HIGH COURT OF AUSTRALIA

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File Number:	S71/2020
File Title:	AUS17 v. Minister for Immigration and Border Protection & A
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	12 Jun 2020

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IN THE HIGH COURT OF AUSTRALIA No. S71/2020

SYDNEY REGISTRY

BETWEEN: **AUS17**

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second respondent

APPELLANT'S SUBMISSIONS

Date: 12 June 2020

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PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. This appeal presents the following issues:

   (a) Whether a finding that new information could have been "obtained and furnished to the Minister before the delegate made the decision under review" is a sufficient basis for the IAA to conclude there are not exceptional circumstances to justify considering the information under s 473DD of the *Migration Act 1958* (Cth) (**Act**).

   (b) Whether, in a case involving new information that is credible personal information, the IAA may lawfully conclude there are not exceptional circumstances to justify considering the information under s 473DD of the Act without evaluating the significance of the information for its review.

PART III: NOTICES

3. This appeal does not attract the operation of s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CITATIONS

4. The judgments below are unreported and have the following medium neutral citations:

   (a) *Minister for Immigration and Border Protection v AUS17* [2019] FCA 1686;

   (b) *AUS17 v Minister for Immigration & Anor* [2017] FCCA 1986.

PART V: RELEVANT FACTS

5. The appellant is a national of Sri Lanka and a Tamil from the Jaffna District who arrived in Australia as an unauthorised maritime arrival on 13 October 2012. He was detained upon arrival and, other than for a short period between May and December 2013, the appellant has remained in immigration detention.

6. On 4 January 2013, an officer conducted an entry interview with the appellant.

7. On 13 August 2015, the Minister exercised power under s 46A(2) of the *Migration Act 1958* (Cth) (**Act**) to permit the appellant to apply for certain classes of protection visa.

8. On 12 February 2016, the appellant made a valid application for a protection visa and became a fast track applicant.

The appellant's claims

9. On 7 April 2016, the appellant attended a protection visa interview.

10. The appellant's protection claims included, relevantly, fears of violence, torture, and death at the hands of the Eelam People's Democratic Party (**EPDP**) and the Sri Lankan Army arising from events spanning a decade including the following:

    (a) In 2003, the EPDP stabbed and murdered a close friend of the appellant in his presence. When the appellant was summoned to testify against the EPDP in court, the EPDP threatened him with violence to prevent him attending and testifying.

    (b) In 2005, while in Colombo, he was arrested on suspicion of planning to kill the EPDP leader, Douglas Devananda. He was beaten by the EPDP and handed over to the Army. He was released when his mother bribed the officers holding him.

    (c) In 2008, while in Kayts, he was assaulted by EPDP members.

    (d) In 2011, having been the driver in a car accident involving the death of a soldier, he was threatened by army members who believed he deliberately caused the crash.

The decision of the delegate

11. The delegate was impressed by the appellant, finding that he was "generally a credible witness" whose account "was sufficiently detailed, consistent and conformed to independent information"; that at interview he "appeared relaxed", gave "spontaneous" responses, and "did not show any hesitation when answering questions, giving the impression that his responses were not fabrications"; that he "was able to clarify matters when asked" and "appeared to recall events from experience" (**AFM 26** [30]).

12. The delegate also accepted many specific factual claims made by the appellant regarding his interactions with the EPDP and the Army, including those stated above (**AFM 27**).

13. Nonetheless, the delegate ultimately found that:

    (a) the appellant was not of ongoing interest to the EPDP (**AFM 37** [100]; and

    (b) although "there is a possibility that the applicant will be harmed by some elements in the Sri Lankan army", he can safely relocate to Colombo (**AFM 38** [104]).

14. On 9 September 2016, the delegate refused to grant a protection visa, and on 14 September 2016, the Secretary referred this fast track reviewable decision to the IAA.

The decision of the Immigration Assessment Authority

15. Prior to the IAA making its decision, the appellant gave new information to the IAA recorded in a letter from a lawyer and former Member of Parliament together with submissions (**AFM 47-54**). The author of the letter stated that the appellant and his family were known to him and gave details about events involving the EPDP, the Army, and the appellant, as well as the appellant's legal proceedings. The letter concluded: "Even still the EPDP and the Army visit [the appellant's] house to make inquiries about his whereabouts." (**AFM 53-54**)

16. The IAA found that the appellant could have obtained a letter outlining that information earlier and provided it to the Minister and concluded that it was not satisfied there were exceptional circumstances to justify considering the information (**CAB 8** [10]).

17. The IAA did not interview the appellant. In contrast to the delegate, the IAA found that the appellant had fabricated the claims relating to his interactions with the EPDP between 2003 and 2009, principally because he had not referred to them in his entry interview (**CAB 13** [26]; **CAB 31** [14]). His later claims of torture and harassment by the Army were largely rejected as "embellishment" (**CAB 15** [30]; **CAB 31** [14]).

18. The IAA concluded that the appellant had not come to the adverse attention of the EPDP or the Army as claimed, that the Army had not visited the appellant's home and assaulted his friend, and that the Army had not assaulted his father or made threats against him (**CAB 13** [26], **CAB 15** [31]). Having found to the contrary of the delegate's findings in relation to a real chance of significant harm, the IAA did not consider relocation.

19. On 9 January 2017, the IAA affirmed the decision under review.

The judgment of the Federal Circuit Court

20. On 16 February 2017, the appellant sought judicial review in the Federal Circuit Court.

21. On 8 December 2017, Judge Driver granted writs of certiorari and mandamus (**CAB 49**), holding that the IAA had failed to consider whether the information in the letter was credible personal information within the meaning of s 473DD(b)(ii) and failed to evaluate the significance of the information in the context of the appellant's claims more generally (**CAB 55-57** [47], [49]-[50]).

The judgment of the Federal Court

22. On 19 January 2018, the Minister appealed from the judgment given by Judge Driver (**CAB 53-55**).

23. On 18 October 2019, Logan J allowed the appeal (**CAB 61**) on the basis that, in his Honour's view:

    (a) the primary judge had erroneously proceeded on the basis that the matters specified in s 473DD(b) were mandatory relevant considerations (**CAB 69-70** [24]); and

    (b) the IAA's finding that the letter could have been obtained and furnished to the Minister before the delegate made the decision under review was "a sufficient basis" for its satisfaction that no exceptional circumstances existed (**CAB 70** [26]).

24. On 24 April 2020, Kiefel CJ and Keane J granted special leave to appeal (**CAB 82-83**).

PART VI: ARGUMENT

Summary of argument

25. The appellant's argument proceeds as follows:

    (a) The text and context of s 473DD, together with its legislative history, show that it is a remedial provision with an evident logic and purpose directed at permitting consideration of new credible personal information in appropriate cases irrespective of whether the information could have been given to the Minister.

    (b) In any case in which a referred applicant gives "new information" to the IAA, the IAA must determine whether it is bound not to consider the new information.

    (c) In determining whether it is bound not to consider new information that is "credible personal information", the overarching duty of the IAA to "review" precludes the IAA from concluding there are not exceptional circumstances to justify considering the information without evaluating the significance of the information in the context of the applicant's claims more generally and its importance to the review.

    (d) In this case, the primary judge correctly found that the IAA erred in law in failing to consider s 473DD(b)(ii) and in failing to evaluate the significance of the corroborative letter in the context of the appellant's claims more generally and its importance to the review.

Text, context, and purpose of s 473DD

26. Aspects of the scheme of review provided for by Part 7AA of the Act were considered by this Court in *Plaintiff M174*,[1] *BVD17*,[2] and *CNY17*.[3] These submissions address the proper construction of s 473DD against the backdrop provided by those judgments.

27. ***First*, the provision is of a remedial nature.** Its evident purpose is to provide relief from the potential injustice that might otherwise be caused by the operation of the "primary obligation"[4] in s 473DB(1)(a) insofar as that paragraph requires the IAA to review decisions "on the papers" "without accepting or requesting new information". "To that primary rule, subdiv C of Div 3 admits of exceptions."[5] One exception is s 473DD. Textually and contextually, its remedial nature is shown in four ways:

(a) by s 473DB(1) expressly being made "[s]ubject to this Part", including s 473DD, which shows that the latter is an exception to the primary rule in the former;

(b) by s 473DD expressly providing for applicants to give certain types of "new information" to the IAA in "exceptional circumstances", which is a remedial mechanism familiar to the law in other statutory review contexts, such as powers to admit fresh or further evidence on appeal in the interests of justice;[6]

(c) by s 473DD(b)(ii) expressly recognising the special category of "credible personal information which … may have affected the consideration of the referred applicant's claims", being the type of information that is ordinarily at the heart of individualised merits review;

(d) by s 473DA(1) expressly providing that "[t]his Division", including s 473DD, are to be construed in a manner sufficient to meet the statutory description of those provisions as a statement of the requirements of the natural justice hearing rule.[7]

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1 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 (***Plaintiff M174***).

2 *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 (***BVD17***).

3 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 (***CNY17***).

4 *BVD17* at 1096 [14] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

5 *Plaintiff M174* at 227 [22] (Gageler, Keane and Nettle JJ).

6 See, for example, *Federal Court of Australia Act 1976* (Cth) s 27; *CDJ v VAJ* (1998) 197 CLR 172 at 184–186 (Gaudron J), 199–201 (McHugh, Gummow and Callinan JJ), 230–238 (Kirby J). The conditions applicable in that context are much stricter than the conditions in s 473DD.

7 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 373 [99] (Gageler J).

28. The primary rationale behind s 473DD(b)(ii) is to facilitate Australia's response to its view of its international obligations in respect of refugees and other asylum seekers by ensuring that credible personal information may be considered in appropriate cases.

29. ***Secondly*, there is a logical structure to the provision.** Although paragraphs (a) and (b) are conjunctive, the text and structure of s 473DD provide for a disjunction between paragraphs (b)(i) and (b)(ii). As a matter of logic, it follows from that disjunction that non-satisfaction of paragraph (b)(i) is never a sufficient condition for non-satisfaction of the conjunction between paragraphs (a) and (b), because "exceptional circumstances" may exist whenever the IAA is satisfied that paragraph (b)(ii) is met notwithstanding that paragraph (b)(i) is not met. To reason to the contrary is to take "an inappropriately narrow view of the breadth of the expression 'exceptional circumstances'."[8]

30. ***Thirdly*, the scope of paragraph (a) means that, in cases engaging the chapeau to paragraph (b), at least one of the conditions in paragraph (b) must be considered.**

31. "Quite what will amount to exceptional circumstances is inherently incapable of exhaustive statement … '[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'."[9] The condition "necessarily requires that consideration be given to all the relevant circumstances", which may include paragraphs (b)(i) and (b)(ii).[10]

32. Paragraphs (b)(i) and (b)(ii) are not mandatory relevant considerations,[11] and the IAA is not bound to consider both of them in every case in which a referred applicant gives new information to the IAA. That is because the IAA might accept the new information (be satisfied there are exceptional circumstances to justify considering the new information) having considered only one of them. But for that possibility, the conditions in those paragraphs may well have been mandatory relevant considerations in cases engaging the chapeau to paragraph (b). The converse is not true. The IAA cannot refuse to accept new information (conclude there are not exceptional circumstances to justify considering

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8 *Minister for Immigration and Border Protection v CQW17* (2018) 264 FCR 249 at 259–260 [47]–[51] (McKerracher, Murphy and Davies JJ).

9 *Plaintiff M174* at 229 [30] (Gageler, Keane and Nettle JJ).

10 *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111 (***BBS16***) at 144 [102]–[105] (Kenny, Tracey and Griffiths JJ).

11 *AQU17 v Minister for Immigration and Border Protection* [2018] FCAFC 111 at [14] (McKerracher, Murphy and Davies JJ); *CHF16 v Minister for Immigration and Border Protection* (2017) 257 FCR 148 at 159 [46] (Gilmour, Robertson and Kerr JJ).

the new information) without having considered both (b)(i) and (b)(ii), because either or both of those conditions, alone or in conjunction with other circumstances, may amount to "exceptional circumstances".[12] For that reason, a failure to address itself to either condition in paragraph (b) shows that the IAA "misunderstood the scope of (a)".[13]

33. ***Fourthly*, the object of the provision would otherwise be frustrated.** "[T]he whole purpose of s 473DD is to deal with a circumstance that is an exception to the usual way in which the Authority is required to review a decision."[14] An important premise for the operation of s 473DD, expressed in the first limb of the definition of "new information" in s 473DC(1)(a), is that the information was not before the delegate. "The mere fact of non-disclosure [to the delegate] is therefore not a sufficient basis for the rejection of new information, otherwise the purpose of the exception for which s 473DD provides would be frustrated. The objective of s 473DD is to take the non-disclosure as a starting point and then to require the Authority to engage in an evaluative exercise about whether there is, in accordance with the text of the provision, a sufficient justification to make an exception to the operation of s 473DB(1)."[15]

34. ***Fifthly*, the foregoing analysis is supported by the legislative history.** As this Court noted in *Plaintiff M174*,[16] paragraph (b)(ii) was the result of an amendment to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (No 135/2014) moved in the Senate. As originally proposed, the clause did not include paragraph (b)(ii) and did not distinguish between new information that was "credible personal information" and other types of new information.

35. The explanatory memorandum for the original Bill nevertheless gave examples of "exceptional circumstances", including where "credible personal information that was not previously known has emerged which suggests a fast track review applicant will face a significant threat to their personal security, human rights or human dignity if returned to the country of claimed persecution". It stated: "The purpose of imposing an additional

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12 *BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221 at 224–225 [9], 231 [41] (White J).

13 *CHF16 v Minister for Immigration and Border Protection* (2017) 257 FCR 148 at 158–159 [44], [46] (Gilmour, Robertson and Kerr JJ).

14 *ALJ18 v Minister for Home Affairs* [2020] FCA 491 at [37] (Mortimer J).

15 Ibid.

16 *Plaintiff M174* at 230 [33] (Gageler, Keane and Nettle JJ).

component [in para (a)] where a referred applicant gives or seeks to give new information to the IAA is to reinforce the policy position that fast track applicants must be forthcoming with all of their claims and provide all available information to the Minister before a fast track decision is made under section 65 of the Migration Act." The policy position underlying the original Bill was that, in every case, the referred applicant must satisfy the IAA that the new information could not have been given to the Minister.

36. During the committee stage in the Senate, however, an amendment[17] was moved on behalf of the Government to "extend the types of 'new information' that a referred applicant may present to the IAA to include, for example, evidence of significant torture and trauma which, if it had been known by either the Minister or the referred applicant, may have affected the consideration of the referred applicant's asylum claims by the Minister".[18] The amendment was passed.

37. In giving statutory recognition to a specific subclass of "new information", Parliament necessarily intended that such information should be given different treatment. In other words, the "policy position" behind the original Bill ("that fast track applicants must be forthcoming with all of their claims and provide all available information") should not apply in cases where the applicant satisfies the IAA that the new information is credible personal information that may have affected the consideration of the applicant's claims and the IAA is satisfied there are exceptional circumstances to justify considering it.

38. For those reasons, "no construction of Pt 7AA should be countenanced which further constrains the ability of a visa applicant to … seek to have the Authority exercise its power under s 473DD to consider 'new information'".[19] That is not to say that the IAA is unable to consider whether "credible personal information" could have been provided to the Minister and if so why it was not provided. Those matters may be considered. But the IAA's consideration of those matters may be affected in particular cases by its overarching duty to "review", as explained below.

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17 Government sheet GH118 at (10).

18 Australia, Senate, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Supplementary Explanatory Memorandum at [29], quoted in *Plaintiff M174* at 230 [33] (Gageler, Keane and Nettle JJ).

19 *Minister for Immigration and Border Protection v CLV16* (2018) 260 FCR 482 (***CLV16***) at 503–504 [91] (Flick, Griffiths and Perry JJ).

The operation of s 473DD and the special case of "credible personal information" in the context of the overarching duty of the IAA to review the fast track reviewable decision

39. Section 473DD must be construed in the context of: (1) the primary obligation of the IAA to review decisions on the papers; (2) the overarching duty of the IAA to review the decision; and (3) the special case of "credible personal information".

40. For the reasons that follow, where a referred applicant gives new information to the IAA, the IAA must determine whether it is bound not to consider that information, and where the IAA is satisfied that it is credible personal information (or cannot reasonably fail to be so satisfied), the IAA cannot refuse to accept it without evaluating its significance in the context of the applicant's claims more generally and its importance to the review.

The primary obligation of the IAA to review decisions on the papers

41. This appeal is concerned only with cases in which a referred applicant gives new information to the IAA. Section 473DB (headed "Authority to review decisions on the papers") provides that "[s]ubject to this Part", including s 473DD, the IAA "must review" the decision "by considering the review material … without accepting or requesting new information". Section 473DD provides that the IAA "must not consider any new information unless" it is satisfied of the preconditions in that section.

42. Although the IAA "does not have a duty to get, request or accept, any new information" (s 473DC(2)), where the IAA is satisfied there are exceptional circumstances to justify considering new information under paragraph (a) and is satisfied of either condition in paragraph (b), the IAA does not have a residual discretion to refuse to accept the new information. In those circumstances, the IAA has accepted the new information.

43. For completeness, it is necessarily implicit in s 473DB(1)(a), understood in the context of the overarching duty to "review" imposed by s 473CC(1), that, where the IAA has accepted new information under s 473DD, the IAA must review the decision "by considering the review material" in light of such "new information" as the IAA has lawfully accepted.[20] The power of the IAA to accept new information in particular

[20] *Plaintiff M174* at 248 [95] (Edelman J: "the Authority is required to reach its own conclusion, including by reference to new information"); *DVO16 v Minister for Immigration & Border Protection* [2019] FCAFC 157 at [11] (Greenwood and Flick JJ); cf. *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 341–342 [10] (French CJ).

circumstances is conferred in aid of the performance of its duty to review[21] and, once accepted, the new information forms part of the material that is before the IAA on the review. An administrative decision-maker has a duty to make its decision on the material before it.[22] This appeal is about the position prior to acceptance of the new information.

The overarching duty of the IAA to review the fast track reviewable decision

44. Section 473CC(1), which is not expressly subject to any other provision in Part 7AA, provides that the IAA "must review" a decision referred to the IAA under s 473CA. The duty to "review" "is not concerned with the correction of error" but requires "a de novo consideration of the merits" in which the IAA "is to consider the application for a protection visa afresh and to determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met".[23] The duty to "review" stands outside and apart from those provisions that are to be taken to be an exhaustive statement of the requirements of the natural justice hearing rule (s 473DA(1)). The review is "limited" (s 473FA(1)) only insofar as Part 7AA imposes limitations.

45. One aspect of such a duty to "review", long accepted in relation to cognate statutory duties imposed on tribunals by ss 348(1) and 414(1)[24] of the Act, was described in *WAEE*[25] and *NABE*[26] and expressly endorsed by this Court in *SZMTA*[27]:

> "*Amongst the obligations to be observed by the Tribunal in the conduct of the review which are implicit in the scheme of Pt 7 is the obligation to reconsider the merits of the decision under review 'in light of the information, evidence and arguments which are relevant to the application and which are provided to it or which it obtains for itself'. That obligation is fundamental to the nature of the review ...*"

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21 Cf. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 (Bowen CJ and Deane J), 429-430 (Smithers J).

22 *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425 (Brennan J).

23 *Plaintiff M174* at 226 [17] (Gageler, Keane and Nettle JJ), 245 [85] (Gordon J), 246 [92] (Edelman J).

24 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (***SZMTA***) at [7]–[14] (Bell, Gageler and Keane JJ), [104]–[105] (Nettle and Gordon JJ).

25 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at 604 [44] (French, Sackville and Hely JJ).

26 *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 15–16 [48]–[49] (Black CJ, French and Selway JJ).

27 *SZMTA* at [13] (Bell, Gageler and Keane JJ), [104] (Nettle and Gordon JJ).

46. The corresponding obligation to be observed by the IAA in the conduct of its review, implicit in the scheme of Part 7AA, is the obligation to reconsider the merits of the decision under review in light of the "review material" (s 473CB) and such further information, evidence and arguments as may be lawfully accepted or obtained by the IAA pursuant to the provisions of Part 7AA (ss 473DC, 473DD, 473DE).

47. A tribunal conducting a "review" under ss 348(1) and 414(1) of the Act "would fail to perform its duty of review if it failed to take account of cogent evidence providing substantial support to the applicant's case"[28] or "failed to take account of a substantial and clearly articulated argument advanced by the applicant in support of that case".[29]

10 48. Importantly for the purposes of Part 7AA, this Court has confirmed that such failures go beyond a mere failure to observe the requirements of natural justice and amount to a constructive failure to perform the duty to "review".[30] For that reason, except to the extent such omissions are authorised by Part 7AA, the same omissions by the IAA involve a constructive failure to perform its duty to "review" under s 473CC(1).[31]

49. In the case of "review material", the duty requires that "the Authority examine the review material … in order for the Authority to form and act on its own assessment of the relevance of that material to the review of the referred decision"[32] "[w]ithin the bounds of reasonableness". "What the Authority cannot do is to fail or refuse to turn its attention to any of the review material".[33] Those propositions accord with the description of the
20 IAA's review function given by this Court in *Plaintiff M174*.[34]

50. Where an applicant gives new information to the IAA, the duty to review requires that the IAA not "fail or refuse to turn its attention to", and reasonably "form and act on its

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28 *SZMTA* at 435–436 [13] (Bell, Gageler and Keane JJ), citing *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at 130–131 [111]–[112] (Robertson J).

29 *SZMTA* at 435–436 [13] (Bell, Gageler and Keane JJ), 463 [105] (Nettle and Gordon JJ), citing *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 (***Dranichnikov***) at 1092 [24]–[25] (Gummow and Callinan JJ with whom Hayne J agreed).

30 *Dranichnikov* at 1092 [25] (Gummow and Callinan JJ with whom Hayne J agreed).

31 See, for example, *DVD16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 332 at [54] (Perry J); *BBS16* at 139 [79] (Kenny, Tracey and Griffiths JJ).

32 *CNY17* at 145 [7] (Kiefel CJ and Gageler J), 166 [140] (Edelman J).

33 *CNY17* at 145 [7] (Kiefel CJ and Gageler J).

34 *Plaintiff M174* at 226 [17] (Gageler, Keane and Nettle JJ), 245 [85] (Gordon J), 246 [92] (Edelman J).

own assessment of", the new information in determining whether it is bound not to consider it. It must also consider submissions made in respect of the new information.[35]

The special case of "credible personal information" in paragraph (b)(ii)

51. Paragraph (b)(ii) gives special treatment to "credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims". Those requirements are addressed below.

52. ***"Credible":*** Leaving aside the 'poisoned well' cases,[36] the requirement that the IAA be "free of bias" (s 473FA(1)) requires the IAA to bring an open mind to its assessment of credibility in paragraph (b)(ii) in the first instance: what is "credible" information "must be determined by a decision-maker before the final decision is reached"[37] according to whether the information is "open to be or capable of being accepted by the Authority as truthful (or accurate, or genuine)".[38]

53. ***"Personal information":*** The paragraph is limited to "new information" that is "personal information", being "information or an opinion about an identified individual, or an individual who is reasonably identifiable"[39] that meets the conditions in s 473DC(1). "Information" is used "in the ordinary sense of a communication of knowledge about some particular fact, subject or event"[40] and does not extend beyond "knowledge of facts or circumstances relating to material or documentation of an evidentiary nature".[41]

54. ***"Not previously known":*** It is settled that this expression means not previously known to at least one of the referred applicant or the Minister.[42]

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35 *CLV16* at 499 [69] (Flick, Griffiths and Perry JJ).

36 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2002) 77 ALJR 1165 at 1174 [49] (McHugh and Gummow JJ).

37 *VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 96 [17] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

38 *CLV16* at 487–488 [17] (Flick, Griffiths and Perry JJ), citing *CSR16 v Minister for Immigration and Border Protection* [2018] FCA 474 at [41]-[42] (Bromberg J).

39 *Migration Act 1958* (Cth) s 5(1); *Privacy Act 1988* (Cth) s 6(1). See also *Plaintiff M174* at [33].

40 *Plaintiff M174* at [24], citing *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [205].

41 *SZMTA* at 440 [28] (Bell, Gageler and Keane JJ).

42 *Plaintiff M174* at 230–231 [33] (Gageler, Keane and Nettle JJ).

55. To meet the requirements of paragraph (b)(ii), the IAA must be satisfied that the previously unknown personal information is "credible" (s 473DD(b)(ii)), "relevant" (s 473DC(1)(b)) and, to use a shorthand for the expression "may have affected the consideration of the referred applicant's claims" (s 473DD(b)(ii)), the information must also be "significant". Understood in that way, the statute evokes, in the case of personal information, the common law description of administrative decision-making as involving inquiries into allegations that are "credible, relevant and significant".[43] It is satisfied by all personal information that was not previously known and "that cannot be dismissed from further consideration by the decision-maker" as not credible, or not relevant, or of little or no significance to the decision.[44] All such information may be considered where the IAA is satisfied that there are exceptional circumstances to justify considering it.

56. Where a referred applicant gives to the IAA new information that is "credible personal information", the effect of the overarching duty to "review" is that the IAA cannot affirm the decision under review without an "evaluation of the significance of the new information in the context of the referred applicant's claims more generally" at some point during the review.[45] Whether that evaluation occurs in considering exceptional circumstances under s 473DD(a), or later in the review, is a matter for the IAA. An important corollary, however, is that the IAA cannot refuse to accept new information that is credible personal information without evaluating its significance for the review, because that would involve a failure to perform the duty to review.

57. Although it has been held that "[i]t is only at the deliberative stage of its review … that the Authority will be required to determine whether or not the 'new information' is true",[46] that proposition requires qualification. There is no error in the IAA concluding that the new information is true, or evaluating the significance of the new information (if true), prior to "the deliberative stage of its review".[47] The outcome of such an evaluation

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43 *VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 95–96 [16]-[17] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), citing *Kioa v West* (1985) 159 CLR 550 at 628-629 (Brennan J).

44 Ibid.

45 *BBS16* at 144 [105] (Kenny, Tracey and Griffiths JJ).

46 *CLV16* at 487–488 [17] (Flick, Griffiths and Perry JJ), citing *CSR16 v Minister for Immigration and Border Protection* [2018] FCA 474 at [41]-[42] (Bromberg J).

47 *DLB17 v Minister for Home Affairs* [2018] FCAFC 230 at [22] (McKerracher, Barker and Banks-Smith JJ).

might well satisfy the IAA that there are exceptional circumstances to justify considering the information. Understood in the factual context in which it was stated, the proposition means no more than that the IAA is not "required" to determine whether the new information is true at any earlier stage, and must not do so if that would result in the IAA rejecting the new information without considering its place in the balance of the review material, its significance in the context of the applicant's claims more generally, and its importance to the review. The probative value of the new information may be different when considered together with the review material rather than in isolation. That general approach is best understood as an aspect of the overarching duty to review.

10 **Application of legal principles to the facts of this case**

58. The primary judge was correct to find that the IAA failed to consider paragraph (b)(ii) and failed to evaluate the significance of the corroborative letter in the context of the appellant's claims more generally (**CAB 55-57** [47], [49]-[50]).

59. As shown below, those matters are demonstrated by a fair reading of the IAA's reasons. In further support of that conclusion, such inferences must also be drawn in light of *Yusuf*.

The reasons given by the IAA show that it did not consider paragraph (b)(ii)

60. Where the IAA gives reasons, there is no impediment to the courts drawing inferences from them.[48] In this case, in those instances where the IAA turned its mind to paragraph (b)(ii) in considering whether there were exceptional circumstances to justify
20 considering new information, the IAA expressly said that it had done so, and used the exact language of paragraph (b)(ii). For example, with reference to:

(a) ***The new country information:*** "Nor am I satisfied the new information is credible personal information. Further, I am not satisfied that any exceptional circumstances exist that justify considering the new information." (**CAB 7** [9])

(b) ***The new information in the Facebook posts:*** "I am satisfied it is credible personal information which if known could have affected the primary decision. I am satisfied there are exceptional circumstances for its consideration." (**CAB 7** [11])

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48 *CHF16 v Minister for Immigration and Border Protection* [2017] FCAFC 192 at [40]-[49] (Gilmour, Robertson and Kerr JJ); *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146 at 165 [72] (Kenny, Flick and Griffiths JJ).

61. The IAA was satisfied as to the condition in paragraph (b)(ii) in the case of the latter but not satisfied in the case of the former. In each case it expressed the state of satisfaction it had reached, whether it was satisfied or not.

62. In those circumstances, it is natural and appropriate to infer that the reason why the IAA did not refer to "credible personal information" in relation to the corroborative letter (**CAB 7** [10]) was because it simply did not consider paragraph (b)(ii) or did not consider that condition to be material. It did not express a state of satisfaction because it had not formed one. That is the simplest and fairest explanation. The use of the shorthand description "letter of support" does not require any different conclusion.

10 The reasons given by the IAA show that it did not evaluate the significance of the letter

63. On the face of the new information (**AFM 47-54**), the following was apparent:

(a) ***Factual context:*** The letter was not provided to recount that which had been accepted by the delegate, but to corroborate what was not accepted by the delegate, namely, the continuing interest of the EPDP and the Army in the appellant.

(b) ***"Personal information":*** On any reasonable view, the letter evidently sought to communicate knowledge about an identified individual, being the appellant, and the IAA did not find otherwise.

(c) ***"Credible":*** The letter was signed in the name of a man who identified himself as a lawyer and former Member of Parliament in the appellant's home district, and
20 provided direct contact details including an office address, two telephone numbers, and an email address. On its face, the letter could not reasonably be dismissed from further consideration as not credible, in the sense of capable of being accepted as truthful, and the IAA did not find otherwise.

(d) ***Corroboration of claims before delegate based on personal knowledge:*** The author of the letter stated that "[the appellant] and his family are known to me" and corroborated many of the appellant's claims. The letter purported to be direct evidence from a lawyer based on his personal knowledge of the appellant and the appellant's legal proceedings. For example, that the appellant was arrested when he went past Douglas Devananda's house in 2005; that the appellant was involved
30 in an accident involving the death of an army officer in 2011; that a case was filed against the appellant in the Mullaithivu Magistrate's Court; and the appellant was thereafter followed by the Army and the Police Intelligence Unit wherever he went.

(e) ***New claims based on personal knowledge:*** The letter stated: "Even still the EPDP and the Army visit his house to make inquiries about his whereabouts." The appellant had not previously claimed that the Army had visited "his house" (as distinct from his parents' home in Jaffna: **AFM 12** [41]). The appellant's last place of residence was in Colombo, which was the area to which the delegate suggested he relocate. The appellant had also not previously claimed that the EPDP (as distinct from the Army) had visited either house. The timing of the "inquiries" may be ambiguous but the pith of the letter is that the appellant was and remains of ongoing interest to the EPDP and the Army.

64. Despite all of the foregoing considerations, which were evident on the face of the new information in light of the appellant's claims and the delegate's decision, the IAA said only that the letter "recounts the claims already provided by the applicant". These circumstances provide further support for the inference that the IAA failed to consider paragraph (b)(ii) and failed to evaluate the significance of the letter in the context of the appellant's claims and its importance to the review.

65. Even if the IAA had summarised the information in the letter (which it did not), a "brief restatement" of the information would not show "real consideration" in the sense of an "active intellectual process" directed at the material.[49] The only other reason given by the IAA for concluding that there were not exceptional circumstances to justify considering the corroborative letter was its finding that paragraph (b)(i) was not satisfied because the appellant could have provided the information to the Minister. That reason was not "a sufficient basis" (cf. **CAB 77** [26]). The IAA's approach "bespeaks an overly narrow interpretation of the expression 'exceptional circumstances'".[50]

<u>An orthodox application of the principles stated in *Yusuf* requires the same conclusion</u>

66. The same conclusion may also be reached by an alternative path based on s 473EA(1) of the Act and s 25D of the *Acts Interpretation Act 1901* (Cth). Accepting that the IAA does not have to give reasons for the exercise or non-exercise of a procedural power,[51]

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49 *Minister for Immigration and Border Protection v CQW17* (2018) 264 FCR 249 at [38]-[39] (McKerracher, Murphy and Davies JJ), citing *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [45] (Griffiths, White and Bromwich JJ).

50 Ibid at 260 [51] (McKerracher, Murphy and Davies JJ).

51 *BVD17* at [16], [40].

or indeed for any decision other than the decision on the review, it remains the case that to the extent the IAA treats material as a basis for making a finding of fact that forms part of the reasons for the decision that it makes on the review, the IAA is obliged to set out its findings on those questions of fact and identify that material in the written statement of reasons that it is required to give for the decision.[52]

67. Notwithstanding that there is no freestanding duty to give reasons for determinations under s 473DD, the absence from the IAA's reasons of findings of fact as to whether new information is "credible personal information" nevertheless entitles a court to infer that those matters of fact were not considered by the IAA to be material to its decision on the review,[53] which may expose legal error in the manner in which the IAA has applied s 473DD or performed its duty to review. Those propositions were settled in *Yusuf* and were not overturned by *BVD17*.

68. This Court has long recognised that "[t]here may be situations where a procedural decision forms part of the Tribunal's 'reasons for the decision'" for the purposes of a statutory duty to give reasons.[54] Where "new information" is before the IAA, the IAA has an implied duty to consider whether to accept the new information under s 473DD,[55] and where the IAA accepts the new information, the IAA must review the fast track reviewable decision by considering both the review material and the new information.[56] The IAA's findings under s 473DD delimit the material that the IAA is legally required to consider on the review. Accordingly, "a decision on whether to consider new information is a decision about the very scope and nature of the review decision."[57]

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52 *CNY17* at 145 [8] (Kiefel CJ and Gageler J).

53 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69] (McHugh, Gummow and Hayne JJ).

54 *SZGUR* at [69] (Gummow J with whom Heydon and Crennan JJ agreed).

55 *BYA17 v Minister for Immigration and Border Protection* (2019) 269 FCR 94 (***BYA17***) at 97 [4], 110 [56] (Rares, Perry and Charlesworth JJ).

56 Section 473DB (IAA to review decisions on the papers) is "[s]ubject to this Part", including s 473DD. It is necessarily implicit in ss 473DB(1)(a) and 473DD that once the IAA has "accept[ed] … new information" under s 473DD, the IAA must review the fast track reviewable decision by considering both the review material and such new information as it has accepted. See also *Plaintiff M174* at [95] (Edelman J: "the Authority is required to reach its own conclusion, including by reference to new information"); *DVO16 v Minister for Immigration & Border Protection* [2019] FCAFC 157 at [11] (Greenwood and Flick JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [10] (French CJ).

57 *BYA17* at 110 [57] (Rares, Perry and Charlesworth JJ).

69. The absence from the IAA's reasons of findings on questions of fact such as whether the corroborative letter was "credible personal information" or how important the information in the letter was to the review requires the inference that the IAA erroneously considered those questions of fact not to be material to its decision on the review. The IAA erred in law in determining whether it was bound not to consider the information.

The error was jurisdictional

70. There is no challenge to the concurrent findings below that the error found by the primary judge was both material and jurisdictional (**CAB 56** [47], **CAB 78** [27]). A correct application of the law could have resulted in a different decision.[58]

10 Conclusion

71. The primary judge was correct to conclude that the IAA erred in law in applying s 473DD and constructively failed to exercise jurisdiction (**CAB 57** [50]). Justice Logan erred in holding otherwise. The appeal must be allowed.

PART VII: ORDERS

72. The appellant seeks the following orders:

    1. Appeal allowed with costs.

    2. Set aside the orders made by the Federal Court of Australia on 16 October 2019 and, in their place, order that the appeal be dismissed with costs.

PART VIII: TIME ESTIMATE

20 73. The appellant estimates that one and a half hours will be required for the presentation of his oral argument.

Dated: 12 June 2020

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[58] *Shrestha v Minister for Immigration and Border Protection* (2018) 264 CLR 151 at 155 [1] (Kiefel CJ, Gageler and Keane JJ).

IN THE HIGH COURT OF AUSTRALIA No. S71/2020
SYDNEY REGISTRY

BETWEEN: **AUS17**

Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First respondent

IMMIGRATION ASSESSMENT AUTHORITY

Second respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

The statutory provisions referred to in the appellant's submissions are as follows:

1. *Acts Interpretation Act 1901* (Cth) s 25D (as currently in force).
2. *Migration Act 1958* (Cth) s 5(1) ("personal information"), Pt 7AA (as at 9 January 2017).
3. *Privacy Act 1988* (Cth) s 6(1) ("personal information") (as at 9 January 2017).