FEDERAL COURT OF AUSTRALIA

AQK17 v Minister for Immigration and Border Protection [2019] FCA 1176

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| Appeal from: | *AQK17 v Minister for Immigration & Anor* [2018] FCCA 3584 |
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| File number: |  |
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| Judge: | **ABRAHAM J** |
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| Date of judgment: | 31 July 2019 |
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| Catchwords: | **MIGRATION** – where Authority affirms decision of the Minister to refuse a safe haven enterprise visa – where Federal Circuit Court upholds that decision – where leave sought to amend notice of appeal to include additional grounds of appeal – leave to rely on new grounds refused – appeal dismissed  **PRACTICE AND PROCEDURE** – new arguments raised on appeal – need for leave – arguments without merit – leave refused |
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| Legislation: | *Migration Act 1958* (Cth) ss 5H(1), 36(2)(a), 36(2)(aa), 473DC, Pt 7AA |
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| Cases cited: | *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30;(2001) 206 CLR 323  *Kalala v Minister for Immigration and Multicultural Affairs* [2001] FCA 1594; (2001) 114 FCR 212  *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437  *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600  *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220  *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707; (2005) 148 FCR 446  *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588  *BRQ18 v Minister for Home Affairs* [2019] FCA 319  *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123  *Singh v Minister for Home Affairs* [2019] FCAFC 3  *DYD16 v Minister for Immigration and Border Protection* [2019] FCA 828  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259  *CSO15 v Minister for Immigration* *and Border Protection* [2018] FCAFC 14; (2018) 353 ALR 666  *DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12; (2018) 258 FCR 551  *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210; (2017) 253 FCR 475 |
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| Date of hearing: | 30 May 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 56 |
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| Counsel for the Appellant: | The Appellant appeared in person with the assistance of an interpreter |
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| Counsel for the First Respondent: | Mr M P Cleary |
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| Solicitor for the First Respondent: | Mills Oakley Lawyers |
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| Solicitor for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | NSD 12 of 2019 |
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| BETWEEN: | AQK17  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | ABRAHAM J |
| DATE OF ORDER: | 31 July 2019 |

THE COURT ORDERS THAT:

1. Leave to amend the notice of appeal is refused.
2. The appeal is dismissed.
3. The appellant to pay the costs of the first respondent to be agreed or taxed.

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

REASONS FOR JUDGMENT

ABRAHAM J:

1. The appellant is a citizen of Sri Lanka who arrived in Australia on 3 November 2012. The appellant applied for a Safe Haven Enterprise Visa (SHEV) which was received by the Minister’s department on 17 February 2016. On 22 September 2016, the Minister’s delegate refused the application. On 19 January 2017, the Immigration Assessment Authority (the Authority) affirmed the decision of the Minister’s delegate to refuse the grant of a SHEV to the appellant.
2. This is an appeal from an order made by the Federal Circuit Court of Australia on 21 December 2018 dismissing an application for judicial review of that decision of the Authority.
3. The appellant was represented in the Federal Circuit Court, but appears in this Court unrepresented with the assistance of an interpreter.
4. The appellant appears to have had some assistance in drafting the notice of appeal dated 7 January 2019, which identifies three grounds, which are as follows:
5. The primary judge erred in failing to find that the Authority committed jurisdictional error because it overlooked considering matters in the reasonably foreseeable future when assessing the appellant’s claim. The appellant cites *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30;(2001) 206 CLR 323 at [69] and *Kalala v Minister for Immigration and Multicultural Affairs* [2001] FCA 1594; (2001) 114 FCR 212 at [23] in support of this ground as examples of cases where the decision maker overlooked an issue which amounted to jurisdictional error.
6. It was legally unreasonable for the Authority not to exercise its powers under s 473DC(3) of the *Migration Act 1958* (Cth) (Migration Act) to invite the appellant to comment on adverse findings made in relation to his claim, relying on *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1;(2014) 231 FCR 437 at 447 and *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600 in support of this ground.
7. The Authority failed to take into account the possibility that the appellant’s claims concerning past events were true, relying on *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220 in support of this ground.
8. In addition, the appellant filed an interlocutory application (dated 14 May 2019) which seeks leave to add two additional grounds of appeal. On 15 May 2019, I granted leave to file the application and directed that it be heard at the same time as the hearing of the appeal. The proposed additional grounds are as follows:
9. The Authority’s decision was legally unreasonable because of the changed circumstances in Sri Lanka as a result of the recent terrorist bombings, relying on *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707; (2005) 148 FCR 446.
10. The Authority’s decision was legally unreasonable because of the changed circumstances in Sri Lanka, relying on a new report of UN Rapporteur Ben Emmerson QC dated 23 July 2018.
11. Before addressing the interlocutory application and the appeal grounds it is necessary to outline the background to the applications, and the reasons of the Authority and the Federal Circuit Court.

**The Authority**

1. The primary judge in the Federal Circuit Court accurately summarised the appellant’s claims, which he drew from the submissions of the parties, as follows:

6. The applicant outlined his written claims in his statutory declaration attached to his SHEV application and attended a SHEV interview before the delegate on 19 July 2016. His representative also provided a submission on 29 July 2016 (the post-interview submission).

7. In his statutory declaration, the applicant claimed that from 1999 until 2006 he worked for the Pesalai Fishermen Co-op Society (the Co-op Society) supplying fuel and fishing needs to fishermen. He stated that between 2002 and 2005 during the civil war ceasefire, the Liberation Tigers of Tamil Eelam (LTTE) bought and took fuel from the Co-op Society. He also claimed that fishermen sold fuel to the LTTE to make money and the Criminal Investigation Department (CID) came to the office of the Co-op Society and told them to stop giving fuel and other assistance to LTTE members. The applicant claimed the Sri Lankan Army (SLA) suspected him of financially supporting the LTTE and supplying them with fuel.

8. The applicant also claimed that in 2006, an army officer was killed outside his shop and he was arrested along with 20 to 30 people and held for a day. The next day there was a fight at sea between the Sri Lankan Navy (SNA) and the LTTE which killed many Navy officers and five Co-op Society members. Men in uniform subsequently burnt 40 to 50 boats at the Co-op Society and a local Catholic church was bombed and members of the congregation had shots fired at them.

9. The applicant made additional claims. In 2007, his cousin disappeared and was later found dead. In 2008, four of his friends were abducted and never found and his friend in the LTTE also passed away. The applicant also claimed the military came looking for him as they suspected him of “some kind” of involvement.

10. Further, in 2010, the applicant’s friend, who shared the same name as the applicant, was mistakenly arrested instead of the applicant and detained for one year. In 2012, the applicant’s business partner was arrested, physically and sexually abused, tortured and following his release was required to report monthly to the authorities and report on the applicant’s whereabouts. The applicant claimed to fear harm from the SLA as they believed he had connections with the LTTE.

11. At his SHEV interview, the applicant claimed that in 2006, he fled to India with his family where he remained until 2010. He also claimed that he had campaigned on behalf of the Tamil National Alliance (TNA) during the 2010 and 2012 elections, which included doorknocking.

12. In his submission to the Authority, the applicant further claimed that in 2003, he participated in a demonstration organised by the Co-op Society on behalf of the LTTE that was filmed.

1. The appellant submitted new information before the Authority, but as it does not form a ground of appeal it is sufficient to note the Authority was not satisfied that exceptional circumstances had been established such as to enable it to consider the information.
2. The Authority made a number of findings.
3. The Authority accepted that the appellant was a Sri Lankan citizen; was born in Pesalai, Mannar District in the Northern Province; and was a Tamil and a Roman Catholic. It accepted that: he spent time in India as a refugee and returned voluntarily to Sri Lanka in 2010; he worked as a sales manager for the Co-Op Society from 1999-2006 and supplied fuel to local fishermen; the LTTE bought and took fuel from the Co­Op Society during the ceasefire between 2002 and 2005; fishermen sold fuel on the black market to the LTTE; and the CID came to the Co-Op Society and told them to stop giving fuel and assistance to the LTTE.
4. However, the Authority did not accept the claim that the CID looked for him a number of times but he escaped because, although he had later claimed he was arrested and detained for one day because an army officer was killed outside his shop, he did not claim that it was in relation to (or that he was questioned about) his role at the Co­Op Society. It did not accept that during this period the CID suspected him of providing financial assistance or fuel to the LTTE or were looking for him for any of the reasons he claimed.
5. The Authority accepted that the appellant was arrested with others in 2006 after an army officer was killed outside his shop, but did not accept this was related to the fact that he previously sold fuel to the LTTE. Despite claiming at the entry interview that he escaped after being arrested, the Authority did not accept this claim given his evidence that he returned to his workplace the next day and did not repeat the claim in his SHEV application or at the interview. The Authority was satisfied that he was released after one day of detention. It was not satisfied he was of any further interest to the authorities or that he faced a real chance of harm because of this incident.
6. The Authority accepted as plausible the appellant’s evidence that the day after his arrest there was a sea battle between the SNA and the LTTE and the SNA subsequently took an adverse interest in the Co-Op Society and its employees, including the appellant, as they were known to have provided fuel to the LTTE during the ceasefire. It accepted that the appellant fled to India in July 2006 as he feared being implicated in these events and that he returned to Sri Lanka with his family in May 2010. The Authority accepted that during 2010 to 2012, he participated in campaigns and doorknocking for the TNA. However, the Authority found this claim and his claim to have been involved in coaching a local football team from 2010 to 2011 were implausible and inconsistent with his claim to have been in hiding in a church compound between 2010 and 2012. The Authority did not accept his explanation for the inconsistency and rejected his claim that he was in hiding between 2010 and 2012. It did accept that the appellant might have been questioned by the authorities on his return from India however, was not satisfied that he was of any further adverse interest to the authorities due to his former role at the Co-Op Society or for any perceived link to the LTTE. It also did not accept his claim that his friend who had the same name was mistakenly arrested in his place in 2010.
7. While the Authority accepted his cousin was killed in 2007 and four friends disappeared after being abducted in 2008, it was not satisfied these incidents were related in any way to the appellant and did not accept that he faced a real chance of harm for these reasons. It also accepted his claim that one of his friends was in the LTTE but died in 2008, but did not accept he faced a real chance of harm for this reason. The Authority also did not accept he faced a real chance of harm as a Roman Catholic Christian.
8. The Authority accepted the appellant would be identified as a failed asylum seeker from Australia on his return and would be subject to investigative processes and questioning at the airport, however it was not satisfied he would be arrested on his return for any reason because it had found he was of no adverse interest for any reason to the authorities after he returned in 2010 and when he left in 2012. It was not satisfied the appellant would be viewed as an LTTE member/sympathiser/supporter for having sought asylum abroad and/or as a result of his Tamil ethnicity. Given its findings, the Authority was not satisfied the appellant faced a real chance of harm whilst being questioned by the authorities on his return and did not accept that such questioning constituted serious harm.
9. Considering the claims cumulatively, the Authority concluded the appellant did not meet the definition of refugee in s 5H(1) or the criterion in s 36(2)(a) and s 36(2)(aa) of the Migration Act.

**The Federal Circuit Court**

1. The appellant sought judicial review of the decision of the Authority in the Federal Circuit Court and relied upon two grounds: *first* that the Authority failed to consider the reasonably foreseeable future when assessing the appellant’s claim; and *second*, that the Authority was unreasonable in failing to exercise its power under s 473DC of the Migration Act.
2. Those two grounds reflect grounds 1 and 2 in the original notice of appeal filed in this Court. The reasoning of the primary judge is referred to below in discussing the grounds. Suffice to say at this stage, the primary judge rejected both grounds.

**Interlocutory application**

1. The Minister opposed leave being granted on either ground on the basis that they both lacked merit. The Minister contends that the appellant’s argument in relation to these grounds is misconceived and misunderstands the nature of a Pt 7AA review by the Authority and the judicial review of that decision by the primary judge under the Migration Act. The Minister is correct.
2. The relevant principles for the grant of leave are well established and are summarised in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588 at [46]–[48] where the Full Court said:

In our view, the application for leave to rely upon the sole ground of appeal now raised should be refused. Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O’Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 at [20]-[24] and [38].

In *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

1. It is also important to note the limited role of the Federal Circuit Court, and this Court on appeal: see the summary in *BRQ18 v Minister for Home Affairs* [2019] FCA 319 at [15]-[17]. The Federal Circuit Court could only have disturbed the decision of the Authority under review if that decision was infected by jurisdictional error: *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123 at [13] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. This Court’s appellate function is to ascertain whether there is an error in the decision of the Federal Circuit Court.
2. Against that background I turn to consider the proposed grounds.
3. *In the proposed additional ground 1*, the appellant asserts that the Authority’s decision is legally unreasonable because of the changed circumstances in Sri Lanka as a result of the recent terrorist bombings. The only information before the Court about the bombings is in an affidavit affirmed by the appellant, in which he asserts that because of the deteriorating circumstances in Sri Lanka, the authorities will be totally engaged in “the operation against Islamic subversive elements” and it is unrealistic to believe they will be able to protect him.
4. The test for unreasonableness focuses on the decision maker, as the Full Court recently summarised in *Singh v Minister for Home Affairs* [2019] FCAFC 3 at [61] as follows:

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

1. Given the jurisdiction of this Court on appeal and the grounds of appeal, the recent events in Sri Lanka are not relevant to whether there was any error in the decisions of the Federal Circuit Court or the Authority: e.g. *DYD16 v Minister for Immigration and Border Protection* [2019] FCA 828 at [29]-[32].
2. The appellant’s reliance on *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707; (2005) 148 FCR 446 (*RBA*) at [457]-[459] is misplaced. As the respondent correctly contends, that case is distinguishable from this one. In that case, the Court affirmed that in cases where it is argued that the decision maker lacked jurisdiction because its jurisdiction depended on the existence of facts which did not exist, or where the decision maker based the decision on a finding of a particular fact that does not exist, then a party might be entitled to lead new evidence, and that the same principle applied to cases in which *Wednesbury* unreasonableness is alleged and a party seeking to affirm the decision impugned on that basis wishes to rely on expert evidence to show that the decision was reasonable: *RBA* at [457]-[458]. That is not this case.
3. Rather, this ground is an attempt to have this Court conduct a merits review of the Authority’s decision: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ, by taking into account this additional information.
4. *In the proposed additional ground 2,* the argument is in essence the same, except reliance is placed upon a report of Ben Emmerson QC dated 23 July 2018, which was not before the Authority or the primary judge. This is described as a form of new information relating to the country information.
5. This ground suffers from the same flaw as the first ground, with the only difference being that this document existed before the hearing in the Federal Circuit Court but it was not relied on in that Court. The reasons referred to above apply equally to this ground. The ground has no merit.
6. Leave to amend the notice of appeal to add the two proposed grounds is refused.

**Consideration**

**Ground 1: whether the Authority overlooked considering matters into the reasonably foreseeable future**

1. This ground, as is apparent from the particulars, relates to an allegation that the Authority failed to make the forward looking assessment of the risk of future harm if the appellant were to return to Sri Lanka.
2. As the primary judge observed, when assessing whether the appellant has a well-founded fear of persecution the Authority must clearly engage in a prospective assessment of the appellant’s risk of harm should he return to his country of nationality. The decision maker is required “to engage in a predictive and therefore somewhat speculative task about what is likely to happen to a person in the reasonably foreseeable future on return to her or his country of nationality”: *CSO15 v Minister for Immigration and Border Protection* [2018] FCAFC 14; (2018) 353 ALR 666 at [23].
3. Contrary to what is alleged in the appeal ground, it is unnecessary for the decision maker to specifically refer to the reasonably foreseeable future.
4. As the primary judge correctly concluded, the Authority, by its language and expression in a number of places in its reasons, makes clear it engaged in that prospective assessment. One example of this, which is referred to by the primary judge, is that the Authority was not satisfied the appellant “faces” or “will face” a real chance of harm for the reasons he advances.
5. The reasons of the Authority reflect that it complied with what was required to determine whether the appellant had a well-founded fear of persecution under the Migration Act.
6. The appellant’s reference to *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30;(2001) 206 CLR 323 (*Yusuf*) at [69] and *Kalala v Minister for Immigration and Multicultural Affairs* [2001] FCA 1594; (2001) 114 FCR 212 (*Kalala*) at [23] in support of this ground, does not assist him. Those decisions are examples of cases where the Court considered whether a decision maker had overlooked a relevant issue, and if so, whether that constituted jurisdictional error.
7. The question in *Yusuf* was whether the tribunal was obliged, under s 430 of the Migration Act, to make findings on material questions of fact and, if so obliged, whether a failure to make such findings was a ground for review. In the paragraph referred to by the appellant, the Court found that it was not necessary to read s 430 as implying an obligation on the tribunal to *make* findings, but rather that the provision required the tribunal to set out what were its findings on the questions of fact it considered to be material. The Court acknowledged that these reasons may reveal some basis for judicial review, for example, that it took into account an irrelevant consideration, or failed to consider a relevant consideration. It considered that the provision entitles a Court to infer that any material not mentioned in the s 430 statement was not considered to be material: *Yusuf* at [69] per McHugh, Gummow and Hayne JJ.
8. The Court in *Kalala* applied *Yusuf* in finding that the tribunal in that case failed to deal with an important aspect of the case as it was required to do. In making reference to *Yusuf* at [69] the Court concluded that “if the Tribunal member had really examined whether there was a real and substantial risk that the events recited in the article had occurred, one would have expected to see reference to such examination”: *Kalala* at [23] per North and Madgwick JJ.
9. That is not an issue in this case. As noted above, the Authority by its language and expression in a number of places in its reasons, makes clear that it engaged in the prospective assessment required under the Migration Act.
10. This ground is not established.

**Ground 2: whether the Authority unreasonably failed to exercise its power under s 473DC of the Migration Act**

1. This ground alleges that the error arose because the Authority did not exercise its power under s 473DC(3) to put potential inconsistencies in the appellant’s evidence to him for comment before making its decision. The particulars to the ground make it clear that this relates to a finding as to whether the CID had accused the appellant of supplying fuel to the LTTE during his time working at the Pesalai Fishermen Co-op Society, prior to his departure to India.
2. The primary judge properly considered what was said by the delegate and the Authority on this topic before concluding that the Authority took a “somewhat different view” of those circumstances. However, as the primary judge observed, while there was a difference in the findings between the delegate and the Authority in relation to one particular aspect of the appellant’s claim regarding the circumstances leading to his departure for India, both decision makers rejected the appellant’s claims to have had continuing issues with the CID and Sri Lankan authorities. Both also were not satisfied the appellant faced a real chance of harm for any of the reasons he advanced. His Honour concluded that the Authority’s reasoning did not materially depart from that of the delegate.
3. The primary judge correctly found that there was no unreasonable failure on the part of the Authority to exercise its powers under s 473DC(3).
4. Moreover, as the primary judge observed, Pt 7AA contemplates that the Authority will evaluate for itself the material considered by the delegate. The statutory regime does not require the Authority to notify the referred applicant that it is considering taking a different view, or a view adverse to the referred applicant, of the material considered by the delegate.
5. As was said in *DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12; (2018) 258 FCR 551 at [72], [75], [76]:

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.

There is no requirement in Pt 7AA, equivalent to s 425, which provides that the Tribunal must invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. Indeed, as we have noted, by s 473DB, subject to Pt 7AA, the Authority must review the fast track reviewable decision by considering the review material provided to it without accepting or requesting new information and without interviewing the referred applicant.

It was open to the Authority to disagree with the delegate’s evaluation of the material without providing to the appellant an opportunity to respond.

1. It follows that the Authority was not required to inform the appellant of any reservation it had or to provide him with an opportunity to respond. As the primary judge correctly concluded, this case is distinguishable from *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210; (2017) 253 FCR 475. In that case, the Authority made its decision based on relocation in circumstances where the delegate had not made the decision on that basis. As such, the Authority knew that it did not have, but the applicant for the visa was likely to have, information on his particular circumstances and the impact of relocation on him. In those circumstances, the failure of the Authority to consider exercising its discretionary power under s 473DC to get information from the applicant on the issue of relocation was legally unreasonable. These circumstances do not arise here. As set out in paragraph [42], the Authority’s reasons did not materially depart from the delegate’s reasons sufficient to warrant consideration of the exercise of the powers under s 473DC.
2. The passage in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1;(2014) 231 FCR 437 at 447 relied on by the appellant, is consistent with the authorities referred to above. In that case, the Court makes clear that in assessing legal unreasonableness, regard must be had to the scope, subject and purpose of the particular statutory provisions in issue, and that the relevant tribunal must act in accordance with those provisions. As the cases referred to above demonstrate, there are situations in which a failure to exercise the power under s 473DC(3) could amount to legal unreasonableness. However, this is not one of those cases.
3. Finally, the appellant’s reliance on *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 353 ALR 600(*Plaintiff M174*) is misplaced. In *Plaintiff M174* the Court considered legal unreasonableness in the context of a failure by the Minister or delegate to comply with s 57(2) of the Migration Act (which requires that the applicant be provided particulars of relevant information and invited to comment on it) and observed at [71] per Gageler, Keane and Nettle JJ:

Non-compliance by the Minister or delegate with s 57(2) of the Act would have the potential to impact on the validity of the Authority’s decision were relevant information obtained without compliance with s 57(2) included in review material given to the Authority and then taken into consideration by the Authority without the Authority first inviting the referred applicant to respond to that relevant information.

[J]urisdictional error would potentially lie either in non-compliance on the part of the Authority with the duty imposed by s 473DE(1) (in a case where the relevant information was not before the Minister or delegate at the time of making the decision under review and is therefore capable of being new information) or, in the absence of good reason for not doing so, in an unreasonable failure to exercise the power conferred by s 473DC(3) (in a case where the relevant information was before the Minister or delegate at the time of making the decision under review and is therefore incapable of being new information).

1. The circumstances described by the Court in *Plaintiff M174* do not exist in this case. While the Court in *Plaintiff M174* accepted that legal unreasonableness might arise where the Authority failed to exercise the power under s 473DC(3), it concluded that in that case the Authority’s choice not to exercise its power under s 473DC(3) was open to it, and justified by the reasons it gave: *Plaintiff M174* at [74]-[75] per Gageler, Keane and Nettle JJ.
2. In the circumstances of this case it was not unreasonable for the Authority not to consider exercising its power under s 473DC(3).
3. This ground has not been established.

**Ground 3: failure to take into account the possibility that the appellant’s claims were true**

1. The particulars to this ground assert the same arguments as in ground 1. The primary judge correctly found that the Authority had complied with what the High Court required of decision makers when determining whether an applicant had a well-founded fear of persecution under the Migration Act, as set out in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 278 - 279 per Brennan CJ, Toohey, McHugh and Gummow JJ. For the reasons given for dismissing ground 1, this ground also is not established.
2. In addition the appellant relies on *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220. The findings in that case were premised on the presence of doubt on the part of the Tribunal (here the Authority) as to its conclusions. Sackville J, with whom North J agreed, stated at [62]:

In this context, it is not always possible for the decision-maker to be satisfied as to whether alleged past events have occurred with certainty or even confidence. When the RRT is uncertain as to whether an alleged event occurred, or finds that, although the probabilities are against it, the event might have occurred, it may be necessary to take into account the possibility that the event took place in considering the ultimate question. Depending on the significance of the alleged event to the ultimate question, a failure to consider the possibility that it occurred might constitute a failure to undertake the required reasonable speculation in deciding whether there is a “real substantial basis” for the applicant’s claimed fear of persecution. Similarly, if the non-occurrence of an event is important to an applicant’s case (for example, the withdrawal of a threat to the applicant) the possibility that the event did not occur may need to be considered by the decision-maker even though the latter considers the disputed event probably did occur.

1. In this case the Authority did not express any doubts as to its conclusion. To the contrary, the Authority rejected the claims. It was not required to take into account the possibility that the appellant’s claims concerning past events were true.
2. This ground is not established.

**Conclusion**

1. Leave to amend the notice of appeal to add two additional grounds is refused. As the grounds of appeal have not been established the appeal is dismissed.

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| I certify that the preceding fifty-six (56) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Abraham. |

Associate:

Dated: 31 July 2019