IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M140 of 2019

BETWEEN:

ABT17
Appellant

and

HIGH COURT OF AUSTRALIA
FILED
10 JAN 2020
THE REGISTRY MELBOURNE

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II ISSUES

2. **Appeal ground 1** raises one issue: whether the failure by the Second Respondent (**IAA**) to interview the Appellant using the power in s 473DC of the *Migration Act 1958* (Cth) (**Act**) so as to enable the IAA to make its own observations of his demeanour and scarring before departing from the delegate's favourable findings of fact was legally unreasonable: see Appellant's submissions (**AS**) [2]-[3]. The First Respondent (**Minister**) contends that the answer to that question is "no".

   2.1. The primary obligation on the IAA under Pt 7AA is to conduct a review on the papers, such that the IAA will rarely be required to exercise its power under s 473DC(3) to conduct an interview.

   2.2. Here, nothing displaces the ordinary position contemplated by Pt 7AA. In particular, there is nothing in the delegate's reasons to suggest that demeanour (or observations of the Appellant) formed an important part of the delegate's decision. Indeed, the delegate did not refer to the Appellant's demeanour at all, and Bromberg J held only that the delegate's favourable findings "may have been, at least in part" based on demeanour. That bare possibility – which would exist in almost every case – is not sufficient to render it legally unreasonable for

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the IAA to depart from factual findings made by the delegate without first conducting an interview (if in fact the IAA had power under s 473DC to conduct an interview simply in order to observe the Appellant's demeanour).

3. Although appeal ground 1 requires consideration of the purposes of s 473DC, it is not helpful to pose as a discrete question whether s 473DC should be interpreted with regard to the principles of procedural fairness: contra AS [4]. The Appellant's arguments on this point invert the true effect of s 473DA of the Act.

4. **Appeal ground 2** raises two issues: whether materiality is a necessary element in establishing jurisdictional error based on legal unreasonableness; and, if so, whether any unreasonableness in this case by the IAA was material: AS [5]-[6]. The Minister contends that materiality is a necessary element in establishing jurisdictional error based on unreasonableness, and that the alleged unreasonableness in this case would not have been material even if established, because the IAA's findings based on country information provided an independent and separate basis for the decision (like the equivalent findings of the delegate, who found against the Appellant on this basis even though she accepted the evidence that underlies appeal ground 1). Bromberg J was correct to so hold.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

5. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV MATERIAL FACTS

6. The Minister accepts the facts as set out by the Appellant (AS [9]-[16]), but highlights two matters.

7. **Delegate's findings did not depend to any significant extent on an assessment of the Appellant's demeanour:** First, nothing in the delegate's reasons supports an inference that the delegate's acceptance of the Appellant's claims as "plausible" depended to any significant extent on the Appellant's demeanour, or on any visual evidence not available to the IAA (such as scars). The delegate summarised the Appellant's claims in writing and at the interview: Appellant's Book of Further Materials (**AFM**) 5. That summary included the claim that in May 2011 the Applicant physically defended his sister from a man who came to the Appellant's home looking for him; that the following morning the Appellant was taken into detention for six days

and beaten; and that the Appellant's brother secured the Appellant's release by paying a bribe. While the delegate accepted that the Appellant's evidence at the interview "was plausible", and "was also broadly consistent with country information concerning Sri Lanka", she did not make any specific findings about the claimed sexual torture during the May 2011 detention, let alone finding that she accepted that claim because of the Applicant's demeanour when giving evidence: **AFM 6**.

8. The delegate did not need to be more specific in her findings, as she based her decision on an independent ground, being country information that supported her finding that "[g]iven the improved situation in the north of the country and noting that the [Appellant] has not claimed to have actual links to the LTTE", there was only a remote chance of the Appellant being persecuted for being a Tamil from the north of Sri Lanka: **AFM 10**.

9. **IAA gave multiple reasons for rejecting May 2011 claim:** Second, the IAA gave multiple reasons for rejecting the Appellant's claims, including, in particular, his claims relating to his claimed May 2011 detention.

10. The IAA accepted as plausible that the Appellant had experienced regular, low-level harassment from the Army, and that as a "young male returnee from an IDP camp" he may have been viewed with a certain amount of suspicion from the Army.[1] However, the Appellant's evidence was that, although he lived in an LTTE-controlled area, he had no direct dealings with the LTTE, did not support them and nor did any other member of his family, his friends or his neighbours: IAA [20], **CAB 9**. In those circumstances, the IAA did not accept that the Army targeted the Appellant for harm, or that he was beaten every 3 or 4 months as he claimed: IAA [21]-[22], **CAB 9-10**.

11. The IAA then stated "[e]ven if I were to accept that there was such an incident in May 2011", it did not accept that the Appellant was detained for six days or that during this time he was sexually tortured: IAA [23] (emphasis added), **CAB 10**. It so found because:

    11.1. Given the Appellant's family's willingness to take action to secure the brother's release, the IAA did not find it plausible that the family would not have taken

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1 IAA [19]-[20], Core Appeal Book (**CAB**) 9.

some action to secure the Appellant's release, such as lodging a court case or complaining to police: IAA [23], **CAB 10**.

11.2. The IAA accepted that it was difficult for the Appellant to talk about traumatic events. However, despite sympathetic questioning by the delegate, the Appellant stated that he was unable to talk about the claimed sexual torture or to provide any details beyond saying there were 2 to 3 men and that he was unconscious for a lot of the time. The claim was therefore vague and lacking in detail (IAA [10], [23], **CAB 7, 10**), and was given for the first time in his TPV interview, being the same interview in which he had earlier claimed for the first time to have been tortured (but without mentioning sexual torture): IAA [15]-[16], **CAB 8**.

11.3. Further, the IAA specifically found the Appellant's explanation for why he did not seek medical treatment afterwards (because the Army would be there and would take him back and beat him up) unconvincing: IAA [23], **CAB 10**.

12. Accordingly, the IAA gave multiple reasons for rejecting the Appellant's claims about having been detained and sexually assaulted. Specifically, it is plain from IAA [23] that the IAA had already rejected the claim that the Appellant had been detained in May 2011 on a more general basis, before making the specific findings about the claimed sexual assault which are the focus of the Appellant's arguments.

13. *IAA also relied on country information:* The IAA found that Tamils who lived in LTTE-controlled areas are not, without more, in need of protection: IAA [30], **CAB 12**.

14. The Appellant's evidence was that neither he nor any member of his family was a member of the LTTE or supported the LTTE: IAA [20], **CAB 9**. Although his brother had been detained on suspicion of LTTE involvement, on the Appellant's own account he was not questioned in any detail about his brother's alleged LTTE involvement during the occasions on which he claimed to have been detained. In those circumstances, based on the country information as it related to persons in the same position as the Appellant, the IAA was not satisfied that the Appellant had a profile that would bring him to the attention of the Sri Lankan authorities, or that he would be perceived as an LTTE supporter "on the basis of his ethnicity, the fact he originates from the north of Sri Lanka, or his brother's detention on suspicion of LTTE involvement": IAA [31], **CAB 12**. On that basis, and taking into account "the number

of years that have elapsed since he left, his personal circumstances and the country information referred to", the IAA found it was not satisfied that the Appellant would face a real chance of serious harm on return to Sri Lanka on the basis of his Tamil ethnicity or imputed political opinion: IAA [33], **CAB 13**.

PART V FIRST RESPONDENT'S ARGUMENT

Ground 1: Not unreasonable for the IAA to make different credibility findings without interviewing the Appellant

15. In answer to ground 1, it was not unreasonable in the circumstances of this case for the IAA to make different credibility findings to those made by the delegate without using its powers in s 473DC to interview the Appellant. It should be noted that the unreasonableness asserted by the Appellant is a failure to exercise the s 473DC power (not a failure to consider exercising that power): AS [41]-[42].

16. **Scheme of Pt 7AA:** Section 473DC(1) confers a power on the IAA, in circumstances that satisfy the two conditions in s 473DC(1)(a) and (b), to get "new information", in addition to the information in the review materials provided to the IAA by the Secretary under s 473CB. Parliament has expressly stated that the IAA does not have any duty to exercise that power (s 473DC(2)). The power must, however, be exercised within the bounds of reasonableness.[2]

17. The content of the standard of legal reasonableness is assessed by reference to the terms, scope, purpose and object of the statutory scheme in question.[3] That is not simply a proposition to be recited before going on to make sweeping general claims as to the requirements of legal reasonableness that pay no attention to the statutory scheme: cf AS [22]. Instead, that proposition is critical to evaluating the Appellant's submissions, because the scheme embodied in Pt 7AA reveals that it will rarely be unreasonable for the IAA to fail to exercise the power conferred by s 473DC(3) to conduct an oral hearing, given that the evident intent of Pt 7AA is to provide for merits

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2 See eg *Plaintiff M174/2016 v Minister for Immigration* (2018) 264 CLR 217 (***Plaintiff M174***) at [21], [49] (Gageler, Keane and Nettle JJ), [86], [90] (Gordon J), [97] (Edelman J); *BVD17 v Minister for Immigration* (2019) 93 ALJR 1091 (***BVD17***) at [15], [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

3 *SZVFW* (2018) 92 ALJR 713 at [12] (Kiefel CJ), [59] (Gageler J), [79] (Nettle and Gordon JJ) and [135] (Edelman J); *Li* (2013) 249 CLR 332 at [21] (French CJ), [67] (Hayne, Kiefel and Bell JJ), [90] (Gageler J).

review that is generally conducted on the papers. The Minister highlights four aspects of that scheme.

18. *Review on papers except in limited circumstances:* First, the "primary obligation"[4] of the IAA, which is imposed by s 473DB(1), is to conduct its review on the papers that are referred to it under s 473CB, "without accepting or requesting new information" and "without interviewing the referred applicant". It is in that way that, as s 473BA recites, Pt 7AA provides "a limited form of review", that is intended to be "efficient, quick, free of bias and consistent with Division 3 (conduct of review)".[5] The scheme that Pt 7AA provides is, as s 473BA explains, one under which the IAA "does not hold hearings and is required to review decisions on the papers",[6] save that "in exceptional circumstances ... [it] may consider new material and may invite referred applicants to provide, or comment on, new information at an interview or in writing".

19. Parliament is, of course, not required to provide any form of merits review of decisions. Where merits review is provided, it can take the form that Parliament considers appropriate. In enacting Pt 7AA, Parliament evidently gave considerable weight to the fact that fast track applicants will have had extensive opportunities to advance the material upon which they wish to rely before Pt 7AA is engaged. In particular, by the time a matter is considered by the IAA, an applicant will ordinarily already have had an opportunity to put his or her claims to a delegate during an interview: ss 54-59. It was against that background that Parliament explicitly created a scheme in which ordinarily no such further opportunity is available.[7] This is not an "assumption", but a feature of the scheme: cf AS [26](c).

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4 *BVD17* (2019) 93 ALJR 1091 at [14] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Plaintiff M174* (2018) 264 CLR 217 at [22] (Gageler, Keane and Nettle JJ, referring to the "primary requirement") and [87] (Gordon J).

5 This obligation is imposed by s 473FA(1).

6 See also the note to s 473FA(1), stating that under s 473DB the IAA "is generally required to undertake a review on the papers".

7 See the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Case Load) Bill 2014 (**2014 Explanatory Memorandum**), [893]: "A fast track review applicant has had ample opportunities to present their claims and supporting evidence to justify their request to international protection throughout the decision-making process and before a primary decision is made on their application."

20. *IAA conducts de novo review:* Second, the IAA conducts a "de novo" review.[8] Accordingly, the IAA must consider for itself the credibility of a person's claims. The prospect that the IAA will take a different view to that taken by the delegate concerning the credibility of particular claims is an obvious and ordinary aspect of the scheme, it being inherent in de novo review. The combination of de novo review with the primary rule in s 473DB(1) that, "subject to this Part", the IAA must conduct its review "without interviewing" an applicant, points strongly against the conclusion that the IAA will act unreasonably if it fail to interview an applicant simply because it intends to takes a different view of the credibility of particular claims to that taken by the delegate. The contrary view would defeat the clear terms of the statute.[9]

21. *Only consider "new information" in exceptional circumstances:* Third, the power to get "new information" in s 473DC must be read together with the limit on considering new information in s 473DD: contra AS [30].[10] By reason of s 473DD, the IAA may consider new information only if (among other things) the IAA is satisfied that there are "exceptional circumstances",[11] and that any new information given, or proposed to be given, to the IAA by an applicant was not, and could not have been, provided to the delegate. It follows that it cannot be unreasonable for the IAA to fail to conduct an interview unless, at a minimum, it can be shown that the information expected to be derived from such an interview would meet the "exceptional circumstances" standard (and the other requirements in s 473DD).

22. *Should not use "natural justice lens":* Fourth, the express provisions in Div 3, together with ss 473GA and 473GB, are an "exhaustive statement" of the requirements of the natural justice hearing rule (s 473DA(1)). Accordingly, "except to the extent that procedural fairness overlaps with unreasonableness", procedural fairness is not the lens for determining the content of procedural obligations imposed on the IAA.[12]

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8 *Plaintiff M174* (2018) 264 CLR 217 at [17] (Gageler, Keane and Nettle JJ), [85] (Gordon J).

9 See *DGZ16 v Minister for Immigration* (2018) 253 FCR 551 (***DGZ16***) at [72] (the Court); *DYK16 v Minister for Immigration* [2018] FCAFC 222 at [74] (the Court); see also [68]: the IAA is not obliged to conduct an interview simply because an applicant's credit is called into question.

10 *CNY17 v Minister for Immigration* [2019] HCA 50 (***CNY17***) at [65] (Nettle and Gordon JJ).

11 *Plaintiff M174* (2018) 264 CLR 217 at [30] (Gageler, Keane and Nettle JJ).

12 *BVD17* (2019) 93 ALJR 1091 at [34] (the Court), approving *Minister for Immigration v CRY16* (2017) 253 FCR 475 (***CRY16***) at [67]; *Minister for Immigration v DZU16* (2018) 253 FCR 526 at [99].

In other words, the requirements of procedural fairness cannot be imported into Pt 7AA, notwithstanding the express terms of s 473DA, simply by recasting those arguments as requirements of reasonableness.[13]

23. Of course, procedural fairness and unreasonableness can overlap in their practical operation when the impugned decision goes to a matter of procedure, such as a refusal to grant an adjournment. However, the overlap in the context of s 473DC (and Part 7AA more generally) is not substantial. That is because procedural fairness and unreasonableness have quite different perspectives. Procedural fairness looks to procedure, not outcome,[14] and considers the fairness (or practical justice) of that process from the perspective of the applicant.[15] By contrast, legal unreasonableness is concerned pre-eminently with the outcome of a decision, and whether there is an intelligible justification (assessed objectively) for the decision.[16]

24. **Within Pt 7AA, it will rarely be unreasonable to fail to interview an applicant**: In the large majority of cases, the scheme of Part 7AA itself provides an intelligible justification for the IAA to decide not to interview an applicant, given Parliament's choice to provide a form of de novo merits review on the papers (s 473DB); its limitation on the power to get further information to "new information" (s 473DC(1)); its express exclusion of any obligation to exercise even that limited power (s 473DC(2)); and the "exceptional circumstances" limitation on the consideration of "new information" (s 473DD). Further, the IAA is to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Div 3 (s 473FA).[17] Those matters taken together indicate that, in the context of Pt 7AA, legal reasonableness will rarely require the IAA to conduct an interview.

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13 See *CSR16 v Minister for Immigration* [2018] FCA 474 at [29] (Bromberg J): the failure of the IAA to provide the appellant with an opportunity be heard as to whether to exercise its discretion under s 473GB(3)(b) does not equate to a legally unreasonable exercise of that power.

14 *Minister for Immigration v WZARH* (2015) 256 CLR 326 (***WZARH***) at [55] (Gageler and Gordon JJ); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [16] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

15 *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ).

16 *Minister for Immigration v Li* (2013) 249 CLR 332 (***Li***) at [76] (Hayne, Kiefel and Bell JJ). The related ground of irrationality asks whether a logical and rational person could have reached the same decision on that material: *Minister for Immigration v SZMDS* (2010) 240 CLR 611 at [135] (Crennan and Bell JJ).

17 2014 Explanatory Memorandum, [905]: The intention of s 473DC(3) "is for the IAA to quickly and flexibly get new information that it may consider relevant in accordance with its objective of providing a mechanism of limited review that is efficient and quick under section 473FA."

25. **The Appellant's argument**: In this appeal, the Appellant contends that, at least where the delegate's finding is based in part on the demeanour of the applicant or on physically having seen an applicant, it is legally unreasonable for the IAA to fail to exercise its power under s 473DC(3) to interview the Appellant. The asserted purpose of such an interview is to allow the IAA to see the applicant's demeanour, it being said to be unreasonable for the IAA to depart from any credit findings made by the delegate without itself having access to all of the information that was available to the delegate in making those findings: AS [40]-[42].

26. The above argument assumes that it was open to the IAA to interview the Appellant for the above purpose. However, that will be the case only if such an interview would have involved the IAA in obtaining: (i) "information"; (ii) that also constitutes "new information"; and (iii) where there is a proper basis to conclude that the "new information" would meet the "exceptional circumstances" threshold in s 473DD.

27. A fundamental difficulty with the Appellant's argument is that to assert that the IAA was required to conduct an interview so as to put it in the same position as the delegate is, by definition, to assert that the IAA was required to obtain information that was inherently incapable of being "new information". That is so for three reasons.

    27.1. First, to observe a witnesses' demeanour is not "information" in the sense identified in *Plaintiff M174*, because it is not "knowledge about some particular fact, subject or event".[18]

    27.2. Secondly, even if the observation of demeanour were "information", it cannot be "new information",[19] for the essence of the complaint is that the delegate observed the witnesses' demeanour but the IAA did not. That is, the argument is that the IAA was required to use its power under s 473DC to get the same information as was considered by the delegate, not new information.

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18 *Plaintiff M174* (2018) 264 CLR 217 at [24] (Gageler, Keane and Nettle JJ).

19 *Plaintiff M174* (2018) 264 CLR 217 at [24] (Gageler, Keane and Nettle JJ), stating that "The term 'new information' must be must be read consistently when used in ss 473DC, 473DD and 473DE as limited to 'information' (which may or may not be recorded in a document), in the ordinary sense of a communication of knowledge about some particular fact, subject or event, that meets the two conditions set out in s 473DC(1)(a) and (b). The first is that the information was not before the Minister or delegate at the time of making the decision to refuse to grant the protection visa." (Emphasis added.)

27.3. Thirdly, even if information about an applicant's demeanour were to be "new information", there is nothing "exceptional" about the receipt of such information if that would need to be received every time a de novo review by the IAA causes it to reach conclusions of fact that differ from those reached by the delegate.

28. For each of those reasons, the IAA had no power to interview the Appellant for the purpose alleged (or, alternatively, could not have considered any information that was provided because s 473DD could not be satisfied[20]). That is a decisive answer to Ground 1, because it cannot have been legally unreasonable to fail to exercise the power under s 473C if that power did not apply (or if the information received by the IAA as a result of the interview could not have been considered).

29. Further or alternatively, even if the IAA did have the power to interview the Appellant for the purpose identified above, then for the following reasons it nevertheless was not legally unreasonable not to exercise that power.

30. **Section 473DC is not concerned with procedural fairness:** The purpose of s 473DC(3) is not to provide a person with an opportunity to be heard as required by the circumstances of the case: contra AS [31].[21] The Appellant's argument to the contrary starts with preconceptions about the purpose of s 473DC that are not derived from its terms, and that are inconsistent with the terms of Pt 7AA and, in particular, s 473DA(1) and s 473DC(1) and (2).[22]

31. Section 473DC is a power conferred on the IAA to get new information, within the limits of Pt 7AA identified above. Its purpose is not to give an opportunity to a visa applicant. The mere fact that the delegate has observed the visa applicant, while the IAA has not, does not deprive the IAA of an intelligible justification for not exercising that power (assuming it is available), because the fact that the IAA ordinarily will not

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20 *Plaintiff M174* (2018) 264 CLR 217 at [29]-[32] (Gageler, Keane and Nettle JJ).

21 See *BZC17 v Minister for Immigration* [2018] FCA 902 at [46]-[47] (Mortimer J): s 473DC is not concerned with procedural fairness. The IAA is not required to get new information under s 473DC if, unbeknownst to the delegate, oral evidence provided to the delegate was not translated correctly: *DVO16 v Minister for Immigration* [2019] FCAFC 157 at [4]-[6], [10] (Greenwood and Flick JJ).

22 Cf *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064 at [32] (Kiefel CJ, Bell and Nettle JJ); see also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26] (French CJ and Hayne JJ).

have observed the applicant is inherent in the fact that ordinarily the IAA is required by s 473DB(1)(b) to conduct its review "without interviewing" the applicant.

32. In the face of the express terms of s 473DB(1)(b), when considered together with the fact that Pt 7AA permits the IAA to get information (including through an interview) only if that information is "new information" and to consider that new information only if the IAA is satisfied (inter alia) that there are "exceptional circumstances", it would be a rare case where it would be legally unreasonable for the IAA to decline to exercise the power conferred by s 473DC. That is likely to be the case only where the review materials do not contain sufficient information to enable the IAA to make an intelligibly justifiable decision. That situation might occur, for example, because an error made by the delegate has the result that an applicant is unable to provide relevant information to the delegate,[23] or where relevant information was incorrectly not brought to the visa applicant's attention before the delegate,[24] with the result that the IAA has no idea how the applicant would respond to it. However, the reason that the IAA may be obliged to seek comment from the visa applicant in these cases is to obtain sufficient information to make a rational decision. It is not to accord procedural fairness to the visa applicant.

33. ***DPI17***: Once s 473DC is analysed in its statutory setting, it is apparent that the IAA is not required to conduct an interview with a visa applicant merely because the delegate's decision "may have been, at least in part" based on demeanour: cf Reasons below [24], **CAB 59**. That situation describes almost every case where a finding is made after an interview or oral hearing. As such, to require the IAA to conduct an interview in such circumstances would subvert the scheme of Pt 7AA.

34. The decision in *DPI17* is distinguishable. There, a Full Court of the Federal Court held that it was legally unreasonable in the circumstances of that case for the IAA to reach different credibility findings from the delegate, without considering whether to exercise the power in s 473DC to get new information. However, that result did not follow simply from the fact that the IAA made different findings from the delegate on the credibility of the applicant's claims. To the contrary, the Full Court accepted it

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23 *DPI17 v Minister for Immigration and Border Protection* (2019) 366 ALR 665 (***DPI17***).

24 See *Plaintiff M174* (2018) 264 CLR 217 at [49] (Gageler, Keane and Nettle JJ).

was open to the IAA to come to a different view to the delegate on the significance of inconsistencies in DPI17's evidence.[25] The conclusion of legal unreasonableness ultimately reached in *DPI17* arose because of the particular combination of the following circumstances:[26]

34.1. There were inconsistencies in DPI17's claims made in an invalid protection visa application, and a later valid application.

34.2. The delegate explicitly stated at the interview that the discrepancies were not major, and would not be relied upon, and those inconsistencies were not relied on in the delegate's reasons for decision. That had the direct result that, because of the favourable view that the delegate expressly formed of the applicant's evidence on the basis of his demeanour, DPI17 was denied the opportunity to explain the inconsistencies.[27]

34.3. The IAA based its credibility findings on inconsistencies in DPI17's evidence, including inconsistencies upon which the delegate had expressly stated she would not be relying, being inconsistencies the delegate's conduct had denied DPI17 the opportunity to explain.

35. In light of the above, it is apparent that there were two critical factors in *DPI17*: (1) the delegate's decision "was based primarily"[28] on the delegate's assessment of DPI17's demeanour; and (2) the delegate's reliance on demeanour had the consequence that DPI17 did not address the inconsistencies in his written claims that would become critical before the IAA. That is, consistently with the analysis in [32] above, the unreasonableness in *DPI17* arose not because of some general rule requiring the IAA to conduct an interview before departing from a delegate's findings on credibility,[29] but because the way that the delegate had conducted the particular hearing

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25 *DPI17* (2019) 366 ALR 665 at [46](5) (Griffiths and Steward JJ). There is no equivalent of s 425 of the Act in Pt 7AA reviews: see *DGZ16* (2018) 253 FCR 551 at [75] (the Court).

26 *DPI17* (2019) 366 ALR 665 at [46](5) and [47] (Griffiths and Steward JJ).

27 See *DPI17* (2019) 366 ALR 665 at [46](1) (Griffiths and Steward JJ). See also [58] (Mortimer J).

28 See *DPI17* (2019) 366 ALR 665 at [46](1) (Griffiths and Steward JJ).

29 There being no such general rule: see *FND17 v Minister for Immigration* [2019] FCA 1369 at [36]-[37], [40] (Griffiths J); *DUZ17 v Minister for Home Affairs* [2019] FCA 1593 at [46] (Beach J); *DDG17 v Minister for Home Affairs* [2019] FCA 1608 at [35] (Abraham J); *FPU17 v Minister for Home Affairs* [2019] FCA 1727 at [60] (Stewart J).

(discouraging evidence from being given by the applicant to explain inconsistencies because of their favourable views of the applicant's credit) meant that it would be unreasonable for the IAA to make a decision without knowing how the applicant would explain those inconsistencies. It was that unusual combination of circumstances that caused the Full Court to find that the IAA was obliged to consider whether it should exercise its discretion under s 473DC to invite the appellant to provide "new information" addressing the relevant inconsistencies (being information that was not before the delegate).[30]

36. **No unreasonableness in this case:** The IAA recognised the potential difficulty for a visa applicant in giving evidence about sexual assault, particularly as a man in front of two women: IAA [23], **CAB 10**. However, even making every allowance for the Appellant, for reasons that it explained (including his inability to provide any details of what happened to him, and his unconvincing explanation of his failure to seek medical treatment) the IAA did not accept the Appellant's claim. That fact-finding process does not bespeak unreasonableness, particularly in light of the IAA's other findings: contra AS [47].

37. This is not one of the exceptional cases where it may be legally unreasonable for the IAA to fail to conduct an interview. Even if it was open to the IAA to interview the Appellant simply so as to observe his demeanour and then to take the result of that interview into account (cf [27] above), there was nothing unreasonable about the IAA proceeding in accordance with the general statutory instruction in s 473DB(1) to conduct its review without interviewing the applicant.

38. Nor is there anything to indicate that the "exceptional circumstances" threshold in s 437DD could have been met even if the Appellant had been interviewed. In particular, there is no basis for inferring that the delegate's findings were based to any significant extent on the Appellant's demeanour: see [7]-[8] above; contra AS [41].[31] There is simply nothing to indicate that "demeanour or visual evidence play[ed] a critical role to the acceptance of a claim or fact" in this case: cf AS [42]. Justice Bromberg certainly did not so find, holding only that the delegate's finding about the

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30 *DPI17* (2019) 366 ALR 665 at [46](5) and [47](4) (Griffiths and Steward JJ).

31 This is unlike *WZARH* (2015) 256 CLR 326, where there was a departure from an express statement that the decision-maker would conduct the hearing. The Court's statements in *WZARH* about the importance of an oral hearing were in the context of a material breach of procedural fairness: cf AS fn 41.

alleged sexual torture "may have been, at least in part, based on" a positive assessment of demeanour: Reasons below [24], **CAB 59**.

39. The IAA noted that the Appellant had showed the delegate "some scars" on his back: IAA [14], **CAB 8**. The existence of scarring on the Appellant's back may be consistent with his claims to have been beaten by the Army, but that is far from the only possible explanation. The IAA was not required to provide a positive hypothesis as to how those scars were inflicted before deciding that it did not accept the Appellant's claims, for other reasons: contra AS [48]. And there is no suggestion that a visual inspection of the Appellant's scars could have made any difference to the IAA's reasoning (noting again that the delegate, who accepted the Appellant's claims as plausible, did not refer to this scarring in her decision).

Ground 2: Any error would not be material, because the findings in IAA [33] provide an independent basis for the decision

40. In answer to ground 2, even if it was unreasonable to reject the Appellant's claims that he was detained and sexually tortured in March 2011 without first interviewing him (which is denied), that error would not be material in this case, because the findings in IAA [33] provide an independent basis for the IAA's decision.

41. **Materiality requirement applies to legal unreasonableness:** Bromberg J correctly held that an unreasonable failure to consider exercising the s 473DC power is only a jurisdictional error if any error is material to the decision made: Reasons below [25], **CAB 59**. In *Minister for Immigration v SZTMA*,[32] this Court held (Nettle and Gordon JJ dissenting) that materiality is "essential in each case to the existence of jurisdictional error". *SZMTA* sets out a general principle, which applies to all express

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32 (2019) 264 CLR 421 (***SZMTA***) at [45] (Bell, Gageler and Keane JJ). In *SZMTA* the breach of procedural fairness was a failure to disclose the existence of a s 438 notification, and the breach of a statutory requirement was the issuing of an invalid notification under s 438.

or implied conditions on statutory power,[33] including legal unreasonableness[34] and the cognate ground of illogicality or irrationality.[35]

42. As such, it is irrelevant for these purposes that legal unreasonableness involves an implied condition on the exercise of a statutory power.[36] As just noted, *SZTMA* establishes that a breach of an express statutory requirement or a breach of procedural fairness (also an implied condition on the exercise of statutory power[37]) will not be a jurisdictional error unless the breach is material. Further, *Hossain*[38] establishes that a misunderstanding of the relevant Act will not be a jurisdictional error unless the error is material. Those authorities cannot be distinguished by treating them as inapplicable to implied conditions on the exercise of statutory power.

43. Materiality involves a "backwards-looking" assessment, which considers the effect of the identified error on the decision actually made (taking account of other findings made by the decision-maker). It is a question of fact, determined by inferences drawn from the evidence adduced on the application.[39] That contrasts with an assessment of the utility of relief, which is a "forwards-looking" exercise which asks whether any future decision-maker will necessarily reach the same conclusion.[40] That difference is important, because materiality should not be approached on the basis that the delegate might revisit any and all factual questions – rather, it is necessary for the Appellant

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33 See also *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [23] (Gageler and Keane JJ), referring to jurisdictional error consisting of a "material breach of an express or implied condition on the valid exercise of a decision-making power". That statement was quoted with approval in *Hossain v Minister for Immigration* (2018) 264 CLR 123 (***Hossain***) at [31] (Kiefel CJ, Gageler and Keane JJ).

34 *DPI17* (2019) 366 ALR 665 at [48]-[50] (Griffiths and Steward JJ); *BVD17* (2019) 93 ALJR 1091 at [65]-[66] (Edelman J).

35 *CGA15 v Minister for Immigration* [2019] FCAFC 46 at [59] (the Court).

36 Contra *DPI17* (2019) 366 ALR 665 at [105]-[106] (Mortimer J, dissenting on this point).

37 See eg *Minister for Immigration v SZSSJ* (2016) 259 CLR 180 at [75] (the Court).

38 (2018) 264 CLR 123 at [29]-[31] (Kiefel CJ, Gageler and Keane JJ).

39 *SZMTA* (2019) 264 CLR 421 at [46] (Bell, Gageler and Keane JJ). See also *CNY17* [2019] HCA 50 at [47] (Kiefel CJ and Gageler JJ, dissenting).

40 On this difference between materiality and futility, see *DKX17 v Federal Circuit Court* [2019] FCAFC 10 at [77] (Rangiah J, with Reeves and Bromwich JJ agreeing).

(who bears the onus of establishing that the error is material[41]) to establish that the error had a material effect on the decision actually made.

44. **Independent basis for IAA's decision:** In this case, the IAA's findings on country information provided an independent basis for its decision.[42] The existence of the independent basis for the IAA's decision means it is not necessary to determine whether or not the failure to exercise the s 473DC power was unreasonable: contra AS [67].[43] *Wehbe v Minister for Home Affairs*[44] (cited by the Appellant) concerned a different situation where it was argued that an error was not material because it only went to peripheral matters. That is not this case.

10 45. The effect of that country information was that – whether or not the Appellant's account of his treatment in May 2011 was accepted – he did not have a well-founded fear of persecution. No assessment of his demeanour in an interview could have changed that conclusion, because the conclusion was based on acceptance of the Appellant's own evidence concerning the lack of connection between himself and his family and the LTTE.

46. The fact that the country information provided a basis for rejecting the Appellant's claims that is independent of any acceptance or rejection of the claims concerning the events in May 2011 is demonstrated by the fact that the delegate accepted the Appellant's factual claims, but it nevertheless rejected his application on the basis of
20 country information: see [8] above. As such, when the IAA took a different view of the Appellant's factual claims, that provided an additional basis to that relied upon by the delegate to reject his claims. However, putting that additional basis entirely to one

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41 *SZMTA* (2019) 264 CLR 421 at [4], [46] (Bell, Gageler and Keane JJ).

42 It can appear from reading the reasons as whole that a particular finding (found to be in error) is not critical to the ultimate conclusion, or is merely one of a number of independent findings, so that there is no jurisdictional error: see eg *CRK15 v Minister for Immigration* [2019] FCA 420 at [46] (Moshinsky J); *ABT16 v Minister for Home Affairs* [2019] FCA 836 at [36]-[37] (Perry J).

43 The situation in this case is akin to that in *Hossain* (2018) 264 CLR 123 at [35] (Kiefel CJ, Gageler and Keane JJ), where an established legal error was immaterial because there was a wholly independent basis for the decision.

44 (2018) 92 ALJR 1033 at [23] (Edelman J), where the asserted error was fraud by the migration agent. Similarly, in *SZMTA* (2019) 264 CLR 421 at [48], [71] (Bell, Gageler and Keane JJ), the failure to provide the Tribunal with a document was not material, because that document could not realistically have affected the analysis of the person's claims.

side, the IAA reached the same conclusion as the delegate concerning the effect of the country information about the situation in Sri Lanka on the Appellant's claims. Thus:

46.1. The IAA found that people with "real or perceived links" to the LTTE were still at risk in Sri Lanka: IAA [30], **CAB 12**. However, the Appellant's own evidence was that neither he nor any member of his family was a member of the LTTE or supported the LTTE. Even though his brother had been detained on suspicion of LTTE involvement, the Appellant did not claim to have been questioned in any detail about either his brother or his own suspected LTTE affiliations or involvement: IAA [31], **CAB 12.** On that basis, while the IAA was satisfied that in the past "LTTE support may have been imputed to him on the basis of ethnicity", it was not satisfied that any monitoring or harassment that he had experienced was the result of a profile as a perceived LTTE supporter "on the basis of his ethnicity, the fact that he originates from the north of Sri Lanka or his brother's detention on suspicion of LTTE involvement": IAA [31], **CAB 12**.

46.2. The IAA found that the Appellant would not face a real chance of serious harm on his return, taking into consideration the number of years that have elapsed since he left, his personal circumstances, and the country information referred to: IAA [33], **CAB 13**. The "personal circumstances" referred to in that finding are clearly those referred to in IAA [31]. As those findings make clear, even having accepted that in the past LTTE support may have been imputed to him on the basis of ethnicity, on his own account the manner in which he claimed to have been treated and questioned did not support the conclusion that he had a profile with Sri Lankan authorities of the kind that the current country information indicated would be needed before he would have faced a well-founded fear of persecution were he now to be returned to Sri Lanka.

PART VII ESTIMATE OF ORAL ARGUMENT

47. It is estimated that the Minister will require 1.5 hours to present oral argument.

Dated: 10 January 2020

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M140 of 2019

BETWEEN:

ABT17
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

FIRST RESPONDENT'S LIST OF LEGISLATIVE PROVISIONS

1. *Migration Act 1958* (Cth) (consolidated at 1 July 2016), ss 473BA, 473CB, 473DA, 473DB, 473DC, 473DD, 473DE, 473FA(1), 473GA, 473GB

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