FEDERAL COURT OF AUSTRALIA

DUZ17 v Minister for Home Affairs [2019] FCA 1593

|  |  |
| --- | --- |
| Appeal from: | *DUZ17 v Minister for Immigration & Anor* [2019] FCCA 539 |
|  |  |
| File number: |  |
|  |  |
| Judge: | **BEACH J** |
|  |  |
| Date of judgment: | 25 September 2019 |
|  |  |
| Catchwords: | **MIGRATION** – whether decision of the Immigration Assessment Authority affected by jurisdictional error – failure to exercise power under ss 473DC(1) and (3) of the *Migration Act 1958* (Cth) to obtain new information – whether failure unreasonable – materiality of failure even if unreasonable – error of law – failure to apply “real chance” test – appeal dismissed |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) ss 36, 473DB, 473DC, 473DD |
|  |  |
| Cases cited: | *CSR16 v Minister for Immigration and Border Protection* [2018] FCA 474  *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91  *DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12  *DPI17 v Minister for Home Affairs* (2019) 366 ALR 665  *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611  *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 353 ALR 600 |
|  |  |
| Date of hearing: | 24 September 2019 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 78 |
|  |  |
| Counsel for the Appellant: | Mr AFL Krohn |
|  |  |
| Solicitor for the Appellant: | Ambi Associates |
|  |  |
| Counsel for the First Respondent: | Mr AF Solomon-Bridge |
|  |  |
| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 299 of 2019 |
|  | | |
| BETWEEN: | DUZ17  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

|  |  |
| --- | --- |
| JUDGE: | BEACH J |
| DATE OF ORDER: | 25 September 2019 |

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 taxed in default of agreement.

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

REASONS FOR JUDGMENT

BEACH J:

1. The appellant, a citizen of Sri Lanka and a Hindu of Tamil ethnicity, appeals from a judgment of the Federal Circuit Court delivered on 8 March 2019 dismissing his application for judicial review of a decision of the second respondent (the Authority) to affirm a decision of a delegate of the Minister to refuse to grant to the appellant a Temporary Protection (subclass 785) visa (the visa).
2. Although the appellant originally raised numerous grounds of appeal, yesterday he only pressed two grounds. First, it was said that the Authority unreasonably failed to exercise its statutory powers under ss 473DC(1) and (3) of the *Migration Act 1958* (Cth) (the Act) to obtain new information by way of interviewing the appellant concerning belatedly raised sexual assault claims involving the Sri Lankan authorities. Second, it was said that the Authority failed to apply the correct test in assessing a real chance of persecution involving serious harm applicable to the criterion under s 36(2)(a) of the Act, and the cognate aspect of the test applicable to the criterion under s 36(2)(aa) of a real risk of significant harm.
3. For the reasons that follow, I would dismiss this appeal.
4. Let me begin with some background.

## Background

1. On 20 August 2012, the appellant, a non-citizen of Australia, left Sri Lanka and illegally arrived in Australia by boat on 6 September 2012. He was interviewed on 12 September 2012, although during his arrival interview he made no claims to being variously assaulted by the Sri Lankan authorities; this was perhaps understandable given the limited context thereof and his character which was recorded at the time as being timid. Later he made an invalid application for a protection visa, the detail of which is not relevant for present purposes.
2. By way of an application dated 19 January 2016 the appellant applied to the Minister for the visa. As part of that application, the appellant put forward a detailed statutory declaration which relevantly said (at [2], [5], [7], [8] and [14]) the following:

An Entry interview was conducted with me on arrival to Australia with a DIAC officer. During that interview I was asked to provide my claims in a brief form which is why not all my claims were given at that stage. Also [it] had not been explained what was relevant and what I was required to disclose to the Department for the purpose of assessment of my claims.

…

I have never travelled outside of Sri Lanka before fleeing to come to Australia. I have never held a passport of any country and have never used a false passport. I fled Sri Lanka in 2012 because I was persecuted a[s] a Tamil youth. I was constantly under the suspicion of the Sri Lankan Army for being involved with or having the potential to support and fight for the LTTE. I have many scars on my body that were inflicted during the bombing [attacks] by the Sri Lankan Army when we tried to flee. I have been harassed and persecuted by the Sri Lankan Army and CID and interrogated many times as a way of trying to obtain information about the LTTE. I fear returning to Sri Lanka because I am sure that this interrogation will continue. My fleeing to Australia will confirm to the Sri Lanka Army that I fled to Australia because I am an LTTE [supporter] and they will wish to seek retribution against me.

…

The area we lived in was controlled by the LTTE for a long time. We fled and relocated to an Army controlled area at the Kathikarma Camp in Vavuniya. I was injured by wire when I ran from the army. The army was shooting and chasing people so I ran for my life. Later, when the army questioned me, they saw my scars. The scars confirmed for them that I was an LTTE fighter. Consequently, I was interrogated by the army and CID many times while I was in the camp. My father was also interrogated because of me.

Because I am the only male in the family and because of my ethnicity and because of my youth, and because of my scarring, I was presumed by the army and CID to be involved with and [a] supporter of and fighter for the LTTE. These interrogations happened many many times - both in the camp and when we went back to our village. The interrogations happened at random times and in random places. This [led] to me being in constant fear of the army. I had no choice [but] to attend and was forced to comply with their demands. The questioning would last a few hours or on occasion it may last a day or two. My father suffered the same fate. But his interrogations may last longer than mine. During my interrogations I would be forced to strip naked and abused verbally and physically. I was beaten with pipes and wire on my hands and feet. They said they believed I knew where the LTTE weapons were.

…

If I was forced to return to Sri Lanka, I believe I would be harmed due to the fact I was previously considered to be associated with the LTTE. The fact I am a young Tamil male, who has been interrogated many times and who has significant scars, and who has disobeyed the authorities, makes me a target for the authorities.

1. What is notable is that the appellant notwithstanding this detail made no express reference in terms to any sexual assault claims.
2. On 17 August 2016 the appellant was interviewed by the delegate. It was accepted before me that during this interview he made no reference to any sexual assault claims; there is no transcript of this interview.
3. On 5 September 2016, the appellant’s representatives, AUM Lawyers, sent a detailed submission to the delegate, extracts of which said the following:

The Applicant relies upon his statement of claim [the statutory declaration] submitted in support of his application for a protection visa and the information forwarded at his interview with the Department of Immigration and Border Protection. It is our submission that given the Applicant’s personal circumstances and the situation in his home country, the application meets the relevant legal test for the grant of a visa in Australia.

…

The Applicant fears harm due to his imputed political opinion. As outlined by the applicant given his age, gender, [scarring], area of origin and race, he was continually considered to be an LTTE affiliate while in Sri Lanka. He instructs that while he was held in the Army Camp, he was regularly questioned and interrogated. Further, upon release from the Camp, the applicant was further interrogated about his perceived involvement with the LTTE. The Applicant notes the fact he was the only male member of his family, the Authorities assumed he assisted the LTTE. The Applicant was required to attend the local Army Camp in order to undergo questioning. Further, he was required to regularly report to the Authorities. *While there he would be physically, mentally and sexually abused by members of the Sri Lankan Authorities*. The Applicant instructs the mistreatment against him escalated to the extent he felt he could not withstand further torment and decided he had no option except to flee the country. Prior to the applicant’s departure from Sri Lanka, he was summonsed to attend the Army Camp. The Applicant was fearful he would not be able to withstand the harm [the] Army would inflict on him and therefore decided not to comply with their request. Instead the applicant went into hiding then fled the country. The Applicant notes the Authorities attend his family’s home and questioned his family about his whereabouts and why he did not comply with their request and come to the camp. The Authorities made it known to the applicant’s family that he would face serious harm once found.

…

We submit the fact the applicant was not arrested in the time prior to his departure from Sri Lanka should not be considered indicative of the fact he would not face future harm. As outlined by the applicant he was monitored and regularly subjected to harm by the Sri Lankan Authorities. In particular, we note the applicant provided detailed evidence with respect to the issues faced in Sri Lanka including evidence with respect to the serious mistreatment he suffered while detained. *We note country information outlined below indicates that sexual violence and torture are used by the Sri Lankan Authorities in order to punish individuals and to coerce them to provide information. We submit the fact the Authorities treated the applicant in this manner indicate they did have an ongoing interest in him and genuinely intended to harm him.* Further, the fact he had departed the country and claimed asylum heighten his profile and given he would be detained and questioned upon re-entry to the country, there exists a real chance he would be subjected to further serious and significant harm upon return.

(Emphasis added.)

1. What may be noted is that the assertion of sexual abuse was not the subject of any detail but appears to have been put on instructions. It is also apparent that the appellant relied upon, inter-alia, the detail in his statutory declaration to support his claims.
2. On 6 December 2016, the delegate refused the application for the visa. The delegate accepted that the appellant was questioned by the authorities about any possible links to the LTTE or any information about the LTTE. But the delegate did not accept that the appellant was of continuing interest to the authorities, nor that he had been required to report daily. The delegate did not accept that the appellant would be at risk of harm as a Tamil or for any reason related to his illegal departure or application for asylum.
3. The application was then referred under Pt 7AA of the Act to the Authority for review of the delegate’s decision.
4. On 9 December 2016, the Authority wrote to the appellant setting out in some detail, including attaching a fact sheet and Practice Direction, the procedure that he needed to follow if he wanted to put new information to the Authority. There is no doubt that he was both aware of such a procedure and that neither he nor his representatives sought to avail themselves of it in relation to the sexual abuse claims. For completeness, I would also note that at the time the delegate notified the appellant of his decision on 6 December 2016 he set out some details concerning the review involving the Authority including the provision of new information.
5. On 28 December 2016 the appellant’s representatives AUM Lawyers put in a detailed written submission to the Authority in response to the delegate’s decision. But this submission made no reference to the sexual assault claims that were expressly made for the first time in AUM Lawyers’ letter of 5 September 2016. The letter dealt with other matters being more in the nature of a submission taking issue with what the delegate had said on broader aspects. Moreover, no request was made of the Authority to interview the appellant.
6. On 20 July 2017, the Authority affirmed the delegate’s decision.
7. Now before the Authority, the appellant’s reasons for seeking protection included the following claims:
   1. As I have said, the appellant is a citizen of Sri Lanka and a Hindu of Tamil ethnicity. He is in his twenties, never married and without children. He has no right to enter and to reside in any other country.
   2. The appellant has claimed that he was under constant suspicion by the Sri Lankan army as involved with or having the potential to support and fight for the Liberation Tigers of Tamil Eelam (LTTE). This suspicion was reinforced by his scarring, his youth and his being the only male child in his family.
   3. He has claimed that he was harassed, persecuted and interrogated by the Sri Lankan Army about links with the LTTE and he was stripped naked, abused verbally and physically, including beating with pipes and wire on his hands and feet. As I say, he also made on 5 September 2016 through his representatives and for the first time a claim to having been sexually assaulted.
   4. He claimed that after his release from detention, he was required to report daily, and was also summoned on occasion to go to the Sri Lankan Army for further investigation. Further, he says that he feared further harm by the army and so refused a further summons to go for questioning, and avoided the authorities. Apparently also, the Sri Lankan Army came looking for the appellant when he did not obey their summons.
   5. The appellant has feared serious harm, including being killed.
8. The Authority accepted many of the appellant’s claims about his and his family’s history, including:
   1. his family had been displaced, spending time in 2009-2010 in an army camp;
   2. his having scars, although the Authority gave more weight to the explanation that they were caused whilst escaping although it did not reject wholesale that some injuries were caused by the army;
   3. his having been on three or four occasions interrogated about the LTTE;
   4. the Sri Lankan authorities having questioned the appellant for information about the LTTE, and also his father; and
   5. the appellant having been “harassed, questioned and possibly mistreated by the local security forces”.
9. But the Authority emphasised a number of times that the appellant had not been arrested, charged, imprisoned or sent to a rehabilitation centre.
10. Further, it did not accept the appellant’s claims that he had to report and had been reporting daily to the police nor to have been sexually abused, because of the timing, lack of detail or inconsistency which the Authority perceived in these claims.
11. At this point it is worth setting out some aspects of the Authority’s reasons:

15. I note that the applicant was represented by legally qualified registered migration agents who provided him with assistance in the lodgement of both his 2013 and 2016 visa applications and were present during the applicant’s visa interview with the delegate. In respect of both applications and the visa interview, he was also assisted by an interpreter in the Tamil language. I consider the applicant was on notice about the importance of providing complete and accurate information as early as possible, as not only did he receive advice and assistance from his representative but officers of the Department of Immigration and Border Protection also provided this information to him directly (in writing and during the visa interview). The applicant’s inconsistency about the cause of the scarring to his chest arises late in his visa application process, at the point of the visa interview. Given the applicant’s earlier explanation for how the scarring to his body was caused is consistent between both his applications lodged in 2013 and 2016, I have given the explanation that the scarring to his chest was caused by becoming entangled in wire when fleeing the army in 2009, more weight. I am not satisfied that the scarring to the applicant’s chest was caused by injuries sustained when he was being mistreated by the army during questioning.

16. During the visa interview, the applicant stated that he was mistreated and accused of being involved with the LTTE on three to four occasions while at the Kathikarma army camp in Vavuniya and that the army officers were particularly suspicious of him when they saw the [scarring] on his body. Country information before the delegate indicates that in post-war Sri Lanka, many Tamils, particularly in the North and East, reported being monitored, harassed and detained by security forces. Country information also supports that Tamils were often required to report to the authorities and were subjected to varying levels of harassment and mistreatment. Having regard to the applicant’s area of origin, the recent conclusion of the war, the scarring on his body and country information, I consider it plausible that he was questioned on three to four occasions over the course of twelve months while he was at the camp.

17. I note that despite these encounters, the applicant was not arrested, charged, imprisoned or sent to a rehabilitation centre. When this was put to him during the interview, the applicant stated it was because they could not prove any involvement with the LTTE due to his young age at the time. Country information before the delegate indicates that thousands of Tamils were screened by the army and CID after the war with people being arrested and detained for even minor association with the LTTE. While I accept the basis for the army’s initial suspicion of the applicant was imputed due to his ethnicity and area of origin, I consider that the applicant’s release on multiple occasions without arrest, charge, imprisonment or rehabilitation indicates the army did not consider he held a profile of being involved with or supporting the LTTE, even in a minor capacity. Rather, as the applicant has suggested, they questioned him because they believed he may have had some information about the location of weapons or former members.

18. The applicant claimed that while his family were residing at the Kathikarma army camp in Vavuniya his father was also taken and questioned about being involved with the LTTE. During the applicant’s entry interview he stated that neither he nor members of his family were involved with or supported the LTTE. There is no information before me to indicate that the applicant’s father was suspected of LTTE involvement on any other basis apart from being a male Tamil from the Mullaitivu District. I note that the applicant’s father, despite being mistreated and subjected to questioning while they remained in the camp, was not arrested, charged or sent to a rehabilitation centre. On the applicant’s testimony, the family was released from the camp in 2010 and allowed to return to their home village. While I accept the applicant’s father was also questioned and mistreated by the Sri Lankan army while they were living at the camp, having regard to the father’s release without arrest, charge or detention and country information referred to previously, I consider this indicates that the authorities also did not consider the father to have been involved with the LTTE. I am not satisfied there is a real chance the applicant would be imputed with LTTE involvement on the basis of his connection to his father.

19. The applicant has also claimed he would be targeted on return to Sri Lanka by the authorities, including the army and CID, because he has previously been questioned by authorities in relation to LTTE involvement and fled the country while being required to report.

…

21. Given the applicant’s testimony and country information about the treatment of Tamils during this period, I accept that he was harassed, questioned and possibly mistreated by the local security forces. However, having regard to the circumstances of his questioning (occurring in the street or on occasions when he was able to attend of his own volition), that the treatment was similar to that being experienced by other Tamil males in his village and that the applicant being released after each encounter to return home, I am not satisfied that the applicant was being targeted by the local CID or army because he was considered to be involved with the LTTE notwithstanding his scarring and profile as a young, single, male Tamil from Mullaitivu. Rather, the evidence indicates the applicant was experiencing harassment and questioning from the local security forces prevalent at the time and directed at Tamil males generally.

…

23. During the visa interview, the applicant raised claims that had not been disclosed to the department previously and was inconsistent with information he had provided earlier. He stated to the delegate that he was at risk of harm from the authorities on return to Sri Lanka because he had left the country not complying with reporting requirements. He detailed that up until leaving the country, he was signing in every morning at their office which was a distance of half an hour away when riding a pushbike. He said that the CID office and the army camp were close to each other and each morning he would be told where to sign in. When questioned by the delegate about why he had not provided this information earlier, the applicant stated that it was because his mind was not in the right place and he felt under pressure at entry and this had not resolved when preparing his applications with the assistance of his representative. The applicant’s representative later clarified the applicant’s testimony by indicating that he was required to report to the local police station every day in addition to reporting to the local army camp when requested to do so by the CID. I have considerable doubts that the applicant was subjected to such intensive monitoring over a number of years, given he did not hold a profile for LTTE involvement, was able to meet work commitments on a farm and intermittently travelled to Jaffna to visit relative for up to two weeks at a time. There is no information before me to indicate that any adverse action was taken by the local authorities towards the applicant in respect of failing to report during the periods he was visiting Jaffna. Having regard to this and the late stage at which this information was introduced and the inconsistency of this information with other aspects of the applicant’s profile and personal narrative. I consider his claim that he was required to report daily to the police station in order to be a recent invention to embellish his claims for protection. I am not satisfied that at the time of departure, the applicant had failed to sign-in with the local authorities as he has claimed.

24. In post-interview submissions provided by the applicant’s representative to the delegate, new claims were made on behalf of the applicant including that when he was being questioned by the army/CID, he was sexually abused. There is no other information before me in support of this claim. The submission also raised a claim that the applicant on return to Sri Lanka would be viewed by the authorities as a spy and punished accordingly. There is also no other information before me in support of this claim. Given the absence of any details and the late introduction of this information, I consider they are also recent inventions by the applicant to bolster his case. I am not satisfied that the applicant was sexually abused when he was questioned by the army and CID or that he faces harm from the authorities on his return to Sri Lanka because he would be suspected of being a spy.

1. Further, the Authority did not accept that the appellant was of any interest to the authorities at the time he left Sri Lanka, although it did accept that he had a genuine fear of the authorities based on his previous experiences.
2. Further, the Authority noted that prison conditions in Sri Lanka were poor, but did not consider that if the appellant spent a brief period in prison as a person who had illegally departed from Sri Lanka he would have a real chance of suffering serious harm. Further, the Authority was of the view that the appellant would not suffer in prison any harm serious or intentional such as to be torture, cruel or inhuman or degrading treatment or punishment, and thus significant harm for the purposes of considering the complementary protection criterion.
3. The Authority found that the appellant was not a person to whom Australia owed protection obligations and affirmed the delegate’s decision to refuse to grant the visa.
4. On the application for judicial review to the Federal Circuit Court challenging the Authority’s decision, the primary judge was not persuaded that the Authority had fallen into jurisdictional error and accordingly dismissed the application. For the moment I do not need to elaborate on her Honour’s reasoning.
5. Let me turn then to the appeal before me of that dismissal.

## Grounds of appeal

1. Notwithstanding the extensive grounds in the notice of appeal, the appellant now only presses two grounds, being aspects of grounds 3 and 4, which were grounds 5 and 6 respectively before the primary judge. It is convenient to deal with each in turn.

#### Ground 3 – The Authority acted unreasonably in not inviting the appellant to an interview

1. The Authority had the discretionary power under s 473DC of the Act to invite the appellant to an interview or otherwise to get further information concerning the sexual abuse claims. The appellant says that the Authority’s failure to do so was unreasonable and therefore a jurisdictional error. In elaboration of this ground the appellant gave the following particulars:

The Authority did not exercise its power under section 473DC of the *Migration Act* 1958 to invite the Appellant to an interview or otherwise to get new information from the Appellant about his claims, when the credibility of the Appellant was critical to the Authority’s decision, there was a significant interval between the interview of the appellant by the Minister’s delegate and the decision by the Authority, and some of the Appellant’s evidence was rejected as “a recent invention” because of its view of “the late stage at which this information was introduced and the inconsistency of this information”.

1. Section 473DC provides:

**Subdivision C—Additional information**

**473DC Getting new information**

(1) Subject to this Part, the Immigration Assessment Authority may, in relation to a fast track decision, get any documents or information (***new information***) that:

(a) were not before the Minister when the Minister made the decision under section 65; and

(b) the Authority considers may be relevant.

(2) The Immigration Assessment Authority does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances.

(3) Without limiting subsection (1), the Immigration Assessment Authority may invite a person, orally or in writing, to give new information:

(a) in writing; or

(b) at an interview, whether conducted in person, by telephone or in any other way.

1. Section 473DD provides:

**473DD 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. Relevantly to the present context I would note that in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 353 ALR 600, Gageler, Keane and Nettle JJ said (at [21]):

There is no dispute between the parties that the various powers conferred on the Authority by Div 3 of Pt 7AA are conferred on the implied condition that they are to be exercised within the bounds of reasonableness, in the sense explained in *Minister for Immigration and Citizenship v Li*, with the consequence that an unreasonable failure to exercise such a power can render invalid a purported performance by the Authority of the duty imposed on it by s 473CC to conduct a review and either to affirm or to remit the decision under review.

(Citations omitted.)

1. Let me elaborate on the appellant’s arguments which were efficiently put by his counsel, Mr Anthony Krohn.
2. The appellant submits that if there are issues or information which the Authority regards as necessary to be determined or considered on its review under Pt 7AA, but which were not dealt with by the delegate, then it is necessary for the Authority to remedy this situation by giving an invitation to the applicant for the visa to attend an interview. And failure to do so is legally unreasonable, and may also amount to a denial of procedural fairness.
3. The appellant also says that if procedural fairness has been denied by the delegate, it may be necessary for the Authority to remedy this situation, for example by giving an invitation to the applicant for the visa to attend an interview. And failure to do so may be legally unreasonable, as well as amounting to a denial of procedural fairness.
4. Now it may be accepted that the Authority did not exercise its power under s 473DC to invite the appellant to an interview or otherwise to get new information from the appellant about his sexual abuse claims. The appellant says that this was unreasonable when the credibility of the appellant was critical to the Authority’s decision, there was a significant interval between the interview of the appellant by the delegate and the decision by the Authority, and some of the appellant’s assertions were rejected by the Authority as a recent invention because of inter-alia the late stage at which the information was introduced and the lack of detail.
5. The appellant says that given that the credibility of the appellant was critical to the Authority’s decision, including its assessment of a real chance of serious harm, together with the fact that in large part the Authority accepted the credibility of the appellant including his claims to have been detained, interrogated and mistreated on multiple occasions, it was not reasonable for the Authority not to have invited the appellant to give further information at an interview.
6. Further, the appellant submits that the timing, lack of detail or inconsistency which the Authority perceived in some of the appellant’s claims related especially to the claims to have suffered sexual abuse and also to have been reporting daily to the police; in the way the argument unfolded before me yesterday I do not need to elaborate further on this latter aspect. But the appellant says that given the delicacy with which a claim of sexual abuse must reasonably be treated, as well as the notorious reluctance of victims of sexual abuse to reveal such abuse, this all meant that the Authority ought to have been cautious in not dismissing, without an interview, the claim to have suffered sexual abuse. In this context the appellant sought to draw some support from *DPI17 v Minister for Home Affairs* (2019) 366 ALR 665.
7. Further, although the primary judge concluded that there was nothing in the refusal of the Authority to accept some of the appellant’s claims which required an oral interview by the Authority, it is said that her Honour was in error because the importance of the claim of sexual abuse, which was relevant both to the gravity of harm claimed to have been suffered and to be feared, and also to the general credibility of the appellant, required an interview.
8. In these circumstances, the appellant submitted that it was unreasonable of the Authority not to exercise its powers under ss 473DC(1) and (3) to invite the appellant to give new information at an interview.
9. Let me address these arguments.
10. First, I do not doubt that the powers under ss 473DC(1) and (3) must be exercised reasonably and that not to do so may amount to a jurisdictional error. And in this regard I would note what was said in *DCP16 v Minister for Immigration and Border Protection* [2019] FCAFC 91 at [106] to [110] per Beach, O’Callaghan and Anastassiou JJ:

The standard of legal reasonableness applicable to the exercise of a statutory power takes its content and boundaries from the text, context, subject matter and purpose of the particular statutory provisions under which the particular or general power is being exercised (see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332).

As *Li* indicates, the exercise of power must be “legal and regular, not arbitrary, vague and fanciful” (at [65] per Hayne, Kiefel and Bell JJ). A lack of legal reasonableness may be concluded from an exercise of power “which lacks an evident and intelligible justification” (at [76]). It may also be concluded from “an obviously disproportionate” response or exercise of power in the particular circumstances (at [74]). French CJ explained that it may be concluded from “a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut … [or exceeding] what, on any view, is necessary for the purpose it serves” (at [30]). Contrastingly, Gageler J applied the test of *Wednesbury* unreasonableness, but did not reason to the effect that a lack of an evident and intelligible justification or an obviously disproportionate exercise of power could not in an appropriate case be a manifestation of or establish *Wednesbury* unreasonableness.

This Court in *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 has also emphasised two points. First, it is not appropriate merely to take the scenario in *Li* and address factual similarities or differences (at [41] and [42] per Allsop CJ, Robertson and Mortimer JJ). In each context in which it is to be assessed, legal unreasonableness is invariably fact dependent (*Singh* at [42] and [48]). Whether a particular exercise of statutory power or its lack of exercise descends into legal unreasonableness necessitates a careful evaluation of the evidence and its context in the particular application for judicial review (at [42]). Second, if the decision maker has given reasons for the relevant exercise of power or lack of exercise under challenge, then it is to those reasons “which a supervising court should look in order to understand why the power was exercised as it was” (at [47]). More generally, the intelligible justification may be found within the reasons explicitly or *implicitly* for its exercise or its lack of exercise.

Further, applying a standard of legal reasonableness does not merely involve or justify substituting this Court’s view as to how a discretion should be exercised for that of the decision maker (*Li* at [66]).

In summary, to demonstrate legal unreasonableness is a demanding standard and requires its demonstration against the statutory framework for making the decision to exercise or not exercise the relevant power. In the present context the scheme of Pt 7AA is such that save for limited circumstances, the Authority conducts its review on the papers (s 473DB(1)), and without accepting or requesting new information or interviewing the referred applicant. The Authority has power to invite the referred applicant to give new information (s 473DC(3)), but it does not have any duty to get, accept or request new information (s 473DC(2)). And the Authority will only consider new information if there are exceptional circumstances to justify doing so (s 473DD(a)) and providing of course that one of the limbs in s 473DD(b) is made out. A more detailed discussion of the structure and provisions of Pt 7AA is set out in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 353 ALR 600 at [1] and [15] to [35] per Gageler, Keane and Nettle JJ. It is unnecessary to further distil or summarise what is there set out.

1. Second, whilst it must be accepted that the power to get new information is to be exercised reasonably, what is reasonable is to be understood within the statutory context, including in this case that the review is in the ordinary course to be conducted on the papers. But in considering the statutory context I accept, as was put by Mr Krohn, that the context is not just Div 3 of Pt 7AA but also the broader statutory context of Pt 7AA and even more broadly the context of and the seriousness of the issues dealt with under, inter-alia, ss 36 and 65.
2. Third, the fact that the Authority here disbelieved some of the appellant’s claims does not elevate the Authority’s conduct in not inviting an oral interview with the appellant to the level of unreasonableness. Nor is any effluxion of time between the delegate’s decision and the Authority’s decision of any importance in and of itself.
3. Further, in *DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12 in a case in which the Authority had made adverse credit findings against the appellant it was said (at [71] to [74] per Reeves, Robertson and Rangiah JJ):

In the present appeal, in our opinion, the Authority reassessed the material which the delegate had considered. The delegate did not accept the appellant’s claims largely because of the delegate’s finding that there was no CTS office in Nasiriyah during the period claimed by the appellant, which significantly undermined the credibility of the appellant’s claims to have been a CTS informant. The delegate referred to “the significant credibility issues surrounding the applicant’s claim to have been a ‘secret agent’ for the CTS”. But the delegate also tested the plausibility of the appellant’s claims to have become or remained an informant. The delegate was not satisfied that the risk in which the appellant claimed to have put himself and his family was plausible, in that the delegate did not accept that a reasonable person would continue to be an informant for altruistic reasons after being personally attacked and having his home burnt out.

In our opinion, Pt 7AA contemplates that the Authority will evaluate for itself the material considered by the delegate. We do not consider that the fast track statutory regime of Pt 7AA requires the Authority to notify the referred applicant that it is considering taking a different view, adverse to the referred applicant, of the material considered by the delegate. To that extent we agree with the primary judge, at [106], that the Authority is not required to inform the appellant of specific reservations about the appellant’s case and to provide the appellant with an opportunity to respond.

We would not however approach the resolution of the appeal by considering whether or not the delegate’s decision indicated that all aspects of the appellant’s credit were at issue in the Authority’s review. That is to view the procedure through a natural justice lens.

We do not accept the submission put on behalf of the appellant that the fact that the Authority in the present case accepted as being before it the submissions made by the appellant, and accepted the new information involved in those submissions, implies that the Authority was required, as a matter of legal reasonableness or otherwise, to seek further submissions from the appellant once it formed specific reservations about the appellant’s case, and to provide the appellant with an opportunity to respond.

1. Fourth, although one of the appellant’s claims involved a claim of sexual assault, as the Minister’s counsel, Mr Alexander Solomon-Bridge, correctly submitted, *DPI17* does not greatly assist the appellant.
2. In *DPI17*, a concession had been made that the power to interview had not even been considered, and it was that failure to consider the exercise of the power itself that was held to be unreasonable. Now the notice of appeal in the case before me alleges that the Authority’s error was in failing to exercise its power to interview the appellant, and not in failing to consider the exercise of the power. I must say though that when one considers the evidence before me it seems that the Authority never turned its mind to considering whether to exercise the s 473DC power such that the appellant’s real case may be whether the Authority unreasonably failed to consider whether to exercise the s 473DC power. I will deal with both possibilities later.
3. Further, in *DPI17* the delegate below had accepted the appellant’s claims to torture and sexual assault and had done so, at least in substantial part, based on an assessment of the appellant’s *demeanour* in interview. In that case, there was considerable disparity between the delegate’s treatment of credibility and the Authority’s treatment of credibility, where credibility turned on demeanour. So in that context it was unreasonable for the Authority not to have sought new information if it was going to take a course different from the delegate. Contrastingly, in the case before me the delegate made no positive findings about the claimed sexual abuse. To the contrary, he found that the appellant’s embellishing of other parts of his claims “casts doubt on the treatment he experienced when he was questioned”. There was not the same disparity between the delegate and the Authority on such matters, let alone one turning on demeanour.
4. Further, the sexual assault claims in *DPI17* assumed prominence in the appellant’s overall claims (as Mortimer J pointed out at [125(b)]). But in the case before me the sexual assault claims consisted of a sentence in one set of the appellant’s representative’s submissions to the delegate. And notably, the appellant’s separate submissions to the Authority did *not* refer to a sexual assault claim at all.
5. Further, *DPI17* does not stand for the proposition that whenever an allegation of sexual assault is made, the Authority is required to conduct an interview. An assessment of legal reasonableness will always turn on the facts and circumstances peculiar to each particular case. In my view there was nothing in the bare fact that a sexual assault allegation was made and disbelieved that renders the Authority’s failure to conduct an interview unreasonable in the circumstances of this case.
6. Let me deal with some other problems for the appellant.
7. First, at no stage did the appellant or his representatives seek an oral interview before the Authority. The appellant’s representatives were quite content merely to put before the Authority submissions querying the delegate’s reasoning. But in this context no submissions were made whatsoever on the sexual assault question.
8. If the case were to have been put that it was unreasonable for the Authority not to have turned its mind to considering whether to exercise the s 473DC power, in my view no unreasonableness was shown. There was no trigger provided by the appellant’s representatives’ conduct. Moreover, the fact that the Authority was proposing to take a stronger view perhaps than the delegate on embellishment did not require the Authority to consider whether to exercise the s 473DC power let alone exercise it. As I say, the present case is not like *DPI17* where there was a considerable disparity between the delegate and the Authority and which turned on questions of demeanour.
9. Second and relatedly, it is to be recalled that the delegate considered the appellant’s statutory declaration and the submissions of AUM Lawyers on 5 September 2016 in the following terms:

After the PV interview, on 5 September 2016, the applicant submitted a document in support of his claims which I have considered. In this submission, the applicant states that he was required to regularly report to the authorities for questioning and at this time he would be physically, mentally and sexually abused by members of the Sri Lankan authorities.

…

At the PV interview, the applicant stated that he was required to report to the authorities on a daily basis. The applicant did not put this particular claim forward in his statement of claims or at any time prior to the PV interview. I do not accept that the applicant would be of such great interest to the authorities that he would be required to report on a daily basis, yet not be subjected to any charges or rehabilitation. I consider the applicant claim that he was required to report daily is at odds with his claim that he was requested by the CID and the Army to come to their offices for questioning as they would not need to summon him if he was reporting daily. I consider the applicant has attempted to embellish the level of interest the authorities have in him and this also casts doubt on the treatment he experienced when he was questioned.

…

**Summary**

I accept the following to be credible:

* The applicant was questioned by the authorities about potential links to the LTTE at times in the years 2009 to 2012.

However, I do not accept that:

* The applicant was of significant interest to the authorities or was pursued for having ties to the LTTE or for any other reason.
* The applicant was required to report to the authorities on a daily basis.

On the basis of the above findings, I consider that the applicant has embellished the extent to which he was of interest to the authorities and the level of interaction he had with the authorities.

1. It is a fair reading of the delegate’s decision that the delegate also considered, inter-alia, the sexual abuse claims and thought that there had been embellishment.
2. Third, it may be queried whether any of what the appellant suggests was “new information” given what had already been put before the delegate. But even accepting that new oral evidence by the appellant on the same topic could be “new information”, there is nothing to show that the failure to consider exercising the s 473DC power or the failure to exercise it was unreasonable.
3. Fourth, there is difficulty for the appellant in any event under s 473DD. The exceptional circumstances limb of s 473DD(a) was most unlikely to be satisfied. But even if it could be, s 473DD(b) created difficulties. Clearly s 473DD(b)(i) could not be satisfied. Moreover s 473DD(b)(ii) was not without its difficulties. Let me elaborate on this last aspect a little concerning the phrase “credible personal information”. It may be accepted that the phrase “not previously known” can refer to the Minister or his delegate even if the information is known to the visa applicant (*Plaintiff M174* at [33] and [34]).
4. In terms of what is meant by “credible” in the phrase “credible personal information”, the text and context of s 473DD(b)(ii) suggest to me that “credible” was intended to mean “reasonably able to be believed in”, which is a meaning that happily sits with both its ordinary meaning and its Oxford English Dictionary definition (cf *CSR16 v Minister for Immigration and Border Protection* [2018] FCA 474 at [41] per Bromberg J). I have looked at the extrinsic material on this question, but unsurprisingly it is of little assistance. In the original bill (Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)), cl 473DD did not have limb 473DD(b)(ii). Originally this was all dealt with under the exceptional circumstances limb. As the Explanatory Memorandum for the original Bill said (at [914] and [915]):

Under this component of the test, the IAA would not be able to consider any new information in relation to making a fast track reviewable decision unless the Authority was satisfied that there are exceptional circumstances to justify considering the new information. Exceptional circumstances has not been defined and will provide a reviewer of the IAA with discretion to ascertain what he or she thinks are exceptional dependent on the characteristics of each fast track reviewable decision. It will be a matter for the IAA to develop guidelines to assist in the interpretation of this phrase, which has been deliberately left undefined as circumstances will differ from case to case.

*Examples of exceptional circumstances that may justify the consideration of new information may include, but are not limited to*:

* a material change in the referred applicant’s circumstances which occurred after the Minister made the section 65 decision including a factual event, such as significant and rapidly deteriorating conditions emerging in the referred applicant’s country of claimed protection, for example, a change in the political or security landscape; or
* *credible personal information that was not previously known has emerged which suggests a fast track review applicant will face a significant threat to their personal security, human rights or human dignity if returned to the country of claimed persecution.*

(Emphasis added.)

1. In the Senate an amendment was made to substitute for the original cl 473DD(b) a new (b) to read:

**(18) Govt (10) [Sheet GH118]**

Schedule 4, item 21, page 68 (lines 25 to 29), omit paragraph 473DD(b), substitute:

(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. A Supplementary Explanatory Memorandum was then produced which said (at [27] to [29]):

The purpose of paragraph 473DD(b) is to ensure that for the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless, in addition to paragraph 473DD(a), 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 was not, and could not have been, provided to the Minister before the Minister made the decision under section 65.

The effect of new paragraph 473DD(b) is that it will provide that a new type of ‘new information’ that a referred applicant can present to the IAA can be credible personal information which was not previously known and had it been known, may have affected the consideration of the fast track review applicant’s claims.

This new provision will extend the types of ‘new information’ that a referred applicant may present to the IAA to include, for example, evidence of significant torture and trauma which, if it had been known by either the Minister or the referred applicant, may have affected the consideration of the referred applicant’s asylum claims by the Minister.

1. Little illumination is shone on the meaning of “credible” by the extrinsic material other than that Parliament was concerned to stipulate limb 473DD(b)(ii) separately rather than to leave it blended with the exceptional circumstances condition stipulated in s 473DD(a). Of course, to leave standing the high conjunctive bar of s 473DD(a) may suggest less of a need to add any high bar to “credible” in limb 473DD(b)(ii).
2. But even if I was to assume the last aspect in favour of the appellant, or indeed that s 473DD was generally no bar, the appellant has a broader lack of materiality difficulty.
3. The Authority would in any event have concluded that there was no relevant real chance or risk given its findings of the appellant’s exaggerations (with or without further detail on the sexual assault claims) taken together with more recent country information. The Authority had rejected the claim of the appellant being perceived to have been involved with the LTTE ([15] to [17] and [21]). The Authority accepted that he may have been of interest to be and was questioned and may have been mistreated at various times. But on each occasion he was not arrested, charged, imprisoned or sent to a rehabilitation centre. Further and importantly, taken with the more up to date country information, there was now no such relevant real chance or risk (see at [27], [30] and [43]).
4. In my view no jurisdictional error is shown and the primary judge has not been shown to be in error in her ultimate conclusion. This ground of appeal is not made out.
5. Before passing from this ground of appeal I would note one other matter for completeness. I had pondered whether the appellant’s representatives’ letter of 5 September 2016 in referring to sexual abuse was merely only putting a different characterisation on what the appellant had already said in his statutory declaration when he said that he was “forced to strip naked and abused verbally and physically” rather than something new, and whether or not this should have been clarified. But the parties put their cases on the hypothesis that something new was intended to be added. Therefore I will say nothing further on my alternative hypothesis.
6. Let me turn to the next ground of appeal.

#### Ground 4 – The Authority failed to apply or apply correctly the “real chance” test

1. In elaboration of this ground the appellant gave the following particulars:

The Authority did not in fact apply the test whether there was a “real chance” the appellant may suffer serious or significant harm, but required a higher probability of harm, shown by its affirming the delegate’s decision although it accepted that the Appellant “was harassed, questioned and possibly abused by the local security forces” and that “given the applicant’s prior experience of detention and questioning by the authorities, he is concerned about future treatment by the CID and the army should he return to Sri Lanka.”

1. The appellant points out that the Authority accepted that the appellant was on three or four occasions interrogated about the LTTE and assaulted, that the local authorities then, after his release from the camp and his return to his home area, questioned the appellant for information about the LTTE and possibly mistreated him, and his father was also questioned and mistreated.
2. But, as the appellant points out, the Authority concluded that the appellant was not targeted because of his profile except as a Tamil male generally ([21]), and that he was “not considered to hold a profile of LTTE involvement with the local authorities, or otherwise be of interest to them” ([22]).
3. The appellant submits that this conclusion demonstrates error in the application of the proper legal test for assessing a real chance of serious harm or a real risk of significant harm.
4. The appellant submits that as the Authority found that the appellant was repeatedly questioned about the LTTE, and may have been mistreated by the local authorities, even on multiple occasions after having previously been considered not to have been of interest, this demonstrates a level of adverse interest such as to demonstrate over time a real chance that the appellant may suffer serious or significant harm. It is said that the finding that the appellant was not “of any adverse interest to the authorities, including the army and the CID, in the months leading up to his departure from Sri Lanka” ([25]), despite his repeated “experience of detention and questioning” (and mistreatment, amounting to torture) ([27]), demonstrates an implicit error in the assessment of the boundaries of a real chance.
5. The appellant submits that the findings that the Authority was “not satisfied that [the appellant] faces a real chance of serious harm now or in the reasonably foreseeable future” ([43]) and was “satisfied there is no real risk of significant harm” ([49]) were infected by the Authority’s narrow focus on whether the appellant had been of interest at particular points of time, rather than also on the whole picture of repeated interrogation and abuse and release.
6. I would reject this ground of appeal as well.
7. The appellant can point to no error in the manner in which the Authority articulated the test. Instead the appellant has relied upon inferences of error from the Authority’s ultimate findings. In particular, he relies upon the findings of past repeated questioning as evidence that the Authority erred in some unspecified way in considering the “real chance” test. In substance I agree with the Minister that this ground seems to reduce to one of irrationality or unreasonableness.
8. As was pointed out in *DCP16*, differences of degree, impression and empirical judgment between the approach and reasoning of the Authority as compared with the opinion of a court undertaking judicial review do not establish illogicality or irrationality (*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [78] per Heydon J). There is a high threshold. The question is whether no rational or logical decision-maker could arrive at the relevant decision on the evidence before the decision-maker (*SZMDS* at [130] per Crennan and Bell JJ). As their Honours said at [131]:

The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality 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.

1. Moreover, at [135] their Honours continued:

Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here. It could not be said that the reasons under consideration were unintelligible or that there was an absence of logical connection between the evidence as a whole and the reasons for the decision. Nor could it be said that there was no probative material which contradicted the first respondent's claims.

1. In this case, there was evidence before the Authority and the delegate that the security and economic situation for Tamils in Sri Lanka had changed markedly since the appellant’s departure from that country and so it was in that context that the claims of past questioning were to be and were considered. As the Authority observed (at [27] and [30]):

I accept that given the applicant’s prior experience of detention and questioning by authorities, he is concerned about future treatment by the CID and the army should he return to Sri Lanka. During the interview, the delegate raised with the applicant the impact of the passage of time since the applicant’s departure in 2012. Recent reports of country information do not support a conclusion that Tamils, including young Tamil men from the Northern Province, are being systematically targeted and subjected to serious harm because of their race and/or area of origin. The United Nations High Commissioner for Refugees Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka issued in 2012, states that in its opinion, originating from an area previously controlled by the LTTE does not of itself result in the need for international refugee protection.

…

Given the applicant’s profile, the country information about the change in Sri Lanka’s political and security landscape, I am not satisfied that the applicant would be targeted by the Sri Lankan authorities, including the local CID and army, on return to Sri Lanka.

(Citations omitted.)

1. Once it is appreciated that the Authority also considered the changed country information in assessing the future risk of harm, the findings of past questioning are consistent with a finding that the appellant is *no longer* of any interest to the authorities. It is difficult to see how that latter finding could be said to be illogical or as otherwise revealing or manifesting some unspecified error in relation to the applicable test for the relevant real chance or risk. Moreover, the previous harassment and questioning of the appellant were explained by the Authority on the basis not of the security force’s interest in him in particular, but as a function of their directing such harassment and questioning at Tamil males generally at an earlier time.
2. This ground of appeal also fails.

## Conclusion

1. As none of the grounds of appeal have been made good, the appeal must be dismissed with costs.

|  |
| --- |
| I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 25 September 2019