(aa) of the Act.
2. The following paragraphs from the Authority's reasons are of particular relevance (references to the applicant being references to the appellant in this appeal, and with emphasis added):

17 While the applicant has provided corroboration of his brother's abductions and his mother's interrogation in 2012, he has provided no supporting evidence of his claims to have been abducted in 2008, or to have been in hiding in 2009 and then in 2012. I acknowledge that an applicant's claims should not turn on whether or not they can provide independent evidence that corroborates their claims, however I give some weight to the absence of such evidence in the context of other documentation provided in support of claims relating to his family members. In relation to the claimed abductions of his brother and the detention of his mother, his family was active in contacting bodies such as the HRC, the ICRC, as well as advertising in a local newspaper. In this respect, I have given some weight to the absence of any documentation which evidences actions taken by his family during or after his claimed abduction.

18 **In this regard, I also find if significant that while the summary of the applicant's brother's protection claims is detailed, it makes no mention of the applicant's own abduction by the Karuna Group in 2008, which I consider would at least have had some relevance to his brother's own claims. I have given some weight to this omission.**

19 In terms of his own evidence, the applicant was somewhat inconsistent about the period of his claimed detention, stating in the arrival and visa interviews that it was three months, but in his written statement referring only to one month. When asked about this, the applicant stated that he had issues with his memory, in part due to the stress of his journey and the time that has passed. While I accept that explanation, I share the delegate's concerns about other aspects of his own evidence. Notably, the applicant's failure to detail his claims to have gone into hiding for seventeen months following his abduction until the visa interview, the specifics of him going into hiding, and his claims that his family continues to be monitored and harassed by the CID.

20 The applicant has provided little detail of his claimed detention in 2008. In the written statement, he said that the Karuna Group gave him chores around the camp to perform. He stated that they wanted him to join them and to help them with their kidnappings and extortion, but he refused and he was beaten up. When asked during the visa interview what happened after he was detained, he said he was tortured and assaulted, and he decided to escape from the camp.

21 In his written statement, he claimed that he escaped form the Karuna Groups' camp by jumping over a fence. He then made his way to Colombo and obtained a passport. The applicant also claimed that he stayed in hiding and waited until he turned eighteen so that he could obtain a passport and visa to go to Qatar, which he ultimately did in 2009.

22 When questioned about this at the interview, the applicant said that he escaped from the camp at night by jumping over the wall. He then went to his aunt's house. He confirmed the CID came looking for him, but he was at his aunt's house and they did not see him. The delegate asked how far his aunt's house was away from his mother's. He confirmed it was about five houses away.

23 The delegate put to him her concerns why he would fail to mention that he went into hiding from the Karuna Group for seventeen months, and that if he was genuinely fearful of the Karuna Group, why he would stay with his aunt who lived so close to his home. The applicant stated that he was not only living in his aunt's house, but that he was monitoring the movements of the authorities and living in several houses. He confirmed it was in the same village.

24 I found the applicant's evidence about his detention and being in hiding for seventeen months to be vague and unconvincing. The applicant was in hiding for a significant period of time, yet he provided few specifics of these claims, even when pressed by the delegate. Given the gravity of his family's claimed history with the Karuna Group, including his own escape, I also find it difficult to accept that he would consider it a reasonable option to stay at his aunt's house five doors down from the place where he was abducted, let alone remain in the same village for seventeen months. This can be contrasted to his brother, who fled his home area to Colombo after he was abducted. Viewed together, his evidence suggests to me that he was not abducted by the Karuna Group or in hiding for seventeen months.

25 The applicant was questioned about his travels from his home area to Colombo, before his departure from the country, and whether he had issues at any checkpoints. He claimed he was interrogated at a checkpoint and asked where he was going. His mother spoke Sinhala and was able to give them reasons (medical treatment) why they were travelling to Colombo. Country information before me indicates that questioning and harassment of Tamils at checkpoints was common, in particular during and immediately after the war. I find it plausible they could negotiate a checkpoint in the way described, however it also indicates to me that he did not have a profile with the Sri Lankan authorities as he has claimed. Were it otherwise, I do not accept he would have been given permission to pass through solely with his mother's intervention, or that she herself would not have faced further scrutiny.

26 **Cumulatively, the above factors lead me to conclude that he has fabricated his own claims** to have been of interest to the Karuna Group, the CID, the SLA or any other authority. I do accept his family has faced serious issues and difficulties from these groups in the past, but I am not satisfied the applicant himself has had a profile with any of these groups, or that he has ever been abducted, detained, mistreated or otherwise harmed by any of these groups. I also do not accept that he had a profile, or would have a profile, that would lead him to be targeted on return to Sri Lanka for reasons connected to the profile and histories of his other family members. For clarity, I also do not accept his younger brother would have any such profile.

1. It is not in issue that the 'summary of the applicant's brother's protection claims' referred to by the Authority at [18] of its reasons (Summary) was information the subject of the Certificate. The information referred to in the Certificate has not been disclosed at any time to the appellant or his representatives. The existence of the Certificate was not disclosed until after the Authority's reasons were published. The basis upon which confidentiality is claimed over the documents and information covered by the Certificate is not known.
2. We add that the Summary was said by counsel for the Minister to form part of the file referred to in the footnote to the delegate's decision record. It is apparent from that record that the delegate, in contrast to the Authority, did not appear to place any significance on the apparent omission by the brother to refer in his own claims to the appellant's abduction or time spent in hiding. There is no reference to such omission in the delegate's decision record.

## Before the Federal Circuit Court

1. An application made to the Federal Circuit Court of Australia for review of the Authority's decision was dismissed in December 2017: *BVD17 v Minister for Immigration and Border Protection* [2017] FCCA 3046.
2. The appellant claimed before the Federal Circuit Court that the Authority's decision was affected by jurisdictional error in that it failed to provide the appellant with natural justice within the meaning of s 473DA of the Act. In the alternative, it was said that the Authority's decision was affected by jurisdictional error in that it was legally unreasonable. Both grounds of appeal were dismissed by the primary judge. As to the legal unreasonableness ground, the primary judge found (at [33]) that:

Whilst the Authority may have a discretion under s 473GB of the Act, in the absence of compelling reasons, it was open to the Authority not to exercise that discretion in the circumstances of the present case. The failure to disclose that information cannot be said to be legally unreasonable. Further it was open to the authority to have regard to that information in making findings in respect of the [appellant's] claims. The adverse findings cannot be said to be illogical, irrational or unreasonable.

1. The appellant now appeals to this Court.

## The appeal

1. Following the abandonment of some proposed grounds, the sole ground upon which the appellant proceeded in this Court is a claim that the primary judge erred at law in failing to find that the decision of the Authority was legally unreasonable. The appellant contends that the Authority failed to consider whether to exercise the discretionary power conferred on it by s 473GB(3)(b) of the Act to disclose to the appellant the material referred to in the Certificate, or did not exercise its discretion to disclose the material, and that either course was unreasonable, resulting in jurisdictional error.

## Part 7AA

1. It is appropriate to briefly consider the relevant provisions of Pt 7AA. Its operation is discussed extensively in, for example, *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600 at [13]–[38] per Gageler, Keane and Nettle JJ; *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176 at [85]–[98] per Kenny, Tracey and Griffiths JJ; *Minister for Immigration & Border Protection* *v AMA16* [2017] FCAFC 136 at [12]–[27] per Griffiths J.
2. Part 7AA of the Act is headed 'Fast Track Review Process in Relation to Certain Protection Visa Decisions'. Section 473BA explains that Pt 7AA provides for a limited form of review of certain decisions (fast track decisions) to refuse protection visas to some applicants. It is 'a mechanism designed to result in an automatic review of a fast track reviewable decision': *Plaintiff M174* at [15].
3. Division 3 of Pt 7AA is entitled 'Conduct of Review'. Section 473DA addresses the natural justice rule in the context of reviews by the Authority:

**Exhaustive statement of natural justice hearing rule**

1. This Division, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority.
2. To avoid doubt, nothing in this Part requires the Immigration Assessment Authority to give to a referred applicant any material that was before the Minister when the Minister made the decision under section 65.
3. Division 3 includes a range of provisions that provide for and limit any requirement to consider new information or interview the referred applicant. It has been observed that s 473DA restricts the first limb of natural justice (the fair hearing rule), but does not purport to affect the second limb (bias): *AMA16* at [18].
4. Subdivision B of Division 3 provides for a 'review on the papers'. Section 473DB provides:

**Immigration Assessment Authority to review decision on the papers**

1. Subject to this Part, the Immigration Assessment Authority must review a fast track reviewable decision referred to it under s 473CA by considering the review material provided to the Authority under s 473CB:

(a) without accepting or requesting new information; and

(b) without interviewing the referred applicant.

(2) Subject to this Part, the Immigration Assessment Authority may make a decision on a fast track reviewable decision at any time after the decision has been referred to the Authority.

1. The review is a hearing *de novo* on the material provided: *Plaintiff M174* at [17].
2. Subdivision C of Division 3 provides for the Authority to obtain new information, but the topic of new information is not relevant to this appeal. The appellant accepts that the material subject to the Certificate is not 'new information' within the meaning of Subdivision C: see *BBS16* at [90]–[98]. The parties are agreed that the material the subject of the Certificate was before the delegate when the decision was made.
3. Division 4 of Part 7AA deals with decisions of the Authority. Section 473EA(1) provides as follows:

**Immigration Assessment Authority's decision and written statement**

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

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

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

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

1. Division 6 deals with disclosure of information. In particular, s 473GB provides for the issue of a Certificate (as occurred in this case) as follows:

**Immigration Assessment Authority's discretion in relation to disclosure of certain information etc**

1. This section applies to a document or information if:
2. the Minister has certified, under subsection (5), that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the Certificate (other than a reason set out in paragraph 473GA(1)(a) or (b) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed; or
3. the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence.
4. If, in compliance with a requirement of or under this Act, the Secretary gives to the Immigration Assessment Authority a document or information to which this section applies, the Secretary:
5. must notify the Authority in writing that this section applies in relation to the document or information; and
6. may give the Authority any written advice that the Secretary thinks relevant about the significance of the document or information.
7. If the Immigration Assessment Authority is given a document or information and is notified that this section applies in relation to it, the Authority:
8. may, for the purpose of the exercise of its powers in relation to a fast track reviewable decision in respect of a referred applicant, have regard to any matter contained in the document, or to the information; and
9. may, if the Authority thinks it appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the referred applicant.
10. If the Immigration Assessment Authority discloses any matter to the referred applicant under subsection (3), the Authority must give a direction under section 473GD in relation to the information.
11. The Minister may issue a written certificate for the purposes of subsection (1).
12. Therefore, under the s 473GB scheme the Authority has a discretion conferred by s 473GB(3) as to whether or not to have regard to any matter in the materials and a discretion as to whether to disclose the materials to the referred applicant.
13. Notwithstanding that s 473DA expressly includes s 473GB in its exhaustive statement as to the natural justice hearing rule, the Minister accepted that the discretionary powers conferred on the Authority by s 473GB are conferred on the implied condition that they are to be exercised within the bounds of reasonableness in the sense explained in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [28]; (2013) 249 CLR 332, 350–351 per French CJ: that is, a decision cannot be arbitrary or capricious or one which abandons common sense, viewed in the statutory context of the conferral of power.
14. The Minister took this position as to the implied condition taking into account that the High Court has held that the discretionary powers conferred on the Authority by Division 3 of Pt 7AA are conferred on the implied condition that they are to be exercised within the bounds of reasonableness: *Plaintiff M174* at [21]. See also *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210; (2017) 253 FCR 475 at [81]–[82] per Robertson, Murphy and Kerr JJ; *Minister for Immigration and Border Protection v DZU16* [2018] FCAFC 32; (2018) 253 FCR 526at [69]–[75], [79]–[81], [83] per Robertson, Murphy and Kerr JJ (as to powers conferred by s 473DC). The Full Court in *BBS16* (at [98]) considered that the same position applies with respect to powers conferred by s 473GB. We respectfully agree.
15. Further, the scheme of Pt 7AA is not such as to involve the referred applicant in any consideration of the validity of a s 473GB Certificate or whether any written advice given by the Secretary under s 473GB(2)(b) should be accepted or rejected. In fact, a referred applicant may never know that a document or information was provided to the Authority with a Certificate under s 473GB: *BBS16* at [98].
16. In summary, the scheme of Pt 7AA is that, except in limited circumstances, the Authority must review *de novo* a fast track decision referred to it on the papers, those papers being the review material provided to it by the Secretary of the Department, and conduct that review without accepting or requesting new information or interviewing the referred applicant. It may receive and take into account confidential information the subject of a Certificate and has a discretion as to whether to use such information or disclose it to the referred applicant. That is the nature of the statutory scheme against which issues of legal unreasonableness are to be considered.

## The position of the parties

1. Taking into account the particulars of the ground of appeal and the submissions made on behalf of the appellant, the appellant's argument proceeded on two paths. The first was as follows:
   1. para [18] of the Authority's reasons evidences an assumption by the Authority;
   2. that assumption is that the appellant's brother would have known about the appellant's claimed abduction in 2008;
   3. there was no evidence that indicated what the brother's state of knowledge as to the abduction in fact was;
   4. there was no evidence to suggest the brother was involved or was present at the time of the abduction;
   5. there was no information as to the circumstances of the preparation of the brother's statement or its summary;
   6. there was no reason for the Authority to assume that the brother would have known of the abduction: nor was there any reason for the Authority to assume that the brother would not have known of the abduction; and
   7. it was legally unreasonable for the Authority to 'give some weight' to the 'omission' in the brother's statement as to the appellant's own abduction.
2. The alternative path was as follows:
   1. in circumstances where any number of inferences could have been drawn as to the reason the brother did not mention the appellant's abduction, the Authority should have exercised its discretion to disclose the material to the appellant and receive comment from him;
   2. therefore the Authority either failed to consider the exercise of its discretion to disclose the material, or decided not to disclose it, and its reliance on the material in those circumstances was legally unreasonable;
   3. the only manner in which the discretion could have been exercised reasonably was to put the information, taking into account the serious nature of the express finding of fabrication, the scant information that the Authority had before it, that the material was not known to the appellant and that the inference drawn was not obvious;
   4. alternatively, it can be inferred that the Authority failed to consider the exercise of its discretion to disclose, taking into account the serious nature of the finding and the fact that the Authority did not refer to any exercise of its discretion in its reasons. In support of this submission the appellant noted that four factors were relevant to the Authority's finding of fabrication by the appellant: a lack of independent evidence about the abduction and his being in hiding (at [17]); the description of the brother's evidence as 'significant' (at [18]); the conclusion that the appellant's evidence as to his abduction and being in hiding was 'vague and unconvincing' (at [24]); and its findings that the appellant and his mother were able to clear checkpoints (at [25]).
3. The Minister's argument can be summarised as follows:
   1. the Authority was not obliged to give reasons as to why it did not disclose the material;
   2. there was no reason why the Authority ought to have assumed the brother did not know about the appellant's movements or that the family members were not in contact, particularly as the Appellant's claim was that when he was in hiding he remained in the proximity of his village;
   3. an assumption that the brother would have known of the claimed abduction was 'within the realms of reasonableness';
   4. s 473EA does not require the Authority in its reasons to refer to or explain a procedural decision taken in the course of the review;
   5. the onus is on the appellant to establish the relevant factual foundation for drawing an inference that the Authority has failed to consider whether or not to exercise its discretion;
   6. the lack of reference to consideration of the exercise of the discretion does not necessarily mean such exercise was not considered;
   7. put simply, the appellant has not met his onus as to establishing legal unreasonableness.

## Issues for consideration

1. The matters raised by the appeal ground are addressed by considering the following questions:
   1. does regard to the materials the subject of a Certificate by the Authority without disclosure to a referred applicant comprise a legally unreasonable exercise of power;
   2. has the appellant met its onus to establish a foundation from which an inference can be drawn that the Authority failed to consider exercising its discretion to disclose the material to the appellant; and
   3. was an exercise of the discretionary power by declining to disclose the material to the appellant legally unreasonable so as to constitute jurisdictional error.

## Determination

### No obligation to disclose

1. As the extracts from paras [18] and [26] of its reasons emphasised above make clear, the Authority in fact had regard to information the subject of the Certificate.
2. The mere fact that the Authority has regard to material the subject of a Certificate without disclosing it to a referred applicant does not of itself comprise a legally unreasonable exercise of power.
3. The statutory context includes that both s 473GB(3) and s 473GB(4) expressly grant a discretionary power as to disclosure, and anticipate that disclosure may or may not occur. Part 7AA anticipates potential non-disclosure.
4. Further, the fact that the Authority has apparently placed weight on the information in apparent contrast to the position of the delegate does not of itself require the Authority to explain or provide notice to the appellant: see *DGZ16* at [72].
5. That is not to say that non-disclosure cannot be considered legally unreasonable. However, whether or not in a particular case the non-disclosure might comprise an unreasonable exercise of power will depend on the circumstances.

### No established foundation for drawing the inference of no consideration

1. The appellant bears the onus of establishing the basis for drawing the inference necessary to make out the alleged jurisdictional error: *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 at [67] per Gummow J. It follows that he bears the onus of establishing the factual foundation from which it can be inferred that the Authority failed to consider the exercise of its discretion under s 473GB(3)(b). The Minister does not need to establish that the Authority had indeed considered the exercise of the discretion.
2. The fact that the Authority did not refer to or explain the exercise of its discretion in its reasons does not assist the appellant in this case. As Thawley J noted in *BCQ16 v Minister for Immigration and Border Protection* [2018] FCA 365 (at [45], [49]–[50]), the Authority's obligation to provide written reasons under s 473EA(1) does not require a statement as to the exercise of a procedural decision in the course of the review. This is consistent with the fact that the statutory scheme contemplates that a person may have no knowledge of the existence of a Certificate.
3. In reaching this view, Thawley J had regard to s 25D of the *Acts Interpretation Act 1901* (Cth) (Interpretation Act) (without determining the scope of its interaction with s 437EA) and authorities that had considered the necessity for the Administrative Appeals Tribunal to provide reasons under s 430 of the Act (at [39]–[50]).
4. Section 430(1) provides:

**Written statement of decision**

1. Where the Tribunal makes its decision on a review (other than an oral decision), the Tribunal must make a written statement that:

(a) sets out the decision of the Tribunal on the review, and

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

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based; and

(e) …

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

1. In *SZGUR*, the High Court considered whether s 430 required the Tribunal to disclose in its written reasons a procedural decision (as to obtaining information) taken in the course of making its decision on a review. French CJ and Kiefel J, with whom Heydon and Crennan JJ agreed, stated as follows (at [31] and [32]):

[31] The premise upon which the Federal Court found jurisdictional error on the part of the Tribunal was that the Tribunal overlooked the agent’s request, or did not consider it and had no good reason for not doing so. The premise depended for its correctness upon the content of the Tribunal’s obligation under s 430 to give reasons for its decision. Rares J relied upon a passage from the judgment of McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf* in which their Honours said that s 430 “entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material”. That, of course does not mean that a matter not mentioned in the s 430 statement was not considered.

[32] Section 430 presupposes a logical structure to the Tribunal’s reasoning which involves the following steps:

1. Identification of the relevant evidence or material upon which findings of fact can be based.

2. Making findings of fact based on the relevant evidence or material.

3. Reasoning to the decision by application of the relevant legal principles to findings of fact, both primary and inferential.

Section 430 therefore does not require that the Tribunal make reference, in its reasons, to the disposition of a request from an applicant for a medical examination or for any other investigation. The Tribunal’s consideration of whether or not to exercise its power under s 427(1)(d) in aid of its discretion under s 424(1), whether requested or not, to “get any information that it considers relevant”, is neither evidence nor material nor a fact upon which the Tribunal could base any findings or its ultimate decision. The nature of the Tribunal’s treatment of the agent’s letter of 20 June 2008 in its reasons was consistent with that view of what s 430 requires and the logical structure it presupposes.

1. During the hearing of the appeal we invited the parties to file supplementary submissions addressing (amongst other things) the effect of s 25D of the Interpretation Act. Section 25D provides:

**Content of statements of reasons for decisions**

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

1. The Minister conceded in his supplementary submissions that s 25D of the Interpretation Act applies to s 473EA of the Act. A similar concession was made and accepted in *AMA16* [2017] FCAFC 136 at [74]. The Minister submits that the reference to 'decision' in s 473EA(1)(b) as a matter of statutory construction is a reference to the decision by the Authority on the review and does not extend to procedural decisions that may have been made in the course of the review. We accept that construction, taking into account the terms of Division 4 of Pt 7AA as a whole. Division 4 provides for a regime whereby the 'decision on a review' is made by a written statement, the time and date are recorded, the decision is irrevocable, the review documents are then returned to the Secretary and the referred applicant is notified of the decision by being provided with a copy of the written statement. The construction contended for by the Minister is also consistent with the use of the word 'decision' in, for example, s 473DB(2), which refers to the Authority making a decision on a fast track reviewable decision at any time after the fast track reviewable decision is referred to it. Such reference is clearly a reference to a decision to affirm the delegate's decision or remit it for consideration.
2. Section 25D of the Interpretation Act does not require more than reasons that 'set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based'. That definition does not require the Authority to set out reasons as to an exercise of its discretion, such reasoning not being of itself a finding, evidence or a material fact. Section 25D, whilst applicable, does not advance the appellant's argument.
3. In our view, consistent with that expressed in *BCQ16*, the terms of s 473EA do not compel a different approach to that which applies with respect to s 430. The absence of reference to the exercise of discretion in the reasons does not of itself give rise to an inference that its exercise was not considered.
4. As noted in *BCQ16* (at [50]), there may well be circumstances where the lack of any information in the reasons as to the exercise of the discretion supports an inference that the exercise was not considered.
5. In our view, this is not such a case. We acknowledge that the appellant is not in a position to know whether the exercise of the discretion was considered. He is left to resort to inference. Even accepting that the nature of the Authority's finding as to fabrication was significant, that does not of itself justify an inference being drawn that the Tribunal overlooked its power to exercise its discretion to disclose the material. We accept that the omission in the Summary was a matter taken into account by the Authority and given weight. It was one of various matters given weight by the Authority in making its credibility finding. However it does not follow that because a finding is of a serious nature or relates to credibility that the Authority must have failed to consider whether or not to exercise its discretion.
6. The appellant raised the issue of his own abduction by way of his claim for protection. That issue was disclosed before both the delegate and the Authority.
7. The delegate also disclosed that it had some information from the brother, albeit that the disclosure by footnote was perhaps not readily apparent to the appellant.
8. The information in the Summary was only one piece of information used to discredit the appellant's claim that he was detained and was in hiding for 17 months. So much is clear from paragraphs [16] to [26] of the Authority's reasons. Other reasons included the lack of specific details about his claims, and evidence that despite the gravity of his family's situation he said he hid at his aunt's home only five doors from his home and stayed in the same village for 17 months.
9. In those circumstances it may be more difficult to infer that the Authority failed to consider the exercise of its discretion to disclose. An inference might equally be drawn that the Authority did so, but considered that it had sufficient information regardless to reject the appellant's claim.
10. We consider there is insufficient evidence from which it can be inferred that the Authority failed to consider the exercise of its discretion under s 473GB(3)(b) at all.

### Was the failure to disclose legally unreasonable

1. The appellant's contention that the Authority erred in making an assumption as to the brother's knowledge of the appellant's abduction and movements underlies this issue.
2. The appellant had provided information that was before the Authority as to his brother's abduction in 2007 and escape, and as to the brother's abduction in 2009 and travel overseas. The appellant had some knowledge of his brother's movements. There was no information to suggest that the brother had no contact with his family either when he was abducted or in hiding or afterwards. There was some evidence that the brother was in communication with the family in 2012 when he assisted in securing the release of his mother from custody. Against that backdrop, it was not arbitrary, capricious or irrational for the Authority to assume that the family members would have some knowledge of their respective experiences as at the time the brother provided the information referred to in the Summary. Nor was it arbitrary, capricious or irrational for the Authority to place weight on the absence of any mention by the brother of the appellant's alleged abduction. The fact that it was open to the Authority to draw other inferences from the omission does not compel a finding that the inference in fact drawn was legally unreasonable in the sense discussed in *Li*.
3. Whilst it is true, as the appellant submitted, that the circumstances in which the brother provided the information referred to in the Summary are unknown, the Authority was entitled to rely on the information provided to it by way of the review materials. That is the statutory regime. It cannot properly be said that lack of any evidence that impugns the circumstances in which the information was provided by the brother compels the drawing of an inference that the Summary is unreliable such that it was legally unreasonable for the Authority to accord it regard.
4. Further, the appellant has not established that, where the Authority drew an inference as to the brother's knowledge in circumstances that were not legally unreasonable, and taking into account the Pt 7AA regime, it was in any event legally unreasonable for the Authority to decline to disclose the material to the appellant for his information and comment. The matters referred to in paras [52]–[55] and [58] of these reasons are equally relevant to this issue. Taking into account those matters, the appellant has not met the onus of establishing that an exercise of the discretion to deny disclosure was legally unreasonable.
5. The Authority complied with the statutory review process required of it by Pt 7AA. It conducted a review on the basis of materials provided to it. It did so without accepting or requesting new information and without interviewing the referred applicant. It was not obliged to disclose the material the subject of the Certificate to the appellant, and the appellant has not established that the Authority's conduct in not doing so was capricious, illogical or otherwise legally unreasonable. The prospect that others may have taken a different view as to disclosure does not render the decision legally unreasonable.

## Determination

1. We do not consider jurisdictional error on the part of the Authority is established. It follows that the appeal is dismissed and the appellant is to pay the first respondent's costs to be assessed if not agreed.

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| I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Flick, Markovic and Banks-Smith. |

Associate:

Dated: 25 July 2018