FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v AUS17 [2019] FCA 1686

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| Appeal from: | *AUS17 v Minister for Immigration and Anor* [2017] FCCA 1986  |
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| File number: |  |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 16 October 2019 |
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| Catchwords: | **MIGRATION** – appeal from the Federal Circuit Court – where the respondent was a “fast track applicant” before the Immigration Assessment Authority – where the respondent produced new information – exception to the prohibition on considering new information – application of s 473DD of the *Migration Act 1958* (Cth) – exceptional circumstances – whether the Authority was required to have regard to the matters contained in s 473DD(b)(ii) in assessing whether exceptional circumstances existed – whether Authority had regard to a letter of support provided in support of respondent’s case  |
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| Legislation: | *Constitution* s 75*Migration Act 1958* (Cth) ss 5, 473DA, 473DC, 473DD, 473EA, 473GB  |
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| Cases cited: | *AQU17 v Minister for Immigration and Border Protection* (2018) 162 ALD 442*AUS17 v Minister for Immigration & Anor* [2017] FCCA 1986*BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34*BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123*Minister for Aboriginal Affairs v Peko-Wallsend* *Ltd* (1986) 162 CLR 24*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 |
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| Date of hearing: | 17 May 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 28 |
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| Counsel for the Appellant: | Mr B Kaplan |
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| Solicitor for the Appellant: | Sparke Helmore |
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| Counsel for the First Respondent: | Mr R Clark |
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| Solicitor for the First Respondent: | Fragomen until 1 February 2019, thereafter Varess |
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| Counsel for the Second Respondent: | The second respondent did not appear |

ORDERS

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|  | NSD 44 of 2018 |
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| BETWEEN: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONAppellant |
| AND: | AUS17First RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 16 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. Each party having informed the Court that no submissions are to be lodged arising from the judgment of the High Court of Australia in *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34, judgment in the present case be delivered on 16 October 2019.
2. The appeal be allowed.
3. The orders made by the Federal Circuit Court on 8 December 2017 be set aside.
4. In lieu thereof, it be ordered that:
	1. the application be dismissed; and
	2. the applicant (first respondent to the appeal) pay the respondent’s (appellant’s) costs of and incidental to the application, to be taxed if not agreed.
5. The first respondent pay the appellant’s costs of and incidental to the appeal, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

LOGAN J:

1. This is yet another appeal concerning the construction and application of s 473DD of the *Migration Act 1958* (Cth) (**the Act**) by the Immigration Assessment Authority (**Authority**). On this occasion, the appellant is the Minister for Immigration and Border Protection (**Minister**).
2. It might also be observed that this is yet another case arising from an era when many thousands arrived in Australia by sea without visas authorising their entry. The first respondent, AUS17, is such a person. The circumstances of his arrival were such that he is what the Act terms an “unauthorised maritime arrival”. The Authority is not an active party respondent. It is therefore convenient to refer to AUS17 as “the respondent”.
3. The impact on the cost of public administration in the executive branch of government aside, the impact on the judicial branch of government of the sheer number of unauthorised maritime arrivals who later seek to avail themselves of Commonwealth judicial power has been, and continues to be, considerable. One impact in absolute terms, arising from the sheer number of cases and finite judicial resources, is by when each case can be heard and determined. Another, related to that, is the opportunity cost of such cases in terms of the timely hearing and determination of cases arising in other areas of the Court’s jurisdiction. Yet another is that the Hegelian dynamic of frequent and complex legislative responses to changes in policy and patterns of unauthorised arrivals and inadequacies perceived by Parliament in existing legislation as revealed by judicial decisions inevitably throw up novel controversies. These, in turn, yield test cases upon the fate of which sound husbanding of judicial resources dictates that others which may be affected must await determination. The present exemplifies such a case. At the request of the parties and at a time when it would otherwise have been possible to have delivered judgement, I ordered on 18 March 2019 that the delivery of judgement in this case be deferred until not less than 14 days after the High Court had delivered judgement in *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34 (***BVD17***) or further order of the Court.
4. The High Court delivered judgement in *BVD17* on 9 October 2019. At issue in *BVD17* was whether procedural fairness dictated that the Authority disclose the fact of notification under s 473GB(2)(a) (as a sequel to a Ministerial certificate given under s 473GB(5)) to a referred applicant in a review under Pt 7AA of the Act. The High Court held that s 473DA precludes such an obligation from arising.
5. Such an alleged denial of procedural fairness had not featured as a ground of review in this case; nor had it been sought by the respondent to raise such an issue by notice of contention. However, with the consummate and commendable fairness of a model litigant, the Minister, upon noticing after reservation of judgement that there had been a s 473GB(2)(a) notification and related Ministerial certificate in the present case and being aware of a pending appeal in *BVD17*, promoted, and the respondent agreed to, the deferral of the delivery of judgement for the reason indicated. After the High Court’s judgment in *BVD17* waspublished, each party was offered an opportunity to file supplementary submissions with respect to any issue arising from that judgment. Each party notified the Court that no further submissions were proposed. In light of *BVD17*, these could be no certificate-based procedural fairness error in the circumstances of this case.
6. However these strategic issues of public and judicial administration may be, an individual such as the respondent is entitled to have his or her application for a visa dealt with according to law both by the Minister and his delegates and, in turn, by the Authority and to have resort to an exercise of the judicial power of the Commonwealth, at least in the High Court’s original jurisdiction under s 75(v) of the Constitution if no alternative similar provision is made in respect of resort to another court exercising federal jurisdiction. Further and materially, the Minister is entitled, in the event of any such resort, to assert that he, one of his delegates or, as the case may be, the Authority has lawfully discharged their respective duties under the Act. In this case, the Minister contends that the Authority conducted its review function under Pt 7AA of the Act according to law and that the Federal Circuit Court (Driver FCJ) erred in concluding otherwise in the judgment under appeal: *AUS17 v Minister for Immigration & Anor* [2017] FCCA 1986.
7. The earlier procedural history of the case is as follows.
8. The respondent is a citizen of Sri Lanka. He is a Tamil from that country’s Jaffna District. He came to Australia by boat in 2012.
9. On 10 September 2015, the respondent applied for a protection visa. That application was later withdrawn. The following year, on 10 February 2016, he applied under the Act for that class of protection visa known as a Safe Haven Enterprise Visa (**SHEV**).
10. The respondent claimed to fear persecution if returned to Sri Lanka on one or more of the following bases:
* at the hands of members of the Eelam People’s Democratic Party (**EPDP**) owing to his earlier interactions with that organisation in 2003 (when he says he pressured not to testify against its members in a trial about his friend’s murder), 2005 (when he was tortured and accused of trying to kill its leader) and 2008 (when he was attacked by its members);
* at the hands of the Sri Lankan Army either due to his perceived affiliation with the Liberation Tigers of Tamil Eelam or his having been involved in a motor vehicle accident in 2011 in respect of which he was charged and fined after the passenger in the vehicle, an officer, died;
* by reason of:
* his Tamil ethnicity;
* his having left Sri Lanka unlawfully;
* his being a member of the particular social group comprising failed asylum seekers; and
* his details having been made publically available by the Minister’s Department which, it was alleged, may lead to persons in Sri Lanka becoming aware of his having sought asylum in Australia.
1. On 9 September 2016, a delegate of the Minister decided to refuse to grant the respondent a SHEV.
2. On 14 September 2016, the decision of the delegate was referred to the Authority for a review. It is common ground that the respondent was a “fast track applicant” within the meaning of that term in s 5(1)(a) of the Act. On 9 January 2017, the Authority decided to affirm the decision of the Minister’s delegate.
3. On 19 October 2016, prior to and for the purposes of the Authority’s decision on the review, the respondent’s then-representative gave to the Authority a letter which enclosed various documents, materially including a letter dated 12 October 2016 from a sometime Sri Lankan member of parliament, Mr Appathuray Vinayagamoorthy (**Letter of Support**).
4. The Authority made this reference to the Letter of Support when furnishing a statement of reasons to the respondent for the affirmation of the Minister’s delegate’s decision:

4. On 21 October 2016 the [the Authority] received a submission ([the Authority] submission) from the applicant’s representative. The [the Authority] submission in part responds to issues arising from the delegate’s assessment and refers to country information before the delegate. I do not consider this to be new information and I have considered these aspects of the submission.

…

6. Included in the [the Authority] submission is a letter dated 12 October 2016 from Appathuray Vinayagamoorthy, Attorney at Law and Notary Public Commissioner for Oaths, which post-dates the delegate’s decision and is new information.

…

8. The [the Authority] must not consider any new information from an applicant unless satisfied exceptional circumstances justify considering the new information and the new information was not and could not have been provided to the Minister, or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant’s claims.

…

I accept the letter of support from Appathuray Vinayagamoorthy could not have been provided to the delegate as it was written after the delegate’s decision. However, the information it provides recounts the claims already provided by the applicant and in that regard there is no reason to believe that the applicant could not have obtained a letter outlining this information earlier and provided it to the Minister. I am not satisfied that any exceptional circumstances exist that justify considering the new information.

1. The respondent then sought the judicial review of the Authority’s decision by the Federal Circuit Court. As it came to be amended, the respondent’s judicial review application included as ground 4 an allegation that the Authority had fallen into jurisdictional error “by failing to comply with s 473DD of the Act”, in that it “failed to consider whether s 473DD(b)(ii) applied to the [Letter of Support]” It was this ground which proved decisive in the quashing of the Authority’s decision by that court by an order made on 8 December 2017. Influential in that outcome was the learned primary judge’s understanding of the effect and application to the present case of a jurisdictional error which White J had found to have been committed by the Authority in *BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221 (***BVZ16***). Having referred to *BVZ16*, the learned primary judge, at [47], stated:

I see the same error in this case. The Authority failed to have regard to all material considerations in determining whether to accept the new information pursuant to s.473DD. In particular, the Authority’s consideration in relation to s.473DD(a) was not informed by the consideration of both subparagraphs of s.473DD(b). Further, a material consideration to which the Authority should have had regard was that the letter in issue was provided to corroborate several of the applicant’s claims, in response to the adverse decision of the delegate. A relevant consideration for the Authority was the probative value of that purportedly corroborative evidence.

His Honour further stated, at [48], that it was “pertinent to take into account White J’s rejection of the Minister’s Notice of Contention in *BVZ16* concerning the interpretation of s.473DD(b)(ii) of the … Act”. The learned primary judge concluded, at [50], that there was “a constructive failure of jurisdiction by the Authority in this case because of its misapplication of s.473DD … to the new information provided by the applicant.”

1. In summary, the Minister’s case in this appeal entails three propositions:
	1. First, the Authority’s determination of whether there existed exceptional circumstances to justify consideration of the Letter of Support was not erroneous. In that connection, the Minister contends that the primary judge was wrong to hold that the Authority was *required* to have regard to the matters described in s 473DD(b)(ii) when assessing whether or not there existed exceptional circumstances.
	2. Secondly, without detracting from the first proposition, that, in any event, the Authority had regard to the fact that the Letter of Support had been given to corroborate his claims for protection.
	3. Thirdly, even if the Authority made an error in its construction and application of s 473DD in respect of the Letter of Support, any such error does not go to jurisdiction, as the new information was not such that, had it been known by the Minister’s delegate, it may have affected the consideration of the respondent’s claims.
2. The High Court had occasion last year, in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 92 ALJR 481 (***M174***), to consider the construction of s 473DD of the Act. This same subject had come before the Full Court of this Court in some earlier cases but, in the circumstances of this particular case, it is both necessary and sufficient to refer to the observations by the High Court made about that section.
3. Section 473DD provides:

**Considering new information in exceptional circumstances**

For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment Authority must not consider any new information unless:

(a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and

(b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the information:

(i) was not, and could not have been, provided to the Minister before the Minister made the decision under section 65; or

(ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant’s claims.

1. Section 473DD imposes, as the High Court observed in *M174*,at [28], restrictions on when the Authority can consider new information. The Authority’s ability to “get” new information is governed by s 473DC which, as observed, at [23], by the High Court, is “entirely facultative”. In this case, the Authority expressly considered whether or not to “get” new information. In their joint judgement in *M174*, Gageler, Keane and Nettle JJ made, at [29] - [34], the following observations in respect of s 473DD:

29. The precondition set out in s 473DD (a) must always be met before the Authority can consider any new information. Whatever the source of new information, the Authority needs always to be satisfied that there are “exceptional circumstances” to justify considering it.

30. Quite what will amount to exceptional circumstances is inherently incapable of exhaustive statement. The word “exceptional”, in such a context, is not a term of art but “an ordinary, familiar English adjective”: “[t]o be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered”.

31. Cumulatively upon the precondition set out in s 473DD(a) that the Authority must be satisfied that there are exceptional circumstances to justify considering new information, s 473DD(b) sets out a further precondition that must also be met before the Authority can consider new information that is given to it, or proposed to be given to it, by the referred applicant. In respect of new information within that category, the Authority must be satisfied of one or other of the circumstances set out in s 473DD(b)(i) and (ii).

32. The circumstance of which the Authority needs to be satisfied in order to meet s 473DD(b)(i) is that the new information that is given, or proposed to be given, by the referred applicant was not, and could not have been, provided to the Minister before the Minister or delegate made the decision to refuse to grant the protection visa. No explication of that circumstance is required in the present case.

33. The circumstance of which the Authority needs to be satisfied in order to meet s 473DD(b)(ii) does require some explication. In that provision, the term “personal information” takes its defined meaning within the Act of “information or an opinion about an identified individual, or an individual who is reasonably identifiable”. Unaided by considerations of legislative history, the reference in s 473DD(b)(ii) to personal information which was not previously “known” might have been read as confined to personal information not previously known to the referred applicant. Legislative history, however, is against that reading. The provision is the result of an amendment to the Bill for the 2014 Amendment Act made in the Senate. The purpose of the amendment was explained at the time as being to “extend the types of ‘new information’ that a referred applicant may present to [the Authority] to include, for example, evidence of significant torture and trauma which, if it had been known by either the Minister or the referred applicant, may have affected the consideration of the referred applicant’s asylum claims by the Minister”. The Full Court of the Federal Court has correctly recognised that the identified purpose is best achieved by reading the reference to personal information which was not previously known as encompassing personal information which, although previously known to the referred applicant, was not previously known to the Minister.

34. Accordingly, all that the Authority needs to be satisfied of in order to meet the precondition to its consideration of new information given, or proposed to be given, by the referred applicant set out in s 473DD(b)(ii) is that: (1) the information is credible information about an identified individual, or an individual who is reasonably identifiable; (2) the information was not previously known by either the Minister or the referred applicant; and (3) had the information been known by either the Minister or the referred applicant, the information may have affected the consideration of the referred applicant’s claims.

[Footnotes omitted]

1. In her separate reasons for judgment, Gordon J remarked, at [88], of s 473DD the following:

88. Section 473DD in Pt 7AA provides an exception to the prohibition on the Authority considering new information. The Authority must not consider new information unless it is satisfied that there are *exceptional circumstances* to justify considering the new information. Where the new information is given or proposed to be given to the Authority by the referred applicant, s 473DD(b) imposes, relevantly, a further requirement that the new information was not, and could not have been, provided to the Minister before the Minister made the decision to refuse to grant the protection visa. Section 473DE provides the mechanism to ensure that the referred applicant has an opportunity to address new information that has been, or is to be, considered by the Authority under s 473DD where that new information would be the reason, or part of the reason, for affirming the fast track reviewable decision.

[Footnotes omitted]

1. Such is the breadth of the “exceptional circumstances” criterion in s 473DD(a), the Authority might, permissibly, advert to matters which, if it ever became necessary, it would be required to consider in addressing s 473DD(b). If, however, the Authority were not satisfied that the requirements of s 473DD(a) were met, because there were no “exceptional circumstances”, there would, as a matter of necessary consequence arising from the text of s 473DD, be no need for the Authority separately to address s 473DD(b). That is because what is found in s 473DD(b) is cumulative or, as Gordon J remarked in the passage quoted, a “further requirement”.
2. *BVZ16* was decided prior to *M174*, as for that matter was the judgement which is the subject of the present appeal. It is thus no adverse criticism of the learned primary judge or, with respect, White J, to state that care must now be taken in relation to all that was stated in *BVZ16* in relation to s 473DD of the Act. Because it was decided after *M174* and because it contains reference both to that case and to a number of earlier cases in this Court, including *BVZ16*, the following passage from *AQU17 v Minister for Immigration and Border Protection* (2018) 162 ALD 442 (***AQU17***), at [14], is particularly pertinent:

14. As the plurality in *Plaintiff M174* made clear, what will amount to exceptional circumstances is inherently incapable of exhaustive statement. Each case will be different to every other case and must be treated on its merits and the matters for the Authority to take into consideration must necessarily vary from case to case. *It is a misconception that the factors in s 473DD(b)(i) and (ii) of the Act must, in all cases, be considered by the Authority in deciding whether “exceptional circumstances” exist as s 473DD(b) does not codify what constitutes “exceptional circumstances”. Rather, s 473DD(b) sets out the further preconditions that must also be met before the Authority can consider the new information cumulatively upon the precondition set out in s 473DD(a): Plaintiff M174 at [31]*. As *BVZ16*, *BBS16* and *CHF16* illustrate, in many cases consideration of the factors in ss 473DD(b)(i) and/or (ii) may assist the Authority in deciding whether or not it is satisfied that exceptional circumstances exist but whether those factors will have bearing upon that decision will depend on the particular case.

[Emphasis added]

1. To these observations I would respectfully add that it is likewise a misconception to elevate subjects such as those found in s 473DD(b), which may permissibly be considered by the Authority – or, as put in the observations quoted, “may assist” – in deciding, for the purposes of s 473DD(a), whether “exceptional circumstances” exist to the status of subjects which *must* be so considered. Put another way, for the purposes of s 473DD(a), those subjects are not “relevant considerations” in the sense described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 39-40. To the extent that the respondent’s submissions are premised on those subjects being obligatory considerations in relation to a conclusion by the Authority, for the purposes of s 473DD(a), as to whether it was satisfied that exceptional circumstances existed, they are mistaken.
2. It seems to me, with respect, that the learned primary judge proceeded on the basis that, in turning its mind to the subject for satisfaction posited by s 473DD(a) of the Act, the Authority was *obliged* to be “informed” by a consideration of the matters specified in s 473DD(b). I am not at all sure that in *BVZ16* White J intended to convey that there was such an obligation although, with respect, I can see how certain passages in the judgement might be read that way. However that may be, in light of *M174* and *AQU17*, the basis upon which the primary judge proceeded must now be regarded as mistaken. It follows that the Minister has made out his first proposition.
3. As to the Minister’s second proposition, the Authority was obliged (s 473EA) to give reasons for its decision on the review it conducted, not separately for why it was or was not satisfied that it was permitted by s 473DD, in the conduct of that review, to consider new information, here the Letter of Support. So much necessarily follows, in my view, from what was stated in respect of cognate provisions governing the former Refugee Review Tribunal in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405, at [67], per McHugh J and in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, at 396 [235], per Callinan J. As it happens, the Authority chose, voluntarily, to make brief reference to why it considered it could not, for the purposes of determining the review, consider the Letter of Support. The Authority is hardly to be criticised for making that reference.
4. It is axiomatic that the reasons of the Authority, as with those of other administrative tribunals and officials, must not in later judicial review (or related appellate) proceedings be read narrowly and with an eye for error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, at 272. Approaching the Authority’s reasons in this way, I am not persuaded that the Authority was unaware that the Letter of Support, if accepted, was capable of corroborating at least some of the respondent’s claims. True it is that the Authority has not employed the word “corroborate”, but the description “letter of support” which was adopted by the Authority conveys that understanding, in my view. Once this is appreciated, what the Authority is conveying in its reasons is that it is not satisfied that this corroborative letter could not have been obtained and furnished to the Minister before the delegate made the decision under review. That is a sufficient basis, explained in tolerably clear, if abbreviated, terms, for satisfaction that no exceptional circumstances exist. The Minister’s second proposition is also made out.
5. On these bases alone, the appeal must be allowed. It is as well though to consider the Minister’s third proposition. In the text of s 473DD(b)(ii), it is the word “may”, not “must”, which is employed. The point made by the respondent about the Letter of Support is a good one. It may (and that is all that s 473DD(b)(ii) would require) have impacted upon the finding by the delegate that the respondent was no longer of interest to the EPDP or the Army (or at least in the case of the Army whether the respondent could relocate to an area where the local unit of the Army that was a threat to him would not be a risk). That was because the Letter of Support, fairly read, admitted of a conclusion that those parties were still seeking out the respondent, even after he had left Sri Lanka. Were I not to have made the findings I have made in relation to the Minister’s first and second propositions, I have little doubt that the failure to consider the Letter of Support would have been material in the sense described in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123. I do not therefore consider that there is any merit in the Minister’s third proposition. That conclusion does not however affect the disposition of the appeal.
6. For these reasons, the appeal must be allowed and the orders made by the Federal Circuit Court set aside. There is no reason why costs should not follow the event both in respect of the appeal and in the court below.

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| I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 16 October 2019