FEDERAL COURT OF AUSTRALIA

CTG18 v Minister for Home Affairs [2019] FCA 1470

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| Appeal from: | *CTG18 & Anor v Minister for Home Affairs & Anor* [2018] FCCA 3313 |
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| File number: | 8 |
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| Judge: | **ABRAHAM J** |
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| Date of judgment: | 6 September 2019 |
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| Catchwords: | **MIGRATION** – where Immigration Assessment Authority affirms decision of the delegate to refuse Safe Haven Enterprise Visas to the appellants – where Federal Circuit Court dismisses application for judicial review – where appellants raise new claims before the Authority – whether decision of the Authority legally unreasonable – whether Authority should have exercised its discretion under s 473DC of the *Migration Act 1958* (Cth) to invite the first appellant to an interview – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 5H, 36, 473GA, 473GB, 473DA, 473CA, 473DB, 473CB, 473DC, 473DD, 476, Pt 7AA |
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| Cases cited: | *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332  *Minister for Immigration and Border Protection v CRY16* [2017]FCAFC 210; (2017) 253 FCR 475  *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91  *Singh v Minister for Home Affairs* [2019] FCAFC 3  *Minister for Immigration and Border Protection v* *SZVFW* [2018] HCA 30; (2018) 92 ALJR 713  *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1  *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 200; (2017) 255 FCR 81  *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600  *Minister for Immigration and Border Protection v DZU16* [2018] FCAFC 32; (2018) 253 FCR 526  *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220 |
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| Date of hearing: | 27 June 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Solicitor for the First Respondent: | Clayton Utz |
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| Solicitor for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | NSD 2014 of 2018 |
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| BETWEEN: | CTG18  First Appellant  **CTJ18**  Second Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | ABRAHAM J |
| DATE OF ORDER: | 6 september 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The first and second appellants to pay the costs of the first respondent to be agreed or taxed.

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

REASONS FOR JUDGMENT

ABRAHAM J:

1. This is an appeal from an order made by the Federal Circuit Court of Australia on 31 October 2018 dismissing an application for judicial review of a decision of the Immigration Assessment Authority (the Authority) made on 14 May 2018, which affirmed the decision of the Minister’s delegate to refuse the grant of a Safe Haven Enterprise Visa (SHEV) to the first and second appellants (the appellants): see *CTG18 & Anor v Minister for Home Affairs & Anor* [2018] FCCA 3313.

**Background**

1. The appellants are husband and wife and are citizens of Sri Lanka. They arrived in Australia as unauthorised maritime arrivals on 3 November 2012. On 14 March 2017, the appellants lodged an application for a protection visa. On 12 September 2017, the Minister’s delegate refused the application and the matter was referred to the Authority for review pursuant to Part 7AA of the *Migration Act 1958* (Cth) (Migration Act).
2. For the reasons below the grounds of appeal are not established.

**The Authority**

1. The basis of the appellants’ claim in support of a protection visa are summarised in the reasons of the Authority as follows:

Applicant 1’s claims can be summarised as follows:

* He never had any involvement with the LTTE. However, as he and other fishermen used to fish in the Vanni, he was accused of being an LTTE member and providing them with assistance.
* Because of those allegations, they started having problems with the Sri Lankan Navy (SLN). They would burn their fishing boats, beaten and kidnap Tamils.
* On one occasion, he witnessed the SLN set fire to a boat and he saw people he worked with burnt alive. He escaped with a beating.
* Following this incident, he went to India in May 2008 and worked as a painter. Approximately two months after arriving, the Indian CID questioned him regarding his LTTE links and on 19 July 2008 was arrested. The Indian CID alleged he helped smuggle engines to Sri Lanka for the LTTE.
* In the days following his arrest, his name was published in both Indian and Sri Lankan newspapers and television alleging he was a member of the LTTE. As a result, the Sri Lankan CID visited his wife at their home in Sri Lanka and told her that if the applicant were to return to Sri Lanka, they would kill him and put his head out the front of their house.
* He spent three years in custody, two of which were spent in prison and then a CID camp for one year where he was continuously interrogated about his alleged links to the LTTE.
* He returned to Sri Lanka in March 2012. He suffered a work injury and while in hospital, the SLN CID went to his home in search of him and beat his wife.
* Several months later, he was near the bus stop in town and was kidnapped by members of the ‘white van’ network. There were lots of Tamil people around who blocked the van. He was beaten and thrown out of the van. They threatened they would kill him. As a result of this incident, the applicant and his wife decided to leave Sri Lanka.
* He heard in 2016 that a fisherman friend of his was captured and killed by members of the SLN CID. His arms, legs and head were cut off. He fears he will suffer the same fate.
* Members of the SLN CID have visited his mother several times asking where he is and whether she has seen him. They have found out he is now in Australia.
* They were affected by the Department’s data breach in 2014.

Applicant 2’s claims can be summarised as follows:

* She fears the Sri Lankan authorities on account of her husband’s imputed political opinion following his detention in India.
* She was visited by the CID in 2008 following her husband’s arrest and shown the newspaper articles related to the case against him. The CID threatened that if her husband returned to Sri Lanka, they would cut off his head and hang it outside their home.
* Shortly after her husband’s return in March 2012, the CID came again. They interviewed her and her husband with the help of her father interpreting as he speaks Tamil and Sinhalese. They were asking about her husband’s movements. After that interview, they started to harass them; they were searching for her husband.
* The Sri Lankan authorities came in search of him when he was in hospital. They asked where he was, assaulted her and kept her detained in the room. They beat her and she suffered swelling to her neck, ribs and back. They told her that if she was hiding her husband, they would take the whole family. They told her if he comes back, she was to take him to their camp and if she didn’t, they would take the family.
* In July 2012 they tried to kidnap her husband in a white van. Members of the public intervened and stopped it. As a result of this incident, they left in fear. For a while they were hiding out. The CID were searching for them. They searched everywhere for them and were asking different family members if they knew where they were.
* Since they left, the authorities have been to her uncle’s house looking for her husband. Her uncle told the CID her husband wasn’t there.

1. The appellants put new material before the Authority in the form of a submission which raised five new claims relating to the involvement of the first appellant, CTG18, with the Liberation Tigers of Tamil Eelam (LTTE), which are accurately described in the Authority’s reasons as follows:
2. CTG18 travelled to India in order to work for the LTTE;
3. CTG18 smuggled boat engines for the LTTE and was caught red-handed by the Indian authorities;
4. the Sri Lankan Criminal Investigation Department (CID) knew he had smuggled engines on behalf of the LTTE, so he will be detained for longer on his return to Sri Lanka and subjected to physical harm;
5. the CID was still looking for him to harm him; and
6. as he obtained a passport to travel to India through a Sinhalese person he does not know if the passport is genuine or not.
7. The new information related to the first appellant CTG18 but was said to have an impact on the position of his wife, the second appellant CTJ18.
8. In that submission, CTG18 said he was willing to attend an interview before the Authority relating to the new protection visa claims and why they had not been previously made.
9. Consequently, relevant to this appeal, is the Authority’s findings in relation to the new information. Given the prominence of the reasoning to the grounds as argued, it is appropriate to cite it in full. After summarising the new claims, the Authority concluded:

5. All of the LTTE claims pre-date the delegate’s decision. Applicant 1 stated in his submission to the IAA that he did not put forward his true claims to the Department as he was afraid he would be sent back to Sri Lanka or detained in Australia; he’d heard in immigration detention that LTTE linked people were being sent back or detained. He now realises that the IAA is his last opportunity to tell his true claims. He did not reveal this information at his SHEV interview because he did not come to Australia willingly but to protect his life. He was also scared he might be deported to Sri Lanka or jailed and he did not want to experience the hardships he suffered in jail previously again.

6. The applicants were made aware at the beginning of their SHEV interview of the importance of providing all their claims and information in support as soon as possible as they may not have another opportunity to do so. They attended the SHEV interview with their representative, stated their lawyer had explained everything to them about the process, and when asked stated there was nothing in their application they wanted to correct. They provided additional documents in support during that interview and afterwards their representative provided the delegate with a detailed post-interview submission and another lengthy document which compiled country information about Sri Lanka. In his entry interview Applicant 1 was asked specific questions about whether he or any members of his family had been associated or involved with any political group or organisation and whether he or any family members had been involved in activities or protests against the government. He answered no. In his statutory declaration submitted with the SHEV application he stated he never had any links with the LTTE. In his SHEV interview he stated he lived in an area that had always been under the control of the army, didn’t know anything about the LTTE and its recruitment practices and said he was put in prison in India on suspicion of LTTE activities but that when he was arrested he didn’t know what the case against him was.

7. I accept that a person with the history that Applicant 1 now claims may initially fear disclosing his LTTE connections for the reasons stated in his submission. When first interviewed the applicants had recently arrived and did not have legal representation. However, since then they were released from detention and have had professional legal assistance to prepare their SHEV application. I note that when the applicants were advised at the end of their SHEV interview that any further information provided could be considered up to the date of the delegate’s decision, Applicant 1 stated they had given all their evidence to the delegate. A further period of some three months elapsed following their SHEV interview which I consider more than adequate for the applicants to raise with their representative any concerns they had about being sent back to Sri Lanka or detained for a longer period if they disclosed Applicant 1’s LTTE connections. No credible explanation has been provided for why the applicants waited until being informed of the delegate’s decision to raise this important new claim. I also place weight on the fact that Applicant 1 stated under oath in his SHEV interview that he knew nothing about the LTTE. This new information directly contradicts the earlier sworn evidence. I do not accept that Applicant 1 did not provide truthful information in his previous statutory declaration submitted with his SHEV application and during his SHEV interview because he was afraid of the consequences of doing so. Applicant 1 has not satisfied me that the information could not have been given to the Minister prior to the decision being made nor that the new information in the submission is credible personal information which was not previously known and had it been known, may have affected consideration of the applicants’ claims. The new information does not meet the requirements of s.473DD(b) and I am unable to consider it.

8. Applicant 1 states he is willing to attend an interview relating to “my new protection visa claims” explaining why the new information could not have been given to the Department before it made the decision and/or why the claims are credible; he states he trusts the IAA will invite him for an interview if required as natural justice to him. It is not clear from this whether he is requesting that the IAA invite him for an interview. I have, in any case, decided not to invite Applicant 1 for an interview. I am conducting a fast-track review under the Act. The IAA is not obliged to invite an applicant to provide new information whether in writing or at an interview, simply because the person requests it. Given these are new claims, any additional information given by Applicant 1 in an interview would be new information under s.473DC and, as discussed above, subject to the restrictions in s.473DD. Taking all of the circumstances into account, I am not satisfied the circumstances of this case require me to invite Applicant 1 to attend an interview.

1. In relation to its review, the Authority made a number of adverse findings against the appellants which were summarised as follows:

36. In summary, I do not accept that either before or after he returned to Sri Lanka the authorities were looking for Applicant 1, that they went to his home on many occasions, threatened and beat Applicant 2, attempted to kidnap Applicant 1 in a white van, that they were hiding from the authorities and that they went to India immediately after the white van incident to escape the authorities. I find that Applicant 1 was not a person of adverse interest to the Sri Lanka authorities because of anything that occurred in India and that after his release from the camp in India in March 2012 and return to Sri Lanka, he experienced no adverse interest from the Sri Lankan authorities. While I accept that, as a Tamil fishermen from the north, he was subject to some instances of routine monitoring, harassment, occasional threats and beatings, these occurred prior to 2008 in the context of the civil war during which many Tamils were subjected to similar treatment and I am not satisfied Applicant 1 was of adverse interest to the authorities at the time he left Sri Lanka because he was suspected of involvement in smuggling engines for the LTTE, spent time in prison in India because of it or that his details were published so that the Sri Lankan authorities became aware of the charges. I do not accept that Applicant 2 was questioned and threatened at home in 2008 about Applicant 1, interviewed at home with Applicant 1 by the authorities in early 2012, was detained in a room, beaten and threatened in around June 2012, or that she was routinely subject to visits and harassment by the authorities who were looking for Applicant 1.

37. As I do not accept that they were of any interest to the authorities at the time they left, I do not accept the authorities were searching for them either at Applicant 1’s mother’s home or at Applicant 2’s uncle’s home and I consider this as a further embellishment designed to bolster their claims for protection.

38. Applicant 1 did not refer in his SHEV interview to the claim that heard in 2016 that a friend of his was captured and killed by members of the SLN CID and he fears he will suffer a similar fate. In view of his failure to refer to this matter in his SHEV interview, I am not satisfied it occurred.

**Federal Circuit Court**

1. In the Court below the appellants filed 13 grounds of review, but only pressed three grounds, identified as grounds 11, 12 and 13 in the amended application. The grounds were interrelated, and concerned the new information put to the Authority. Only grounds 11 and 13 were grounds before this Court. As ground 12, which alleged the Authority did not consider s 473DD according to law and thereby committed jurisdictional error, was not pressed in this Court it is unnecessary to recite the reasons of the Court below in relation to that ground. Suffice to say the Court rejected the submission.
2. Ground 11 alleged that the Authority committed jurisdictional error when it did not invite the first appellant for an interview. After reciting the findings of the Authority, and observing that this included its conclusion that the new information did not meet the criteria in s 473DD, the primary judge concluded that the Authority’s reasons for not exercising the power under s 473DC cannot be said to lack an evident and intelligible justification.
3. Ground 13 alleged that the Authority committed jurisdictional error when it did not give the first appellant the benefit of the doubt as to the basis upon which he did not make the new claims before the delegate. This ground was dependent on ground 12, and as that ground was dismissed, this ground was also dismissed.

**Consideration**

1. As initially filed, the notice of appeal only alleged one ground. Amended grounds of appeal were filed and, as noted above, only grounds 11 and 13 in the Court below are the subject of this appeal.

**Ground 11: invitation by the Authority to the first appellant for an interview**

1. This ground relates to the 5 new claims before the Authority which are described at paragraph [5] above. The effect of this ground, as described in its particulars, is that the Authority did not invite CTG18 to an interview when it ought to have done so, and accordingly acted unreasonably in refusing him the opportunity to explain the matters which the Authority refused to consider as new information, contrary to *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (*Li*), thereby committing jurisdictional error.
2. The appellants’ primary submission was based on the propositions that the new claims that were made were serious, significant, and a credible explanation for failing to inform the delegate of this information had been provided. It was on that basis, the appellants argued that CTG18 ought to have been invited by the Authority to give evidence. The appellants drew support from the Authority’s statement that it accepted that a person with the history that CTG18 now claims, may initially fear disclosing his LTTE connections for the reasons he gives. The appellants are critical of the reasoning of the Authority thereafter, particularly in the reference to time in paragraph [7] and the conclusion in paragraph [8] of the Authority’s reasons, cited above. The appellants were also critical of the conclusion of the Court below.
3. The issue is whether the primary judge was in error in concluding that the Authority’s decision not to invite CTG18 for an interview was not attended by jurisdictional error. To put it another way, whether the Authority’s decision not to invite CTG18 for an interview was within the bounds of reasonableness, having regard to the circumstances and the statutory purpose for which the discretion to get new information was directed: *Minister for Immigration and Border Protection v CRY16* [2017]FCAFC 210; (2017) 253 FCR 475 (*CRY16*) at [83].
4. This ground directs attention to s 473DC of the Migration Act. Whether a statutory power is exercised reasonably, requires a consideration of the statutory terms, context, subject matter and purpose of the provisions under which the power is exercised: *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91 at [106].
5. Division 3 of Pt 7AA, together with ss 473GA and 473GB of the Migration Act, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Authority: s 473DA(1). Pt 7AA requires the Authority to review a fast track reviewable decision referred to it under s 473CA by considering the review material, as defined in s 473CB, without accepting or requesting new information and without interviewing the referred applicant: s 473DB(1). This is subject to s 473DC, which includes subsection (2), which states that there is no duty upon the Authority to get, request or accept any new information.
6. Recently, the Full Court in *Singh v Minister for Home Affairs* [2019] FCAFC 3 at [61] per Reeves, O’Callaghan and Thawley JJ, summarised the position as to whether a decision is legally unreasonable as follows:

The question of whether a decision is legally unreasonable is answered by reference to whether or not the decision is within the scope of the statutory authority conferred on the decision-maker; it involves an assessment of whether the decision was lawful or authorised having regard to the scope, purpose and objects of the statutory source of power: *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 357 ALR 408 at [54]-[60] (Gageler J); [78]-[79] (Nettle and Gordon JJ); [135] (Edelman J).

1. The Court provided the following examples. A decision might be legally unreasonable if it is “illogical”, though an inference of unreasonableness will not be supported merely because a decision appears to be irrational: *Minister for Immigration and Border Protection v* *SZVFW* [2018] HCA 30; (2018) 92 ALJR 713 (*SZVFW*) at [10] per Kiefel CJ; [82] per Nettle and Gordon JJ; *Li* at [68] per Hayne, Kiefel and Bell JJ; or it “lacks an evident and intelligible justification”: *Li* at [76] per Hayne, Kiefel and Bell JJ; *SZVFW* at [10] per Kiefel CJ; [82] per Nettle and Gordon JJ; or it is plainly unjust, arbitrary, capricious or lacking common sense: *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1 at [11] per Allsop CJ, with whom Griffiths and Wigney JJ relevantly agreed at [87], [90]; *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 200; (2017) 255 FCR 81 at [35] per Charlesworth J with whom Flick and Perry JJ agreed at [1], [2].
2. As the High Court has observed, the test of legal unreasonableness is necessarily stringent: *SZVFW* at [11] per Kiefel CJ; and see [51]-[60] per Gageler J; [78]-[87] per Nettle and Gordon JJ; [131]–[135] per Edelman J.
3. It may be accepted that there may be circumstances in which it would be legally unreasonable for the Authority to fail to exercise the discretion in s 473DC(3): *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600 (*Plaintiff M174/2016*) at [21]. See for example: *CRY16* at [82]; *Minister for Immigration and Border Protection v DZU16* [2018] FCAFC 32; (2018) 253 FCR 526at [80], [81]. However, this is not one of those cases.
4. As noted above, the Authority considered the new information, and is apparent from the passages cited at [8] above (at [5]-[8] of its reasons), gave detailed consideration to whether this new information satisfied s 473DD.
5. While, as counsel for the appellants pointed out, the Authority did accept that a person with the history that CTG18 claimed may initially fear disclosing his LTTE connections for the reasons he gave, it rejected the submission as to why it was not put before the delegate. The Authority concluded in the circumstances that there was no credible explanation for why the appellants waited until after the delegate’s decision to make the claim. The Authority also placed weight on the fact that the new information directly contradicted the first appellant’s earlier sworn evidence. The Authority concluded neither condition in s 473DD(b) was satisfied.
6. It was in that context that the Authority decided it would not invite CTG18 for an interview. It gave detailed reasons for that decision. It was open to the Authority to decline to exercise the discretion in s 473DC(3)(b).
7. During the course of oral submissions the appellants raised a number of matters, some of which were not the subject of their written submissions.
8. *First*, the appellants ultimately submitted that the aspect of paragraph [7] of the Authority’s reasons (recited above at [8]), which was irrational and illogical was the reference to the three month delay. The appellants submitted that the Authority discounted the new claims because of the length of time it took before the appellants’ claims were raised, but for which the Authority would have accepted the explanation for the delay in making the claims. However, that submission is not supported by the reasons. It is apparent that the time period was only one factor. It was also in the context of the appellants having professional help, the appellants not being in detention, what the appellants’ said in their interview, and a lack of a credible explanation for the delay which the Authority took into account in making its finding. The Authority also concluded that the new information directly contradicted the earlier sworn evidence. It did not accept that CTG18 did not provide truthful information in his previous statutory declaration submitted with his application and during his SHEV interview because he was afraid of the consequences of doing so. In addition, as noted above, the Authority concluded that the new information was not credible personal information. The Authority was not satisfied of either of the conditions in s 473DD(b).
9. *Second*, when attempting to address that the Authority concluded that the new information did not satisfy s 473DD, the appellants submitted that the new claims were not new information for the purposes of s 473DC. The argument was that a “claim” is “nothing more than an assertion or perhaps a combination of argument” and therefore s 473DD was irrelevant. It is not entirely clear where this argument led. In any event, the submission is incorrect.
10. As the High Court concluded in *Plaintiff M174/2016* at [24] per Gageler, Keane and Nettle JJ (citations omitted):

The term "new information" must be read consistently when used in ss 473DC, 473DD and 473DE as limited to "information" (which may or may not be recorded in a document), in the ordinary sense of a communication of knowledge about some particular fact, subject or event, that meets the two conditions set out in s 473DC(1)(a) and (b). The first is that the information was not before the Minister or delegate at the time of making the decision to refuse to grant the protection visa. The second is that the Authority considers that the information may be relevant.

The five new claims plainly fall within that description and satisfy the criteria in s 473DC(1)(a) and (b).

1. *Third*, the appellants submitted, that in the event I concluded against them in relation to whether the claims were new information, the decision to invite the first appellant for an interview should have occurred before the decision in relation to s 473DD(b) was made. However, the Authority’s decision not to invite the first appellant to an interview was based on a number of factors, including the scheme in Pt 7AA. There is nothing in this case that renders it unreasonable for the Authority to first consider the new information and whether it satisfies s 473DD before deciding whether to exercise the discretion in s 473DC to invite the appellant for an interview. Indeed, as the respondent submitted it may be considered prudent to first consider all the relevant circumstances of the new information before making the decision whether to exercise the discretion to invite the first appellant to an interview. Therefore, the manner in which the Authority addressed the issues cannot be said to lack an evident and intelligible justification.
2. *Fourth,* the appellants rely on the UNHCR Handbook of Procedures at [196] to submit that it placed an obligation on the Authority to consider the true facts. Based on this, given the seriousness and consequences of the new claims, it was submitted that the Authority should have invited the first appellant to give further evidence. However, the relevant statutory regime governing the Authority’s review is that set out in Pt 7AA of the Migration Act. Nothing in the UNHCR guidelines can, in that context, impose such an obligation.
3. *Finally,* the appellants submitted that the decision was unreasonable because the claims were significant and serious and, if true would place the appellants at greater risk of persecution. That, without more, was said to be sufficient. However that description may apply to new information presented to the Authority in a number of cases. The submission ignores the structure of Pt 7AA. It also considers the new information in isolation from all other relevant material before the Authority. There is no logical reason why that should be done. Further, this submission does not address the limited circumstances in which a failure by the Authority to consider exercising the discretion in s 473DC(3) may constitute legal unreasonableness: see for example [22] above.
4. The Authority’s choice not to exercise its power under s 473DC(3) to interview CTG18 involved a considered decision based on reasons which the Authority recorded. The exercise of the discretion in not inviting the first appellant for an interview was open to it.
5. The primary judge correctly concluded that the Authority's reasons for not exercising its power under s 473DC did not lack an evident and intelligible justification*.* The Authority's decision was not legally unreasonable.
6. This ground of appeal is not established.

**Ground 13: the Authority did not give the appellants the benefit of the doubt**

1. The problem with this ground of appeal is that in the Court below the appellants accepted it was dependent on ground 12, which challenged the application of s 473DD. As ground 12 is not pursued in this Court the ground cannot succeed. As such, counsel for the appellants then abandoned the written submission he had advanced in favour of ground 13.
2. Consequently, during the course of submissions the ground was recast, with the argument being that based on the UNHCR guidelines the Authority ought to have given the appellants the benefit of the doubt in relation to the existence of the new claims. The aspect of the guidelines relied upon in support of this was “if the applicant’s account appears to be credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt”. The appellants submitted that *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220 (*Rajalingam*) is a reflection of that principle. It was accepted that this ground, as recast, was dependent on ground 11.
3. The relevant aspect of *Rajalingam* relied on is that a tribunal might be required to consider the possibility that its findings of fact might not have been correct (thereby giving the applicant the benefit of the doubt). This is determined by reference to the tribunal’s reasons. The relevant passages in that case demonstrate this only applies where a fair reading of the tribunal’s reasons (here the Authority’s reasons) shows it had a real doubt as to whether it was correct: see *Rajalingam* [67], [61]. In this case the Authority did not express any doubts as to its final conclusion. To the contrary, the Authority rejected the claims. It was not required to take into account the possibility that the appellants’ claims concerning past events were true.
4. There is nothing in *Rajalingam* to support the appellants’ contention that the reasoning applies to new information such that the first appellant ought to have been given the benefit of the doubt about that information and invited to an interview.
5. This ground is not established.

**Conclusion**

1. The appeal is dismissed. The appellants pay the cost of the first respondent to be agreed or taxed.

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| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Abraham. |

Associate:

Dated: 6 September 2019