AJE18 v Minister for Home Affairs [2020] FCA 1387

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| Appeal from: | *AJE18 v Minister for Home Affairs & Anor* |
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| File number: |  |
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| Judgment of: | **ANASTASSIOU J** |
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| Date of judgment: | 28 September 2020 |
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| Catchwords: | **MIGRATION** – appeal from the Federal Circuit Court of Australia – protection visa application based on Tamil ethnicity and chronic post-traumatic stress disorder – whether Immigration Assessment **Authority** failed to engage in active intellectual process – whether Authority failed to consider new information pursuant to s 473DC – whether Authority failed to reach prescribed state of satisfaction in s 473DD – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth), ss 473DC, 473DD  Explanatory Memorandumto the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* |
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| Cases cited: | *AAL19 v Minister for Home Affairs* [2020] FCAFC 114  *BVC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 565  *BYA17 v Minister for Immigration and Border Protection* (2019) 269 FCR 94; [2019] FCAFC 44  *Carrascalao* *v Minister for Immigration and Border Protection* (2017) 252 FCR 352; [2017] FCAFC 107  *CCQ17 v Minister for Immigration and Border Protection* [2018] FCA 1641  *CMA19 v Minister for Home Affairs* [2020] FCA 736  *DGZ16 v Minister for Immigration and Border Protection* (2018) 258 FCR 551; [2018] FCAFC 12  *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134; [2019] FCAFC 43  *DYS16 v Minister for Immigration and Border Protection* (2018) 260 FCR 260; [2018] FCAFC 33  *EEM17 v Minister for Immigration and Border Protection* (2018) 265 FCR 527; [2018] FCAFC 180  *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409; [2019] FCA 1681  *GGD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1463  *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34  *LKQD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1591  *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475; [2017] FCAFC 21  *Minister for Immigration and Border Protection v Haq* (2019) 267 FCR 513; [2019] FCAFC 7  *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; [2014] FCAFC 1  *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18  *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217; [2018] HCA 16  *Singh v Minister for Home Affairs* (2019) 267 FCR 200; [2019] FCAFC 3  *SZSLA v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 944  *XFCS v Minister for Home Affairs* [2020] FCAFC 140 |
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| Number of paragraphs: | 59 |
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| Date of hearing: | 12 August 2020 |
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| Counsel for the Appellant: | Mr R. Chia |
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| Counsel for the First Respondent: | Ms N. Campbell |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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ORDERS

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|  | | VID 1305 of 2019 |
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| BETWEEN: | AJE18  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| order made by: | ANASTASSIOU J |
| DATE OF ORDER: | 28 September 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellant pay the First Respondents’ costs of and incidental to this appeal.

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

REASONS FOR JUDGMENT

# Anastassiou J

# Background

1. The Appellant is a Sri Lankan Tamil of Christian faith. He was born in the Mannar district, a Northern Province of Sri Lanka, on 15 January 1992. He departed Sri Lanka illegally by boat on 19 October 2012 and arrived on the Cocos Islands on 3 November 2012. The Appellant lodged a valid application for a Safe Haven Enterprise Visa (**protection visa**) on 7 March 2016. In summary, the Appellant’s claims for protection are based on a real or imputed association with the Liberation Tigers of Tamil Eelam (**LTTE**); his status as a young Tamil from the North of Sri Lanka; his diagnosis with post-traumatic stress disorder (**PTSD**); and putatively being a returned asylum seeker who fled Sri Lanka illegally.
2. A **delegate** of the **Minister** for Immigration and Border Protectionrefused to grant the Appellant a protection visa on 15 November 2016. That decision was affirmed by the Immigration Assessment **Authority** on 30 June 2017. The Appellant filed an application for judicial review of the Authority’s decision in the Federal **Circuit Court** on 29 January 2018, as amended on 17 September 2019. That application was dismissed by the primary judge on 21 November 2019: *AJE18 v Minister for Home Affairs & Anor* [2019] FCCA 3365. The Appellant now appeals that decision.
3. The Appellant filed a Notice of Appeal on 3 December 2019. However, at the hearing, the Appellant sought leave to file and rely upon an Amended Notice of Appeal dated 12 August 2020. The First Respondent did not oppose leave and no prejudice was raised in relation to the proposed amendments. Accordingly, I granted the Appellant leave to file and rely upon that Amended Notice of Appeal at the hearing.
4. The Appellant raises three grounds for consideration in the Amended Notice of Appeal, which I summarise as follows:
5. whether the Authority failed to engage in an ‘active intellectual process’ in considering whether returning the Appellant to Sri Lanka would exacerbate his chronic PTSD;
6. whether the Authority’s failure to invite the Appellant to give ‘new information’ in relation to his mental health, or other protection claims, was legally unreasonable; and
7. whether the Authority failed to form the ‘state of satisfaction’ required by s 473DD of the *Migration* ***Act*** *1958* (Cth) in relation to ‘new information’ provided by the Appellant.
8. For the reasons that follow, I do not consider that any of the grounds are made out. Accordingly, I dismiss the appeal.
9. I note that subsequent to notice being given to the parties that judgment would be delivered, the First Respondent objected to reliance on the first ground of appeal. In substance, the First Respondent submitted that the first ground of appeal was unparticularised and did not reflect the manner in which the ground was argued at the hearing. The First Respondent had understood that the Appellant would file a further Amended Notice of Appeal to properly reflect what was argued at the hearing, by consent, but that has not occurred. I understand the Appellant now refuses to make any application to the Court to that effect.
10. It is ultimately unnecessary for me to decide any dispute between the Appellant and First Respondent concerning the purported agreement that, subsequent to the hearing, the Appellant would serve and file a further Amended Notice of Appeal in relation to ground one. It is beyond doubt that the hearing was conducted on the basis that ground one related to the failure by the Authority to properly consider the Appellant’s PTSD, and the availability of mental health services, if he were returned to Sri Lanka. I have decided the appeal on that basis, as that is plainly the issue in relation to which the parties made oral and written submissions.

# ground one

## Appellant’s submissions

1. By the first ground of appeal, the Appellant submitted that the Authority had failed to engage in an ‘active intellectual process’ in finding that the Appellant had access to adequate medical treatment and mental health services in both his home district (Mannar) and in Colombo. In particular, the Appellant submitted that the Authority did not give ‘proper, genuine and realistic consideration’ to the Appellant’s claims and thereby failed to discharge its statutory obligation.
2. The Appellant advanced the following five propositions in support of this ground of appeal.
3. The Authority failed to consider in detail, and make relevant findings about, the Appellant’s claim that being returned to Sri Lanka would acutely exacerbate his PTSD. This was an issue which could, if accepted, have itself been dispositive of the review. This is because the likely exacerbation of the Appellant’s condition could amount to a real risk of significant harm for the purposes of paragraph 36(2)(aa) of the Act, enlivening Australia’s complementary protection obligations.
4. The Authority’s discussion of country information regarding Sri Lanka’s health care system largely repeated the delegate’s discussion of access to mental health services in Colombo, without actively engaging with the material. The Authority merely described the National Institute of Mental Health Facility in Colombo, noting that state hospitals are located in most cities but are congested, and that there is a private, albeit expensive, health care system in Sri Lanka. The Authority failed to consider the implications that flowed from this for the Appellant.
5. The Authority made no findings as to what would happen if the Appellant were returned to Sri Lanka, including where the Appellant would live, how the Appellant would conduct himself, whether the required mental health services would be available in the town or city where he lived and how far he would have to travel to access the required services.
6. The Authority made findings at the ‘highest level of generality’ and did not provide any explanation regarding the mental health services the Appellant would require, whether those services might not be available for reasons of cost or over-capacity and whether they would be suitable to treat the Appellant’s PTSD.
7. The Authority knew that the delegate had:
   1. formed a view that the Appellant faced a real chance of serious harm due to his ethnicity;
   2. not considered whether acute exacerbation of the Appellant’s PTSD would amount to serious or significant harm; and
   3. only considered the availability of mental health services in Colombo in the context of considering whether internal relocation was reasonable.

In those circumstances, the Authority should have either obtained itself, or invited the Appellant to give, new information. The failure to do so weighs in favour of an inference that there was no ‘proper, genuine and realistic consideration’ of the Appellant’s claim. As will become apparent, there is substantial overlap between this submission and the second ground of appeal.

1. The Appellant submitted that each of these propositions support the inference that the Authority failed to actively engage with the claim that the Appellant’s chronic PTSD would be acutely exacerbated if he were returned to Sri Lanka.

## Relevant principles

1. It has been repeatedly observed that if a statute requires a decision-maker to consider a matter, the decision-maker must give the matter ‘proper, genuine and realistic consideration’; that is, they must engage in an ‘active intellectual process’ directed at the matter: ***Carrascalao*** *v Minister for Immigration and Border Protection* (2017) 252 FCR 352; [2017] FCAFC 107 at [45] (Griffiths, White and Bromwich JJ).
2. This does not require the decision-maker to refer to every piece of evidence and every contention put by the Appellant: *Carrascalao* at [45]. However, the failure to refer to a critical piece of evidence or a particular issue might support an inference that the decision-maker did not consider a particular issue and therefore did not actively engage with the matter: ***Singh v Minister for Home Affairs*** (2019) 267 FCR 200; [2019] FCAFC 3 at [36] (Reeves, O’Callaghan and Thawley JJ).
3. To this end, the proper approach to determining whether there has been an ‘active intellectual process’ was recently summarised in *Singh v Minister for Home Affairs* at[37]:

In determining whether the decision-maker had an active intellectual engagement, the following matters are relevant:

(1) First, the degree of consideration which is necessary for the jurisdiction to have been exercised, and exercised in a manner which is authorised, is affected by the centrality of the matter, which it is said was not engaged with, to the issues and the prominence the matter assumed.

(2) Secondly, in examining the reasons of the decision-maker to determine whether there was a lack of intellectual engagement:

(a) the reasons should not be scrutinised “minutely and finely with an eye keenly attuned to the perception of error”: *Carrascalao* at [[45]](https://jade.io/article/541701/section/140602), quoting *Minister for Immigration and Ethnic Affairs v*[*Wu Shan Liang*](https://jade.io/article/67943) (1996) 185 CLR 259 at [[30]](https://jade.io/article/67943/section/332);

(b) it is necessary to read the reasons in light of the whole case as it was before the Tribunal, which might have involved more issues than are raised, and more evidence than is, before courts on judicial review and subsequent appeal.  The failure to mention a particular paragraph of a particular piece of evidence should be analysed by reference to the whole of the material before the Tribunal and its prominence assessed by reference to all of the issues and the way in which the matter was conducted in the Tribunal; and

(c) a conclusion that the decision-maker has not engaged in an active intellectual process “will not lightly be made and must be supported by clear evidence, bearing in mind that the judicial review applicants carry the onus of proof”: *Carrascalao* at [48].

1. That summary of principles has been repeatedly endorsed in subsequent decisions: see e.g. *XFCS v Minister for Home Affairs* [2020] FCAFC 140 at [36] (Moshinsky, Derrington and Colvin JJ); *SZSLA v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 944 at [31] (Colvin J); *CMA19 v Minister for Home Affairs* [2020] FCA 736 at [157] (Murphy J); *LKQD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1591 at [41] (Jackson J); and *GGD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1463 at [36] (Thawley J).

## Consideration

1. At the heart of the Appellant’s first ground of appeal is an assertion that the Authority did not adequately consider the Appellant’s PTSD and the exacerbation of his condition if he were to be returned to Sri Lanka. More specifically, criticism was directed at paragraphs [38]-[40] of the Authority’s reasons, extracted in full below.

*Post-Traumatic Stress Disorder*

38. The applicant claims to suffer PTSD and has provided a report from a consultant psychiatrist, dated 29 September 2016, in support of this claim. The report diagnoses chronic PTSD that has been ‘recently amplified’ by the applicant’s protection visa process. The applicant has also provided a report from Companion House, an organisation that works towards assisting survivors of torture and trauma. From these reports I note that the applicant has undergone counselling and has attended a Tamil Men’s Group in Australia since 2013. His counselling was initially done weekly but by September 2016, it was being undertaken on an “as needs” basis. There is nothing in either report to indicate that he has asked for or been assessed for any residential-based programs. Both reports note that the applicant is anxious about returning to Sri Lanka and that a return may exacerbate his PTSD. I accept the evidence in these reports and I find that the applicant is suffering from PTSD and that this may be exacerbated by a return to Sri Lanka.

39. I have considered whether the applicant will be able to access appropriate care if he was to return to Sri Lanka. Information in the referred materials indicates that the main public mental health facility in Sri Lanka is the National Institute of Mental Health (NIMH), which operates two residential facilities in Colombo. In addition, every district in Sri Lanka apart from Monaragala (in the south-east) has a hospital offering treatment for mental health. The World Health Organisation (WHO) has commented that Sri Lanka’s progress in the mental health sector is commendable and it has achieved a significant improvement in human resources development and the expansion of resources and facilities. The WHO said that Sri Lanka “is doing much better in the field of mental health when comparing with the world’s status”. On the other hand, the UN has expressed a concern that mental health services remain insufficient to cope with widespread post-conflict mental disorders. Other information indicates that the government provides free healthcare for the public at all state hospitals, which are located in almost every city as well as in major towns. These are equipped with modern equipment and provide a range of medical services, although it is noted that these hospitals can be congested. There is also a private health system but this is expensive and the cost would be borne almost entirely by the user.

40. I take into account that the health care system in Sri Lanka may face some difficulties, although the information above is now some five years old. I also take into account that the applicant has not previously been hospitalised and is undertaking as-needs counselling. There is no evidence before me that indicates that the applicant would require hospitalisation in Sri Lanka, although I accept this could be needed if his condition deteriorates. However, I am satisfied that if he did require more intensive treatment including hospitalisation, this could be obtained in his district or in Colombo. I am therefore satisfied that the applicant would be able to seek mental health care in Sri Lanka if he was to require it. I find that the applicant does not face a real chance of serious harm arising from his diagnosed PTSD. [footnotes omitted]

1. The Appellant’s submission is that the Authority’s reasoning process was flawed because it did not involve a ‘proper, genuine and realistic consideration’ of the Appellant’s circumstances. I do accept that proposition.
2. At [38], the Authority considered the contents of the reports specifically prepared in relation to the Appellant’s chronic PTSD. Those reports indicated, and the Authority accepted, that the Appellant was suffering from PTSD and that returning to Sri Lanka might exacerbate his condition. The Authority also noted that while the Appellant initially received weekly counselling, he was now only undertaking counselling on an ad hoc basis.
3. At [39], the Authority then considered the availability of mental health services in both Colombo and, crucially, other districts in Sri Lanka. This included an assessment of the ‘significant improvement’ in the mental health sector identified by the World Health Organisation (**WHO**), as well as recognition of the ongoing limitations associated with the delivery of mental health services in Sri Lanka, such as congestion (in public hospitals) and prohibitive cost (in the private health system).
4. At [40], the Authority evaluated the information in the preceding paragraphs. On that basis, the Authority was satisfied that the Appellant would be able to access mental health care in Sri Lanka if he required it. The Authority also noted that the Appellant had not been previously hospitalised due to his PTSD. The Authority explained that there was no evidence to suggest the Appellant would require hospitalisation if returned to Sri Lanka but, if his condition deteriorated, appropriate care would be available in both Colombo and other districts in Sri Lanka. Weighing up these various considerations, the Authority concluded that the Appellant did not face a real chance of serious harm arising from his diagnosed PTSD.
5. This reasoning process was considered, thorough and balanced. The Authority critically engaged with both the general country information and the Appellant’s personal circumstances. This demonstrated an active intellectual engagement with the materials, in which the Authority accepted that the Appellant suffered from chronic PTSD, which would likely be exacerbated on his return to Sri Lanka, but that appropriate mental health services would be available to the Appellant, irrespective of where he lived in Sri Lanka. Bearing in mind that a determination that the Authority failed to engage in active intellectual process will not lightly be made and must be supported by clear evidence, I am not persuaded by the Appellant’s submissions.
6. The Appellant was unable to point to any particular issue, of significance, that the Authority did not address. I do not accept that the Authority’s findings were at too high a level of generality or merely repetitive of general country information. I am also not satisfied that the Authority failed to properly consider the Appellant’s claim merely because it did not reach a view about issues such as where the Appellant would live, how far he would have to travel or how he would conduct himself in Sri Lanka. To the extent such issues are not expressly discussed in the reasons, I infer it is because they did not assume sufficient importance or prominence, in the context of all the information before the Authority and the findings made by the Authority, to warrant detailed consideration.
7. The First Respondent submitted that even if an error occurred, such an error was not ‘material’ in the sense contemplated by the High Court in ***Hossain*** *v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [30] (Kiefel CJ, Gageler and Keane JJ). The relevant paragraph in that decision is extracted below:

Whilst a statute on its proper construction might set a higher or lower threshold of materiality, the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of "the possibility of a successful outcome", or where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was "so insignificant that the failure to take it into account could not have materially affected" the decision that was made. [footnotes omitted]

1. During the course of the hearing, this issue was the subject of detailed submissions from counsel for the Appellant and First Respondent. Although I am not required to determine the question of materiality in light of my conclusion above, I note that I am not satisfied that any error by the Authority would be material in the sense contemplated by the High Court in *Hossain*.
2. In relation to the Appellant’s claim for protection as a refugee, the Appellant submitted that the requisite convention nexus was established because the Appellant’s PTSD was associated with his past experiences at the hands of the Sri Lankan Army (**SLA**), which were related to his ethnicity, and that his mental health condition would be exacerbated by his return to Sri Lanka. I consider that such a nexus is peripheral to the grounds under the Refugee Convention. The position might have been different if, for example, there was evidence that the Appellant was denied access to mental health services on the basis of his ethnicity or as a returned asylum seeker. However, no such information was before the Authority to demonstrate the requisite convention nexus.
3. In relation to the Appellant’s claim for complementary protection, the Appellant submitted that there was a real risk that the Appellant would suffer significant harm to his mental health as a necessary and foreseeable consequence of being returned to Sri Lanka. The Appellant submitted that if the Authority had given proper, genuine and realistic consideration to the Appellant’s chronic PSTD, there were a range of possibilities open to the Authority on remittal. I have concluded above that the Authority did in fact undertake an ‘active intellectual process’, which itself disposes of the first ground of appeal. I also consider that the Authority’s conclusion would not have been any different even if it had considered the matters identified by the Appellant to constitute an error. Accordingly, I do not accept that any alleged error would have been material.

# Ground two

## Appellant’s submissions

1. The Appellant further submitted that the failure to invite, or to consider inviting, the Appellant to give new information under s 473DC(3) of the Act lacked any intelligible justification and was legally unreasonable. To this end, it was suggested that the Authority committed a jurisdictional error due to the failure to invite the Appellant to give ‘new information’ regarding:
2. the Appellant’s access to mental health services, including personal circumstances such as where he would live in Sri Lanka, what mental health services would be available in that area and what harm he might suffer if his PTSD was exacerbated; and
3. the risk of harm posed by rogue SLA officers, including whether the Appellant would need to pass through checkpoints or otherwise interact with the SLA.
4. In substance, the Appellant’s submission was that it was legally unreasonable not to invite the Appellant to provide new information in circumstances where the Authority departed from the reasoning of the delegate, particularly given that:
5. the new information was relevant to the Appellant’s claims for protection;
6. the Authority knew it did not have relevant information; and
7. the Appellant was able to provide such information.
8. In support of this ground of appeal, the Appellant relied principally on *Minister for Immigration and Border Protection v* ***CRY16***(2017) 253 FCR 475; [2017] FCAFC 21 at [82] (Robertson, Murphy and Kerr JJ) and ***DPI17*** *v Minister for Home Affairs* (2019) 269 FCR 134; [2019] FCAFC 43 at [45] (Griffiths, Mortimer and Steward JJ).

## Relevant principles

1. Section 473DC of the Act provides as follows:

**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. In ***Plaintiff M174****/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217; [2018] HCA 16 at [21] (Gageler, Keane and Nettle JJ) and [86] (Gordon J), the High Court explained that the statutory power in s 473DC must be exercised reasonably, with the consequence that an unreasonable failure to exercise the power potentially constitutes a jurisdictional error. Subsequent authorities have emphasised that a determination of legal unreasonableness is “invariably fact dependent’ and context specific: see e.g. ***Minister for Immigration and Border Protection v Singh*** (2014) 231 FCR 437; [2014] FCAFC 1 at [47] (Allsop CJ, Robertson and Mortimer JJ) and *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30 at [84] (Nettle and Gordon JJ).
2. Indeed, it has been observed that there are no fixed categories of circumstances in which it would be legally unreasonable to fail to consider the discretion in s 473DC: ***CCQ17*** *v Minister for Immigration and Border Protection* [2018] FCA 1641 at [42] (Thawley J). The correct approach is to apply the relevant general principles to the particular factual circumstances of the case and not to engage in an analysis which merely involves identifying particular factual similarities or differences between individual cases: *Minister for Immigration and Border Protection v Singh* at [47]; *Minister for Immigration and Border Protection v Haq* (2019) 267 FCR 513; [2019] FCAFC 7 at [32].
3. Further, simply because there has been a failure to consider exercising the power in s 473DC,that does not of itself involve error, let alone a jurisdictional error: *CCQ17* at [41]. The failure will only be legally unreasonable if it is shown to be outside the area of “decisional freedom” within which a valid decision or exercise of discretion can be made having regard to the subject matter, scope and purpose of the relevant legislation: *BVC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 565 at [107] (Wigney J) citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18at [28] (French CJ), [66] (Hayne, Kiefel and Bell JJ).
4. It is with these principles in mind that the question of whether the failure to exercise the discretionary power in s 473DC was legally unreasonable must be determined. The appropriate analytical framework guiding that exercise is found in *DPI17* at [38], cited with approval in *CCQ17* at [51]:
5. identify the failure with precision;
6. examine the terms, scope and purpose of the statutory power which the decision-maker failed to consider; and
7. evaluate the failure to see whether it has the character of being legally unreasonable, perhaps in lacking a rational foundation or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking in common sense.
8. Each of those three steps is important but it is the third of those steps which highlights the fact that a mere failure to consider the exercise of the power under s 473DC is insufficient *per se* to give rise to jurisdictional error: *DPI17* at [39].

## Consideration

1. The issue that arises in the present circumstances is whether the failure to exercise the discretionary power to invite the Appellant to give ‘new information’ in relation to either his mental health or the risk of harm he faced from rogue aspects of the SLA was legally unreasonable. I consider each of these issues in turn.

### Appellant’s mental health condition

1. The Appellant’s submission effectively relied on two cumulative propositions. First, that the reasons of the delegate and Authority were premised on different findings about whether the Appellant faced a real chance of serious harm if he returned to the Mannar district. Second, and relatedly, that because of the divergent approaches, it was legally unreasonable for the Authority not to invite, or consider inviting, the Appellant to give new information about his chronic PTSD and the availability of mental health services in the Mannar district.
2. I accept that the delegate and Authority formed different views about whether the Appellant could return to the Mannar district. More specifically, the delegate accepted that the Appellant faced a real chance of persecution or risk of harm from particular elements of the SLA if returned to the Mannar distract, but found this could be avoided by relocating the Appellant to Colombo. Meanwhile, the Authority concluded that the Appellant did not face a real risk of harm from rogue elements of the SLA, because he would not have to pass through checkpoints or otherwise interact with such individuals, and could in any event lodge a complaint for effective protection from the State. Accordingly, the Authority found that it was feasible for the Appellant to return to the Mannar district, where the risk of harm was only remote and adequate mental health services were available.
3. I accept that there are circumstances where it will be legally unreasonable not to consider inviting an applicant to provide new information, particularly where the Authority is required to determine matters that were not explored or the subject of findings by the delegate: see e.g. *CRY16* at [76] and [82]; *DPI17* at [43]. However, that is not the situation which arises in the present circumstances.
4. To the extent the approaches of the delegate and Authority differed, it was because the Authority ‘reassessed’ the material before the delegate and that did not, *ipso facto*, require the Authority to invite the Appellant to provide new information: see *DGZ16 v Minister for Immigration and Border Protection* (2018) 258 FCR 551; [2018] FCAFC 12 at [76] (Reeves, Robertson and Rangiah JJ). The Authority had regard to information that was before the delegate, and known by the Appellant, to come to its own conclusions. In that sense, the failure to invite the Appellant to provide new information was within the discretional freedom afforded to the Authority by the statute, which expressly provides that the Authority does not have a duty to get, request or accept any new information: see s 473DC(2) of the Act.
5. Importantly, this ground of appeal ultimately directs attention to whether the failure to invite, or consider inviting, the Appellant to give new information was legally unreasonable. In this respect, the Appellant most precisely formulated the failure by the Authority as follows:

The appellant never had the opportunity to elaborate on the claim regarding exacerbation of his mental condition: he did not have the chance to say where we would live, whether he could access counselling or what harm he could suffer. And the referred material only included country information relevant to the delegate’s consideration of whether mental health services would be available in Colombo, and not material specific to the availability of mental health services in Mannar.

1. In my view, the Authority had ample country information before it in relation to mental health services in Sri Lanka, both in Colombo and in other districts. In addition, the Authority was provided with separate reports regarding the Appellant’s mental health from a consultant psychiatrist and from an organisation that assists survivors of trauma and torture, which gave it extensive information in relation to the Appellant’s personal circumstances. That combination of general country information about mental health services in Sri Lanka, and more specific information regarding the Appellant’s PTSD, provided a rational foundation and evident justification for the Authority not inviting the Appellant to give further information.
2. This approach is consistent with the broader statutory context, including the simplified outline in section 473BA which explains that Part 7AA of the Act provides a ***limited form of review*** and forms part of a fast track regime which is intended to be an ‘efficient’ and ‘streamlined’ process for reviewing protection visa refusal decisions: see Explanatory Memorandumto the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* at page 2.

### Risk of harm posed at checkpoints and by rogue elements of army

1. As explained above, the Appellant focused on the divergent reasoning and findings of the delegate and the Authority. In the Appellant’s submission it was legally unreasonable, in the sense that it lacked any evident and intelligible justification, for the Authority not to invite the Appellant to give new information given that:
2. on the one hand, the delegate concluded that there was a real chance the Appellant would face serious harm if he returned to his home district of Mannar because of potential interactions with the SLA; and
3. on the other hand, the Authority concluded that there was **no information** to indicate that the Appellant would need to pass through checkpoints or have any reason to interact with rogue elements of the SLA. As such, the risk of harm to the Appellant was only remote, even in his home district.
4. The Appellant seized on the phrase ‘no information’ to suggest that there was an absence of evidence before the Authority. The Appellant submitted that this was an issue central to the Appellant’s claims for protection and a matter in relation to which the Appellant was likely to be able to provide relevant information. Accordingly, an inference could be drawn that the Authority should have considered inviting the Appellant to give new information about his personal circumstances in relation to the risk of harm posed at checkpoints and by rogue elements of the SLA.
5. I do not accept this submission. The Authority already had before it the necessary information to determine the Appellant’s claim. The reading of the Authority’s reasons postulated by the Appellant is overly narrow and literal. Taking into account the preceding and subsequent paragraphs, the Authority was not conveying that it did not have the requisite information to determine the issue. To the contrary, it was explaining that it had weighed up all the relevant information and the chance of any interaction with a rogue member of the SLA, and associated risk of harm, was only remote. Put simply, this was not a situation in which the Authority’s reasoning was solely predicated on the absence of information.
6. I also note that the Appellant did not identify with any precision what new information the Authority should have invited the Appellant to provide, other than information already available to it. That being so, I am not persuaded that the failure to invite, or consider inviting, the Appellant to give new information should be regarded as legally unreasonable, in the sense of lacking in rational foundation.

# Ground Three

## Appellant’s submissions

1. By ground 3 the Appellant submitted that the Authority failed to form the ‘state of satisfaction’ required under s 473DD of the Act in relation to ‘new information’ comprising:
2. submissions that the Appellant would not have access to adequate mental health services on return to Sri Lanka; and
3. an academic article authored by Richard Johnson and Mark Morgan, regarding how police officers develop suspicions about citizens and how those suspicions influence their behaviour.
4. According to the Appellant, there was no reference to either the submissions or academic article in the Authority’s consideration of the materials before it. In circumstances where the Authority’s reasons otherwise included a detailed and comprehensive consideration of the other ‘new information’ provided to it, the Appellant submitted that this indicated that the Authority did not make the ‘evaluative judgment’ required under s 473DD of the Act.
5. The central issue was thus whether the Authority had failed to make any reference to the ‘new information’ provided by the Appellant, in the context of an otherwise detailed consideration of the ‘new information’ available to it, thereby supporting an inference that the Authority failed to discharge its function according to law: ***BYA17*** *v Minister for Immigration and Border Protection* (2019) 269 FCR 94; [2019] FCAFC 44 at [55] (Rares, Perry and Charlesworth JJ). That function was to form a ‘state of satisfaction’ under s 473DD in respect of the new information and, if satisfied that there were exceptional circumstances, to consider that information.
6. The Appellant further submitted, in accordance with the principle in *EEM17 v Minister for Immigration and Border Protection* (2018) 265 FCR 527; [2018] FCAFC 180 at [44]-[45] (Barker, Griffiths and Moshinsky JJ) that even if the Authority did consider the new information, it failed to do so in the context of considering whether the conditions in s 473DD of the Act were satisfied. It followed that such a failure was a material error which meant the Authority’s decision was affected by jurisdictional error.

## Relevant principles

1. Under s 473DD of the Act, the Authority may consider new information if it reaches the prescribed state of satisfaction identified in subsections (a) and (b).

**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. The expression “new information” is defined in s 473DC of the Act as being any document or information that was not before the Minister when the Minister made the decision under section 65 and which the Authority considers may be relevant. As has been frequently observed, the phrase “exceptional circumstances” takes its ordinary, broad meaning: *Plaintiff M174/2016* at [30]. However, precisely what will amount to exceptional circumstances is ‘inherently incapable of exhaustive definition’: *Plaintiff M174/2016* at [30].
2. Given that the precondition for the consideration of new information is being ‘satisfied’ of the prescribed matters in subsections (a) and (b), it is clear that the Authority is required to form a ‘state of satisfaction’ and make an ‘evaluative judgment’ about whether to consider the new information: *DYS16 v Minister for Immigration and Border Protection* (2018) 260 FCR 260; [2018] FCAFC 33 at [17] (Tracey, Murphy and Kerr JJ). That is a question over which reasonable minds might differ: *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409; [2019] FCA 1681 at [67] (Derrington J) and in relation to which the Court must exercise a principled restraint in its function of judicial review: *AAL19 v Minister for Home Affairs* [2020] FCAFC 114 at [46], [49] (Logan, Markovic and Anastassiou JJ).

## Consideration

1. Before considering the Appellant’s claims for protection, the Authority set out the information available to it for consideration. I have extracted the Authority’s reasons in this respect to properly contextualise my reasons in the subsequent paragraphs.

**Information before the IAA**

4. I have had regard to the material referred by the Secretary under s.473CB of the Migration Act 1958 (the Act).

5. The applicant provided a submission to the IAA on 9 December 2016. To the extent that this submission refers to information before the delegate, I am satisfied that it is not new information.

6. The submission makes a new claim that the applicant suffers from post-traumatic stress disorder (PTSD) and that his physical symptoms (anxiety, tension, hyperventilating and shaking) would be noted at any interview with the authorities in Sri Lanka. This would cause the authorities to become suspicious of the applicant’s political opinions and motivations. Although the evidence of PTSD was before the delegate, the claim in relation to how the applicant’s symptoms might be perceived was not raised in the SHEV application or at the interview with the delegate on 25 August 2016 (the interview). It is not in the referred materials and I am satisfied that it is new information. The claim refers to a psychiatric report dated 26 September 2016 that documents the symptoms referred to above. This report was not obtained until after the interview but was provided to the delegate under cover of an email on 4 October 2016. This email does not make any submission in relation to these symptoms. There is nothing in the referred material that indicates the applicant or his lawyers made any further comment or submissions in relation to this report or his observed symptoms, until the decision was handed down on 15 November 2016. I have considered all of these factors and I am not satisfied that there are exceptional circumstances to justify considering this new information.

7. The submission also attaches the following documents:

* The psychiatric report and attachments referred to above and a media report dated 22 August 2011. These reports were provided to the delegate and are not new information.
* A media report dated 12 June 2007, a report of the United Nations Economic and Social Council dated 9 December 2010 and an article on mental health in Sri Lanka published in 2012. None of this information are in the referred material and I am satisfied that it is new information. The documents pre-date the interview and the applicant has not referred to any reason why they were not provided to the delegate. I am not satisfied that these documents could not have been provided before the decision was made and I am not satisfied that there are exceptional circumstances to justify considering this information

8. The submission also refers to and attaches two previous and unrelated IAA decisions that were not before the delegate and are new information. The submission invites the IAA to draw similar inferences as those said to be drawn in these decision. These AAT decisions are not in the referred material in this present matter and the applicant did not raise them with the delegate at the interview or provide them with his post-interview submissions. I am not satisfied that there are exceptional circumstances to consider the new information.

9. The delegate considered the Department of Foreign Affairs and Trade (DFAT) country information report dated 18 December 2015.1 On 24 January 2017, DFAT released an updated version of the country information report.2 This was not before the delegate at the time of the decision and is new information. I consider DFAT to be an authoritative source of country information and as its January 2017 report supplements the December 2015 report I am satisfied that there are exceptional circumstances to justify considering this new information.

10. I have considered s.473DE which provides that the IAA must give the applicant particulars of any new information if that new information would be the reason, or part of the reason, for affirming the decision. However, this requirement does not apply to information that is not about the applicant specifically and is just about a class of persons of which the applicant is a member. From the 2017 report I have obtained new information regarding Sri Lankan citizens who are returning as returned asylum seekers and/or those who departed Sri Lanka illegally. This information is not specifically about the applicant and is just about a class of persons of which the applicant is, or looking forward should he return to Sri Lanka, will be, a member. I also note that the information relating to the treatment of returned asylum seekers in the 2017 report is substantially the same as the information that was in the 2015 report.

1. It is plain from these paragraphs that the Authority had regard to the Appellant’s submissions regarding the adequacy of mental health services and the potential for the authorities to be suspicious of the Appellant. At paragraph 5 of its reasons, the Authority referred to the submissions generally and noted, to the extent those submissions referred to information before the delegate, it was not new information. The delegate already had information before it about the Appellant’s access to mental health care and was correct to determine that this was not new information.
2. Further, at paragraph 6 of its reasons, the Authority accepted that the Appellant provided new information indicating that his PTSD symptoms (anxiety, tension, hyperventilating and shaking) would be noted in an interview with the authorities in Sri Lanka, potentially prompting them to be suspicious of his political opinions and motivations. The Authority then proceeded to determine that there were no exceptional circumstances for considering this new information, as it was entitled to do under the statutory regime. By this process, I am satisfied that the Authority reached the required ‘state of satisfaction’, ultimately concluding that there were no exceptional circumstances to justify considering the new information.
3. This ground of appeal ultimately turns upon a proper characterisation of paragraphs 5 to 7 of the Authority’s reasons. I cannot see how, on a proper reading of those reasons, it could be said that there was no reference to the ‘new information’. It may be that the Authority only referred to the submissions about access to mental health services in a general way, and did not expressly refer to the academic article, but it was not required to. The Authority discharged its statutory function by considering the substance of the new information and in turn making an evaluative judgment that ‘exceptional circumstances’ did not exist to justify further action.
4. The First Respondent submitted that even if the Court was satisfied that the Authority erred by failing to consider the new information, such an error was not ‘material’. I do not consider it necessary to decide this issue, as I am persuaded that the Authority reached the prescribed ‘state of satisfaction’. However, I note for completeness that if the Authority had failed to consider the new information, then such an error may not be material, insofar as it did not deprive the Appellant of the ‘possibility of a successful outcome’. In any event, this ground of appeal is dismissed on the basis that the Authority discharged its statutory function and there is no need to consider the issue of materiality any further.

# disposition

1. For these reasons, the Appellant has not established any error by the primary judge in respect of any of the grounds of appeal. Accordingly, the appeal must be dismissed with costs.

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| I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anastassiou. |

Associate:

Dated: 28 September 2020