IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M140 of 2019

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **ABT17**

Appellant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet certification

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

Part II: Issues arising in this appeal

2. Does reasonableness require the exercise of the power in section 473DC of the *Migration Act 1958* (the **Act**) to enable an applicant to be heard where the Independent Assessment Authority (**IAA**) proposes to depart from a favourable finding of fact or credit by the Minister's delegate that relied substantially on demeanour or on visual evidence of torture or violence not otherwise available to the IAA? The Appellant says the answer is 'yes'.

3. Was it unreasonable, in circumstances where:

   (a) the delegate accepted the Appellant's evidence at the interview in its entirety as plausible and broadly consistent with country information;

   (b) the IAA reviewed the audio of the Appellant's interview with the delegate;

   (c) the IAA did not have the benefit of observing the Appellant giving evidence;

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(d) the IAA did not have the benefit of observing the Appellant's physical scarring which was shown to the delegate;

(e) the IAA acknowledged that it was difficult to describe the traumatic events of sexual torture;

(f) the IAA acknowledged that such difficulty would be compounded by the fact that the delegate and the Appellant's representative were both female; and

(g) the IAA proposed to depart from the delegate's findings about the credibility of the Appellant's evidence, including the episodes of beatings and sexual torture;

for the IAA to fail to exercise its power under subsection 473DC(3) of the Act to invite the Appellant to an interview before making an adverse credibility finding as to that part of the Appellant's evidence? The Appellant says the answer is 'yes'.

4. Should the standard of reasonableness applicable to the exercise of the discretion in section 473DC of the Act be interpreted with regard to the principles of procedural fairness which are intended to be embodied in part 7AA of the Act? The Appellant says the answer is 'yes'.

5. Is an assessment of materiality required as an additional step to determine whether an unreasonable exercise of power constitutes jurisdictional error? The Appellant says the answer is 'no'.

6. Did the Court below err in finding that there was a separate and independent basis for the decision of the IAA? The Appellant says the answer is 'yes'.

Part III: Section 78B of the *Judiciary Act 1903*

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

Part IV: Citations

8. This is an appeal from the whole of the judgment of Justice Bromberg of the Federal Court of Australia in *ABT17 v Minister for Immigration and Border Protection and Anor* [2019] FCA 613 (**FC**). The decision of the Federal Court was on appeal from a judgment of the Federal Circuit Court of Australia in *ABT17 v Minister for Immigration and Border Protection and Anor* [2018] FCCA 658.

Part V: Facts

9. The Appellant is a citizen of Sri Lanka of Tamil ethnicity. He arrived in Australia as an unauthorised maritime arrival on 27 August 2012. [1]

10. The Appellant was a "fast track applicant" within the meaning of s 5(1) of the Act.

11. On 4 October 2015, the Appellant applied for a temporary protection visa on grounds of his Tamil ethnicity,[2] his status as a failed asylum seeker, and as a person who had illegally departed Sri Lanka. The Appellant claimed that, prior to leaving Sri Lanka, he had been repeatedly detained and physically assaulted by officers of the Sri Lankan Army (**SLA**). [3]

12. The Appellant attended an interview with the Minister's delegate.[4] At the delegate's request, the Appellant showed the delegate scarring on his back which he said had been inflicted by SLA officers.[5] The Appellant also gave evidence during the delegate interview that, during the most serious incident of detention in 2011, he had been beaten and subjected to sexual torture.[6]

13. On 21 September 2016, the delegate refused the application for a protection visa.[7] The delegate accepted the Appellant's evidence at the interview to be "*plausible and consistent with country information*". The delegate stated: "*I accept, in light of the* [Appellant's] *Tamil ethnicity and experiences of detention, that the* [Appellant] *genuinely feared being seriously harmed by the Sri Lankan authorities when he left Sri Lanka*".[8] However, on the basis of country information, the delegate found that

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1 FC [2], Core Appeal Book (**CAB**)54. "Unauthorised maritime arrival" is defined by s 5AA and 5(1) of the Act.

2 The Appellant's claim in this regard was based on his Tamil ethnicity *per se*, that he was a young Tamil male and that he was a Tamil from Northern Sri Lanka: see, FC [3] CAB 54.

3 FC [3], CAB 54; Protection Visa Decision Record dated 21 September 2016 (**Delegate's Decision Record**), pp 2-3, Appellant's Further Materials (**AFM**) 5-6.

4 FC [2], CAB 54.

5 IAA decision and reasons dated 16 December 2016 (**IAA Decision Record**) [14], CAB 8.

6 IAA Decision Record [15]-[16], CAB 8.

7 Delegate's Decision Record, Appellant's Further Material (**AFM**).

8 Delegate's Decision Record, p 3, AFM 6.

the Appellant did not face a real chance of persecution if he were to return to Sri Lanka because of changed country conditions.[9]

14. On 21 September 2016, the application was referred to the IAA.[10] The Appellant was not invited to an interview with the IAA.

15. On 16 December 2016, the IAA affirmed the delegate's decision.[11] Although the IAA noted in its reasons that the Appellant's scars had been shown to the delegate,[12] the IAA did not refer further to that evidence in its reasons.

16. As to the sexual torture, the IAA, who had evidently listened to the recording of the Appellant's interview with the delegate,[13] described that evidence as follows:[14]

> At interview the [Appellant's] version of what happened was almost identical to that in his written claims although he claimed at interview that he was tortured for those 6 days. The delegate asked him how he was tortured; the [Appellant] sounded hesitant before stating he was locked up in a room, not given food, beaten and they would ask him to clean their toilet.
> After the break in his TPV interview the applicant disclosed that he had also been sexually tortured during the 6 days he was detained. He stated he was only giving the information now because it was his last opportunity but he hadn't spoken about it before because it was very degrading. When the delegate asked him whether he had seen a doctor afterwards he stated he would just tell the doctor something had happened at the farm and that he was scared to tell the doctor because the SLA would be there too and would take him back and beat him up.

17. The IAA did not accept that the Appellant had been repeatedly detained and beaten by the SLA.[15] Further, the IAA did not accept that the Appellant had been sexually tortured, stating:[16]

> In regard to his claim to have been sexually tortured as well, there is ample country information which confirms incidents of sexual torture of Tamils who are suspected of LTTE or pro-separatist sympathies. I am mindful of the shame sensed in Tamil culture around the issue of rape. It is

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9 Delegate's Decision Record, p 10, AFM 13.

10 See section 473CA of the Act.

11 IAA Decision Record, [45] and [52]; CAB 16-17.

12 IAA Decision Record, [14], CAB 8.

13 FC [24], CAB 59.

14 FC [20], CAB 58; IAA decision record, [15]-[16], CAB 8.

15 IAA Decision Record, [21]-[23], CAB 9-10.

16 IAA Decision Record, [23], CAB 10 (footnotes omitted).

> undoubtedly also very difficult for applicants to describe such traumatic events, perhaps compounded by the fact that the delegate and the [Appellant's] representative were both female. However, despite sympathetic questioning by the delegate, the [Appellant] stated he was unable to talk about it, and was unable to provide any details of what happened to him other than saying there were 2 or 3 SLA men and that he was unconscious for a lot of the time. I also found his explanation for why he did not seek medical treatment afterwards (because the SLA would be there and would take him back and beat him up) unconvincing. I am not satisfied the applicant was detained and sexually tortured in May 2011 before being released on payment of a bribe.

Part II: Argument

A. GROUND 1 – THE FAILURE TO EXERCISE THE POWER IN S 473DC(3) TO GET NEW INFORMATION WAS UNREASONABLE

A.1: The error below

18. Subsection 473DC(1) of the Act confers discretionary power on the IAA to decide in a given case to "get" – that is, seek[17] – "new information", being "documents or information" that were not before the Minister when the Minister made the decision under section 65 of the Act; and which the IAA "*considers may be relevant*".[18] Subsection 473DC(3) further provides that, without limiting subsection 473DC(1), the IAA "*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.*"

19. The Federal Court below acknowledged that the IAA must have been aware that the delegate had been able "*to see and evaluate the physical manifestations which must have accompanied the evidence given by*" the Appellant, and that the IAA must have recognised that the delegate's findings about the plausibility of the Appellant's evidence, "*and in particular the evidence given about the alleged sexual torture*", may have been "*based on the delegate's positive assessment of the* [Appellant's] *demeanour.*"[19] The Federal Court commented, at [24] of the reasons,

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17 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (**M174**) at [23] (Gageler, Keane and Nettle JJ).

18 In *M174* at [24], the plurality stated that the term "information" in s 473DC of the Act bears its ordinary meaning of "*a communication of knowledge about some particular fact, subject or event.*" The plurality cited *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at 259 [205] in support of that interpretation.

19 FC [24], CAB 59.

why the failure of the IAA to exercise the power under 473DC might have been unreasonable in the circumstances of this case, observing that:

> ....it may well be thought that a reasonable decision-maker would not have made credibility findings contrary to those made by the delegate without considering whether or not the powers given to the IAA under s 473DC should be exercised, including for the purpose of inviting the appellant to attend for an interview so that the IAA could conduct its own assessment of the appellant's demeanour would not have made credibility findings contrary to those made by the delegate.

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20. Despite those observations, his Honour declined to reach a concluded view on the unreasonable failure to exercise the discretion, for reasons that are the subject of ground 2.

21. The Appellant contends that the Federal Court ought to have found, in the circumstances of the case, that the failure of the IAA to exercise its power to invite the applicant to an interview was unreasonable.

A.2: Presumption of reasonableness

22. The presumption that a discretionary power will be exercised within the bounds of legal reasonableness conditions the lawful exercise of power.[20] As this Court
20 accepted in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (**M174**),[21] the presumption of reasonableness applies to the exercise of the procedural discretions conferred by section 473DC.

23. The content of the standard of legal reasonableness is to be assessed in light of the "*terms, scope, purpose and object*" of the statute in question.[22] In *Minister for Immigration and Border Protection v Stretton* (**Stretton**),[23] Allsop CJ observed that the standard of legal reasonableness is also informed by the fundamental values that underpin the proper exercise of power: "*a rejection of unfairness, of*

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20 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) at [26]-[29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88] (Gageler J).

21 *M174* at [21]((Gageler, Keane and Nettle JJ), [86] (Gordon J) and [97] (Edelman J); see, also, *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475 at [82] (the Court).

22 *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 (**SZVFW**) at [12] (Kiefel J), [59] (Gageler J), [79] (Nettle and Gordon JJ) and [135] (Edelman J); *Li* at [21] (French CJ), [67] (Hayne, Kiefel and Bell JJ) and [90] (Gageler J).

23 (2016) 237 FCR 1 at 5-6 [9]-[11], cited by Gageler J at *SFVFW* [59].

unreasonableness and of arbitrariness; equality; and the humanity and dignity of the individual." The application of that standard in a given case is "*invariably fact dependent and requires evaluation of the evidence.*"[24]

A.3: Text, structure and purpose of Division 7AA and section 473DC(3)

24. The starting point is the object of Part 7AA, which is to provide for review of fast track reviewable decisions.[25] Under subsection 473CC(1), the IAA has a duty to review a fast track reviewable decision referred to it under section 473CA. Although, in carrying out that review, the IAA is engaged in a *de novo* consideration of the merits of the decision that has been referred to it,[26] the IAA does not stand squarely in the shoes of the Minister. Rather, the IAA is required to undertake a "limited review", confined in accordance with Part 7AA.

(a) The "primary rule" under section 473DB of Division 3 of Part 7AA is headed "[IAA] *to review decisions on the papers*". Section 473DB states that, subject to Part 7AA, the IAA must review the decision referred to it under section 473CA by considering the review material provided to [the IAA] under section 473CB without accepting or requesting new information; and without interviewing the referred applicant.

(b) Next, section 473DA of Division 3 states that the provisions relating to the conduct of the review set out in Division 3 of Part 7AA, together with sections 473GA and 473GB (which are not relevant in the present case), must be "*taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the* [IAA]".

25. Section 473FA(1) states that, in carrying out its functions, the IAA is required to pursue the objective of "*providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)*". The note to subsection 473(1) reinforces the primary rule in section 473DB, by stating that the IAA is "*generally required to undertake a review on the papers*". Subsection 473FA(2) states further that in reviewing a decision, the IAA is not bound by technicalities, legal forms or rules of evidence.

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24 *SZVFW* at [84] (Nettle and Gordon JJ); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [42] and [48] (Allsop CJ, Robertson and Mortimer JJ).

25 See, section 473BA of the Act.

26 *M174* at [17] (Gageler, Keane and Nettle JJ).

26. The scheme for limited review of fast track decisions under Part 7AA is framed on three assumptions.

(a) **First**, Part 7AA assumes that a decision to refuse to grant a protection visa to a fast track applicant has been made in compliance with the code of procedure set out in subdivision AB of Division 3 of Part 2 of the Act.[27]

(b) **Secondly,** section 473DB assumes that the Minister has complied with s 473CB by providing the IAA with:

i. a statement of reasons that complies with s 473CB(1)(a);

ii. material provided by the referred applicant to the person making the decision before the decision was made; and

iii. any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review.

(c) **Thirdly**, and in consequence of the first two assumptions, the Act assumes that an applicant has had a full and fair opportunity to present their claim and evidence in support of that claim. The explanatory memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (the **Explanatory Memorandum**) confirms that assumption. It states in respect of section 473DB at paragraph [893] (emphasis added):

> The IAA's primary function of limited review is underpinned by a presumption that there should be no further requirement to consider new information in a case involving a fast track review applicant. 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.

27. As noted by the plurality in *M174*,[28] the primary rule in s 473DB admits exceptions. Those exceptions include subsection 473DC(3), which confers discretionary power on the IAA to seek new information from a person which may be relevant to the review.

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27 *M174* at [45] (Gageler, Keane and Nettle JJ); subdivision AB of Division 3 of Part 2 of the Act includes sections 51A to 64.

28 *M174* at [22] (Gageler, Keane and Nettle JJ).

28. Part 7AA contemplates that the exercise of the discretion under subsection 473DC(3) will be informed by the review material provided by the Secretary under section 473CB. The power is otherwise entirely facultative.[29] There is nothing in section 473DC itself, or Division 7AA, to preclude the IAA from exercising the power under subsection 473DC(3) to seek information from a person in relation to material that was before the Minister or delegate at the time of making the decision to refuse to grant the protection visa,[30] or to seek information that the IAA considers may be relevant from an applicant in respect of factual matters that were the subject of evidence during an interview held by the delegate prior to making the decision to refuse the protection visa.

29. The threshold test of potential "relevance" in subsection 473DC(1) is to be contrasted with section 473DD, which imposes restrictions on when the IAA may "*consider*" new information. In all cases, the IAA must be "*satisfied that there are exceptional circumstances to justify considering the new information*" [emphasis added]. In *M174*[31] the plurality observed:

> Quite what will amount to exceptional circumstances is inherently incapable of exhaustive statement. The word "exceptional" in such a context is not a term of art but "an ordinary, familiar English adjective": "[t]o be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

30. The textual matters set out above support the view that section 473DC is intended primarily: (a) to assist the IAA in carrying out its review function under section 473CC; and (b) to deter applicants from seeking to place further information in support of their claim before the IAA. Information not before the Minister at the time of making the decision and reasonably considered potentially "relevant" may be sought by the IAA under subsection 473DC(3). Although, in determining whether to seek such new information, the IAA must give due consideration to the primary rule in section 473DB, the circumstances need not be rare or exceptional to enliven that discretion.

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29 *M174* at [23].

30 *M174* at [26].

31 *M174* at [30].

31. The purpose of subsection 473DC(3) is evident on its face; namely, to provide an opportunity to be heard when the circumstances of the case require it, within the context of a regime where procedural fairness is otherwise strictly confined. It is consistent with that purpose that the principles of procedural fairness should inform the exercise of the discretion and its limits. In support of that proposition the Appellant relies on *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34 (**BVD17**), where in explaining the effect of section 473DA, the plurality said:[32]

> The consequence of the codifying effect of s 473DA(1) was correctly stated by the Full Court of the Federal Court ..... in *Minister for Immigration and Border Protection v CRY16* and in *Minister for Immigration and Border Protection v DZU16*. The consequence is that, except to the extent that procedural unfairness overlaps with legal unreasonableness, procedural fairness analysis is not the "lens" through which the content of the procedural obligations imposed on the Authority in the conduct of a review under Pt 7AA is to be determined. Consistent with the earlier conclusion of the Full Court in *BBS16*, the entirety of the content of the Authority's obligation of procedural fairness in the context of a notification under s 473GB(2) is to be found in the outworking of the discretions conferred on the Authority by s 473GB(3).

32. Edelman J, in a separate judgment (agreeing with the outcome) stated that "*even if any implication of procedural fairness were excluded by s 473DA(1), an implication with almost precisely the same content could be implied as a requirement of legal reasonableness*".[33] His Honour observed that "[i]*t is hard to imagine any circumstance in which the exercise of a power in a manner contrary to the requirements of procedural fairness that would be implied but for the purported exclusion by s 473DA(1) would not be legally unreasonable*".[34]

33. Those observations are equally applicable to the role of the principles of procedural fairness in informing the exercise and limits of the discretion under subsection 473DC(3). That role does not arise from any inherent link between procedural fairness and all examples of unreasonableness, although there is an acknowledged

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32 *BVD17* at [34]-[35] (emphasis added).

33 *BVD17* at [61] (emphasis added).

34 *BVD17* at [62], referring to *Li* at [99] and *M174* at [26], [49], [97].

overlap between those principles.[35] Rather, it gives effect to the purpose of subsection 473DC(3) as a mechanism for ensuring that the review is conducted fairly in the circumstances of the particular case.[36]

34. In *Minister for Immigration and Citizenship v Li*[37], Gageler J said:

> The legislative declaration that Div 5 of Part 5 "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with" (s 357A(1)) gives added significance to the implied requirement for the MRT to act reasonably in the performance of its procedural duties and in the exercise or non-exercise of its procedural powers. The significance is that the implied statutory requirement for the performance of those duties and the exercise of those powers always to be reasonable results in the division providing a measure of procedural fairness sufficient to meet the statutory description of it as a statement of the requirements of the natural justice hearing rule.

35. Those observation apply, *a fortiori*, to Division 3 of Part 7AA, which as this Court held in *BVD17*,[38] excludes the implication of any further procedural fairness obligations.

36. The question that the IAA needed to consider in this case was whether, in the particular circumstances, fairness required that the power under subsection 473DC(3) should be exercised to provide an applicant with an opportunity to be heard, having regard to the fact, obvious from the review material, that the IAA did not have before it critical elements of the Appellant's case that had been before the delegate. Put differently, would a reasonable decision-maker conclude that the review could adequately and fairly be completed "*on the papers*", without exercising the subsection 473DC(3) power? The Appellant contends, for the reasons set out below, that the answer to the latter question was, 'No'.

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35 See, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366-367 (Deane J); *Li* at [26] (French CJ) and [92] (Gageler J) and see the discussion of those authorities in *DPI17 v Minister for Home Affairs* [2019] FCAFC 43 (**DPI17**) at [78] to [95] (Mortimer J).

36 Fairness being the fundamental norm and guiding principle of procedural fairness: *Kioa v West* (1985) 159 CLR 550 at 583-585 (Mason J).

37 (2013) 249 CLR 332at [99].

38 (2019) 93 ALJR 1091 at [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

A.4: Reasonableness in this case

37. In this case, the IAA had listened to the recording of the Appellant's interview with the delegate, in which the Appellant gave evidence of his claim to have been detained, beaten and sexually tortured.

38. As Bromberg J below observed, the IAA must have recognised that the delegate's findings as to the plausibility of the Appellant's evidence regarding sexual torture may have been based on the delegate's positive assessment of the applicant's demeanour.[39]

39. Further, the IAA was alive to matters which would have affected the Appellant's ability to be heard in relation to the sexual assault. In the passage set out at paragraph 17 above, the IAA noted that the quality of the hearing the Appellant had had before the delegate on the sexual assault claim was potentially seriously compromised, because of a cultural taboo, the difficulty of the subject matter and the fact that all other persons in the room were of the opposite gender.

40. The IAA nevertheless disbelieved his account, as given in the audio recording of that compromised hearing, on the basis of the Appellant's hesitancy to elaborate on his account.[40]

41. In those circumstances, having noted the concerns regarding the circumstances of the hearing, and the critical role demeanour likely played in the delegate's findings,[41] a reasonable decision maker would not have departed from those findings without inviting the Appellant to an interview at which it could be confident of giving the Appellant a meaningful hearing that was not compromised in the same way, and by which it could have evaluated all of the claims and evidence put forward by the Appellant in concluding its review.

42. While it has been held by the Full Court of the Federal Court that the IAA is not necessarily required to provide an applicant a hearing before departing from a

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39 FC [24], CAB 59.

40 IAA Decision Record, [10], CAB 7 (noting that the Appellant at the interview "appeared unable to expand in any detail on a number of his written claims and at times sounded vague and hesitant"; and IAA Decision Record, [23], CAB 10.

41 As to the decisive role of demeanour in certain cases, see, *Fox v Percy* (2003) 214 CLR 118 at [68], [76]-[79] (McHugh J) and *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [37]-[41] (Kiefel, Bell and Keane JJ).

finding by a delegate of the Minister,[42] and the Appellant does not challenge the correctness of that general principle, in cases where demeanour or visual evidence play a critical role to the acceptance of a claim or fact, the exercise of the power under section 473DC(3) to invite a person to give new information in respect of that claim or fact is necessary to rectify what would otherwise be a gap in the material required to carry out the "review" contemplated by the Act.[43]

43. The Appellant invites the Court to apply the reasoning of the Full Court of the Federal Court in *DPI17 v Minister for Home Affairs* [2019] FCAFC 43 (**DPI17**). There, the appellant claimed to have been tortured and sexually assaulted by Sri Lankan officials. That claim was accepted by the delegate, but was rejected by the IAA because of, among other matters, inconsistencies in relation to the claim.[44] The plurality (Griffiths and Steward JJ) noted that the delegate's acceptance of the claim was based primarily on the delegate's assessment of demeanour and credibility, and that the IAA must have been aware of that positive assessment as a result of listening to the interview recording. The plurality said:[45]

> In those circumstances, if the IAA was minded to come to a different determination on the central question whether it was satisfied that the sexual assaults had occurred, unless there was available to the IAA a sufficient independent evidentiary basis to support such a determination without the IAA itself inviting the appellant to attend for an interview and conduct its own assessment of his demeanour, it was legally unreasonable for the IAA to fail to consider whether or not it should exercise its powers under s 473DC.

44. In separate judgment, agreeing with the orders proposed by the plurality, Mortimer J said:[46]

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42 *DGZ16 v Minister for Immigration and Border Protection* (2018) 253 FCR 551 at [72] (the Court).

43 The consequence of an unreasonable failure to exercise the power under subsection 473DC(3) also being that the state of satisfaction reached by the IAA would not be of the character contemplated by section 65 the Act: see, *The King v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 and 432 (Latham CJ); *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (Gibbs J).

44 *DPI17* at [13] (Griffiths and Steward JJ).

45 *DPI17* at [45].

46 *DPI17* at [58].

> The reason for my conclusion rests on the fact that the delegate's acceptance of the appellant's claim to have been sexually assaulted and raped by members of the Sri Lanka CID based on her assessment of the appellant during her interview with him. It was the delegate's acceptance of the veracity of the appellant's account because of the way he described his experience, and his body language when describing it, which led her to discount some apparent inconsistencies.

45. Her Honour concluded:[47]

> The IAA, acting reasonably, would have appreciated that a review on the papers might not give it sufficient understanding of this important aspect of the appellant's narrative about what had happened to him in Sri Lanka.

46. Those principles are apposite in the present case.

47. Here, the IAA was critical of the lack of detail in the Appellant's evidence regarding the sexual abuse, focusing particularly on the Appellant's assertion "*that he was unable to talk about it*". The IAA rejected the claim on that basis, notwithstanding that the IAA had itself noted that: "[i]*t is undoubtedly also very difficult for applicants to describe such traumatic events, perhaps compounded by the fact that the delegate and the applicant's representative were both female.*"[48]

48. Further and in respect of the visual evidence of scarring observed by the delegate, the IAA made no further reference to that evidence. No alternative hypothesis was identified or suggested to explain the scarring on the Appellant's back, or why it had not been inflicted in the manner claimed by the Appellant.

49. In the circumstances, no "*sensible* [IAA] *acting with due appreciation of its responsibilities*"[49] and with knowledge that it had the power under s 473DC(3) to interview the Appellant and, thereby, observe his demeanour and the scarring shown to the delegate, would have concluded that the review could fairly be completed "*on the papers*". "*The papers*" were simply incapable of conveying the critical elements of the Appellant's claims and evidence.

50. The IAA's failure to exercise the power in s 473DC(3) was legally unreasonable because, in the circumstances, the failure was unreasonable and unjust.

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47 *DPI17* at [120].

48 IAA Decision Record at [23], CAB 10.

49 *SZVFW* at [69] (Gageler J), citing *Li* at 365 [71], in turn quoting *Secretary for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

GROUND 2 – THE FEDERAL COURT ERRED IN ITS APPLICATION OF MATERIALITY

B.1: The Federal Court erred in finding that the failure of the IAA to exercise its discretion under s 473DC could not be a jurisdictional error because the failure was not material to the decision

51. At [25]-[27] of the Federal Court judgment, Bromberg J held that it was not necessary to complete the assessment of whether the IAA unreasonably failed to exercise its discretion under s 473DC, because any failure would not be a jurisdictional error due to a lack of materiality. His Honour relied on *Minister for Immigration v SZMTA* [2019] HCA 3 in support of that proposition.

52. His Honour's reason for concluding that any error would be immaterial was that there was "*an alternative basis for the decision made which was not reliant on whether the appellant's claims to have been beaten and sexually tortured were or were not accepted.*"[50]

53. That basis was said to be the IAA's finding, at [33] of its decision record, that:

> .....taking into account consideration of the number of years that had elapsed since the appellant had left Sri Lanka, his personal circumstances and the country information to which the IAA had referred, it was not satisfied that the appellant would face a real chance of serious harm on return to Sri Lanka now or in the reasonably foreseeable future on the basis of his Tamil ethnicity or imputed political opinion.[51]

54. His Honour erred in finding that any error would not be material and could therefore not be a jurisdictional error, and in failing to complete the unreasonableness analysis on that basis.

55. First, *SZMTA* and related authorities do not require a separate analysis of the materiality of the error before the error will be jurisdictional where the error is an unreasonable failure to exercise a statutory power.

56. Secondly, even if his Honour correctly identified the principles relating to materiality, his Honour erred in concluding that the IAA's finding at [33] was an alternative basis that was not dependent on the acceptance or non-acceptance of the appellant's claims to have been beaten and sexually tortured.

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50 FC [27], CAB 60.

51 FC [27], CAB 60; IAA Decision Record, [33], CAB 13.

B.2: Separate analysis of materiality is not required for unreasonableness to constitute jurisdictional error

57. The appellant relies on the judgment of Mortimer J, in dissent on this issue (but agreeing in the result), in *DPI17*. Her Honour observed at [105]-[107] that the unreasonable exercise or non-exercise of a repository's power breaches a condition on the repository's power and therefore affects the jurisdiction of the repository.

58. Her Honour found that

> .....as the law currently stands, I do not understand that the ratio of the decisions in Hossain and SZMTA require that where an exercise of power has been found to be legally unreasonable (a ground not addressed in either of those decisions), the supervising court must conduct a separate assessment of "materiality", before being able to characterise the error as jurisdictional in character.

59. The plurality, Griffiths and Steward JJ, interpreted *SZMTA* as requiring an assessment of materiality as a necessary subsequent step, having already found unreasonableness in the non-exercise of the section 473DC power, before that finding could constitute jurisdictional error.[52]

60. In contrast, Mortimer J, relying on the decision of this Court in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (**SZVFW**), held that, in the case of unreasonableness, "*materiality is bound up in the characterisation of an exercise of power as legally unreasonable.*"[53] Where it was apparent to a decision-maker that exercising a statutory power would make no difference – for instance, because the applicant could not have satisfied other criteria for the grant of the visa, as occurred in *Hossain* – then the failure to exercise the power will not have been so unreasonable that no reasonable decision-maker could have so acted.

61. The qualitative assessment of the seriousness of the failure to exercise the power and its connection to the decision being made is thus an integral component of the unreasonableness analysis. If, after completing that analysis, the decision-maker is found to have acted unreasonably in the exercise of his or her power, that decision-maker has acted without authority and has made a jurisdictional error.

62. In *SZVFW*, Gageler J observed:

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52 *DPI17* at [48].

53 *DPI17* at [107].

> Where the presumption prevails so as to condition the exercise of the power on the repository complying with the standard of legal reasonableness, a decision made or action taken in purported exercise of a statutory power in breach of the standard of legal reasonableness is a decision or action which lies beyond the scope of the authority conferred by the power. [54]

63. As Allsop CJ put it in *Stretton*:

> .....the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.[55]

64. The assessment of unreasonableness is thus qualitatively different to the assessment of procedural fairness, which was the subject of *SZMTA*, or other non-compliance with a statutory procedure. In such cases, it is possible to identify non-compliance with a procedure which is effectively *de minimis*, in the sense that it does not cause the applicant practical injustice. Materiality must therefore be separately considered before relief will follow for jurisdictional error – whether that be as part of the parameters of jurisdictional error (per Bell, Gageler and Keane JJ in *SZMTA*) or a function of the discretion to refuse relief for a lack of utility (per Nettle and Gordon JJ in *SZMTA*).

65. By contrast, in the case of unreasonableness, materiality will necessarily have been considered as an integral part of the finding of unreasonableness. To impose an additional layer of materiality before the unreasonable exercise of statutory power can constitute jurisdictional error is unnecessary and inconsistent with the nature of the principle of unreasonableness.

66. The Appellant invites the Court to endorse the reasoning of Mortimer J in *DPI17* in finding that a separate assessment of materiality is not a requirement before a reviewing court can find that an unreasonable exercise or non-exercise of a statutory power can constitute jurisdictional error. Under that approach, a Court would still retain the discretion to refuse relief for jurisdictional error if such relief would be futile in the circumstances of the case.

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54 *SZVFW* at [53].

55 (2016) 237 FCR 1 at [12] (emphasis added).

67. In the present case, the unreasonableness analysis was never completed. As Edelman J observed in *Wehbe v Minister for Home Affairs*, "It is not possible to determine the materiality of an error, or whether materiality is required, until the nature of the error is known."[56] In failing to complete that analysis on the basis of a perceived lack of materiality, his Honour below erred.

B.3: The Federal Court erred in finding that the IAA had relied on an alternative and independent basis for its decision

68. Regardless of whether or not an assessment of materiality is required for an unreasonable failure to exercise a statutory power to constitute jurisdictional error, on the facts of the present case, Bromberg J erred in concluding that the IAA had relied on an alternative and independent basis for its decision. In fact, the IAA's reasoning followed from, and was necessarily dependent on, its earlier findings, including that the Appellant had not been detained and sexually tortured in May 2011.

69. It is apparent from paragraph [33] of the IAA's decision record[57] that three factors led the IAA to conclude that the Appellant would not face a real chance of serious harm on the basis of his Tamil ethnicity or imputed political opinion. They were:

(a) the number of years that had elapsed since the Appellant left Sri Lanka;

(b) the Appellant's personal circumstances; and

(c) the country information referred to in the preceding parts of the IAA decision record.

70. The IAA's lack of satisfaction that the Appellant faced a real chance of serious harm was based on the combination of all three factors.[58]

71. The reference in [33] to "*the appellant's personal circumstances*" must be taken to mean the circumstances as assessed by the IAA, having rejected certain of the Appellant's claims to fear harm and to have suffered violence and mistreatment by Sri Lankan authorities in the past.

72. From [20] to [24] of its decision record, the IAA gave its reasons for rejecting various claims made by the Appellant. The most significant of those was the rejection at [23] of the appellant's claim to have been detained, beaten and sexually

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56 (2018) 92 ALJR 1033 at [23].

57 CAB 13.

58 *BRF038 v Republic of Nauru* (2017) 91 ALJR 1197 at [60]-[62].

tortured for 6 days in May 2011. At [25], drawing together its factual findings in the preceding paragraphs, the IAA concluded:

> In summary, I am not satisfied that the applicant has a profile that would be of interest to the SLA or the Sri Lankan authorities or that he is at risk of harm on the basis of his ethnicity or imputed support for the [Liberation Tigers of Tamil Eelam (**LTTE**)] now or in the reasonably foreseeable future.

73. Having reached that conclusion as to the Appellant's profile, based in substantial part on the rejection of the Appellant's claim to have been beaten and sexually tortured and the claim that he was repeatedly beaten in an attempt to make him confess his involvement with the LTTE, the IAA proceeded to assess various items of country information from [26] to [32], with a view to determining whether a person with *that profile* would face a real chance of serious harm on return to Sri Lanka.

74. The aspects of country information so assessed were limited to the situation of individuals of Tamil ethnicity who had no other reason or "profile" to bring them to the attention of Sri Lankan authorities.

75. It is plain that the application by the IAA of country information to the Appellant's situation was dependent on its earlier rejection of his claim to have been detained, beaten and sexually tortured. The country information was therefore not an independent or alternative basis for the decision that could render the unreasonableness in failing to exercise s 473DC in relation to the evidence of beatings and sexual torture immaterial.

76. It follows that the Federal Court's finding on that point, and its consequent failure to complete the unreasonableness analysis, was in error.

Part VII: Orders sought

The Appellant seeks the following orders:

1. The appeal from the judgment of the Federal Court be allowed.
2. The orders of the Federal Court be set aside and in lieu thereof order:
   (a) The decision of the Second Respondent be quashed;
   (b) The matter be remitted to the Second Respondent to determine according to law;
   (c) The First Respondent pay the Applicant's costs of and incidental to the proceedings in the Federal Circuit Court and the Federal Court.

3. The First Respondent pay the Applicant's costs of and incidental to the proceeding in this Court.

This special leave application was the subject of a referral from the Court for pro bono assistance. There is no other reason why any special order for costs should be made.

Part VIII: Time for oral argument

77. The Appellant estimates he will require 1 hour and 20 minutes for oral argument.

Dated: **6 December 2019**

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M140 of 2019

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

ABT17

Appellant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

LIST OF LEGISLATIVE PROVISIONS

1. *Migration Act 1958* (Cth), compilation 131 (in force 1 July 2016 to 20 October 2016): sections 473CA – 473DD and 473FA.