

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY



No M140 of 2019

BETWEEN:

ABT17
Appellant
-and-

**MINISTER FOR IMMIGRATION AND BORDER
PROTECTION & Anor**

Respondents

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OUTLINE OF THE APPELLANT'S ORAL SUBMISSIONS

1. This outline of submissions is in a form suitable for publication on the internet.

Proposition A: The IAA's finding that the Appellant would not face a real chance of serious harm on return to Sri Lanka, now or in the reasonably foreseeable future on the basis of his imputed political opinion was not a separate or alternative basis for its decision which was not reliant on whether the IAA accepted the Appellant's claim to have been beaten and sexually tortured.

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2. The Federal Court erred in finding that the IAA's findings relying on country information constituted a separate and alternative basis for its conclusion that the Appellant did not face a real chance of serious harm in Sri Lanka, independent of its findings on the Appellant's claims to have been beaten and sexually tortured (Appellant's Submissions ('AS') [68]; Federal Court judgment ('J') [26]-[27], CAB 60).
3. The relevant findings of the IAA relied on aspects of the Appellant's profile, including his "personal circumstances" and the extent to which he would be "of interest to the authorities" or the authorities would perceive he had links to the LTTE (AS [69]-[74]; IAA [26]-[33], CAB 11).
- 30 4. The assessment of the Appellant's profile at IAA [25], providing the premise from which the subsequent assessment of country information proceeded, was in turn based on the IAA's finding at [23] that the detention and sexual torture did not occur.
5. It follows that the IAA's conclusion at [26]-[33] was connected to and capable of being altered by, the finding at [23], which the Appellant contends was the subject of an unreasonable failure by the IAA to exercise its power under s 473DC of the *Migration Act*.
6. It was therefore not open to the Federal Court to decline to complete the unreasonableness assessment on the grounds of materiality (AS [76]).

Proposition B: The Federal Court erred in concluding at J[50] that "in order for jurisdictional error to be established, the primary judge would need to be satisfied that the IAA failed to consider exercising the s 473DC discretion."

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7. The IAA reasons are silent on whether it considered exercising its power under s 473DC.

8. The condition of reasonableness on the power in s 473DC applies both to an unreasonable failure to consider exercising the power and to an unreasonable failure to exercise the power: *SZMTA* (JBA vol 2, 145), [11].

Proposition C: The principles of procedural fairness inform the reasonable exercise of the discretion under s 473DC

9. 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: *SZVFW* (JBA vol 3, 491) at [12] (Kiefel), [59] (Gageler J), [79] (Nettle and Gordon JJ) and [135] (Edelman J) citing Allsop CJ in *Stretton* at [9]-[11]; *Li* at [67] (Hayne, Kiefel and Bell JJ); (AS [23]).
10. Division 3 of part 7AA is intended to give effect to procedural fairness principles, albeit modified and curtailed as part of the fast-track scheme (AS [31]).
11. The “limited review” provided for under part 7AA scheme is premised on the assumption that a review applicant will have had multiple opportunities to present their case (AS [26]); EM [893], JBA vol 4, 592). The integrity of those opportunities is important.
12. Where a reasonable IAA would conclude from a review of the review material that some critical aspect of the information before the delegate is absent from the review material, or that the hearing in respect of some material issue was defective, the failure to exercise the power in s 473DC conferred for that purpose will be unreasonable: *M174* (JBA vol 2, 199) [49] (Gageler, Keane and Nettle JJ), [90] (Gordon J), [97] (Edelman J).
13. The principles of unreasonableness overlap significantly with principles of procedural fairness in substance in relation to the exercise of s 473DC: *BVD17* (JBA vol 2, 259) [62] (Edelman J); *DPI17* (JBA vol 3, 366) [79]; *FND17* (JBA vol 3, 431) [39]; *CRY16* (summarised in *DGZ16*, JBA vol 3, 342, [70]); *DVO16* (JBA vol 3, 399) [12]; (AS [32]).

Proposition D: Demeanour is “information” within the meaning of section 473DC

14. “Information” in s 473DC means “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”: *M174* (JBA vol 2, 199) [24] (citing *SZEEU* at [205]).
15. The demeanour of an interviewee is capable of conveying important information to a decision-maker: *WZARH* (JBA vol 2, 191) [40]; (Appellant’s Reply (‘AR’) [10]-[11], cf Respondent’s Submissions (‘RS’) [27.1]).
16. Information elicited from a person at an interview to which a person is invited under section 473DC(3) will always be “new information” meeting the criteria in section 473DC(1)(a), because that new interview would necessarily not have been before the Minister when the Minister made the decision (AR [12], cf RS [27.2]).
17. Further and alternatively, the further answers and statements given by the Appellant when invited to an interview under s 473DC would constitute new information, even if the demeanour did not.

Proposition E: The IAA's failure to exercise the power was unreasonable in the circumstances of this case

18. The delegate accepted the Appellant's claims to have been beaten and detained.
19. The Federal Court correctly observed (FC [24], CAB 59) that 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 (AS [38]).
20. The inability of the IAA to observe all the information that was available to the delegate in accepting the truth of the Appellant's claims, including his demeanour at interview, made it unreasonable not to exercise its power to invite the Appellant to an interview: *DPII7* (JBA vol 3, 380), [46(3)] (Griffiths and Steward JJ), [125] (Mortimer J); (AS [41]).
21. In addition to the question of demeanour, there were a series of additional factors which made the IAA's failure to exercise the 473DC power unreasonable. The IAA's reasons at [23] (CAB 10) show that the IAA was alive to and identified those other factors as matters which may have affected the Appellant's ability to give evidence about the sexual assault and, thus, the quality of the hearing. Those factors were (AS [39]):
- 21.1. the cultural taboo surrounding rape in Tamil culture;
 - 21.2. the difficulty of the subject matter; and
 - 21.3. the fact that all other persons in the room were of the opposite gender.
22. Failure to exercise the s 473DC power to invite the Appellant to an interview to remedy those shortcomings in the information before it – including the limitations of the audio recording of the Appellant's interview with the delegate – was unreasonable.

Proposition F: Materiality should not have been applied to prevent the completion of the unreasonableness analysis

23. The Federal Court erred in finding that there was a separate and independent basis for the IAA's decision, and that any unreasonableness would therefore not be material (AS [68]-[75]).
24. In the alternative, materiality should not have been treated as a separate step in the assessment of jurisdictional error for unreasonableness: *DPII7* [105]-[107]; (AS [57]-[66]).
25. It was necessary to establish the character and extent of the unreasonableness of the IAA's failure to exercise its power under s 473DC, and therefore to complete the unreasonableness analysis, before any determination could be made as to whether the error was material (AS [67]).

Dated: 6 August 2020

Meredith Schilling

Adam McBeth