FEDERAL COURT OF AUSTRALIA

AAL19 v Minister for Home Affairs [2020] FCAFC 114

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| Appeal from: | *AAL19 v Minister for Home Affairs & Anor* [2019] FCCA 2917 |
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| File number: | VID 1158 of 2019 |
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| Judges: | **LOGAN, MARKOVIC AND ANASTASSIOU JJ** |
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| Date of judgment: | 30 June 2020 |
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| Catchwords: | **MIGRATION** – fast track review – where adverse Safe Haven Enterprise visa decision automatically referred to Immigration Assessment Authority (**Authority**) – whether information provided to the Authority constituted “new information” or “submissions” – whether error in respect of “exceptional circumstances” to justify considering “new information” in the terms of s 473DD(a) of the *Migration Act 1958* (Cth) (**the Act**) – where an “administrative error” resulted in irrelevant material being put before the Authority by the Secretary in purported compliance with s 473CB(1)(c) of the Act – whether the “administrative error” gave rise to a reasonable apprehension of bias – whether the “administrative error” led to a decision by the Authority made in excess of jurisdiction – whether reasonableness required the Authority to consider exercising its power under s 473DC of the Act to get “new information” from the appellant concerning the irrelevant material |
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| Legislation: | *Constitution* s 75(v)  *Administrative Appeals Tribunal Act 1975* (Cth) ss 6, 17K, 43  *Migration Act 1958* (Cth) ss 5AA, 46A, Pt 7AA, 473CB, 473CC, 473DA, 473DB, 473DC, 473DD, 473DE, 473EA, 473FB, 473GA, 473GB, 473JA, 473JB, 473JE  *Public Service Act 1999* (Cth) |
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| Cases cited: | *AAL19 v Minister for Home Affairs & Anor* [2019] FCCA 2917  *AQU17 v Minister for Immigration and Border Protection* (2018) 162 ALD 442  *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109  *Attorney-General (NSW) v Quin* (1990) 170 CLR 1  *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353  *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091  *CAR15 v Minister for Immigration and Border Protection* [2019] FCAFC 155  *Cesan v The Queen* (2008) 236 CLR 358  *CLV16 v Minister for Immigration and Border Protection* [2018] HCATrans 266  *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140  *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088  *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629  *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731  *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123  *Jebb v Repatriation Commission* (1988) 80 ALR 329  *Kennedy v Cahill* (1995) 118 FLR 60  *Marbury v Madison* 5 US (1 Cranch) 137 (1803)  *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Border Protection v CLV16* (2018) 260 FCR 482  *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597  *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992  *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997  *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173  *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656  *Re Easton and Repatriation Commission* (1987) 6 AAR 558  *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405  *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286  *Smits v Roach* (2006) 227 CLR 423  *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214  *Tasker v Fullwood* [1978] 1 NSWLR 20  *Vakauta v Kelly* (1989) 167 CLR 568 |
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| Date of hearing: | 22 May 2020 |
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| Registry: | Victoria |
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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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| Number of paragraphs: | 107 |
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| Counsel for the Appellant: | Mr J Maloney |
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| Solicitor for the Appellant: | Victoria Legal Aid |
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| Counsel for the First Respondent: | Mr N Wood |
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| Solicitor for the First Respondent: | Mills Oakley |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

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| **Table of Corrections** |  |
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| 20 April 2021 | In paragraph 68, “It is further common ground no only that the Secretary’s” has been replaced with “It is further common ground not only that the Secretary’s”. |
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| 20 April 2021 | In paragraph 68, the word “also” has been inserted after the “Authority’s review but”. |

ORDERS

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|  | | VID 1158 of 2019 |
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| BETWEEN: | AAL19  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGES: | LOGAN, MARKOVIC AND ANASTASSIOU JJ |
| DATE OF ORDER: | 30 JUNE 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of and incidental to the appeal, to be assessed if not agreed.

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

REASONS FOR JUDGMENT

THE COURT:

1. The appellant is an adult male citizen of the Islamic Republic of Pakistan. He is from the Turi tribe in that country and an adherent to the Shia branch of the Islamic faith.
2. The appellant left Pakistan in February 2013. He arrived at Christmas Island by sea in March 2013 without having a visa issued under the *Migration Act 1958* (Cth) (**the Act**) authorising his entry into Australia. He was therefore what the Act (s 5AA) terms an “an unauthorised maritime arrival”. As such, he was, in the absence of a favourable exercise of a power vested in the respondent **Minister** (or at least his predecessor in the administration of the Act) under s 46A(2), prevented by s 46A(1) of the Act from lodging a valid application for any visa while in Australia. In April 2016, that power was exercised in the appellant’s favour. He was invited to make an application for either a Temporary Protection (subclass 785) visa or a Safe Haven Enterprise (subclass 790) visa (**SHEV**).
3. The appellant chose to apply under the Act for a SHEV. With the benefit of assistance from a firm of lawyers and migration agents, the appellant lodged such an application with the Minister’s department in March 2017. The basis upon which he claimed he met the statutory criteria for the granting of a SHEV was set out in his statutory declaration dated 24 February 2017, appended to his visa application. As later summarised, not inaccurately, by the Immigration Assessment Authority (**Authority**), the basis of his claim as set out in that statutory declaration was:

* He is a Shia from the Turi tribe in Pakistan.
* After finishing school, he completed a surveying course.
* A friend of his was with a company that did work for the Americans in Afghanistan. The friend suggested that he start working there as well. The appellant began working with the company in Paktia province, staying at an army base and travelling back to Parachinar on the weekends.
* He witnessed a number of serious security incidents while working for the Americans – including gunfire and mortar attacks at their worksite and a suicide bomber attack on the army base.
* He also began receiving threatening phone calls warning him to cease working for the Americans.
* At one point, some Turkish contractors working for the company were kidnapped.
* The threatening calls to him continued even when he was back in Pakistan.
* He got no assistance from the police, and after discussing the issue with his family, he stopped working for the company.
* The threats continued and, fearful for his safety, he eventually decided to leave Pakistan altogether.

1. On 8 October 2018, a delegate of the Minister refused the appellant’s SHEV application. As the Act required, that decision was then referred to the Authority for “fast track” review in accordance with Pt 7AA of the Act. On 3 December 2018, the Authority decided to affirm the Minister’s delegate’s refusal decision.
2. The appellant then sought the judicial review by the Federal Circuit Court of Australia of the Authority’s decision. On 15 October 2019, that Court dismissed the appellant’s judicial review application: *AAL19 v Minister for Home Affairs & Anor* [2019] FCCA 2917.
3. The appellant has now appealed to this Court against that order of dismissal. As it did below, the Authority has, quite properly, filed a submitting appearance. Thus, the Minister is the only active party respondent.
4. The appellant’s grounds of appeal replicate (save for judicial review ground 4, not pressed on appeal) the grounds of review before the court below. In such circumstances, the Full Court of the Federal Court of Australian (**Full Court**) has, in earlier cases, not considered it necessary to refer in detail to the reasons for judgment given in the Court below: see, eg *CAR15 v Minister for Immigration and Border Protection* [2019] FCAFC 155, at [15]. Where there is such replication and related reliance by a respondent on submissions based on the reasoning adopted in the court below, and especially where the grounds of appeal lack merit, success by a respondent will often, necessarily, carry with it vindication of that reasoning. The position will usually be different where it is necessary, in allowing an appeal, to demonstrate an error in that reasoning.
5. While we also propose to adopt this course in the present case, we do not by so doing intend any disrespect to the learned primary judge. His Honour’s reasons for judgment were, with respect, commendably thorough. Further, one way of disposing of the present appeal would be to order that it should be dismissed for the reasons given by his Honour. That, however, would not do justice to the submissions made by counsel on the appellant’s behalf or to the Minister’s response to them. We should not wish it to be thought that, in adopting this course, we offer any encouragement for the notion that the nature of the jurisdiction exercised by this Court in a proceeding such as this is anything other than appellate. The exceptional, constitutionally entrenched, original jurisdiction of the High Court of Australia under s 75(v) of the *Constitution* aside, the court which exercises like original, judicial review jurisdiction in respect of decisions of the Authority is the Federal Circuit Court, not this Court. To succeed on an appeal it is necessary to demonstrate that the order of the Federal Circuit Court was attended with error.
6. As pleaded, the grounds of appeal are as follows:
7. Immigration Assessment Authority (**Authority**) determined that a statutory declaration provided by the Applicant dated 23 October 2018, insofar as it dealt with the Applicant’s mental health, constituted ‘new information’ such that it could not be considered unless it satisfied the criteria set out in s 473DD of the *Migration Act 1958* (CVth) (**Act**). It subsequently found that s 473DD was not satisfied. The Federal Circuit Court erred in failing to find that the information about the Applicant’s mental health constituted ‘submissions’ rather than new information, and did not fall to be assessed against the s 473DD criteria.

Particulars

The relevant findings of the Authority are at [5]-[7] of its reasons.

1. The Authority concluded that it was not satisfied that there were exceptional circumstances to warrant consideration of the Applicant’s contention that he volunteered for the Qaim Foundation in Australia, and would continue to be active in human rights NGOs in Pakistan, exposing him to a real chance or risk of harm. The Federal Circuit Court erred in failing to find that, in reaching that view, the Authority failed to consider the significance of the information, and whether it may have affected consideration of the Applicant’s claims had it been known to the Delegate; it also failed to consider the Applicant’s specific submissions on these matters. The Federal Circuit Court erred in failing to find that the Authority’s conclusion that there were no exceptional circumstances justifying consideration of his claim, was affected by error.

Particulars

The Applicant’s claims regarding the Qaim Foundation are expressed, for example, at [12]-[15] of his statutory declaration dated 23 October 2018. The relevant findings of the Authority are at [6]-[7] of its reasons.

1. Further to ground 2: the Authority’s reasons demonstrate that, in concluding that the NGO claim was not credible, it asked itself whether it believed the NGO claim, rather than whether that claim was capable of being believed. The correct application of s 473DD required it to ask only the latter question. The Federal Circuit Court erred in failing to find the IAA thereby fell into error.
2. The Authority erred by rejecting the Applicant’s claims in part because the lack of substantiating or corroborating evidence. Further, the Authority drew conclusions which the materials before it did not support about the Applicant’s capacity to have obtained such evidence. The Federal Circuit Court erred in failing to find that in the circumstances, reasonableness required it to consider the exercise of its power to get new information from the Applicant pursuant to s 473DC.

Particulars

The impugned reasoning is evidence, for example, at [29] and [31] of the Authority’s reasons.

1. Purportedly pursuant to s 473CB of the Act, the Authority was provided with and had regard to information concerning criminal proceedings against the Applicant. This material was irrelevant and prejudicial, and the Authority’s reasons did not address it (and *a fortiori*, did not disavow reliance upon it). The Federal Circuit Court erred in failing to find that in the circumstances, a fair-minded layperson might reasonably apprehend that the Authority might not have brought an impartial mind to making its decision, so as to give rise to apprehended bias.

Particulars

The impugned materials include an email dated 25 May 2018 from no\_reply@border.gov.au to an unidentifiable recipient, titled ‘Category 2 – Major Incident SITREP #1 / 1-E4IIAVA- SRSS Criminal Behaviour – Major – VIC In Community, and attaching a two-page document titled ‘Incident SITREP #1’ marked as ‘sensitive’ (Federal Circuit Court proceedings Court Book 72-74).

1. Further to ground 6: The Secretary (or a delegate of the Secretary) purportedly provided the information concerning criminal proceedings against the Applicant (the subject of ground 6) pursuant to s 473CB(1)(c), as the materials were ‘considered by the Secretary … to be relevant to the review’. It was not lawfully open to the Secretary (or a delegate of the Secretary) to form the view that the documents were relevant to the Authority’s review. The Federal Circuit Court erred in failing to find that the provision of these materials to the Authority led to a decision by the Authority made in excess of jurisdiction.
2. Further to grounds 6 and 7: Reasonableness required the Authority to consider exercising its power under s 473DC of the Act to get new information from the Applicant about the information that had been provided to it by the Secretary concerning criminal proceedings against the Applicant.

[sic]

1. The origins of the grounds of appeal in the grounds of review are all too evident in the repeated, uncritical reproduction of references to “the Applicant” instead of the appellant. As will be seen, the reference in the grounds to “NGO” is a reference to “non-government organisation”. We now turn to the merits of each of the appeal grounds.

# Ground 1

1. The appellant submitted that he had made claims arising from his mental health before the delegate and the Authority. He submitted that the Authority did not consider those claims. Further, he submitted that the Authority had determined that information about those claims, contained in the statutory declaration of 23 October 2018, was “new information” which did not satisfy the criteria in s 473DD of the Act such that it not be considered. He argued that, as the mental health claims had been pressed before (and considered by) the delegate, those claims did not constitute “new information” and ought to have been considered without applying s 473DD. Thus the Authority had erred, so he submitted, by failing to consider them and misapplying s 473DD.
2. In their submission of 4 October 2018 to the Minister’s delegate, the appellant’s lawyers had made reference to “the vulnerability of the applicant” and requested that “significant regard is given to his poor mental health and history of torture and trauma when assessing his evidence”. As to the appellant’s mental health, no supporting material, even in the form of a statement by the appellant detailing his symptoms, accompanied that submission to the delegate. The appellant had not made any earlier such statement to the Minister’s department.
3. In a statutory declaration of 23 October 2018, submitted to the Authority by new lawyers, “Refugee Legal”, the appellant stated, at [29]:

29. I have been feeling mentally disturbed recently. I feel depressed, my fears are increasing and I am unable to stop my thoughts. I have been prescribed an anti­depressant medication to assist with my symptoms. I have another appointment at 3pm today with a doctor.

1. This information was taken up in the covering submission to the Authority, also dated 23 October 2018, made on the appellant’s behalf by Refugee Legal. It was put that “minor inconsistencies relied upon by the delegate were a result of the mental state of the applicant at the time of his entry interview, as well as poor advice he received about the application process”. This submission also expressly adopted the earlier submission of 4 October 2018.
2. The relevant paragraph of the Authority’s reasons is [5], in which the Authority states, with reference to the submission of Refugee Legal:

5. Included with the submission is a statutory declaration from the applicant. The statutory declaration restates many of the applicant’s claims. It also reiterates and expands on the applicant’s explanations for not mentioning key aspects of his claims at his entry interview. It provides further explanation for some material, such as the photos, already before the delegate. The applicant also refers to his mental health issues. This is put forward to explain some of the omissions and inconsistencies in the applicant’s testimony. In the submission to the IAA, the agent states that “the applicant is suffering from ongoing depression and related symptoms for which he is currently being medicated”. In their submission to the IAA, the agent states that this may have affected the applicant’s ability to provide this information earlier. The agent does not explain why this would be or provide any evidence of the medication the applicant is asserted to be taking. Similarly, the applicant provides no details in his statutory declaration of the medicine he is taking (nor even its name). There is no evidence from a medical professional attesting to the applicant’s medical condition, his program of treatment or the effects of any drugs he is taking. I note that in the submission to the IAA, the agent cites the applicant’s lack of English language skills and his unfamiliarity with Australian migration law as the reason why the new information in the statutory declaration was not put forward earlier. However, the applicant was in Australia for almost four years prior to lodging his application, he was represented at his interview with the Department, and his representative made a post-interview submission to the delegate. The applicant had the benefit of a translator in preparing his SHEV application and an interpreter at his SHEV interview. I consider that he had more ample opportunity and assistance to put forward any claims he wished to make in regard to his SHEV application. Given the assistance provided to the applicant during the primary process and the repeated opportunities to provide any new information, I also have serious doubts about the credibility of information set out in the statutory declaration given that it is only now being provided.

1. The Authority then turns, at [6] of its reasons, to the separate subject of the appellant’s volunteer work with the Qaim Foundation. Having so done, it states, at [7], “I am not satisfied that there are exceptional circumstances that justify consideration of this information under s.473DD”. “[T]his information” is an omnibus reference both to the mental health statements in the statutory declaration as well as to those statements concerning the Qaim Foundation found there.
2. In *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, at [24] (***M174***), Gageler, Keane and Nettle JJ, stated that, “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”. For the latter proposition, their Honours cited with approval *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214, at [205].
3. The statutory declaration of 23 October 2018 contained, at [29], the first evidentiary material submitted by the appellant, a generalised, lay self-description though it was, for his hitherto only asserted mental condition. The statements in [29] were a communication of fresh knowledge about that fact and therefore “new information”. Nowhere in [5] of its reasons does the Authority state that this information is not “new information”. Instead, the Authority’s assessment of that information is qualitative in terms of when it emerged and its generality and lay assertion features. That assessment is implicitly based on an assumption that the condition described in the statutory declaration is a continuance of the asserted condition referred to in the earlier submission of 4 October 2018.
4. By the time Refugee Legal made its submission and forwarded the additional statutory declaration, less than a month had passed from when the submission was made to the delegate on 4 October 2018. The appellant offered no explanation, either in the statutory declaration of 23 October 2018 or even, via Refugee Legal in the covering letter of that date, why this information could not earlier have been provided to the delegate. Plainly enough, the Authority also had reservations about the utility in any event of the statements made by the appellant in his statutory declaration of 23 October 2018 about his mental health, given their lay quality and generality.
5. Against this background, the Authority was entitled to be satisfied, for the purposes of s 473DD of the Act, that there were no exceptional circumstances justifying its considering that information for the purposes of its review. Given that satisfaction, the Authority was obliged by s 473DD of the Act not to consider that information in conducting its review.
6. What remained then for the purposes of the review itself was an assertion in a submission of 4 October 2018 to the delegate, repeated in a submission of 23 October 2018 to the Authority, that the appellant’s mental health condition was explanatory of inconsistencies in the appellant’s earlier accounts of his experiences. As did the Full Court in *Minister for Immigration and Border Protection v CLV16* (2018) 260 FCR 482, at [53] - [56] (***CLV16***), we consider that there is a distinction to be drawn between information, be it “new information” or otherwise, and a submission based on information.
7. The existence of such a distinction is a separate, although not unrelated, subject from whether the Authority is obliged to consider a submission made to it. It was only in relation to the latter subject that the Minister submitted that *CLV16* was inconsistent with the later judgment of the High Court in *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 (***BVD17***).
8. Assuming for the moment, contrary to the Minister’s submission about the effect of *BVD17*, that the Authority was under an obligation to consider, for the purposes of the review itself, the mental health explanation in the submission of 23 October 2018, the only material reasonably capable of supporting it (the statements in [29] of the statutory declaration of 23 October 2018) to which the appellant came to advert was either precluded from consideration by s 473DD or, as we highlight below, assumed by the Authority in the appellant’s favour. In the context of the review itself, a failure to consider a submission offering an explanation which required an evidentiary foundation in circumstances where there was no such foundation could never cross the “threshold of materiality” so as to constitute a jurisdictional error: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, at [29] - [30] (***Hossain***).
9. In any event, we are not persuaded that, in conducting the review itself, the Authority did not advert to the appellant’s mental health as a possible explanation for inconsistency in his accounts of his experiences. Even though the s 473CC function of the Authority in reviewing a “fast track reviewable decisions”, such as the present, is not identical to that of the Administrative Appeals Tribunal (Tribunal) under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), it is, nonetheless, also part of an “administrative continuum”: *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629, at [53], per Bell, Gageler, Gordon and Edelman JJ. The ramifications of being part of an administrative continuum are necessarily dictated by the particular statutory scheme, but one feature shared by the Authority with the Tribunal is that described in *Re Easton and Repatriation Commission* (1987) 6 AAR 558, at 561, “The ambit of a review by the [Tribunal] is necessarily influenced by the ambit of the steps and proceedings that have taken place prior to its review, for the function of the [Tribunal] is to review a decision”. That statement was endorsed by Davies J in *Jebb v Repatriation Commission* (1988) 80 ALR 329, at 333 – 334 and, in turn, by Kirby J in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [45]. One of the “steps and proceedings” earlier in the administrative continuum was the submission made to the delegate on 4 October 2018.
10. The inconsistencies perceived by the delegate, and also by the Authority, arose from a failure by the appellant, when interviewed on 7 May 2013 (which the Authority terms the “entry interview”), to make any claims regarding working for the Americans in Afghanistan or being targeted by the Taliban. These claims, which grounded his asserted fear of persecution, were made only in the appellant’s statutory declaration of 24 February 2017, appended to his SHEV application and then in a subsequent interview prior to the delegate’s decision (which the authority termed the “SHEV interview”).
11. As had the delegate, the Authority expressly grappled with the possible mental health explanation raised by the appellant’s previous advisors in their submission of 4 October 2018. In its reasons, at [14], the Authority acknowledged “that there can be caveats around reading too much into entry interview responses” and then recited, accurately, “The agent variously made claims that the applicant was *still disoriented and traumatised by the boat journey*, received poor advice from other detainees, and instructed by the interviewing officer to keep his answers brief (a message that the applicant claims was reinforced by the interpreter)” (our emphasis). Having disclosed, at [15], that it had listened, personally, to the almost 2 hour entry interview, the Authority stated, at [16]:

16. While I do not discount that he may still have been affected by his ordeal, there was a period some weeks between the end of what would have been an arduous boat trip and his entry interview. The applicant appeared alert and responsive at interview and was able to supply details about his religion, schooling and family composition without apparent hesitation.

Of that entry interview, the Authority stated, at [17]:

17. The entry interviewer asked the applicant a straightforward question - “What was the last job that you had before you left Pakistan?” The applicant responded that he was a student before he left Pakistan. The officer asked the applicant if he ever travelled outside of Pakistan prior to coming to Australia, and the applicant said no.

1. It is thus clear that adverse mental health at the time of the entry interview was assumed by the Authority in the appellant’s favour as a possible explanation for inconsistency between what he then stated and the statements which he made in his statutory declaration of 24 February 2017 and during his SHEV interview. It is just that the Authority, for logical reasons, chose not to accept that possible explanation.
2. Further, it was the appellant’s mental health at the time of the entry interview which, if raised by material capable, if accepted, of being reasonably probative, might have served to explain inconsistencies, not the appellant’s mental health as at October 2018. The appellant did not, in terms, state in his 23 October 2018 statutory declaration that his then present condition had been continuous from the time of that entry interview. For this reason also, even were that assumption in the appellant’s favour not regarded as a taking up by the Authority for consideration in the review itself of the “mental health” submission, be that as made to the delegate or repeated to the Authority, no failure to advert to that submission would, having regard to *Hossain*, cross the “threshold of materiality”.
3. The submission in relation to the appellant’s mental health, even as made to the delegate, was never an integer of why he claimed to fear persecution. It was, however, put forward as an explanation for why his initial failure to refer to particular integers of his claim should not affect its credibility. It may be accepted that to fail to respond to a substantial, clearly articulated argument relying upon established facts was not just a denial of natural justice but also a failure to exercise jurisdiction: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088. But, save for benign inferences one might perhaps draw from the very experience of the particular boat journey and an impression arising from listening to the entry interview, there were no “established facts” in the material before the delegate as to the appellant’s mental health at any time after his arrival in Australia. As mentioned, the Authority’s permissible conclusion under s 473DD of the Act meant that there were no other such “established facts” for the purposes of the Authority’s review. The Authority responded to the only aspect of the appellant’s mental health argument even conceivably supported by an “established fact” in the material before it for the purposes of the review.
4. All of this lends an academic quality to the appellant’s submission that the Authority was under an obligation to consider the submissions which he made about his mental health and, for that matter, to the Minister’s submission that, in light of *BVD17*, *CLV16* should no longer be regarded as correct because it holds that a failure by the Authority to consider submission of 23 October 2018, made to it in accordance with the practice direction issued under s 473FB of the Act, can amount to a jurisdictional error.
5. As at the time when *CLV16* and *BVD17* were decided, the President of the Administrative Appeals Tribunal, acting pursuant to s 473FB of the Act, had issued directions in respect of the practice of the Authority. Similarly, when the present case was decided by the Authority, such presidential directions had been issued. They were contained in a Practice Direction dated 6 February 2017. On the subject of submissions to the Authority, it was directed, at [20]:

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

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

1. In *BVD17*, in their joint judgment, at [32], Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ referred to, and rejected, a submission by the appellant in that case that all that the prescription in s 473DA(1) achieved, was “to prevent recourse to provisions in Pt 7AA other than Div 3 and ss 473GA and 473GB in determining the express or implied incidents of the Authority’s obligation of procedural fairness”. Materially for present purposes, their Honours highlighted as an example of what would follow from the application and an acceptance of this submission, that it would preclude “an implication arising from the requirement of s 473FB for the Authority, so far as practicable, to comply with a direction by the President as to the conduct of reviews”.
2. This submission, and thus that example of what would follow from its acceptance, their Honours stated in *BVD17*, at [33], “would deprive s 473DA(1) of any meaningful operation” and “cannot be accepted”. Given their earlier reference to an implication arising from s 473FB of the Act, the immediately following observations by their Honours, also at [33], are particularly relevant for present purposes:

33. … The evident purpose of s 473DA(1) in prescribing that the provisions to which it refers are to be taken to be an “exhaustive statement of the requirements of the natural justice hearing rule” is to require that those provisions be construed as a codification of the incidents of the Authority’s acknowledged obligation of procedural fairness. *The prescription does not preclude all implications*. Importantly, it does not preclude an implication that a statutory power within the provisions to which s 473DA(1) refers must be exercised only within the bounds of legal reasonableness. What the prescription does preclude is an incident of the Authority’s obligation of procedural fairness arising as a matter of implication through the application of the common law principle of statutory interpretation according to which, where the exercise of a power or the performance of a duty is conditioned by a requirement to afford procedural fairness, “regard must be had to the circumstances of the particular case to ascertain what is needed to satisfy the condition” with the result that “[i]t is not possible precisely and exhaustively to state what the repository of a statutory power must always do to satisfy [the] condition”.

[Emphasis added]

1. Also in *BVD17*, having referred with approval to the understanding in two earlier judgments of the Full Court of this Court as to the codifying effect of s 473DA(1) of the Act, their Honours further observed, at [34], that, “The consequence is that, except to the extent that procedural unfairness overlaps with legal unreasonableness, procedural fairness analysis is not the ‘lens’ through which the content of the procedural obligations imposed on the Authority in the conduct of a review under Pt 7AA is to be determined”. Put in affirmative terms, the “lens” through which the content of the procedural obligations imposed on the Authority in the conduct of a review under Pt 7AA is to be determined is through what is stated in Pt 7AA, either expressly or by necessary implication.
2. As to *CLV16*, the actual decision in that case stands for these propositions. The first, is that there is nothing in s 473DC and s 473DD of the Act which precludes the consideration of a submission by or on behalf of an applicant to the Authority. The second, is that, in circumstances where a submission, related to the reception of identified “new information”, had been put to the Authority in conjunction with such information but inadvertently not considered by the Authority prior to making what purported to be a “decision”, the Authority was not precluded by s 473EA from vacating that earlier, purported decision and considering whether, in light of the submission and the “new information”, it should consider that “new information” and then making a decision. That is because, the Authority at least had to consider whether, in light of the submission and the proffered “new information”, it should consider that “new information” for the purposes of the review. A failure so to do constituted a jurisdictional error with the consequence, as in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, that the earlier, purported decision was no decision at all.
3. The Court’s conclusion that neither s 473DC nor s 473DD of the Act precluded the obligation to consider the submission for that purpose was in part informed by an implication flowing from s 473FB that the President might lawfully have, and had, issued a practice direction which permitted, subject to specified conditions, a submission to the Authority and that the applicant had made just such a submission. A later application for special leave to appeal against the Full Court’s judgment in *CLV16* failed: *CLV16 v Minister for Immigration and Border Protection* [2018] HCATrans 266. Nothing in *BVD17* calls into question the propositions which dictated the actual decision in *CLV16*.
4. In the present case, as [5] of its reasons demonstrates, the Authority did consider whether or not, having regard to the submission to it by Refugee Legal and the appellant’s statutory declaration of 23 October 2018, it ought to receive the “new information” about the appellant’s mental health for the purposes of the review itself. Thus, it did not commit the jurisdictional error identified in *CLV16*. Having permissibly decided that no “exceptional circumstances” existed warranting the consideration of this “new information”, the position which obtained, as we have mentioned, was that there was nothing before the Authority for the purposes of the review itself, other than the possibility assumed in the appellant’s favour, but ultimately permissibly rejected, flowing from the circumstances of his sea voyage to Australia, which reasonably admitted of a finding that the absence of reference at the entry interview to experiences later related was explicable by the appellant’s mental health.
5. What follows from the foregoing is that, however one approaches ground 1, it must be rejected.
6. Further, if anything, the passage in *BVD17* which we have emphasised rather suggests that non-compliance with presidential directions made under s 473FB of the Act can have jurisdictional error implications. Once this is appreciated, it is neither necessary nor desirable in the circumstances of the present case further to explore the metes and bounds of an implication flowing from the lawful making of a presidential direction under s 473FB permitting the making of a submission to the Authority by an applicant, the requirement, found in s 473FB(3) that the Authority “as far as practicable” comply with such presidential directions and the prescription (also found in s 473FB(3)) that a failure to comply with such a direction “does not mean that the Authority’s decision on a review is an invalid decision”. All it is necessary to conclude is that, for the reasons given, if there were any such implications, they were not productive of any jurisdictional error. It is not necessary to consider whether everything stated in *CLV16* is reconcilable with the later decided *BVD17*. It is trite that any such inconsistencies would be resolved by the ultimate appellate status of the pronouncements in *BVD17* but their identification (if there are any) ought to await a case where the facts require that identification.

# Grounds 2 and 3

1. These grounds, as the appellant submitted, might conveniently be considered together. They each arise from the reference by the appellant in his statutory declaration of 23 October 2018 to a volunteer involvement with the Qaim Foundation and to a further statement that, because such work is important to him, he would seek to involve himself with non-government organisations in Pakistan concerned with human rights, were he obliged to return there, which work would place him at greater risk of persecution by militant groups.
2. The relevant paragraph of the Authority’s reasons is [6], in which the Authority states:

6. The applicant also indicates in his statutory declaration that because his volunteer work with the Qaim foundation is important to him, he would seek involvement with non-government organisations (NGOs) in Pakistan doing human rights work which would place him at greater risk from militants. The applicant did not previously raise this concern with the delegate, despite providing a reference from the Qaim Foundation as part of a post-interview submission to the delegate. I note his participation in this group is limited to volunteer work once a month. I also have concerns about the credibility of the new claim given it is only now being put forward. The applicant states that he would have provided more information about the Qaim Foundation if the delegate had asked him. However, the applicant was reminded at his SHEV interview that he should put forward all the claims he wished to make, he was given a break during the interview to confer with his representative, and that same representative subsequently made a submission on his behalf.

1. As to this, the appellant submitted that “the reasons of the Authority are confined to the conclusion that the Appellant had sufficient opportunity to put that claim to the Delegate; and that his failure to do so gives rise to concerns about the credibility of the claim”. He submitted that it was on that basis alone, that the Authority concluded, based on s 473DD(a) of the Act, that there were no “exceptional circumstances” warranting its consideration, for the purposes of the review itself, of so much of the claim as was sought additionally to be based on his involvement with the Qaim Foundation and its sequel in Pakistan. He submitted that the Authority’s conclusion was unduly confined, because the Authority is required to consider “all the relevant circumstances” and that, ordinarily, these circumstances will incorporate matters the subject of s 473DD(b).
2. In *M174* and flowing from the text of s 473DD of the Act, Gageler, Keane and Nettle JJ observed, at [29] and [30], of s 473DD(a) that:

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”.

[Footnote reference omitted]

Flowing from the text of s 473DD, it was also observed by their Honours in *M174*, that the requirements found in s 473DD(b) are cumulative upon those found in s 473DD(a).

1. Section 473DD(a) of the Act is therefore a gateway through which proffered “new information” must pass before it ever becomes necessary for the Authority also to advert to s 473DD(b). It has been recognised in a succession of cases in the Full Court, collected in, and exemplified by, *AQU17 v Minister for Immigration and Border Protection* (2018) 162 ALD 442, at [14], that either or each of the factors in s 473DD(b)(i) and (ii) of the Act may assist the Authority in deciding whether it is satisfied, for the purposes of s 473DD(a), that “exceptional circumstances” exist in relation to its consideration of “new information”. That seems to us, with respect, inexorably to flow from the text of s 473DD(a) and the related observations in the High Court as to the breadth of the phrase, “exceptional circumstances”. Such recognition is one thing, elevation of those factors, for the purposes of s 473DD(a), into “relevant considerations” in the sense described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 39, is quite another. Those factors are no such thing. They are just factors which might permissibly be considered and which one might apprehend will frequently be raised for consideration in the circumstances of a given case. Further, they are in no way exhaustive of what might constitute “exceptional circumstances”.
2. The appellant submitted that he had, via Refugee Legal’s submission of 23 October 2018, “advanced detailed reasons as to why there were exceptional circumstances to consider the NGO claim, and why it constituted credible personal information per s 473DD(b)(ii)”. The “NGO claim” is that based on the appellant’s stated involvement with the Qaim Foundation. He submitted that, “the Authority’s reasons for declining to consider the NGO Claim completely ignore those submissions, and are confined to matters the subject of s 473DD(b)(i) together with the conclusion that, because of those matters, it has concerns about the credibility of the new information”. The consequence, it was submitted, was that the Authority had fallen “well short of considering all relevant circumstances”.
3. On analysis, this submission is nothing more than an impermissible solicitation for the conduct of merits review in the exercise of appellate jurisdiction in respect of an exercise of an original, judicial review jurisdiction.
4. At common law, the Authority was under no duty to give reasons at all: *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 (***Osmond***). As to the giving of reasons, the Authority’s only duty was that created by statute, which was to give reasons in respect of the decision which it made on the review itself: s 473EA(1)(b) of the Act. The Authority was under no duty to give reasons in respect of its presence or absence of satisfaction for the purposes of s 473DD of the Act in relation to the consideration of “new information” for the purposes of that review.
5. In *Osmond*, with reference to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, Gibbs CJ (with whom Brennan and Dawson JJ expressly agreed and with whom also did Wilson and Deane JJ, subject to presently immaterial reservations or additions) stated “the fact that no reasons are given for a decision does not mean that it cannot be questioned; indeed, if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good reason.” Recognising that, in the peculiar circumstances of a given case, an inference as to an absence of good reason may be drawn is nothing more than recognising that it may be possible to draw an inference that a jurisdictional error of the kind described by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, at 360, has been committed by an administrator who must be “satisfied” in relation to specified criteria (or their absence). Where, as here with the Authority, an administrator chooses to give reasons, in the absence of any obligation to give reasons at all, let alone to give detailed reasons, a court conducting judicial review (or one hearing an appeal from such a court) must be astute not to infer jurisdictional error from what that administrator has not said in the reasons given: *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173, at [25], (the “not” being there emphasised by the High Court). Further, the Authority’s reasons, as with those of any administrator, are “not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed”: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, at 272 (***Wu Shan Liang***).
6. It is singularly important that the frequency of encounter with these pronouncements reinforces, rather than diminishes, their force and does nothing to encourage the notion that a court will substitute its own satisfaction in relation to “new information” for that of the Authority. In short, a principled restraint must be adopted, lest the proper role of a reviewing court as described by Sir Gerard Brennan in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, at 35, with particular reference to *Marbury v Madison* 5 US (1 Cranch) 137 (1803), at 177, be exceeded. The injustice rectified by judicial review of an administrative action or inaction is material illegality of commission or omission, not a disagreement with the merits of an administrator’s factual evaluation. Of course, if that factual evaluation entailed jurisdictional error, success on judicial review may dictate a different outcome when the evaluation is made afresh but that evaluation remains one for the administrator.
7. It is patent from [6] of the Authority’s reasons that it read both the appellant’s statutory declaration of 23 October 2018 and the related submission by Refugee Legal. Read fairly, the Authority offered, at [6] of its reasons, perfectly comprehensible, rational reasons why it was not satisfied that it should consider that part of the statutory declaration concerning the appellant’s involvement with the Qaim Foundation and his related intentions if returned to Pakistan. This statutory declaration, and the related submission by Refugee Legal, did advance for the first time, as the Minister submitted and the Authority appreciated, a new integer of a claim. This was advanced even though, as the Authority correctly observed, the submission made earlier that same month to the delegate had been accompanied by a reference concerning the appellant from the Qaim Foundation. That submission, we note, was made not by the appellant personally but by his earlier legal and migration advisors. Further, as the Minister also submitted, the Authority did no more than express reasonably open concerns about the credibility of the information about the Qaim Foundation in the statutory declaration but made no affirmative finding as to credibility, one way or the other.
8. In these circumstances, the premise upon which ground 3 of the grounds of appeal is not present and ground 2 invites us to draw inferences from the reasons as to the commission of jurisdictional error which, in light of the authorities mentioned, we are not prepared to draw. It was for the Authority, not us or the learned primary judge, to be relevantly “satisfied”, to be persuaded as to the merits of the submission advanced by Refugee Legal as to the “NGO claim” and the related part of the statutory declaration which supported it, that it should consider that “new information”. To approach the circumstances of this case in any other way would be to impose an unprincipled, over-exacting standard on the Authority.
9. In light of another submission made by the Minister, we should add this. It may readily be accepted that one evident purpose of Pt 7AA of the Act is, as the Minister submitted, that the class of visa applicants to whom it applies, and those advising them, should advance all claims and related supporting materials to the Minister or his delegate prior to the making of a decision concerning their visa application: s 473DB. However, s 473DB is expressed to be “Subject to this Part”. Part 7AA, by s 473DC, confers on the Authority a power (not a duty) to “get” information or documents not before the Minister at the time when that primary decision was made which it considers to be relevant. Part 7AA also contains, in s 473DD, a prohibition, subject to a satisfaction based exception, in relation to the consideration of “new information” given or proposed to be given by a person such as the appellant. Thus, in relation to information concerning visa eligibility, one identified statutory purpose is, subject to specified conditions, tempered by another. The other embraces everything from human frailty to the non-static nature of human affairs, and more, by not absolutely confining the Authority just to what was before the Minister or the delegate. It is important the Authority does not elevate one evident purpose over another, only that it treats each case on its merits, having regard to its statutory remit. The appellant has not shown that the Authority did otherwise in relation to the “NGO claim” and related “new information”.
10. For these reasons, there is no merit in either ground 2 or ground 3.

# Ground 4

1. Ground 4 by its very pleading (“in part”) presaged, and the appellant’s related submissions confirmed, the commission of the vice identified in *Wu Shan Liang*. To reproduce, in isolation, either [29] of the Authority’s reasons, referred to in ground 4, or [18], referred to in the appellant’s submission in respect of that ground, would be to embrace the vice which ground 4 entails. The Authority’s reasons are not to be read piecemeal.
2. If any part of the Authority’s reasons needs to be reproduced in order to explain that vice it is [31], also referred to in ground 4, in which the Authority draws together its multi-factorial analysis of the appellant’s claims about having worked for the Americans. That analysis commences, at [12], under the heading “Targeting by the Taliban”. It was this analysis which then informed the Authority’s absence of satisfaction, recorded in [32], that the appellant, “faces a real chance of any harm due to being targeted in relation to past employment in Afghanistan”. The Authority stated, at [31]:

31. I find the applicant’s account of his claimed employment on a project associated with the American armed forces and the Afghan Border Police not to be credible. I do not accept the applicant’s explanations for failing to make any mention at his entry interview of the threats he supposedly received from the Taliban or the work he did in Afghanistan. I do not accept that the Taliban would warn him repeatedly when he was in Afghanistan and reiterate these warnings even when he returned to Pakistan but never take any direct action against him, despite his continuing to work on the project. I do not accept that the applicant could work on a project for three years but not retain any photos or other documentation of his own and be forced to rely instead on photos culled from the social media site of an acquaintance.

1. The Authority was not obliged uncritically to accept the appellant’s statements in relation to his having worked for the Americans and its claimed sequel, or the proffered, allegedly supporting, photographs. It was entitled to assess the appellant’s credibility and to analyse all of the material before it and to draw inferences from and about his statement and the photographs. The observations made by McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405, at [67], are applicable by analogy, to the Authority’s decision:

67. … However, this was essentially a finding as to whether the prosecutor should be believed in his claim — a finding on credibility which is the function of the primary decision maker par excellence. If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence.

1. Ultimately, the Authority’s decision turned on a jurisdictional fact, absence of satisfaction for the purposes of s 65 of the Act that the appellant met the criteria for the grant of a SHEV (see *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, at [37] - [38], per Gummow and Hayne JJ and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, at [102] (***SZMDS***), per Crennan and Bell JJ). The Authority’s adverse credibility assessment in relation to the appellant’s claimed work for the Americans formed part of the reasons why it was not ultimately satisfied with respect to the visa criteria. The effect of s 65 of the Act is to make an obligation to grant, or to refuse to grant, a visa dependent upon a satisfaction-based jurisdictional fact.
2. A decision dictated by an absence of a satisfaction-based jurisdictional fact, grounded in an adverse credibility assessment, is not unexaminable on judicial review. Sometimes, for example, a credibility assessment as to a material fact can be seen to be based on premises unsupported by, or in, the material before an administrative decision-maker can evince illogicality or irrationality in that decision. As to such irrationality or illogicality, the task on judicial review, as Crennan and Bell JJ stated in *SZMDS*, at [131]:

131. … must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

That statement is not exhaustive of principles which attend reviewing a factually based decision on the basis of illogicality or irrationality (see: *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109, at [47]) but it suffices for the purposes of dealing with ground 4.

1. In this case, in the course of giving its reasons for its ultimate absence of satisfaction with respect to meeting the SHEV criteria, the Authority has chosen to explain in particular detail why it has not accepted the appellant’s claim to have worked for the Americans in Afghanistan. Of course if, as the appellant submitted, the Authority had in its reasons inflexibly adopted the position that it could not or even, without cause, would not be satisfied as to the visa criteria based on his statement concerning his work for the Americans unless that statement was “substantiated”, the Authority would evince a material legal error. The error would lie in misunderstanding that, for the purpose of administrative decision-making, that statement alone could constitute material which reasonably admitted of being satisfied that the appellant met the visa criteria. When the Authority’s reasons are read fairly and as a whole, it is patent that it committed no such error of law.
2. The appellant also put in submissions that the Authority’s reasoning, “presumes that the Appellant would have had ‘ample opportunity’, in the two weeks before he fled Pakistan, to gather documentary and other evidence about his employment”. He further put that the reasoning, “also presumes that in the years during which he was precluded by the Act from applying for a protection visa, the Applicant should nonetheless have anticipated doing so, and anticipated that this would require evidence from or about his employer in Afghanistan” and that, “There was no evidence before the Authority to licence those assumptions”. Such submissions are just a solicitation to merits review in respect of a case where, to adopt what Crennan and Bell JJ stated in the passage quoted from their judgment in *SZMDS*, “probative evidence can give rise to different processes of reasoning”. This part of the appellant’s submissions did nothing more than promote such different processes of reasoning.
3. The Minister submitted that the reasons given by the Authority, drawn together at [31], logically explain why it was that it was not prepared to be satisfied just on the basis of the appellant’s statements. We agree. They also logically explain why it discounted the proffered photographs. This is just one of those cases where “logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence”. No jurisdictional error is to be found in that.
4. We did not understand the appellant to press that part of ground 4 which referred to an error grounded in s 473DC. In any event, there was nothing in the circumstances which obliged the Authority to exercise its power to “get” “new information” as to whether the appellant had worked for the Americans in Afghanistan.
5. Ground 4 must be rejected.

# Grounds 5, 6 and 7

1. Grounds 5, 6 and 7 are inter-linked and should therefore be considered together.
2. The factual foundation for these grounds reposes in a single page email of 25 May 2018 on the subject, “Category 2 - Major Incident / SITREP #1 / l-E4IIAVA - SRSS Criminal Behaviour- Major - VIC - In Community”, classed as “[DLM=Sensitive]” and generated within the Minister’s department (**the sitrep email**). In the sitrep email and under the heading, “Subjects of Incident Report: - Alleged Offender - [the Appellant’s name] [identifiers, including date of birth and country of citizenship]”, the following summary is offered:

The Department has been advised by VIC Police, via the Immigration Status Service (ISS), that [the appellant] has been arrested and charged with the following offences:

* One (1) x count of sexual assault; and
* One (1) x count of false imprisonment.

Vic Police have advised he is currently in custody and will be required to appear before the Melbourne Magistrates Court at a later date. No further information regarding the incident or the victim's identity is currently known.

Compliance are in the process of cancelling [the appellant’s] visa, and have advised he will be detained later this afternoon.

1. Inferentially, “sitrep” is an abbreviation for a situation report and “Vic Police” is a reference to the Victorian Police force. Attached to the sitrep email is the situation report itself (of two pages), which materially relays the same information as that summarised in the email, repeating the “Major Incident” categorisation.
2. It is common ground between the parties that the sitrep email and its attachment were sent to the Authority by the Secretary to the Minister’s department in purported compliance with s 473CB(1)(c) of the Act. That provision provides that, upon the referral of a “fast track reviewable decision” to the Authority, the Secretary must give the Authority, “material that is in the Secretary’s possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review”. In turn, the sitrep email and attachment formed part of the material which, by s 473DB(1) of the Act, the Authority was obliged to consider in its review of the Minister’s delegate’s “fast track reviewable decision”.
3. It is also common ground that the provision to the Authority by the Secretary of the sitrep email and attachment involved non-compliance with s 473CB(1)(c) of the Act. That is because, albeit unbeknown to the Authority, the relevant delegate of the Secretary did not consider that these documents were relevant to the review. It is further common ground not only that the Secretary’s delegate did not consider that the sitrep email and its attachment were not relevant to the Authority’s review but also that they were indeed not relevant. Their provision to the Authority entailed what the Minister benignly termed in submissions, “administrative error”.
4. The events which transpired are proof perfect of the enduring wisdom of the idiom, sourced in Thomas Reid’s, “*The Essays on the Intellectual Powers of Man*”, published in 1786, www.theidioms.com, that “*a chain is only as strong as its weakest link*”. The idiom is applicable to chains of command, civil and military. In this case, neither the Minister personally, nor the Secretary, nor even the Secretary’s delegate personally, was the weakest link. However, under the Westminster system of government for which the *Constitution* provides, it is the Minister, to whom the administration of the Act was consigned under the Administrative Arrangements by His Excellency the Governor-General, who is responsible to parliament for the lapse. Further, in terms of the alleged jurisdictional error consequences, if any, of that lapse, it is, for like reasons, the Minister who is the appropriate contradictor in an exercise of judicial power. The duty might be consigned to the Secretary but it is the Minister who administers the Act and in whom the power to grant or refuse visas reposes.
5. The Authority made no specific reference at all either to the sitrep email or to the attachment or any information contained therein in its reasons. It did, however, record, at [3], “I have had regard to the material given by the Secretary under s.473CB of [the Act]”.
6. As mentioned above, it is also obvious from the Authority’s reasons that it was well aware of the submission to the delegate of 4 October 2018 and its enclosures. In relation to grounds 5, 6 and 7, it is the following statements in that earlier submission which are relevant:

On 25 May 2018 the Applicant was arrested and charged after a complaint was made to the police. The Applicant on the same day was bailed by the Police Sergeant on the condition that he appear at the Melbourne Magistrate Court on 9 August 2018. However, after having his visa cancelled under s 116(1)(g) of the *Migration Act* 1958 (Cth) (**the Act**) the Applicant was detained and has since been held at the Maribyrnong Immigration Detention Centre.

Although the Applicant has been charged, he has not been found guilty by the criminal justice system. In the circumstances deprivation of the Applicant’s liberty is quite a serious penalty and could have various implications for the Applicant. At this stage the charges are no more than allegations and the charges themselves say nothing about the Applicant’s risk to the community. His detention is not for the purposes of removal from Australia and the Applicant is not free to leave the country. We submit that at this point in time it is critical to consider the presumption of innocence which is fundamental to the criminal justice system, and that the applicant’s pending charges should not have a negative impact on the assessment of his protection claims.

The applicant is under immense stress in relation to his migration and criminal matters that are currently pending. The Applicant has reported of great levels of stress, anxiety and depression …

[sic]

1. In his reasons, which also formed part of the material that was referred to the Authority under s 473CB, the delegate made passing reference only to the criminal charges made against the appellant, although he did refer to the submission of 4 October 2018 and its enclosures.
2. Neither in the submission of 23 October 2018 to the Authority nor in the appellant’s statutory declaration of that date, is there any additional reference to his having been charged with criminal offences. All that the appellant mentions of the submission of 4 October 2018 is (at [31] of his statutory declaration), “I did not have an opportunity speak to the delegate to address any concerns he had about the submissions or documents which were provided by my former lawyers” [sic].
3. Ground 5 might shortly be disposed of. Nothing in either the sitrep email or its attachment was relevant to the review. The appellant had submitted as much to the delegate in his lawyer’s letter of 4 October 2018. In these circumstances, it was hardly unreasonable, in the sense described by Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, at [68], for the Authority not to have exercised its power under s 473DC to get further information on what was stated in the sitrep email and its attachment or, for that matter, his lawyer’s letter of 4 October 2018 in relation to his being charged or any related subject.
4. Grounds 6 and 7 draw inspiration from *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 (***CNY17***).
5. If nothing else, *CNY17* demonstrates that the “administrative error” which occurred in the present case was not unique. In that case also it appears that there was just an uncritical copying and then provision to the Authority of material on the file as considered by the delegate.
6. In *CNY17*, to adopt the description offered in that case by Kiefel CJ and Gageler J, at [33], the material sent to the Authority by the Secretary consisted of:

33. … 48 pages [which] comprised formal letters from officers of the Department to the appellant concerning the provision to him of assistance in the preparation of his application for protection, the formal record of the conviction and the order and recognisance in the Magistrates Court of Western Australia in February 2016 for the offence of intentionally destroying or damaging Commonwealth property, a prosecution report to the Department by the Commonwealth Director of Public Prosecutions referring to that conviction, copies of emails passing between officers of the Department as well as between the Department and “WA Compliance Courts Prisons” concerning the custody and management of the appellant during the period from November 2015 to March 2016, and a departmental “Case Review” in relation to the appellant dated March 2016.

1. Their Honours’ consequential observation, at [34], in respect of those 48 pages could just as aptly be made in respect of the three pages comprising the sitrep email and its attachment in this case, “Nothing in those 48 pages was capable of rationally affecting assessment of the probability of the existence of any fact about which the Authority needed to make a finding in reviewing the delegate’s decision”. The 48 pages were, as their Honours’ judgment, at [35], reveals, replete with departmental characterisations and assessments of the appellant in that case. Their Honours record that it contained these statements in an advice in February 2015 “that the appellant was ‘no longer of interest to Det Intel’, and to the appellant in March 2015 having participated in an ‘interview with National Security Monitoring Section’”. Under the heading “Mental Health”, it referred to then recent “Case Management observations” of “possible mental health issues”. Under the heading “Behaviour”, it referred to the appellant having a history of “aggressive and/or challenging behaviour” when “engaging with the department” possibly attributable to frustration from being held in detention or to mental health issues.
2. In the present case, and aside from the description in the summary of the allegedly offending conduct, the appellant pointed to characterisations in the subject heading of the sitrep email, “Major Incident” and “Criminal Behaviour-Major”.
3. Like the present case, the Authority in *CYN17* made no specific reference at all in its reasons to the material sent to it by “administrative error” in purported compliance with s 473CB. Thus, they did not mention the February 2016 conviction of the appellant in that case, any events on Christmas Island where he had been detained or anything else contained only in the 48 pages. As here, the Authority decided the review adversely to the visa applicant.
4. The facts related provoked in *CNY17* a sharp difference of opinion, with respect, in the High Court as to whether conclusions reached in the original jurisdiction and, by majority, in the Full Court that they did not give rise to a reasonable apprehension of bias in respect of the Authority’s decision adverse were correct. By a majority (Nettle, Gordon and Edelman JJ; Kiefel CJ and Gageler J dissenting) the High Court concluded that those facts did give rise to give rise to a reasonable apprehension of bias. In our respectful view, the difference was not one of principle but rather of the application of settled principle to the circumstances of the case.
5. It will be necessary to return to that settled principle and to consider its application in the circumstances of the present case. Before so doing, it is convenient to dispose of ground 6, which also entails a point raised in *CNY17*.
6. The appellant contended that a prima facie precondition for the Authority’s jurisdiction to conduct a review was the Secretary’s compliance with s 473CB(1). Because the Secretary had failed to comply with s 473CB(1) and, objectively, the sitrep email and its attachment were irrelevant, the Authority had, the appellant submitted, exceeded its jurisdiction in conducting the review.
7. The Minister’s riposte to this took up and relied upon the statement by Kiefel CJ and Gageler J in *CNY17*, at [46], that, “[w]hether that non-compliance would have led to the failure of a condition precedent to the conduct of the review by the Authority turns on whether the further conclusion is properly to be reached that non-compliance could realistically have made any difference to the decision that the Authority in fact went on to make”. That statement, in our view, accords with like views expressed by Edelman J in that case, at [109] and [125]:

109. … s 473CB does not contemplate that jurisdictional error will exist, invalidating the decision of the Authority, unless the failure by the Secretary is material …

125. Although the provision of material that could not reasonably be seen to be relevant to the determination of any issue before the Authority establishes a prima facie case of jurisdictional error, s 473CB of the *Migration Act* does not contemplate that jurisdictional error will exist, and that the decision of the Authority will be invalidated, unless the failure by the Secretary is “material” …

1. As for Nettle and Gordon JJ, the conclusion reached by their Honours as to the existence of apprehended bias meant, in their view, that it was unnecessary to consider the jurisdictional error point based on s 473CB.
2. In our view, a majority of the High Court in *CNY17* determined the point raised by ground 6 adversely to the submission made by the appellant in this case. That alone dictates, in our view, that we do likewise and for the same reasons.
3. We would only add this, which we regard as consistent with the statements made by Kiefel CJ and Gageler J and Edelman J in *CNY17*. It is an unlikely construction of s 473CB of the Act, read in context, that parliament’s purpose was that any error, benign, trivial or otherwise, made by the Secretary in his consideration as to what was relevant would have the consequence, flowing from the duty of consideration in s 473DB, that any subsequent decision of the Authority was necessarily attended with jurisdictional error and invalid: *Tasker v Fullwood* [1978] 1 NSWLR 20, at 24; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at [93]. Instead, a purpose that only material irrelevance can give rise to jurisdictional error is likely to be parliament’s intention. Nothing in what was sent to the Authority in “administrative error” was in any way material to a conclusion as to whether the Authority might or might not have been satisfied that the appellant met the visa criteria specified in either s 36(2)(a) or s 36(2)(aa) of the Act. *Hossain*, already mentioned, definitively establishes that materiality is the relevant touchstone for jurisdictional error. Mere non-observance of a statutory requirement is insufficient. Ground 6 must therefore be rejected.
4. *CNY17* demonstrates that, in given circumstances, even though conduct has resulted in the immaterial being furnished to an administrative decision-maker, it can nonetheless ground a reasonable apprehension of bias. On that note we return to ground 5.

# Ground 5

1. The facts of the present case are different to those of *CNY17*. Here, the appellant, who had the benefit of legal and migration advisors deliberately chose, via a submission made on his behalf by those advisors, not just to mention (cf *CNY17*,at [31]) but to detail and make submissions about his being charged with criminal offences, information quite irrelevant to whether or not he is a person to whom protection obligations are owed for the purposes of the SHEV application. As a matter of first impression, there is something rather odd about the notion that he can later make good a claim for apprehended bias resulting from information about those same charges later being sent by the Secretary to the Authority as a result of administrative error. Exploration of authority serves to vindicate this.
2. The appellant’s case was not, and could not on the evidence be, put forward as one of actual bias on the part of the Authority. But the purpose of the rule against bias also extends to require an appearance of fairness of process to a fair-minded lay observer: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, at [68] (***Michael Wilson***). We take the relevant test to be as summarised by Nettle and Gordon JJ in *CNY17*, at [56]:

56. The test for apprehended bias is whether “a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question the [decision-maker] is required to decide”. A finding of apprehended bias is not to be reached lightly. The determination of whether an apprehension of bias is “reasonable” is not assisted by philosophical conceptions of the varieties of seriousness or materiality.

[Footnote references omitted]

The test entails the answering, successively, of two questions:

* 1. A source of partiality question – what it is that might lead a decision-maker to decide a case other than on its legal and factual merits?
  2. A logical connection question – is there “a logical connection … between the identified thing and the feared deviation from deciding the case on its merits”?

*CNY17*, at [57], per Nettle and Gordon JJ.

1. In *CNY17*, at [132], Edelman J referred to the test as entailing a “double might”, his Honour’s formulation being, “whether a fair-minded lay observer *might* reasonably apprehend that the adjudicator *might* not bring an impartial and independent mind to the fair resolution of the issue to be decided” (emphasis in original). In context, his Honour’s reference to “independence” appears to be a reference to independence of thought rather than institutional independence. As to the latter, in *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731, at [38], Baroness Hale opined that impartiality and independence in the institutional sense were separate although not unrelated, stating, “[i]mpartiality is the tribunal’s approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public”.
2. An unusual and extreme example of the distinction is offered by *Cesan v The Queen* (2008) 236 CLR 358 (***Cesan***). The trial judge in that case, a member of the District Court of New South Wales, enjoyed much greater personal and institutional independence than a Reviewer constituting the Authority. The members of the jury were also in no relationship with the Crown other than that of residence giving rise to an obligation for jury service. However, the repeated distraction of the jury during the trial, occasioned by the trial judge noticeably and repeatedly asleep and a related failure to exercise the necessary degree of control and supervision of the proceedings, was nonetheless held to constitute a miscarriage of justice. The circumstances were such as, objectively, not to give rise to an appearance of impartiality: *Cesan*, at [71], per French CJ. The result in that case also turned on a conclusion that diversions were such that the appearance of the trial was that the verdict against the accused had not been reached by a jury attentive to the whole of the evidence (see Hayne, Crennan and Kiefel JJ, at [119]). However, as the judgment of French CJ indicates, it is also explicable on the basis of an absence of the appearance of impartiality.
3. The Authority is established within the Tribunal’s Migration and Refugee Division, not the department: s 473JA(1) of the Act. Reflecting that, it is constituted by the Tribunal’s President, the head of that Division within the Tribunal, the Senior Reviewer and other Reviewers: s 473JA(2). Even though, pursuant to s 473JE, the Senior Review and the other Reviewers are appointed under the *Public Service Act 1999* (Cth), it is the President, the head of Division and the Senior Reviewer, not the Secretary, who have managerial roles in relation to the operations of the Authority: s 473JB. The Tribunal’s President holds that appointment as a *persona designata* appointment by the Governor-General, in addition to his appointment as a judge of this Court: s 6(2) of the AAT Act. The head of the Division is also appointed by the Governor-General under the AAT Act: s 6(3)(a) and s 17K.
4. That, having regard to their statutory function and to the constitution of the Authority, Reviewers might be regarded as “professional decision-makers” was regarded as relevant but not determinative, one way or the other, by those in *CNY17* who so characterised them: see at [28], per Kiefel CJ and Gageler J and, at [111] and [136], per Edelman J. We adopt a like position.
5. In the present case, the appellant did not base his apprehended bias submission on an asserted absence of institutional independence on the part of the Authority. Instead, appreciating that his own advisors were the original authors of reference to the events charged, he submitted that the reference in the sitrep email and attachment to them “differed, in content and context, from what [he] had … volunteered. For example, it indicated that the Appellant’s alleged offending had been classed as a ‘major incident’ and triggered the involvement of a government branch concerned with community protection”. This, not the fact of being charged, was the alleged source of partiality.
6. The appellant also emphasised this departmental classification when it was put to his counsel in the course of submissions that his adviser’s initial volunteering of the fact of his being charged might be regarded as a species of waiver.
7. For his part, the Minister submitted that the offences charged were self-evidently serious and that the information provided in error by the Secretary went no further than that the appellant had been charged and was due to appear before a Magistrates Court.
8. Is there a logical connection between the identified source of partiality and any deviation from the Authority’s deciding the case on the merits?
9. A fair-minded, lay observer of the proceedings before the Authority would, necessarily, have to be credited not only with knowledge of what had emanated from the Secretary but also from what had emanated on 4 October 2018 from the appellant via his initial legal advisors. That observer must also be taken to be aware that the Authority was obliged by the Act to consider all of that material, not just that which the Secretary considered to be relevant. In addition, that observer would be taken to be aware that, via Refugee Legal’s submission on 23 October 2018 on his behalf, he had expressly adopted the submission of 4 October 2018 in which reference was made to the charges and to their irrelevancy. Objectively, the circumstances are qualitatively different to those of *CNY17*. Why, one might ask rhetorically, is there, objectively, an appearance of bias when the person charged has volunteered the existence of the charges but put forward that they are irrelevant and highlighted the presumption of innocence? To a fair-minded lay observer, that the offences charged are categorised for some departmental purpose as “Major” would add nothing to a description which one might have given them in any event upon being acquainted with their existence by the appellant via his legal advisors. Unlike in *CNY17*, there was in this case no extensive, gratuitous, departmental commentary concerning the events charged in the material forwarded in “administrative error” to the Authority by the Secretary. In our view, the distinction is telling and the outcome is not dictated by the way in which settled principle was applied to the facts of that case. Instead, the application of that same principle, the so-called “double might” test, leads to the opposite result.
10. We further consider that there is an alternative way in which an absence of merit in ground 5 might be explained.
11. If a person is aware of the circumstances that may give rise to the disqualification of a decision-maker on the basis of an appearance of bias but nonetheless acquiesces in the process of decision-making by not taking objection, ordinarily that person will be held to have waived the objection: *Vakauta v Kelly* (1989) 167 CLR 568, at 587, per Toohey J (with whom, in this regard, at 570, Brennan, Deane and Gaudron JJ agreed), see also per Dawson J, at 577 – 579; *Michael Wilson*, at [76]. Acquiescence with such a consequence is not confined to an exercise of judicial power: *Smits v Roach* (2006) 227 CLR 423, at [43], per Gleeson CJ, Heydon and Crennan JJ (Gummow and Hayne JJ agreeing, at [61], in this regard).
12. In the context of an exercise of judicial power, there may be cases where the circumstances are just so egregious that a public interest in a fair hearing and the appearance of that must override any waiver by the parties. *Kennedy v Cahill* (1995) 118 FLR 60, where a judge of the Family Court of Australia was in a personal relationship with the solicitor for one of the parties might be regarded as an example of that type of case. There is no reason in principle why this must not likewise follow in relation to an exercise of administrative power.
13. It would seem to us to be a necessary corollary of informed acquiescence occasioning waiver that a party who has deliberately created and made a submission about the circumstance said to give rise to an apprehension of bias on the part of an administrative decision-maker cannot later assert that, reasonably, there is such an apprehension. Without more, the repetition of that circumstance by another ought not to lead to any different conclusion. The appellant did not acquiesce in the sending by the Secretary of the information concerning his being charged to the Authority but he had already sent and made a submission about that same information, in substance, via his lawyers, himself.
14. On this analysis, it would only be if the addition of the departmental classification complained of to the information sent by the Secretary were so egregious that public confidence in the integrity of the “fast track” review system demanded that the decision be quashed. This is not self-evident. As we have mentioned, that is a classification one might apply in any event, uninformed by the departmental practice.
15. In our view, the circumstances of the present case are such that the appellant ought in any event to be regarded as having waived any right to object to whatever apprehension of bias might otherwise be said to have arisen as a result of the Secretary’s administrative error.
16. For these reasons, ground 5 should be rejected.

# Disposal

1. For the above reasons, the appeal must be dismissed, with costs.

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| I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Logan, Markovic and Anastassiou. |

Associate:

Dated: 30 June 2020