FEDERAL COURT OF AUSTRALIA

AAQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 759

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| Appeal from: | *AAQ18 v Minister for Immigration & Anor* [2019] FCCA 2161  |
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| File number: | NSD 1571 of 2019 |
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| Judge: | **BURLEY J** |
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| Date of judgment: | 3 June 2020 |
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| Catchwords: | **MIGRATION** – refusal of Safe Haven Enterprise Visa application – fast track reviewable decision by the Immigration Assessment Authority (**IAA**) – new information provided to the IAA – whether the IAA erred in applying s 473DD of the *Migration* ***Act*** *1958* (Cth) by failing to consider whether the new information was “credible personal information” – whether the IAA took an inappropriately narrow view of the breadth of the expression “exceptional circumstances” in s 473DD of the Act – whether the Federal Circuit Court of Australia failed to identify those errors – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 32, 473DC, 473DD*Federal Circuit Court Rules 2001* (Cth) r 44.12(1)(b) |
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| Cases cited: | *AAQ18 v Minister for Immigration & Anor* [2019] FCCA 2161*AQU17 v Minister for Immigration and Border Protection* [2018] FCAFC 111*BDY18 v Minister for Immigration and Border Protection* [2020] FCAFC 24*CHF16 v Minister for Immigration and Border Protection* [2017] FCAFC 192*DYS16 v Minister for Immigration and Border Protection* [2018] FCAFC 33*DZU17 v Minister for Immigration and Anor* [2019] FCCA 491*Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176*Minister for Immigration and Border Protection v CQW17* [2018] FCAFC 110 |
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| Date of hearing: | 12 February 2020 |
|  |  |
| Date of last submissions: | 4 March 2020 |
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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 Appellant: | G. Foster |
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| Solicitor for the Appellant: | Sentil Solicitor & Barrister |
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| Counsel for the First Respondent: | A. Douglas-Baker |
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| Solicitor for the First Respondent: | Minter Ellison Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

ORDERS

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|  | NSD 1571 of 2019 |
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| BETWEEN: | AAQ18Appellant |
| AND: | MINISTER FOR IMMIGRATON, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | BURLEY J |
| DATE OF ORDER: | 3 June 2020 |

THE COURT ORDERS THAT:

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

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

REASONS FOR JUDGMENT

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| 1. INTRODUCTION  | [1] |
| 2. BACKGROUND | [6] |
| 2.1 The materials before the delegate | [6] |
| 2.2 The materials before the IAA | [12] |
| 3. THE DECISION OF THE PRIMARY JUDGE | [20] |
| 4. THE APPEAL  | [22] |
| 5. DISPOSITION | [38] |

BURLEY J:

##### INTRODUCTION

1. The appellant is a Sri Lankan citizen of Tamil ethnicity who came to Australia by boat as an irregular maritime arrival in late 2012. On 4 November 2016 he lodged an application for a Safe Haven Enterprise visa (**SHEV**), claiming that he was a person to whom Australia owed protection obligations pursuant to s 36(2)(a) or s 36(2)(aa) of the *Migration* ***Act*** *1958* (Cth).
2. In May 2017 a **delegate** of the **Minister** for Immigration and Border Protection, now the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, refused the appellant’s application. The delegate’s decision was then referred to the Immigration Assessment Authority (**IAA**) for review as a “fast track reviewable decision” under Part 7AA of the Act. On 12 December 2017, the IAA affirmed the delegate’s decision.
3. The appellant then applied to the Federal Circuit Court of Australia (**FCCA**) for a review of the IAA’s decision. The proceedings in that court commenced with a show cause application, in which the appellant advanced 14 grounds. The learned primary judge found no merit in grounds 2 to 14, but made an order under rule 44.12(1)(b) of the *Federal Circuit Court Rules 2001* (Cth) that the Minister show cause why relief should not be granted relied in respect of the following ground:

The IAA erred in deciding that there were not exceptional circumstances to justify considering new information as constituted by the email dated 8 June 2017; the Statutory Declaration dated 8 June 2017; and letter received by the IAA on 27 June, 2017 from Reverend Jegasothy, such error amounting to an error of law.

1. On 16 September 2019, the FCCA delivered reasons for judgment in which it considered and dismissed this ground: *AAQ18 v Minister for Immigration & Anor* [2019] FCCA 2161. The appellant now appeals from that decision to this Court on the basis that the FCCA’s dismissal was in error, and relies on the same ground.
2. The appellant was represented by Mr Foster, of counsel, who filed written submissions two days before the hearing. The Minister was represented by Ms Douglas-Baker of counsel who addressed those submissions orally, and had filed written submissions in advance of the hearing. During the course of argument a question arose concerning the consideration by the IAA of an aspect of a letter dated 27 June 2017 from Reverend Jegasothy (**Jegasothy letter**), to which I refer in more detail below. The parties were granted leave to file written submissions on the subject, which they have done.

##### BACKGROUND

###### The materials before the delegate

1. The appellant was interviewed by an officer of the Department of Immigration and Border Protection in January 2013, shortly after his arrival in Australia. He also provided a **statement** dated 2 August 2016 in which he corrected a number of details from that interview and provided additional information.
2. In summary, in his statement the appellant claimed to fear returning to Sri Lanka because the Sri Lankan Army (**SLA**)and the Criminal Investigation Division (**CID**) will arrest, torture and kill him. He claimed that in 1989 one of his brothers was shot and killed by the SLA. In 1990 he and his family fled the conflict between the SLA and the Liberation Tigers of Tamil Eelam (**LTTE**), and he was shot in the leg while trying to escape. As a result of the injury his right leg was amputated below the knee. He got a prosthetic leg about 10 years later. After that, he was often questioned about his leg, because the SLA suspected that he had lost it fighting for the LTTE. In 2005 the police and the CID went to his house and took him to the police station. They interrogated and tortured him for six hours, trying to establish that he was a member of the LTTE, but he denied that he was. The appellant was released and made a complaint to the Human Rights Commission about the conduct of the authorities.
3. The appellant also claimed that his elder brother, G, was a member of the Eelam People’s Revolutionary Liberation Front (**EPRLF**) and a candidate for a local government position in the elections in 2008. The appellant helped his brother during the elections. G was not elected, but he had some issues with the opposition party, the Tamil Makkal Viduthalai Pulikal (**TMVP**), and so went into hiding. The TMVP then approached the appellant, threatening to kill him if he did not reveal G’s whereabouts. The appellant claimed that in mid-2008 the appellant’s nephew, G’s son, was found hanged at school. The appellant was convinced that his nephew was murdered, and the appellant was involved in attempts to prosecute his nephew’s alleged murderer, whom the appellant suspected was involved with the TMVP. The appellant claimed that he was called as a witness and as a result often received death threats from the TMVP. The appellant further claimed that in August 2012 he was kidnapped and threatened by five people who warned him to withdraw the case and stop being a witness.
4. The appellant claimed to fear harm from the SLA because of his imputed pro-LTTE opinion, and from the TMVP because they had killed his nephew and threatened to kill the appellant. He claimed that he fears being kidnapped, tortured and killed by the SLA and the TMVP if he is returned to Sri Lanka. He is easily identified because of his prosthetic leg and fears this will make him a target, particularly as the SLA and TMVP know what he looks like and because he is a Tamil who speaks no Sinhala.
5. Before the delegate, the appellant relied on claims for protection set out in: his entry interview on 5 January 2013; his statement dated 2 August 2016; and a protection visa interview given on 16 December 2016. He also relied on post-interview submissions made by his migration advisers on 19 January 2017.
6. The delegate was not satisfied that any of the appellant's claims regarding targeting of him by the TMVP were genuine. The delegate was also not satisfied that certain claims made by the appellant in his post-interview submission in respect of his membership of the Tamil National Alliance were credible. The delegate found that the chance of the appellant being suspected as a current or former member or supporter of the LTTE, including because of his amputated leg, was remote.

###### The materials before the IAA

1. After the decision of the delegate, on 8 June 2017 the appellant provided further documents to the IAA. Among other things, those documents provided a different, and inconsistent, version of events, insofar as the appellant claimed that he was forcibly recruited by the LTTE in 1991, when before the delegate he had disclaimed any suggestion that he was or had been a member of the LTTE (**the new information**).
2. In a **covering email** supplied to the IAA on 8 June 2017 he said:

I was read back to and explained to me in Tamil the contents of the Notification of the [delegate’s] decision...

I did not provide my true, total and complete protection claims to immigration. I was afraid to provide that I was a long term member of the LTTE, that I received weapons training and I did not go to a rehabilitation camp.

1. The appellant also provided a **further statement** dated 8 June 2017. It is four pages in length and attaches a medical certificate. In it, the appellant said that he was not honest when he claimed to have been shot in the leg fleeing the SLA in 1990; rather, he said that in 1991, when he was 16 years old, he was forcibly recruited to join the LTTE. He was trained by the LTTE and then worked for them in various roles. In June 1993 he was transporting food and medical supplies when he was shot at by the SLA and wounded in the leg. The wound became infected and his leg was amputated, and in the next year a prosthetic leg was arranged for him by the LTTE. From 1995 until 1999 he was involved in various roles within the LTTE, including propaganda, recruitment and in justice administration. In 1999 his mother persuaded him to leave. He did so, and lived peacefully from 1999 to 2004, however toward the end of this period the LTTE began to put pressure on him to re-join. He was regarded with suspicion by the LTTE when he refused, and by the CID, which suspected that he had been in the LTTE. He was in danger of being exposed by the LTTE to the CID or the SLA. The further statement also referred to the matters concerning G’s election campaign and the death of his nephew, to which the appellant referred in his statement.
2. On 27 June 2017 the Jegasothy letter was provided to the IAA. In it, the Reverend Jegasothy said that he has known the appellant since early 2013, when he took charge of a group of Tamil asylum seekers and assisted them to stay in accommodation in Sydney. He said that at that time the appellant told him:

...a compelling story of being in LTTE since 1991 as a 16 year old forcibly recruited while living with his family in [town], how he lost the leg when he was transporting food in [name] area in [city] shot b[y] the armed forces, how his courageous mother travelled to [town] to bring him out of LTTE in 1999 and how later during peace time the mother or him registered with HRO in [city].

....

Having this compelling background, I was under the impression that [the appellant] would certainly write the authentic account but saddened and shocked when I heard that he told another story to avoid being detained indefinitely and sent back home. We had this problem since I began this ministry 21 years ago that the asylum seekers listened to their friends rather than the mentors, legal support persons.

1. The IAA considered the further statement, the Jegasothy letter and the covering email to be new information within s 473DC of the Act. It noted that in the further statement, the appellant’s explanation for not providing the new information initially to the delegate was “because of fear of Australia informing Sri Lankan authorities and eventually being rejected and incarcerated. This was because I was advised by other asylum seekers not to divulge the truth which could lead to indefinite detention or deported [sic]”.
2. In its decision, the IAA said:

[8] The applicant was represented at the Protection Visa (PV) interview and was clearly informed by the delegate that any personal information he provides during the interview would not be made available to the Sri Lankan authorities or the public whilst his PV application was being decided. He was clearly told that it was very important to provide the department with complete and accurate protection claims as early as possible, including during the interview, and if he failed to do so, he may not have another chance to provide further information to support his claims if his application is refused. The delegate provided the applicant with an opportunity during the PV interview to add or change anything in his PV application, including at the beginning and as the interview was concluding. Further, I note that the applicant waited till June 2017, being some months after his PV interview and also after his representative had provided a post interview submission on 19 January 2017, to raise these new claims. He has not explained why he no longer holds these fears.

[9] I do not accept the applicant’s statement that he feared disclosing a claim that would have been fundamental to his application for protection, noting also that the information is a completely new claim (the new claim) that is inconsistent with the claims he has in fact made as part of his PV application. The applicant has not satisfied me that he could not have provided the new claim earlier.

1. The IAA then said:

[10] Noting the date when the letter was written and also that it purports to be a letter of support in respect of the new statement made by the applicant on [8 June 2019], I am satisfied that the letter itself could not have been provided to the delegate before the decision was made, although again it relates to matters that pre-date that decision and therefore could have been sought earlier. In this letter the Reverend recounts having been told by the applicant in 2013 that he was in the LTTE since 1991 having been forcibly recruited as a 16 year old while living with his family in [town], and that the lost his leg when he was shot by the armed forces while transporting food in the [ name] area in [city]. Whilst the Reverend states that he has known the applicant since February/March 2013 when he was in Macquarie Student accommodation arranged by Red Cross for a group of asylum seekers, his recount of the applicant’s LTTE involvement and consequent injury is based on information relayed to him by the applicant and does not otherwise appear to add any independent substantiation of the applicant’s new claim, although I appreciate that the Reverend refers to his experiences in Sri Lanka during 1981 to 1986 and as such has an understanding of the issues arising for young people at that time. The letter goes on to express regret that the applicant had not disclosed these matters to the Department previously, recounting that he had heard that the applicant ‘told another story to avoid being detained indefinitely and sent back home’. Whilst I accept that the letter reflects the author’s genuine opinion, it is essentially, in so far as it relates to the applicant, relaying what the writer has heard in relation to why the applicant had not disclosed this new claim earlier.

[11] In the absence of any further explanation by the applicant for not bringing forward this new claim earlier, and noting that it substantially changes the nature of his protection claims, I am not satisfied that it is credible personal information that that [sic] may have affected the consideration of the applicant’s claims.

[12] Having regard to the above, I am not satisfied that there are exceptional circumstances to justify considering this new information.

1. The IAA proceeded to affirm the decision of the delegate.

##### THE DECISION OF THE PRIMARY JUDGE

1. The primary judge confined his consideration of the application for review to the ground set out at [3] above, namely that the IAA had erred in deciding that there were not exceptional circumstances to justify consideration of the new information set out in the further statement, the Jegasothy letter and the covering email . The learned primary judge referred to his earlier decision in *DZU17 v Minister for Immigration and Anor* [2019] FCCA 491, citing [54] of that decision, and then said:

[38] In this case the Authority was entitled to reach the conclusions it did on the new information provided to it, for the reasons it gave. The distinguishing feature in this case, relative to *DZU17*, is that the Authority’s field of view in this case was broader, even though the reasons given in *DZU17* were extensive. Nevertheless, it is well for the Authority to be cautious in dealing with a new claim of substantial LTTE involvement in circumstances where earlier claims are admitted to be false and the applicant asserts a fear of the consequences of revealing the truth. As I noted in *DZU17*, a claim of deep or extensive LTTE involvement, if true, can substantially alter a review. While the changeability of claims may count against the credibility of them, a single replacement of claims similar to those made by *DZU17* and the present applicant require close attention before a refusal to consider them, not least because of the consequences if the claim is true and the applicant is returned to Sri Lanka. I am satisfied that, in the present case, the consideration of the new information was adequate for the purposes of s.473DD.

1. The primary judge found that the IAA gave express consideration to the reasons provided by the appellant for changing his story by providing the new information, and that the IAA had rejected at [9] of its reasons those matters relied upon by the appellant in support of the late provision of the new information as not satisfactory. His Honour concluded that in reaching its findings the IAA had not erred by applying an impermissibly narrow construction of the concept of exceptional circumstances and/or by excluding from its consideration any matter or matters relied upon by the appellant of potential relevance to s 473DD.

##### THE APPEAL

1. This appeal focusses attention on the question of whether the IAA erred by refusing to consider the new information as set out in the covering email, the further statement and the Jegasothy letter.
2. Section 473DD of the Act 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 new information:

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

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

1. The appellant contends that there was no discussion by the IAA as to whether the new information amounted to “credible personal information” within s 473DD(b)(ii). He submits that the IAA did not undertake any review of the new information itself in order explicitly to come to a reasoned view on this point. It is not, he submits, sufficient for the IAA simply to say that because the new information is new, it is not credible information, citing *Minister for Immigration and Border Protection v* ***CQW17***[2018] FCAFC 110. He submits that the IAA failed to evaluate the significance of the relevant part of the new information, or turn its mind to whether it was credible personal information capable of informing its satisfaction as to the existence of exceptional circumstances, as the Court in *CQW17* at [51] had required. In so doing, the IAA failed to recognise the significant peril in which the appellant would be placed if he is returned to Sri Lanka, especially having regard to his distinctive physical characteristics as an amputee. The appellant submits that the FCCA erred in concluding that the IAA had expressly considered and rejected the explanation given by the appellant in support of the late provision of the new information as not satisfactory, when the IAA had simply stated its conclusion.
2. During argument, a further issue arose, namely whether or not the IAA had sufficiently considered the Jegasothy letter, not for a hearsay purpose, but rather as a document that identified that in 2013 the appellant had told the Reverend a version of events consistent with the new information as set out in the further statement. In supplementary written submissions, the appellant contends that the IAA failed to consider whether the Jegasothy letter provided evidence that the new information was not simply a recent invention, but was consistent with a version of events given to the Reverend well before the decision of the delegate, thereby adding to the credibility of the new information.
3. The Minister submits that the IAA made express findings as to whether the new information set out in the covering email, further statement and Jegasothy letter could have been provided to the delegate. He further submits that the IAA made express findings at [8] to [10] in relation to the credibility of the new information, and the effect it would have on consideration of the appellant’s claims at [11] of its reasons. Those findings were in relation to the new information as set out in both the further statement and the Jegasothy letter. Having regard to the matters set out in [8] to [10] the IAA also reached a conclusion that there did not exist exceptional circumstances within s 473DD(a). In so finding, the Minister submits that the decision of the IAA reflects no error, and that the primary judge was correct in so concluding.
4. In his supplementary submissions in relation to the Jegasothy letter, the Minister notes that in the four statements and interviews given by the appellant prior to the further statement, the appellant had expressly disclaimed any suggestion that he was a member of the LTTE. Even so, it was the Reverend’s evidence that shortly after the first of these statements the appellant had disclosed to him involuntary membership of the LTTE. The Minister submits that the IAA did not err by failing in terms to consider whether the evidence of the Reverend was corroborative of the credibility of the appellant’s claims to have been a member of the LTTE. That is because at [10] the IAA recorded that the Reverend had recounted having been told by the appellant in 2013 that he was an LTTE member, but found that this did not *otherwise* appear to add any independent substantiation.
5. In *BVZ16* White J said:

[9] The requirements of subparas (a) and (b) are cumulative but may nevertheless overlap to some extent. The Authority’s satisfaction that the new information could not have been provided to the Minister at the time of the s 65 decision (subpara (b)(i)) may contribute to its satisfaction that there are exceptional circumstances to justify considering the new information. So also may the Authority’s satisfaction that the new information is credible personal information which had not previously been known (subpara (b)(ii)). Accordingly, one would expect the IAA to consider the subpara (b) matters when considering in a given case whether the circumstances are exceptional. Obviously enough, however, the matters which may contribute to a finding that the circumstances in a particular case are exceptional may extend beyond those specified in subparas (b)(i) and (ii) and it seems improbable that the Authority could be satisfied, by reference to one matter only, that an applicant’s circumstances are not exceptional.

His Honour’s view was affirmed in *Minister for Immigration and Border Protection v* ***BBS16*** [2017] FCAFC 176at [102]-[103] (Kenny, Tracey and Griffiths JJ) and cited with apparent approval by the Full Court in *CHF16 v Minister for Immigration and Border Protection* [2017] FCAFC 192at [17]-[18] (Gilmour, Robertson and Kerr JJ), *DYS16 v Minister for Immigration and Border Protection* [2018] FCAFC 33at [31]-[33] (Tracey, Murphy and Kerr JJ) and *CQW17*  at [48] (McKerracher, Murphy and Davies JJ). See also, generally in the context of s 473DD, *BDY18 v Minister for Immigration and Border Protection* [2020] FCAFC 24 at [23]-[28] (McKerracher, Colvin and Jackson JJ).

1. In *BBS16* the Full Court said:

[102] We are unpersuaded by the Minister’s contentions that in *BVZ16* White J misconstrued or misapplied the term “exceptional circumstances” under s 473DD. We respectfully agree with his Honour’s reasons for concluding that the IAA in that case adopted an inappropriately narrow understanding of that phrase. In particular, we agree with his Honour’s findings and reasons that the requirements of subparas (a) and (b) of s 437DD [sic] are cumulative but may nevertheless overlap to some extent, with the effect that the IAA’s consideration of either or both of the limbs in subpara (b) may inform the IAA’s satisfaction under subpara (a) as to whether there are exceptional circumstances to justify considering the new information.

[103]That is not to say, however, that the matters in subparas (b)(i) and (ii) are the only matters to be considered by the IAA in determining whether it is satisfied that there are exceptional circumstances to justify considering any new information.

[104]     As White J explained, the phrase “exceptional circumstances” is to be given a broad meaning, along the lines of circumstances which are unusual or out of the ordinary. This necessarily requires that consideration be given to all the relevant circumstances in determining whether or [sic] there are “exceptional circumstances” (see the authorities cited by his Honour at [39]-[41] of *BVZ16*).

1. In *CQW17* the Full Court expanded upon the scope of “exceptional circumstances” within s 473DD:

[51] The expression ‘exceptional circumstances’ in subpara (a) has a broad meaning and it is not possible to state exhaustively what factors will be relevant or what the Authority must consider in a particular case: *Plaintiff M174* at [30]. The Authority is obliged to consider all relevant circumstances, and as White J observed in *BVZ16* the matters in (b)(i) and/or (ii) will usually form part of the consideration. In the circumstances of the present case, the Authority did not evaluate the significance of the relevant part of the New Raid Information, or turn its mind to whether it was credible personal information capable of informing its satisfaction as to the existence of exceptional circumstances. On a fair reading of paragraph six, the Authority’s finding as to (b)(i) was decisive, and this bespeaks an overly narrow interpretation of the expression ‘exceptional circumstances’.

1. Although the appellant contends that the IAA failed to take into account and give consideration to whether the new information was “credible personal information”, and took an inappropriately narrow view of the breadth of the expression “exceptional circumstances” in applying s 473DD of the Act, I am not satisfied that its approach reflects jurisdictional error.
2. Fairly read, I consider that the IAA’s conclusion that it was not satisfied that there were exceptional circumstances to justify considering the new information contained in the further statement and the Jegasothy letter within s 473DD(a) was based on: its conclusion that the appellant had not provided any satisfactory explanation as to why the new information could not have been provided earlier within s 473DD(b)(i); and that it was not credible personal information not previously known that may have affected consideration of the claims within s 473DD(b)(ii). The appellant has been unable to point to any fact or matter materially bearing upon the IAA’s consideration as to whether it was satisfied of the requirement under s 473DD(a) that was not taken into account.
3. The matters which are set out earlier in [8] to [12] of the IAA’s reasons provide the foundation for its conclusion that the new information was not credible personal information. In [8] the IAA described the numerous opportunities which the first respondent had earlier in the process to provide the new information, his knowledge about the limitations of providing new information and the fact that he had not previously raised the new information notwithstanding that it related to events which occurred prior to the delegate’s decision on 17 May 2017. In [9] of its reasons the IAA rejected the appellant’s statement that he feared disclosing the new information. At [10] the IAA gave consideration to the matters described in the Jegasothy letter and whether the Jegasothy letter provided substantiation of the new information. In [11], the IAA reasoned that because there was no further explanation for the appellant’s failure to bring the new information earlier, and because the new information substantially changed the nature of his protection claims, the IAA was not satisfied that it was credible personal information. At [12] the IAA concluded that it was not satisfied that there were exceptional circumstances to justify considering the new information.
4. The appellant points in particular to two matters that are said to reflect error, or an absence of reasoning on the part of the IAA. First, he submits that fairly read, the reasoning of the IAA is confined to consideration only of the explanation for the failure to provide the new information earlier. Even within that consideration, the IAA did not refer to or consider the explanation offered by the appellant, namely, as he states in his further statement, he lied earlier to avoid being marked as a former LTTE cadre and as a terrorist according to many countries, including, as he understood it, Australia. In the covering email he explained that he realised that the IAA review is a final merit review and “a last opportunity to state all of my protection claims”. However, it is apparent from the reasoning at [5] and [7] that the IAA adverted both to the substance of the new information and the explanation for not providing it earlier, before arriving at the conclusion expressed at [9]. Whilst all of the aspects of that explanation are not recited in its conclusion, it is apparent that the IAA adverted to them in arriving at its conclusion.
5. Secondly, the appellant contends that the IAA provided no reasoning for the rolled up conclusions apparently addressing s 473DD(b)(ii) set out in [11], namely: (a) that the new information is not *credible* personal information; and (b) that the new information is not information that *may have affected consideration* of the appellant’s claims.
6. In relation to (a), whilst there is no reasoning provided as to why the new information is not credible, the IAA considered whether the Jegasothy letter provided independent substantiation of the new information, and concluded that it did not at [10]. Although the IAA did not explicitly state so, I infer that the IAA considered the lack of corroborative materials in assessing the credibility of the new information. The IAA also adverted to the fact that the new statement substantially changed the nature of the protection claims advanced. That of itself, may be considered to a matter bearing on the credibility of the claims. As the Full Court in *AQU17 v Minister for Immigration and Border Protection* [2018] FCAFC 111 noted at [17], the IAA is not required “to evaluate the credibility of the new information or the significance of the new information to the appellant’s case beyond the consideration given, absent some feature or matter to cause, or which should have caused, the Authority to consider that there was something about the appellant’s case which made it unusual or out of the ordinary”. It is true that the IAA did not in terms address attention to the fact that the Jegasothy letter records that in April/May 2013, shortly after his arrival in Australia and well before the decision of the delegate, the appellant informed the Reverend of his personal history in terms that are in broad accordance with the new information now advanced. However, whilst that may suggest that the appellant had earlier made a prior consistent statement of events now advanced in the further statement, of itself the Jegasothy letter does not corroborate the evidence in the further statement. It cannot be said that consideration of that material “may have affected the consideration of the [appellant’s] claims” within s 473DD(b)(ii).
7. In relation to (b), there can be no doubt that if the information in the further statement were received it would significantly have affected consideration of the appellant’s claims, because rather than being a victim who was caught up in events as a young man trying to flee the effects of the conflict between the LTTE and the SLA, the new information places him as a formerly active member of the LTTE, which significantly increases the risk profile associated with his return to Sri Lanka. The consequence of refusing to consider that evidence is likely to be significant. However, the predicate to the acceptance of that new information is that there are “exceptional circumstances” within s 473DD(a) to justify its consideration. The circumstances to which the section draws attention are not the content of the new information (although they may have a bearing on the consideration of the requirements of the section) but rather those pertinent to its availability.

##### DISPOSITION

1. In the result, I am not satisfied that the reasons of the IAA reflect jurisdictional error. The learned primary judge was correct to reach the same conclusion.
2. Accordingly, the appeal must be dismissed with costs.

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| I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Burley. |

Associate:

Dated: 3 June 2020