HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

ABT17 APPELLANT

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR RESPONDENTS

ABT17 v Minister for Immigration and Border Protection
[2020] HCA 34
Date of Hearing: 6 August 2020
Date of Judgment: 14 October 2020
M140/2019

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Federal Court of Australia made on 16 April 2019 and, in their place, order that:*

   (a) *the appeal to that Court be allowed;*

   (b) *the orders of the Federal Circuit Court of Australia made on 23 March 2018 be set aside and, in their place, it be ordered that:*

      (i) *writs of certiorari and mandamus be issued to the second respondent quashing the decision made on 16 December 2016 and remitting the matter to be determined according to law; and*

      (ii) *the first respondent pay the applicant's costs of the application for judicial review to the Federal Circuit Court of Australia; and*

(c) the first respondent pay the appellant's costs of the appeal to that Court.

3. The first respondent pay the appellant's costs of the appeal to this Court.

On appeal from the Federal Court of Australia

Representation

M A Schilling with A N P McBeth for the appellant (instructed by Clothier Anderson Immigration Lawyers)

G A Hill for the first respondent (instructed by Sparke Helmore)

Submitting appearance for the second respondent

CATCHWORDS

ABT17 v Minister for Immigration and Border Protection

Immigration – Refugees – Application for protection visa – Immigration Assessment Authority ("IAA") – Review by IAA under Pt 7AA of *Migration Act 1958* (Cth) – Where delegate of Minister for Immigration and Border Protection ("Minister") refused to grant appellant temporary protection visa – Where delegate accepted appellant's account as plausible, but found appellant did not hold well-founded fear of persecution based on country information – Where delegate's decision referred to IAA for review – Where IAA affirmed delegate's decision – Where IAA departed from delegate's assessment of appellant's credibility – Where under s 473DB IAA generally required to review fast track reviewable decision by considering review material, and without accepting new information or interviewing applicant – Where under s 473DC IAA may get new information not before Minister and that IAA considers may be relevant, including by inviting applicant to interview – Where under s 473DD IAA must not consider new information unless satisfied there are exceptional circumstances, and that new information was not and could not have been before Minister or is credible personal information – Whether legally unreasonable for IAA to depart from delegate's assessment of appellant's credibility without inviting appellant to interview – Whether appellant's demeanour "new information" within meaning of s 473DC – Whether failure to invite appellant to interview was material to IAA's decision.

Words and phrases – "credibility", "de novo review", "demeanour", "fast track reviewable decision", "Immigration Assessment Authority", "informational gap", "interview", "legal unreasonableness", "material", "materiality", "new information", "review material", "temporary protection visa".

Migration Act 1958 (Cth), Pt 7AA, ss 473DB, 473DC, 473DD.

1 KIEFEL CJ, BELL, GAGELER AND KEANE JJ. Part 7AA of the *Migration Act 1958* (Cth) confers jurisdiction on the Immigration Assessment Authority to review a "fast track reviewable decision", referred to it by the Minister for Immigration and Border Protection, by which a delegate of the Minister has refused to grant a protection visa to the "referred applicant". The Part has been examined in detail on several occasions[1].

2 The scheme of the Part is to impose a duty on the Authority to review the fast track reviewable decision referred to it by the Minister[2] by "considering" the "review material" provided to it by the Secretary of the Department of Immigration and Border Protection at the time of referral[3], without accepting or requesting "new information" and without interviewing the referred applicant[4], subject to the Authority having specific powers to "get"[5] and, in specified circumstances[6] and on specified conditions[7], to "consider" new information. One way the Authority is empowered to get new information is by inviting a person, who can be the referred applicant, to give new information at an interview which the Authority can conduct in person or by telephone or in any other way[8].

3 The duty of the Authority to review a referred decision is imposed on the implied condition that the duty must be performed within the bounds of

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1 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 225-232 [13]-[38]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1094-1096 [3]-[17]; 373 ALR 196 at 198-201; *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 144-145 [2]-[8]; 375 ALR 47 at 48-50; *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706; 380 ALR 216.

2 Section 473CC of the *Migration Act*.

3 Section 473CB of the *Migration Act*.

4 Section 473DB of the *Migration Act*.

5 Section 473DC of the *Migration Act*.

6 Section 473DD of the *Migration Act.*

7 Sections 473DE and 473DF of the *Migration Act*.

8 Section 473DC(3)(b) of the *Migration Act*.

reasonableness, and the powers of the Authority to get and consider new information are likewise conferred on the implied condition that those powers must be considered and where appropriate exercised within the bounds of reasonableness[9].

4 The question of principle in this appeal is whether compliance with the reasonableness condition can compel the Authority to exercise its powers to get and consider new information by inviting a referred applicant to an interview in order to assess and consider his or her demeanour in the conduct of a review. The answer is that it can, and that in this case it did.

The applicable principles

5 The nature of the jurisdiction exercised by the Authority when conducting a review of a fast track reviewable decision is settled[10]:

> "[T]he Authority when conducting a review of a fast track reviewable decision is not concerned with the correction of error on the part of the Minister or delegate but is engaged in a de novo consideration of the merits of the decision that has been referred to it. The task of the Authority ... 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."

6 "Review material", which the Secretary is obliged in every case to provide to the Authority and which the Authority is obliged in every case to consider in exercising that jurisdiction, comprises material within three categories. The first is a statement concerning the referred decision setting out the findings of fact made by the delegate, referring to the evidence on which those findings were based and giving reasons for the decision[11]. The second is material provided by the referred

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9 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 227 [21]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1096 [15]; 373 ALR 196 at 200; *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [6]-[7]; 375 ALR 47 at 50.

10 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 226 [17].

11 Section 473CB(1)(a) of the *Migration Act*.

applicant to the Minister before the delegate made the referred decision[12]. The third is other material in the Secretary's possession or control considered by the Secretary to be "relevant" to the review[13] in the sense that it is "capable directly or indirectly of rationally affecting assessment of the probability of the existence of some fact about which the Authority might be required to make a finding"[14].

7 Conformably with the nature of the jurisdiction to be exercised by the Authority in the conduct of the review, the obligation of the Authority to "consider" the review material provided to it by the Secretary is to "examine the review material ... to form and act on its own assessment of the relevance of that material to the review of the referred decision"[15].

8 The purpose of obliging the Secretary to provide the review material to the Authority and of obliging the Authority to consider the review material provided to it by the Secretary is evidently to ensure that the Authority, in conducting its de novo consideration of the merits of the referred decision, has and examines for itself the same information that was before the Minister and that was therefore available to be taken into account by the delegate when making the referred decision.

9 "New information", which the Authority can only get and consider in the exercise of its specific powers, comprises any communication of "knowledge of facts or circumstances relating to material or documentation of an evidentiary nature"[16] which was not before the Minister when the delegate made the referred

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12 Section 473CB(1)(b) of the *Migration Act*.

13 Section 473CB(1)(c) of the *Migration Act*.

14 See *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [6]; 375 ALR 47 at 50.

15 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 145 [7]; 375 ALR 47 at 50.

16 *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706 at 710-711 [21]; 380 ALR 216 at 222, quoting *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 440 [28].

decision[17] that the Authority itself considers might be relevant to the review[18] in the sense that it might be capable directly or indirectly of rationally affecting assessment by the Authority of the probability of the existence of some fact about which the Authority might be required to make a finding in determining afresh whether or not to be satisfied that the criteria for the grant of a protection visa have been met[19].

10 Though review by the Authority is described in the "simplified outline" to Pt 7AA as "on the papers"[20], the information contained in the review material which the Secretary provides to the Authority will have been shaped by the Code of Procedure in Subdiv AB of Div 3 of Pt 2. The Code of Procedure has the effect of preventing a visa applicant or interested person from communicating with the Minister in relation to an application for a protection visa other than in writing[21]. But that does not mean that other material in the Secretary's possession or control which might be considered by the Secretary to be relevant to the review will necessarily be in documentary form.

11 The Code of Procedure empowers the Minister or a delegate, "if he or she wants to", to "get any information that he or she considers relevant" on the condition that, if he or she "gets such information", he or she "must have regard to that information in making the decision whether to grant or refuse the visa"[22]. The Minister or delegate is specifically empowered to invite the applicant to give additional information in any of three ways: "in writing", "at an interview between the applicant and an officer" or "by telephone"[23]. If the applicant is invited to give additional information at an interview, there is no need for the officer who conducts the interview to be the delegate who is going to decide whether to grant or refuse the visa. Nor is there any need for the interview to be conducted in person.

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17 Section 473DC(1)(a) of the *Migration Act*.

18 Section 473DC(1)(b) of the *Migration Act*.

19 *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706 at 711 [23]; 380 ALR 216 at 222.

20 Section 473BA of the *Migration Act*.

21 Section 52 of the *Migration Act*; reg 2.13 of the *Migration Regulations 1994* (Cth).

22 Section 56(1) of the *Migration Act*.

23 Sections 56(2) and 58(1) of the *Migration Act*.

Nor does any statutory provision govern the form in which the interview might be recorded or transcribed.

12 Whatever the form in which any interview with a referred applicant conducted in accordance with the Code of Procedure might come to be recorded or transcribed, the record of the interview is material in the Secretary's possession or control which the Secretary could not but consider relevant to the review. The record can therefore be expected to form part of the review material which the Secretary will be obliged to give to the Authority and which the Authority will be obliged to examine for itself.

13 However, the potential for a record of an interview conducted in accordance with the Code of Procedure to take a variety of forms creates potential for an informational gap to arise in the review material where an interview with the referred applicant has been conducted by the delegate in person and has been audio recorded but not video recorded. Provision of the audio recording as part of the review material will then not put the Authority in the position of having and being able to examine for itself the totality of the information available to the delegate and required by the Code of Procedure to be considered by the delegate when making the referred decision. Missing from the review material will be a visual impression of how the referred applicant appeared during the interview – his or her demeanour.

14 An informational gap of that nature has potential to impact on the Authority's assessment of the credibility of the account given by the referred applicant during the audio recorded interview and in turn has potential to impact on the Authority's assessment of the referred applicant's overall credibility. "Impressions formed by a decision-maker from the demeanour of an interviewee may be an important aspect of the information available to the decision-maker."[24] That has "long been recognised"[25] and continues to be appreciated despite awareness on the part of sophisticated decision-makers that "an ounce of intrinsic

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24 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 338 [40].

25 See *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 338 [40], and the cases there cited.

merit or demerit" measured by reference to objectively established facts and the apparent logic of events "is worth pounds of demeanour"[26].

15 The potential significance of demeanour is illustrated by the present case. Here, as will be seen, the Authority was troubled by a concern that the appellant's evidence in his audio recorded interview with the delegate was generally lacking detail and at times vague and hesitant. An interview was the obvious means by which the Authority might seek to resolve these matters of concern, given that the Authority was evidently not convinced by the country information alone to uphold the delegate's ultimate decision, however "plausible" the appellant's account of his personal circumstances might be. At an interview the Authority could seek answers in relation to those aspects of the appellant's evidence that troubled the Authority by raising questions which had not previously been raised with the appellant. The Authority could thus develop an informed impression of the credibility of the appellant based on his responses to such questions and an observation of his demeanour. The appellant's responses and the demeanour of the appellant inextricably associated with them would be new information relevant to his personal circumstances.

16 There can be no doubt that the powers of the Authority to get and consider new information enable the Authority to bridge such an informational gap by inviting the referred applicant to a further interview to be conducted in person or by video link in order to assess and consider his or her demeanour for itself. The Authority's own visual impression of the referred applicant's appearance during such an interview would necessarily constitute new information within the power of the Authority to get because it would communicate knowledge of an evidentiary nature which would be open to be considered by the Authority to have the potential to bear on the Authority's assessment of the referred applicant's credibility[27] and which was not before the Minister when the delegate made the referred decision[28]. The new information so got by the Authority would then meet the preconditions to its consideration by the Authority on the basis that it was not and could not have been before the Minister when the delegate made the referred

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26 *Fox v Percy* (2003) 214 CLR 118 at 129 [30]-[31], quoting *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 Ll L Rep 140 at 152.

27 Section 473DC(1)(b) of the *Migration Act*.

28 Section 473DC(1)(a) of the *Migration Act*.

decision[29] and on the basis of the Authority's satisfaction that the existence of any informational gap is sufficiently aberrant within the scheme of de novo review for which Pt 7AA provides to make existence of the informational gap in the particular review alone enough to constitute "exceptional circumstances" justifying its consideration irrespective of how frequently such an informational gap might arise in practice[30].

17 Were some aspect of the referred applicant's appearance during the interview to end up being so glaringly undermining of the referred applicant's credibility as to lead the Authority to consider in advance of reasoning on the facts that the appearance of itself "would", as distinct from "might", be the reason or part of the reason for affirming the decision of the delegate[31], the Authority would come under an obligation to explain that to the referred applicant and to invite the referred applicant to comment[32]. The Authority would be able to discharge that obligation by inviting the applicant to comment orally in the interview itself or subsequently in writing. But occasions when the need to take such a course might arise would be rare, as the circumstances of the present case again illustrate. The Authority was evidently inclined to reject the appellant's account of his experience of persecution because the Authority found the appellant's account vague and lacking in detail and to have been given in a hesitant fashion. An interview by the Authority would have enabled the Authority to get new information from the appellant by raising these issues with him. If the effect of this new information was that it simply failed to allay the tentative concerns that the Authority already entertained about the appellant's credibility, the obligation to invite further comment would not be engaged. The new information would not be the reason, or part of the reason, for affirming the fast track reviewable decision. The reason would remain the unallayed concerns of the Authority in relation to the appellant's account of his personal circumstances.

18 The Authority being able to exercise its powers to get and consider new information to bridge an informational gap in the review material by inviting a

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29 Section 473DD(b)(i) of the *Migration Act.*

30 Section 473DD(a) of the *Migration Act*. See *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 229 [30].

31 See *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 223 [9], and the cases there cited.

32 Section 473DE of the *Migration Act.*

referred applicant to an interview in order to gauge and consider his or her demeanour for itself, the question becomes as to when if at all compliance with the implied condition of reasonableness in the conduct of the review or in the consideration and exercise of those powers might compel the Authority to adopt that course. Contrary to the urging of the appellant, answering that question is not assisted by seeking to infuse the implied condition of reasonableness with notions of procedural fairness, separate implication of which is expressly excluded from the scheme of Pt 7AA[33].

19 The answer is to be found in recognising that "[t]he implied condition of reasonableness is not confined to why a statutory decision is made; it extends to how a statutory decision is made"[34] such that "[j]ust as a power is exercised in an improper manner if it is, upon the material before the decision-maker, a decision to which no reasonable person could come, so it is exercised in an improper manner if the decision-maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course"[35].

20 Compliance with the implied condition of reasonableness in the performance by the Authority of its duty to review the decision of the delegate necessitates not only that the decision to which the Authority comes on the review has an "intelligible justification"[36] but also that the Authority comes to that decision through an intelligible decision-making process[37]. Thus, as has been recognised, there can be circumstances in which the Authority can transgress the bounds of reasonableness by treating particular information as the reason or part of the reason for the decision to which it comes without first exercising its powers

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33 Section 473DA(1) of the *Migration Act*. See *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1099 [34]; 373 ALR 196 at 204-205.

34 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 371 [91].

35 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290, citing *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170. cf *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1128-1129 [20]-[25]; 259 ALR 429 at 434-436.

36 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76].

37 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 375 [105], quoting *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 220-221 [47].

to get and if appropriate to consider, as new information, further information capable of being provided by the referred applicant[38].

21 Answering the question therefore requires an examination of the decision-making pathways reasonably open to the Authority in reviewing the decision of a delegate to determine for itself whether the criteria for the grant of a protection visa have been met where the review material that it is obliged to consider in making that determination leaves out information that was available to and required to be considered by the delegate.

22 The mere existence of an informational gap will not necessarily result in the Authority being "disadvantaged in comparison with the delegate"[39]. That is because, having regard to country information and other information contained in the review material, the credibility of the referred applicant will not necessarily have a significant bearing on the Authority's determination of whether the criteria for the grant of a protection visa have been met. That is also because, having regard to country information and other information contained in the review material, how the referred applicant may have presented in the interview with the delegate will not necessarily have a significant bearing on such assessment of his or her credibility as the Authority might reasonably undertake.

23 To the extent that the credibility of the referred applicant might bear on whether the Authority is to be satisfied that the criteria for the grant of a protection visa have been met and to the extent that his or her appearance in an interview with the delegate might bear on his or her credibility, it would ordinarily be open to the Authority to form its own assessment of credibility taking into account such second-hand description or impression of his or her appearance as might be conveyed expressly or by implication in the statement forming part of the review material which sets out the delegate's findings of fact and refers to the evidence on which those findings were based. Taking into account any such description or impression of the referred applicant's appearance, it would ordinarily then be open to the Authority to reach an assessment of the referred applicant's credibility

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38 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 236 [49], 249 [97].

39 *FND17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1369 at [39].

without any need for the Authority's assessment of credibility to coincide with the delegate's assessment of credibility.

24 The Minister is therefore correct to say that the Authority is not required to interview a referred applicant merely because credibility is in issue or merely because the Authority comes to a different view as to credibility than did the delegate[40].

25 However, the Authority will act unreasonably if, without good reason, it does not invite a referred applicant to an interview in order to gauge his or her demeanour for itself before it decides to reject an account given by the referred applicant in an audio recorded interview which the delegate accepted in making the referred decision wholly or substantially on the basis of its own assessment of the manner in which that account was given. That is what happened in this case.

The principles applied

26 The procedural history is comprehensively recounted in the reasons for judgment of Nettle J and need not be repeated.

27 The gist of what happened is that the Authority listened to an audio recording of an interview which the delegate who made the referred decision conducted in person with the appellant. Finding the appellant's evidence in the interview "to be generally lacking in detail", the appellant "appear[ing] unable to expand in any detail on a number of his written claims and at times sound[ing] vague and hesitant", the Authority rejected a central part of the account given by the appellant in the interview which the delegate had accepted as plausible and generally consistent with country information. In particular, the Authority rejected the appellant's account of having been detained and beaten and sexually tortured by the Sri Lankan Army on suspicion of having been an LTTE supporter to find that there was "no credible information" before it indicating that he was of any interest to Sri Lankan authorities and that it was not satisfied that he had a "profile" that would be of interest to those authorities at the time of its decision or in the foreseeable future.

28 The Authority did not suggest that anything else in the review material rendered the appellant's account of having been detained and beaten and sexually tortured inherently improbable. To the contrary, the Authority noted that there was "ample country information" confirming "sexual based torture of Tamils who are

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40 cf *DGZ16 v Minister for Immigration and Border Protection* (2018) 258 FCR 551 at 568-570 [69]-[76].

suspected of LTTE or pro-separatist sympathies". The Authority was rather led to reject the appellant's account of the incident, "despite sympathetic questioning by the delegate" and despite its acknowledgement of cultural barriers to the appellant (as a young Tamil male) discussing sexual matters, having regard to the appellant's statement to the delegate (who was female) in the presence of his representative (who was also female) that he was "unable to talk about it", having regard to him being "unable to provide any details of what happened to him other than saying there were 2 or 3 [Sri Lankan Army] men and that he was unconscious for a lot of the time", and having regard to the reasons he gave in the interview for not seeking medical treatment being "unconvincing".

29 Had the Authority acted reasonably in performing its duty to review the decision of the delegate cognisant of its informational disadvantage in assessing the credibility of the appellant when compared with the delegate, the Authority would not have rejected the appellant's account of having been detained and beaten and sexually tortured on the basis of how he sounded on the audio recording without inviting him to a further interview so as to see him as well as hear him. By failing to invite the appellant to a further interview, the Authority transgressed the reasonableness condition implied into both the imposition of its duty to conduct a review and the conferral of its powers to get and consider new information in conducting a review.

30 To be clear, the breach of the reasonableness condition by the Authority lay not in evaluating the review material for itself to arrive at a different assessment of credibility than did the delegate, but in failing in the circumstances to use the powers at its disposal to get and consider new information in order to supplement the review material so as to place itself in as good a position to assess credibility as had been the delegate.

31 And notwithstanding the repetition, it seems necessary in light of alternative views now expressed in this Court to spell out that the failure of the review material to place the Authority in as good a position to assess credibility as had been the delegate arose not from some latent defect in the legislative scheme of Pt 7AA rendering it incapable of fulfilling its legislative purpose and resulting in a cataclysmic breakdown in the capacity of the Authority to rise to the legislative exhortation of "providing a mechanism of limited review that is efficient [and] quick"[41]. The failure arose from an administrative practice within the Department. In particular, the failure arose from the circumstance that the delegate rather than some other officer interviewed the appellant combined with the circumstance that the interview was audio recorded but not video recorded. To the extent that the

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41 Sections 473BA and 473FA of the *Migration Act*.

circumstances of this case throw up a systemic problem, the problem has arisen administratively and can readily be remedied administratively.

32 The judgment under appeal mistook the process of reasoning adopted by the Authority in concluding that country information provided an alternative basis for its lack of satisfaction that the appellant would face a serious risk of harm if he returned to Sri Lanka. The Authority's statement of reasons for its decision made clear that its conclusion was not solely dependent on country information. The conclusion was expressed to be based in part on the appellant's "personal circumstances", which included the Authority's lack of satisfaction that he had a profile that would be of interest to Sri Lankan authorities.

Disposition

33 Performance by the Authority of its duty to review the decision of the delegate miscarried by reason of noncompliance with the implied condition of reasonableness. Performance of that duty is therefore appropriate to be compelled by mandamus directed to the Authority. As ancillary to mandamus, the purported legal effect of the decision in fact made by the Authority to affirm the decision of the delegate is appropriate to be quashed by certiorari.

34 The appeal is therefore to be allowed. The judgment under appeal is to be set aside. In its place, the appeal from the judgment of the primary judge is to be allowed, the orders made by the primary judge are to be set aside, writs of certiorari and mandamus are to be issued to the Authority, and the Minister is to be ordered to pay the costs of the application for judicial review. The Minister is to pay the appellant's costs of the appeals to the Federal Court and this Court.

35 NETTLE J. This is an appeal from a judgment of the Federal Court of Australia (Bromberg J)[42] dismissing an appeal from a judgment of the Federal Circuit Court of Australia (Judge Smith)[43], in turn dismissing the appellant's application for judicial review of the decision of the Immigration Assessment Authority ("the IAA") to affirm a decision of the delegate of the respondent Minister not to grant the appellant a protection visa.

36 The issue presented by the appeal is whether the IAA acted with legal unreasonableness by departing from the delegate's assessment of the appellant's credibility, and thus the delegate's assessment of the plausibility of the appellant's claims. For the reasons which follow, it was legally unreasonable for the IAA to depart from the delegate's assessment of the plausibility of the appellant's claims, and the appeal should be allowed.

The facts

37 The appellant is a citizen of Sri Lanka of Tamil ethnicity who, on 27 August 2012, arrived in Australia by boat at an excised offshore place without a visa, and consequently as an "unauthorised maritime arrival" within the meaning of s 5AA of the *Migration Act 1958* (Cth) ("the Act").

38 On 5 August 2013, the appellant lodged an application for a temporary protection visa, which was invalid, but, on 23 October 2015, he lodged a further, valid application for a temporary protection visa in which he made the following claims:

(1) In May 2009, whilst travelling to an internally displaced persons camp, members of the Sri Lankan Army ("SLA") detained the appellant's brother on suspicion of being a member of the Liberation Tigers of Tamil Eelam ("LTTE").

(2) Shortly after the family's release from the displaced persons camp, SLA officers attended the appellant's home to question him about his travel history and involvement with the LTTE. A day later, the appellant received a letter requesting his attendance at an army camp where, upon his attendance, SLA officers interrogated him and severely beat him when he denied involvement with the LTTE. He was released later that day.

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42 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613.

43 *ABT17 v Minister for Immigration and Border Protection* [2018] FCCA 658.

(3) Subsequently, and over a period of a number of years, SLA officers repeatedly detained the appellant and accused him of being an LTTE member. They also beat him on these occasions.

(4) In around May 2011, an SLA officer attended the appellant's home to request the appellant's attendance at the army camp. The appellant was asleep. His sister indicated to the officer that the appellant was not at home. The officer assaulted his sister and the appellant was woken by the noise and physically defended her. The following morning, a group of men detained the appellant for six days, during which time he was again beaten. The group of men indicated to the appellant that this was revenge for his defence of his sister. The appellant's brother achieved the appellant's release by paying a bribe.

(5) In April 2012, the appellant was called again to attend at the army camp. He tried to escape but was recaptured and beaten severely.

(6) Shortly after the appellant's arrival in Australia, SLA officers attended the appellant's home in Sri Lanka to inquire of his family as to the appellant's whereabouts.

The delegate's decision

39 On 21 September 2016, the Minister's delegate decided to refuse to grant the appellant a temporary protection visa. During the appellant's interview with the delegate ("the TPV interview"), the appellant, at the delegate's request, removed his shirt and showed the delegate scarring on his back which he said was inflicted by SLA officers. The appellant also disclosed to the delegate that he had been sexually tortured during the incident in which he was detained by the SLA for six days in May 2011, in addition to being locked up, deprived of food and beaten.

40 The delegate found that the appellant's evidence during the TPV interview, including that the appellant had been subjected to sexual torture during the 2011 incident, was plausible and broadly consistent with country information pertaining to the events which the appellant described. But based on country information pertaining to the improvement in circumstances relating to Tamils in Sri Lanka since the appellant's departure from that country, the delegate was not satisfied that there was any longer a real chance that the appellant would face serious or significant harm upon his return there, and, on that basis, found that the appellant could not be said to have a well-founded fear of being persecuted by the Sri Lankan authorities by reason of his Tamil ethnicity, his membership of particular social groups (broadly defined as "Tamils from the North" and "young Tamil males from Northern Sri Lanka"), or his status as a failed asylum seeker and a person who had illegally departed Sri Lanka.

The IAA's decision

41 The delegate's decision was referred to the IAA for review as a "fast track reviewable decision", pursuant to s 473CA of the Act. The IAA accepted some of the appellant's claims but found that others were exaggerated and embellished in order to enhance the appellant's "profile" as someone who would be of interest to the SLA or the Sri Lankan authorities. The IAA accepted that the appellant had "experienced regular, low-level harassment from members of the SLA on a day-to-day basis", and that, as a young male returnee from a displaced persons camp, he may have been viewed with a certain amount of suspicion by the SLA. But the IAA did not accept that the appellant was questioned and beaten in late 2009, or that he was targeted and beaten every three to four months by the SLA with a view to making him confess that he was in the LTTE.

42 The IAA accepted that the appellant's brother had been detained for over two years on suspicion of being with the LTTE, but the IAA found it implausible that the appellant was not questioned about his brother during the time that the appellant was detained.

43 The IAA was also not satisfied that the appellant was detained and sexually tortured in May 2011: first, because the appellant's family had not taken immediate steps to have the appellant released (as it was said they had done on other occasions); and secondly, because of the manner in which the appellant gave evidence at the TPV interview about his claim of sexual torture. In particular, from listening to an oral recording of the TPV interview, the IAA found that the appellant's evidence before the delegate was lacking in detail, the appellant appeared unable to expand in any detail on a number of his claims, and, at times, the appellant sounded vague and hesitant. The IAA also rejected the appellant's claim that he was detained and beaten in April 2012 and asked to sign a document admitting his LTTE involvement, because, the IAA said, the appellant's evidence about that claim had varied between his written claims and the evidence he gave in the TPV interview.

44 It followed from those findings, the IAA stated, that:

> "*As I have not accepted that [the April 2012 incident] occurred* and there is no credible information before me that indicates that the [appellant] is of any interest to the authorities, I do not find it plausible that members of the SLA would go to his family home and ask after his whereabouts after he arrived in Australia or that his family was told to report to the authorities when he returned.
>
> In summary, I am not satisfied that the [appellant] 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 LTTE now or in the reasonably foreseeable future." (emphasis added)

45 The IAA then turned to country information that the IAA found demonstrated a considerable improvement in circumstances in Sri Lanka since the appellant's departure. The IAA reasoned that:

> "The 2012 Guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) state that certain real or perceived links with the LTTE continue to expose individuals to treatment which may give rise to a need for protection. *However, there is nothing to support a finding that all Tamils are imputed with LTTE affiliation or membership*. The Guidelines also indicate that even those Tamils who lived within LTTE-controlled areas and had contact with that organisation and its civilian administration in their daily lives are not, without more, in need of protection.
>
> The [appellant's] evidence is that neither he nor any member of his family was a member of the LTTE or supported the LTTE. While his brother L was detained for two years at the end of the war on suspicion of LTTE involvement, the [appellant] was not questioned in any detail about L or his suspected LTTE affiliations or involvement. *While I accept that the [appellant] has experienced some incidents of monitoring and harassment and that LTTE support may have been imputed to him on the basis of ethnicity, I am not satisfied on the evidence before me that the [appellant] has a profile which would bring him to the attention of the Sri Lankan authorities* either because he would be perceived as an LTTE supporter on the basis of his ethnicity, the fact that he originates from the north of Sri Lanka or his brother's detention on suspicion of LTTE involvement.
>
> ...
>
> Taking into consideration the number of years that have elapsed since he left, his personal circumstances and the country information referred to, I am 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." (emphasis added; footnotes omitted)

46 The IAA affirmed the delegate's decision.

The Federal Circuit Court proceedings

47 Before the Federal Circuit Court, the appellant's counsel put the appellant's claim for judicial review of the IAA's decision on several grounds, all of which were rejected. For present purposes, however, it is necessary to mention only one ground that the appellant sought but was refused leave to rely upon. It was that, given the delegate had found the appellant's evidence to be plausible, the IAA could not reasonably have concluded that the appellant's evidence was lacking in

detail or that the appellant appeared unable to expand in any detail on a number of his claims and at times sounded vague and hesitant. Judge Smith refused the appellant leave to advance that ground because the appellant's counsel accepted that he would need to adduce evidence of the TPV interview in order to sustain it, and Judge Smith did not consider it appropriate to grant the appellant an adjournment in order to obtain that evidence. In refusing the application for adjournment, Judge Smith stated[44]:

> "The ground has little prospect of success because the [appellant] is unable to establish that there was no basis upon which the [IAA] could reasonably have made its findings about the manner in which the [appellant] gave evidence at the interview before the delegate and upon which it based, to some extent, its conclusions about the extent of the truthfulness of his claims."

Proceedings before the Federal Court

48 Before the Federal Court, the appellant appeared unrepresented and argued that Judge Smith had erred in rejecting the appellant's contention that the IAA acted unreasonably in finding that the appellant's evidence was lacking in detail and that the appellant appeared unable to expand in any detail on a number of his claims and at times sounded vague and hesitant. The appellant contended that Judge Smith's conclusions were the result of an incorrect application of the principles of reasonableness.

49 Bromberg J found no error in Judge Smith's rejection of the appellant's contention in the form in which it was advanced in the Federal Circuit Court. But at the suggestion of the Minister (acting as a model litigant), his Honour treated the contention as one that the fact of the IAA reaching different credibility findings from those reached by the delegate without first considering whether to exercise the IAA's power to obtain further information under s 473DC of the Act established legal unreasonableness. As his Honour observed[45], that form of contention derived support from the then recent decision of the Full Court of the Federal Court in *DPI17 v Minister for Home Affairs*[46] (which the Minister, acting once again as a model litigant, had drawn to his Honour's attention).

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44 *ABT17 v Minister for Immigration and Border Protection* [2018] FCCA 658 at [35].

45 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [17].

46 (2019) 269 FCR 134.

50 Bromberg J accepted[47] that "the IAA must have been aware that ... the delegate had the opportunity [in interview] to observe the appellant's demeanour", as opposed merely to "listen[ing] to a tape of the interview (as it appears the IAA did)", and thus "to see and evaluate the physical manifestations which must have accompanied the evidence given by the appellant". His Honour reasoned[48] that:

> "In those circumstances, 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."

51 Ultimately, however, Bromberg J took the view[49] that he need not arrive at a conclusion "as to whether or not there [was] a sufficient parallel between the facts of this case and the facts of *DPI17*". His Honour posited[50] that "in order for jurisdictional error to be established, [he] would need to be satisfied that the IAA failed to consider exercising the s 473DC discretion" and that "any such failure was material to the IAA's decision". And as it appeared to his Honour, any such failure was not material because "[b]oth the delegate and the IAA relied on country information dealing with ... changed circumstances since the appellant left Sri Lanka relating to the treatment of Tamils and persons suspected of having had a prior involvement with the LTTE"[51] as "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"[52]. As his Honour expressed his conclusion[53]:

> "Even if the IAA had exercised affirmatively the s 473DC discretion and had arrived at the same view as that arrived at by the delegate in relation to the claims of sexual torture and other physical abuse, in the face of the

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47 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [24].

48 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [24].

49 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [25].

50 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [25].

51 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [26].

52 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [27].

53 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [27].

alternative basis for the application's rejection, the appellant has failed to demonstrate that there was a realistic possibility of the outcome being different."

52 Accordingly, the appeal was dismissed.

The appellant's contentions

53 Before this Court, counsel for the appellant contended that a review authority such as the IAA, "acting with due appreciation of its responsibilities"[54] and with knowledge that it had power under s 473DC(3) to interview the appellant and thereby observe his demeanour and the scarring the appellant had shown to the delegate, could not reasonably have concluded that the review was able fairly to be completed "on the papers". It followed, it was submitted, that the IAA's failure to exercise its power under s 473DC to interview the appellant was legally unreasonable. Further, it was contended, it was not incumbent on the appellant to demonstrate that the legal unreasonableness of the IAA's failure to interview the appellant was "material". For contrary to Bromberg J's reasoning, it was submitted, although materiality might be regarded as a free-standing consideration in a case of jurisdictional error comprised of a lack of procedural fairness (either as an essential element of the existence of jurisdictional error[55] or as a basis to refuse relief in the exercise of discretion where it is apparent that a jurisdictional error could not have made any difference to the outcome[56]), in the case of jurisdictional error constituted of legal unreasonableness "materiality is bound up in the characterisation of an exercise of power as legally unreasonable" and requires no

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54 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 570 [69] per Gageler J, citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 365 [71] per Hayne, Kiefel and Bell JJ, in turn quoting *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064 per Lord Diplock.

55 See, eg, *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134-135 [30]-[31] per Kiefel CJ, Gageler and Keane JJ; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [45] per Bell, Gageler and Keane JJ.

56 See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5] per Gleeson CJ, 106-107 [51]-[53] per Gaudron and Gummow JJ; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137 [40] per Nettle J; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 457-458 [85]-[89], 459-460 [93]-[94] per Nettle and Gordon JJ.

separate consideration[57]. Further and in any event, it was contended, in this matter the legal unreasonableness of the IAA's failure to exercise its power of interview under s 473DC was material because it is apparent that the IAA's analysis of the effect of country information relating to the change in circumstances in Sri Lanka since the appellant's departure was not an independent, alternative basis for the decision but rather was dependent on, or at least to a significant extent informed by, the IAA's earlier rejection of the appellant's claim to have been detained, beaten and sexually tortured, and the IAA's consequent finding that the appellant did not have "a profile which would bring him to the attention of the Sri Lankan authorities either because he would be perceived as an LTTE supporter on the basis of his ethnicity, [or because of] the fact that he originates from the north of Sri Lanka or his brother's detention on suspicion of LTTE involvement".

The Minister's contentions

54 The Minister contended to the contrary that nothing in the delegate's reasons supported an inference that the delegate's acceptance of the appellant's claims as "plausible" depended "to any significant extent" on the appellant's demeanour. In particular, it was submitted, although it is apparent from the delegate's reasons that the delegate accepted that the appellant's evidence at interview was "plausible" and was "also broadly consistent with country information", the delegate did not make any specific finding as to the claimed sexual torture in 2011 let alone find that she accepted that claim because of the appellant's demeanour.

55 The Minister emphasised that the IAA gave multiple reasons for rejecting the appellant's claims in relation to the alleged May 2011 detention. They were, first, on the appellant's evidence, although he had lived in an LTTE-controlled area, he had had no direct dealing with the LTTE, he had not supported the LTTE and no other member of his family, his friends or his neighbours had supported the LTTE. According to the IAA, it followed that it was improbable that the SLA would have targeted the appellant or that he would have been beaten every three to four months as he claimed. Secondly, even if there were an incident in May 2011, it was improbable that the appellant was then subjected to sexual torture, because, given the appellant's family's willingness to take action to secure the release of the appellant's brother, it was implausible that the family would not have taken action (such as instituting court proceedings or complaining to police) to secure the appellant's release from sexual torture. Thirdly, although the IAA accepted that it might be difficult for the appellant to talk about traumatic events, in the IAA's assessment it was notable that the appellant was unable to provide any details of his supposed sexual torture other than to say that there were two or three

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57 Relying on the reasoning of Mortimer J in dissent in *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134 at 163 [107], citing *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 564-566 [53]-[56] per Gageler J, 572-573 [80] per Nettle and Gordon JJ, 583 [131] per Edelman J.

men and that he was unconscious for a lot of the time. Fourthly, according to the IAA it was significant that the claim of sexual torture was not made until late in the TPV interview, after the appellant had first claimed in the TPV interview that he had been tortured without mentioning anything about sexual torture.

56 It followed, the Minister contended, that it was not unreasonable for the IAA to make credibility findings that differed from those made by the delegate. And in the Minister's submission, that conclusion was supported by several features of the statutory scheme of Pt 7AA of the Act, including the "primary obligation"[58] of the IAA to conduct its review on the papers except in limited circumstances; the fact that the IAA conducts a "de novo" review[59], which was said to indicate that the prospect of the IAA taking a different view from that taken by the delegate concerning the credibility of particular claims "is an obvious and ordinary aspect of the scheme, it being inherent in de novo review"; that, perforce of s 473DD, the IAA may only consider new information in "exceptional circumstances"; and the fact that, because the express provisions in Div 3 of Pt 7AA, read together with ss 473GA and 473GB, are an "exhaustive statement" of the natural justice hearing rule[60], procedural fairness is not the "lens" through which the content of procedural obligations imposed on the IAA is to be determined[61].

57 In any event, the Minister contended, the IAA had no power under s 473DC to invite the appellant to interview for the purpose of assessing the appellant's demeanour, because an interview under s 473DC may be undertaken only for the purpose of obtaining "new information" that meets the "exceptional circumstances" threshold of s 473DD, and, in the Minister's submission, a witness's demeanour is not "new information", because it is not "information" in

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58 Referring to *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1096 [14] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ; 373 ALR 196 at 200.

59 Referring to *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 226 [17] per Gageler, Keane and Nettle JJ.

60 *Migration Act 1958* (Cth), s 473DA.

61 Referring to *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1099 [34] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ; 373 ALR 196 at 204-205.

the sense of "knowledge about some particular fact, subject or event"[62]; or, if it is that, because the "information" (the appellant's demeanour) was before and considered by the delegate; or, in any event, because there were not "exceptional circumstances" sufficient to engage the power.

58 Alternatively, the Minister contended that Bromberg J was correct in holding that any failure on the part of the IAA to exercise such power as it may have had to interview the appellant was immaterial, and therefore not legally unreasonable, because the IAA decided the matter on the separate and independent basis of the country information regarding the change in circumstances from which it concluded that the appellant is no longer at risk.

The standard of review under Pt 7AA

59 In some circumstances, it is convenient to distinguish between standards of review by reference to classes or categories of appeal, such as "appeal by way of rehearing" or "hearing de novo"[63]. Thus, as the plurality observed[64] in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*, although, under the scheme provided by Pt 7AA of the Act, the IAA lacks the ability to substitute its own decision for the decision of the Minister or the Minister's delegate[65], the IAA is "not concerned with the correction of error on the part of the Minister or delegate but is engaged in a de novo consideration of the merits of the decision that has been referred to it". That was an accurate description of the process in that context inasmuch as the IAA is not constrained by a need to find demonstrable error in the decision the subject of review. But classifications such as "hearing de novo" are sometimes better understood as descriptive phrases than as categories defined by "immutable characteristics or inflexible boundaries"[66]. Invariably, the true

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62 Referring to *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 228 [24] per Gageler, Keane and Nettle JJ, as to the meaning of "information" in this context.

63 See, eg, *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111] per McHugh, Gummow and Callinan JJ; *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23] per Gaudron, McHugh, Gummow and Hayne JJ; *Fox v Percy* (2003) 214 CLR 118 at 124-125 [20] per Gleeson CJ, Gummow and Kirby JJ; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596-597 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

64 (2018) 264 CLR 217 at 226 [17] per Gageler, Keane and Nettle JJ.

65 *Migration Act 1958* (Cth), s 473CC(2).

66 *Traut v Faustmann Bros Pty Ltd* (1983) 48 ALR 313 at 322 per Lockhart J.

character of any administrative review, like the true character of an appeal from a judicial decision, is a question of statutory intent[67] to be determined by reference to the jurisdiction, powers, composition and functions of the body from whose decision the review lies, as well as the powers and functions of the body in which the power of review is reposed. Hence, as will be explained, for the purposes of assessing whether it was legally unreasonable for the IAA to depart from credibility findings made by the Minister's delegate pursuant to Subdivs AB and AC of Div 3 of Pt 2 of the Act, the task of the IAA is more closely analogous to an appeal by way of rehearing.

The nature of the delegate's task

60 Although the delegate is not a judge, the process of delegate decision-making provided for under Subdivs AB and AC of Div 3 of Pt 2 of the Act is, in relevant respects, analogous to the process of judicial decision-making undertaken by a judge sitting alone. In particular, under s 54 of the Act, the delegate must have regard to all of the information submitted by an applicant in his or her application; under s 56, the delegate may invite the applicant to provide further information orally; under s 57, the delegate must disclose all relevant information to the applicant, explain why it is relevant and invite comment; and, under s 66, the delegate must provide written reasons for decision which, in the case of a fast track reviewable decision, must set out the delegate's findings of fact, refer to the evidence on which the findings are based and give reasons for decision[68]. Evidently, it is the legislative intent of the scheme that an applicant have the fullest opportunity to put his or her case in support of an application for a visa and that the delegate thoroughly consider the case as put, with the opportunity to interview the applicant, if the delegate considers it to be desirable to do so, and so derive the advantage of seeing and hearing the applicant explain the applicant's claims.

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67 See, eg, *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622 per Mason J (Barwick CJ and Stephen J agreeing), 630 per Murphy J; *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273-274 per Deane, Gaudron and McHugh JJ; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 202-203 [11] per Gleeson CJ, Gaudron and Hayne JJ; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596-597 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

68 Such reasons for decision must, in turn, be provided to the IAA in respect of each fast track reviewable decision referred under Pt 7AA: see *Migration Act 1958* (Cth), s 473CB(1)(a)(iii).

The nature of the IAA's task

61 Likewise, although the IAA is not a court of appeal, the process of fast track review under Pt 7AA of the Act is, in relevant respects, analogous to a process of appeal by way of rehearing from the judgment of a judge sitting alone[69]. Upon referral of a fast track reviewable decision to the IAA, s 473CB requires the Secretary of the Department of Immigration and Border Protection to give to the IAA "review material" comprised of any material in the Secretary's possession or control considered by the Secretary to be relevant to the review. That includes all the material that was before the delegate and a statement that sets out the findings of fact made by the delegate, refers to the evidence on which those findings were based, and gives reasons for the decision[70]. The primary obligation of the IAA under s 473CA is to review the fast track reviewable decision by considering the review material "without accepting or requesting new information" and thus, ordinarily, without interviewing the applicant[71], and to make its own decision as to whether to affirm the decision on review or to remit the matter for reconsideration in accordance with such directions as the IAA is permitted to issue[72]. That procedure is, however, subject to other provisions of Pt 7AA, which are to be exercised within the bounds of reasonableness[73], such as s 473DC(1), which confers a discretion on the IAA to get "new information" (being documents or information that were not before the delegate that the IAA considers may be relevant), and s 473DC(3), which confers a discretion on the IAA to invite any person to provide new information in writing or in an interview.

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69 As to the scheme of Pt 7AA see *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1094-1096 [3]-[17] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ; 373 ALR 196 at 198-201. See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 597 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

70 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 225-226 [15] per Gageler, Keane and Nettle JJ.

71 *Migration Act 1958* (Cth), s 473DB(1); *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 245 [88] per Gordon J.

72 *Migration Act 1958* (Cth), s 473CC(2).

73 As that concept is explained in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332: see *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 227 [21] per Gageler, Keane and Nettle JJ, 245 [86] per Gordon J.

The significance of a delegate's assessment of demeanour

62 Ordinarily, in an appeal by way of rehearing from the judgment of a judge alone, a court of appeal has before it, in the form of the record, all the material that was before the judge and the judge's reasons for judgment and determines the appeal on that basis without receiving further evidence. The court of appeal does not, however, have the opportunity of seeing and hearing witnesses give their evidence, or thus the opportunity of making a fully informed assessment of the witnesses' demeanour. Accordingly, the established[74] position in relation to an appeal by way of rehearing from the judgment of a judge alone is that, where the judge's decision is affected by his or her impression of the credibility of a witness whom the judge has seen and heard give evidence, the court of appeal must respect the attendant advantages of the judge in assessing the witness's credibility. Of course, if, making proper allowance for those advantages, the court of appeal concludes that error is shown, it is incumbent on the court of appeal to proceed accordingly[75]. That may be so where the judge's findings, despite being based or said to be based upon an assessment of credibility, are contrary to "incontrovertible facts or uncontested testimony"[76], "glaringly improbable"[77], or "contrary to compelling inferences"[78]. But where no such error is apparent, it is not a justification for the court of appeal to depart from the judge's assessment of the

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74 See, eg, *Edwards v Noble* (1971) 125 CLR 296 at 308-309 per Menzies J; *Jones v Hyde* (1989) 63 ALJR 349 at 351-352 per McHugh J (Brennan, Deane, Dawson and Toohey JJ agreeing); 85 ALR 23 at 27-28; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179 per McHugh J (Mason CJ, Deane, Dawson and Gaudron JJ agreeing); *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ, 482-483 per Deane and Dawson JJ; *Fox v Percy* (2003) 214 CLR 118 at 127 [26], 128 [29] per Gleeson CJ, Gummow and Kirby JJ, 138-147 [65]-[93] per McHugh J; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686-687 [43] per French CJ, Bell, Keane, Nettle and Gordon JJ; 331 ALR 550 at 558-559; *Lee v Lee* (2019) 266 CLR 129 at 148-149 [55]-[56] per Bell, Gageler, Nettle and Edelman JJ; *Queensland v Masson* (2020) 94 ALJR 785 at 812 [119] per Nettle and Gordon JJ; 381 ALR 560 at 594.

75 *Warren v Coombes* (1979) 142 CLR 531 at 551 per Gibbs A-CJ, Jacobs and Murphy JJ.

76 *Fox v Percy* (2003) 214 CLR 118 at 128 [28] per Gleeson CJ, Gummow and Kirby JJ.

77 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844 per Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ; 62 ALR 53 at 57.

78 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10 per Kirby P, 20 per Samuels JA.

credibility of the witness that the court of appeal may consider that the judge did not give sufficient weight to matters that the court of appeal is of opinion bear upon the assessment[79]. In those circumstances, it would be impermissible for the court of appeal to depart from the judge's assessment.

63 Parity of reasoning mandates that similar considerations apply to the IAA's conduct of a fast track review. As has been seen, the evident intent of Pt 7AA is that the IAA should be provided with all the material that was before the delegate and the delegate's reasons for decision, and that the IAA should review the delegate's decision on the basis of that material without interviewing the applicant, and so without the opportunity of making a fully informed assessment of the applicant's demeanour. Accordingly, where a delegate's reasons for decision show that the delegate's assessment of an applicant's credibility is informed by the delegate's assessment of the applicant's demeanour in the course of interview, the IAA should respect the attendant advantages of the delegate. If, making proper allowance for those advantages, the IAA concludes that the delegate's findings are contrary to incontrovertible facts or uncontested testimony, or glaringly improbable, or contrary to compelling inferences, or otherwise erroneous, the IAA should proceed accordingly. But the IAA should not regard it as demonstrative of error, or, therefore, sufficient justification to depart from the delegate's assessment of an applicant's credibility, that the IAA may be of opinion that the delegate did not give sufficient weight to matters that the IAA regards as bearing upon the assessment. In those circumstances, it would be legally unreasonable for the IAA to depart from the delegate's assessment.

64 Moreover, contrary to the reasoning of Bromberg J[80], and of the decision on which his Honour relied[81], in such a case it is not a question of whether the IAA may have considered exercising its discretion under s 473DC to interview an applicant, or whether an applicant is able to prove that the IAA failed to consider exercising its discretion to interview the applicant. The legal unreasonableness consists in the IAA failing sufficiently to respect the advantage of the delegate in seeing and hearing an applicant give evidence and thus in the IAA departing from the delegate's assessment of an applicant's credibility despite the absence of demonstrated error in the sense that has been explained.

65 Whether or not the discretion under s 473DC extends to inviting an applicant to interview in order to assess the applicant's demeanour is another

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79 See, eg, *Queensland v Masson* (2020) 94 ALJR 785 at 799-800 [74]-[78] per Kiefel CJ, Bell and Keane JJ, 812 [119], 814 [127] per Nettle and Gordon JJ; 381 ALR 560 at 577-578, 594, 596-597.

80 *ABT17 v Minister for Immigration and Border Protection* [2019] FCA 613 at [24].

81 *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134.

question which, for present purposes, need not be decided. It may be observed, however, that there are some considerations that potentially stand in the way of a conclusion that it extends that far. As has been seen, s 473DB provides that, subject to exceptions, the IAA's review of a fast track reviewable decision is to be made without interview. The only relevant exception is an interview under s 473DC to obtain "new information". Possibly, an applicant's further and better explanation of events given in interview with the IAA would amount to new information within the meaning of s 473DC(1); for, axiomatically, any such further and better explanation would not have been before the delegate, and the IAA might consider it to be relevant. Possibly, too, the demeanour of an applicant when providing such a further and better explanation in interview with the IAA could be regarded as comprising part of that new information. But s 473DD(b)(i) precludes the IAA considering new information that *could have* been provided to the delegate, and, in one sense, such a further and better explanation of events, including an applicant's demeanour when providing it, could have been provided to the delegate. This is not to overlook that, because demeanour is dependent on time, place and circumstances, the demeanour demonstrated by an applicant when providing a further and better explanation of events in interview with the IAA could not have been provided to the delegate (because the time, place and circumstances of interview before the delegate were different from those of the interview with the IAA). But even so, it would remain that the IAA would be precluded from taking the further and better explanation of events into account (because it could have been provided to the delegate), and so at least arguably precluded from taking into account an applicant's demeanour when providing that further and better explanation. On that view of the matter, the further and better explanation and the demeanour of an applicant when providing it are inseparable.

The IAA's rejection of the delegate's assessment of the appellant's credibility

66 As was earlier set out[82], the delegate found that the appellant's evidence during the TPV interview was plausible and broadly consistent with country information pertaining to the events which the appellant described. And, as will be explained[83], it is apparent that the delegate's assessment of the plausibility of the appellant's claims was based to a significant extent on the delegate's perception of the appellant's demeanour during the TPV interview. By contrast, the IAA treated the appellant's claims as to the severity and duration of the SLA's attacks as implausible because of what the IAA perceived to be the significance of inconsistencies in the appellant's telling of events and, to some extent, on what the IAA perceived as hesitation in the way in which the appellant responded to the delegate's questions during the TPV interview. It has not been suggested, however, that the delegate's assessment of the appellant's credibility, or thus of the

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82 See [40] above.

83 See [74]-[76] below.

plausibility of his claims, was contrary to, or even considered to be contrary to, incontrovertible facts or uncontested evidence or otherwise glaringly improbable. Essentially, the IAA departed from the delegate's assessment of the appellant's plausibility for no more reason than that, in the view of the IAA, the delegate did not give sufficient weight to inconsistencies and hesitation that the IAA regarded as pertinent to the assessment.

67 As the IAA observed, during the TPV interview the appellant stated that a single SLA officer came to his home in 2009 about a month after the appellant returned from the displaced persons camp and showed the appellant a letter requesting him to come to the army camp, and the appellant went there. There, he was kept for two or three days in a dark room, made to lie down on the floor without a shirt and beaten on his back. At the delegate's request, the appellant took off his shirt and showed her some scars on his back and stated that, although he did not know what had been used to beat him, he thought it was needles that were poked into his back. The appellant had previously stated in his written statement that the most serious incident was in 2011 when he was detained for six days as punishment for having pushed an SLA officer who had come to the appellant's family home in plain clothes looking for the appellant. According to the IAA's perception of the oral recording of the TPV interview, when the appellant was asked by the delegate 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" (emphasis added). Then, after a break in the TPV interview, the appellant disclosed that he had been sexually tortured during the six days that he was detained. When asked by the delegate why he had not said so before, "[h]e stated he was only giving the information now because it was his last opportunity but he hadn't spoke about it before because it was very degrading". Nor had the appellant gone to a doctor for medical attention after the attack. As recorded in the IAA's reasons, the appellant stated in the TPV interview that the last incident occurred in April 2012, during which he was mocked for having sustained the SLA's harm for so long, beaten so severely that he lost consciousness, and later dropped outside the SLA camp. The IAA emphasised that the appellant had previously said that he was in hiding when he was taken in in 2012. Later, he stated that he had not tried to avoid being detained in the first place but had tried to escape from the SLA camp. As recorded by the IAA, when the delegate asked the appellant to expand on this, "he stated that during the day the SLA officers would have the door to the room he was in open ... and he pretended to go out but they caught him. When the delegate put to him that it sounded unusual that the SLA officers would leave the door open, he said they would still be outside and he couldn't bear what they were doing to him even though he knew it probably wouldn't work." The IAA further emphasised that the delegate put to the appellant inconsistencies as between his arrival interview, in which he had stated that he had been taken in by the SLA in 2011 and 2012 but had not said that anything occurred in the three to four years before that, and his evidence at the TPV interview, that he was beaten on several occasions between 2008 and 2012. The appellant

responded that "he had originally said the problem was happening from 2009" (which he had).

68 No doubt, there were inconsistencies between what the appellant said in his initial interview and what he said in the TPV interview. Equally, however, as is apparent from the IAA's recitation of the TPV interview, in one way or another the delegate put each of the substantive inconsistencies to the appellant for response and, as is implicit in the delegate's reasons, the delegate was sufficiently impressed by the way in which the appellant responded to conclude that, despite the inconsistencies, the appellant's evidence at the TPV interview was plausible. Thus, as appears implicit in the delegate's reasons, despite the inconsistencies which the IAA identified in respect of the 2009 incident, and which must have been apparent to the delegate, the delegate with the benefit of seeing the appellant give evidence was sufficiently impressed by the appellant's demeanour in giving evidence regarding the incident, including his manner of demonstration of the scarring inflicted on him during that incident, to regard the appellant's description of the 2009 incident as plausible. Despite the inconsistencies that the IAA identified in respect of the 2011 incident, and which must have been apparent to the delegate, and despite the hesitation which the IAA detected in the way in which the appellant described the 2011 incident, the delegate with the benefit of seeing the appellant give evidence was sufficiently impressed by the way in which the appellant responded when the inconsistencies were put to him, including no doubt the manifestations of his embarrassment and hesitation about disclosing the sexual nature of the attack, to accept that the appellant's description of the incident was plausible. And critically, despite such inconsistencies as the IAA identified as pertaining to the 2012 incident, the delegate with the benefit of seeing the appellant give evidence was sufficiently impressed by the way in which the appellant explained the inconsistencies to accept that his description of the 2012 incident, and of the subsequent visit of the authorities to his family's home after he had left Sri Lanka, was plausible.

69 Given that the delegate's acceptance of the appellant's claims was thus to a significant extent informed by the delegate's assessment of the appellant's demeanour as derived from the benefit of seeing and hearing the appellant give evidence at the TPV interview, and that the delegate's assessment was not glaringly improbable, contrary to compelling inferences or otherwise shown to be infected by error, it should be concluded that it was legally unreasonable for the IAA to depart from the delegate's assessment of the plausibility of the appellant's claims.

70 This is not to overlook that the IAA had an oral recording of the TPV interview and so was able to hear the appellant giving evidence before the delegate. But the delegate's advantage in seeing and hearing the appellant give evidence was not replicated or substantially diminished by the IAA's ability to listen to the oral recording. Arguably, it might have been different if the delegate had conducted the TPV interview by telephone and had made an oral recording of the conversation. In such circumstances, it may be that the IAA, by listening to the recording, would

be able to place itself in as good a position as the delegate to assess the appellant's demeanour. And certainly, it would have been different if the delegate had not interviewed the appellant at all. For in those circumstances, the IAA would have been in the same position as the delegate in deciding the matter on the papers. But however that may be, where, as here, a delegate has had the advantage of seeing and hearing an applicant give evidence in interview, it is incumbent on the IAA to respect the delegate's advantage and proceed accordingly. To fail to do so is legally unreasonable.

Materiality

71 It remains to deal with the Minister's alternative contention that the IAA's failure to respect the delegate's advantage in seeing and hearing the appellant give evidence in interview was immaterial, and therefore not legally unreasonable, because, as well as finding the appellant's claims to be implausible, the IAA decided the matter on the separate and independent basis that the change in circumstances since the appellant's departure from Sri Lanka meant that he no longer faces a risk of persecution. In turn, that draws attention back to the appellant's contention that, in the case of jurisdictional error constituted of legal unreasonableness, materiality is "bound up"[84] in the characterisation of an exercise of power as legally unreasonable, such that it requires no separate consideration.

72 I remain of the view, which Gordon J and I expressed in *Minister for Immigration and Border Protection v SZMTA*[85], that a finding of jurisdictional error in the exercise of a statutory decision-making power is a conclusion that the decision maker has failed to comply with an essential pre-condition to, or limit on, the valid exercise of the power and reflects the distinction between acts unauthorised by law and acts that are authorised. Once jurisdictional error has been identified, a further question arises as to whether relief should be refused in the exercise of discretion on the basis that the error could not possibly have made any difference. For the reasons given by Gordon J, the executive, not the individual affected by the exercise of the statutory power, bears the onus of establishing that it would be futile to grant the relief sought[86]. But the notion of materiality involved in that latter exercise remains separate from the identification of jurisdictional error which precedes it, and of which materiality is not a criterion; and the idea of making materiality a criterion of jurisdictional error should be resisted to prevent the identification of judicial error descending into a form of merits review. Failure

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84 See *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134 at 163 [107] per Mortimer J.

85 (2019) 264 CLR 421 at 456-457 [83]-[85], 459-460 [92]-[95].

86 Reasons of Gordon J at [107]-[110].

to exercise a statutory decision-making power reasonably is of course a jurisdictional error, and failure to exercise a statutory decision-making power reasonably may occur where the decision falls beyond the "range of possible, acceptable outcomes which are defensible in respect of the facts and law"[87]. In that sense, it is correct to say that materiality is bound up in the concept of legal unreasonableness[88]. But it does not follow that the IAA's failure to respect the delegate's advantage and proceed accordingly would cease to be legally unreasonable if the IAA had in fact also decided the matter on a basis independent of the IAA's assessment of the appellant's profile. It would mean only that relief might be refused in the exercise of discretion.

73 In any event, the Minister's contention fails in limine for the reason that the IAA's assessment of the effect of the country information regarding changed circumstances since the appellant's departure from Sri Lanka was not independent of the IAA's assessment of the appellant's profile.

74 As was earlier noticed[89], the IAA reasoned that, because it found that the appellant's claims as to the nature and severity of the 2009 and 2011 incidents were implausible, and did not accept that the 2012 incident occurred, there was no "credible information" that indicated that the appellant was of any interest to the Sri Lankan authorities. It followed, the IAA reasoned, that it was implausible that members of the SLA would have gone to the appellant's family home and asked after his whereabouts after he had arrived in Australia, or that his family were told to report to the authorities when he returned. It followed in turn, the IAA said, that it was not satisfied that the appellant "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 LTTE now or in the reasonably foreseeable future".

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87 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 375 [105] per Gageler J, quoting *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 220-221 [47] per Bastarache and LeBel JJ. See also *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 573 [83] per Nettle and Gordon JJ.

88 See, eg, *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134 at 163 [107] per Mortimer J, referring to *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 564-566 [53]-[56] per Gageler J, 572-573 [80] per Nettle and Gordon JJ, 583 [131] per Edelman J. See also, eg, *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at 6 [12] per Allsop CJ (Wigney J agreeing).

89 See [42]-[45] above.

75 And as will be recalled[90], that conclusion was critical to the IAA's final assessment of the significance of the country information regarding the change of circumstances since the appellant's departure. For having recognised that the 2012 Guidelines issued by the United Nations High Commissioner for Refugees indicated that certain real or perceived links with the LTTE continued to expose certain individuals to treatment which may give rise to a need for protection, the IAA sloughed that off as being of no significance in the appellant's case because, according to the IAA, there was nothing to support a finding that "all Tamils are imputed with LTTE affiliation or membership", and, moreover, "even those Tamils who lived within LTTE-controlled areas and had contact with that organisation and its civilian administration in their daily lives are not, *without more*, in need of protection" (emphasis added).

76 If, however, the IAA had respected the delegate's advantage in seeing and hearing the appellant give evidence at the TPV interview, and so had not departed from the delegate's assessment of the plausibility of the 2009, 2011 and 2012 incidents and the SLA's visit to the appellant's family home after the appellant arrived in Australia, the IAA could not have reasoned as it did to the conclusion that the appellant lacked a "profile" that would be of interest to the SLA or Sri Lankan authorities, or, therefore, that this was a case "without more". The IAA would have been constrained to recognise that, according to the delegate's findings, there was something more – the nature and duration of the SLA's abuse of the appellant as claimed and the SLA officers' visit to the appellant's family home after his arrival in Australia – and bound to appreciate that the occurrence of those events bespoke the possibility of a "profile" that was of interest to the SLA or Sri Lankan authorities.

77 So to conclude does not mean that recognition of such a profile would necessarily have precluded the IAA reasoning aliunde to a conclusion that the appellant no longer faces an appreciable risk of harm. But that is not the way in which the IAA approached its task. In the way in which the IAA reasoned, the IAA's departure from the delegate's assessment of the plausibility of the appellant's claims was critical to the IAA's decision.

Conclusion

78 It follows that the appeal should be allowed. The orders of the Federal Court should be set aside and in their place it should be ordered that the appeal to the Federal Court be allowed, the orders of the Federal Circuit Court be set aside, and, in their place, it be ordered that the decision of the IAA be set aside and the matter be remitted to the IAA for redetermination in accordance with Pt 7AA. The

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90 See [45] above.

Minister is to pay the appellant's costs of the application to the Federal Circuit Court and the appeals to the Federal Court and this Court.

79 GORDON J. Part 7AA of the *Migration Act 1958* (Cth), and the scheme created by that Part, impose a requirement for automatic merits review by the Immigration Assessment Authority of a "fast track reviewable decision" referred to it by the Minister for Immigration and Border Protection. Fast track reviewable decisions include certain decisions to refuse a protection visa on the basis that the Minister is not satisfied that the "referred applicant" meets the statutory criteria for the grant of a protection visa[91].

80 The Authority's powers, in Div 3 of Pt 7AA, must be exercised within the bounds of legal reasonableness[92], the content of which is derived from the terms, scope, purpose and object of the Part[93].

81 Division 3 of Pt 7AA provides for de novo review[94], on the papers[95], of certain decisions to refuse a protection visa referred to the Authority under s 473CA, with the objective of "providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)"[96]. Underpinning review on the papers by the Authority is an assumption that "[a] fast track review applicant has had ample opportunities to present their claims and supporting evidence" to the Minister[97]. The Authority is obliged to affirm the decision or remit it to the Minister[98].

82 In this case, a delegate of the Minister interviewed the appellant in person and accepted the appellant's evidence at that interview as plausible and broadly

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91 *Migration Act*, s 473BB definition of "fast track reviewable decision"; see also s 5(1) definition of "fast track decision".

92 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 227 [21], 245 [86].

93 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 551 [12], 567 [59], 572 [79], 586 [135].

94 *Plaintiff M174/2016* (2018) 264 CLR 217 at 226 [17], 245 [85], 246 [92].

95 *Migration Act*, s 473DB(1).

96 *Migration Act*, s 473FA(1).

97 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 131 [893]; see also at 135 [920].

98 *Migration Act*, s 473CC; *Plaintiff M174/2016* (2018) 264 CLR 217 at 226 [16].

consistent with country information. The Authority reviewed the audio recording of the appellant's interview with the delegate, without the benefit of having observed the appellant giving evidence, and then departed from the delegate's findings about the credibility of the appellant's evidence, without providing a sufficient reason. That was legally unreasonable. The facts and procedural history are set out in the reasons of Nettle J[99].

83 The scheme of Pt 7AA has been addressed by this Court on previous occasions[100]. For present purposes, it is sufficient to record that the Part imposes automatic review by the Authority of a fast track reviewable decision "through the imposition of three cumulative and consecutive statutory duties"[101]:

> "[1] The Minister has a duty to refer a fast track reviewable decision to the Authority as soon as reasonably practicable after the decision is made [s 473CA].
>
> [2] The Secretary of the Department of Immigration and Border Protection then has a duty to give specified 'review material' to the Authority at the same time as, or as soon as reasonably practicable after, the decision is referred to the Authority [s 473CB].
>
> [3] The Authority then has a duty to 'review' the referred decision [s 473CC(1)] and to do so 'by considering the review material' provided to it by the Secretary without accepting or requesting new information and without interviewing the referred applicant [s 473DB(1)].
>
> That requirement for the Authority to conduct the review by considering the review material provided to it by the Secretary is expressly made subject to other provisions within the Part which confer power on the Authority to get [s 473DC] and in specified circumstances to consider [s 473DD] 'new information', being information which was not before the Minister

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99 Reasons of Nettle J at [37]-[52].

100 *Plaintiff M174/2016* (2018) 264 CLR 217 at 225-232 [13]-[38]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1094-1096 [3]-[17]; 373 ALR 196 at 198-201; *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 144-145 [2]-[8]; 375 ALR 47 at 48-50. See also *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706; 380 ALR 216.

101 *CNY17* (2019) 94 ALJR 140 at 144 [4]; 375 ALR 47 at 49.

when making the referred decision and which the Authority considers may be relevant."

84 This appeal is concerned with the second and third of those duties. Consistent with the objective of providing a mechanism of limited review that is efficient and quick[102], the primary or default position is that the Authority has a duty to "review" the referred decision[103] "by considering the review material" provided to it by the Secretary, without accepting or requesting new information and without interviewing the referred applicant[104]. Under the scheme, the Authority is to treat the review material provided to it by the Secretary as if it were complete[105].

85 Consistent with that scheme, s 473CB(1)(a) expressly provides that the review material must include a statement that sets out the findings of fact made by the decision-maker, refers to the evidence on which those findings were based and gives the reasons for the decision. It recognises that the review material will record findings made on the evidence and, of course, where the referred applicant is interviewed by the decision-maker, will include any findings based on what occurred at that interview. Thus, the review material will, to the extent necessary for the findings made by the delegate, address demeanour. And that is what the delegate did in this matter. After setting out the evidence, the delegate set out one of her findings – that the appellant's claims were plausible and generally consistent with country information. As Pt 7AA and, in particular, s 473CB(1) requires, the Authority therefore had before it the material to enable it to undertake a de novo merits review of the delegate's decision. There was no informational gap.

86 The difficulty arose after the decision of the delegate was referred to the Authority. As explained, the Authority listened to the audio recording of the

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102 *Migration Act*, ss 473FA(1) and 473DA(1).

103 *Migration Act*, s 473CC(1).

104 *Migration Act*, s 473DB(1). See also *Plaintiff M174/2016* (2018) 264 CLR 217 at 227 [22].

105 See, eg, *Migration Act*, s 5AAA; *Plaintiff M174/2016* (2018) 264 CLR 217 at 248 [95]; *CNY17* (2019) 94 ALJR 140 at 145 [7], 146 [15], 166 [140]; 375 ALR 47 at 50, 51-52, 78; Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 130 [891], 135 [919]-[920]; Australia, Senate, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Supplementary Explanatory Memorandum (Sheet GH118) at 6 [31].

interview conducted in person between the appellant and the delegate who made the referred decision. Contrary to the findings of the delegate that the appellant's claims were plausible, the Authority made findings, among others, that the appellant's evidence in that interview was "generally lacking in detail", the appellant "appear[ing] unable to expand in any detail on a number of his written claims and at times sound[ing] vague and hesitant". The Authority's conclusion that it was not satisfied that the appellant would face a real chance of serious harm if he were returned to Sri Lanka was based, in part, on the appellant's "personal circumstances", which, of course, included the Authority's assessment of the appellant in the interview.

87 In affirming a fast track reviewable decision[106], the Authority is entitled to reject one or more of the delegate's findings based on demeanour if they are glaringly improbable, or for some other sufficient and identified reason[107]. However, the Authority will act unreasonably if, without sufficient reason, it rejects an account given by the referred applicant in an interview conducted in person between the referred applicant and the delegate, and which the delegate accepts in making the referred decision. And that is what the Authority did in this matter. It rejected the delegate's finding that the appellant's claims were plausible (which was based, at least in part, on the appellant's demeanour), not on the basis of the review material but on its own assessment of the appellant's demeanour from an audio recording of that interview and without providing any sufficient reason to depart from, or to reject, that review material. Absent such an analysis and an explication of the reasons for reaching a different conclusion, the Authority was bound to accept those findings of the delegate. Put in different terms, contrary to s 473DB(1), the Authority reviewed the decision by rejecting, or putting to one side, a central part of the review material that had been provided to it and substituting its own findings without any basis for doing so. The decision of the Authority was unreasonable.

88 It is then necessary to address the contention that the appellant's demeanour was "new information" within the meaning of s 473DC. In *Plaintiff M174/2016 v Minister for Immigration and Border Protection*, Gageler, Keane and Nettle JJ explained the approach to new information as one of a "primary rule" (of review on the papers) with "exceptions"[108]. To be new information, among other things, the referred applicant's demeanour must have *not* been "before the Minister when

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106 *Migration Act*, s 473CC(2)(a).

107 cf *Fox v Percy* (2003) 214 CLR 118 at 127-128 [27]-[28]; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686-687 [43]; 331 ALR 550 at 558-559.

108 (2018) 264 CLR 217 at 227 [22]; see also 245 [88].

the Minister made the decision under section 65"[109]. Here, the appellant's demeanour was before the delegate and formed the basis, at least in part, of the delegate's findings. Indeed, that is the nature of the appellant's complaint. The appellant's demeanour was not and could not be "new information".

89 Next, the contention that if the appellant was asked to attend an interview with the Authority, the appellant's demeanour before the Authority would be "new information" because that demeanour was not and could not have been provided to the Minister, should not be accepted. It is contrary to the legislative scheme. As explained, subject to the exceptions in Pt 7AA, the Authority must review a fast track reviewable decision referred to it by considering the review material provided to it under s 473CB without accepting or requesting new information and without interviewing the referred applicant[110]. In conducting the review, the Authority faced a choice – accept the delegate's findings based on demeanour or, if those findings were glaringly improbable or some other sufficient reason could be identified, set them aside.

90 That conclusion is consistent with what underpins Pt 7AA, namely a review on the papers where a referred applicant has had ample opportunity to present their claims and supporting evidence to the Minister. The Authority's obligation is to "consider" the review material provided to it by the Secretary and to "examine the review material ... in order ... to form and act on its own assessment of the relevance of that material to the review of the referred decision"[111]. In order to form and act on its own assessment of the relevance of the review material to its review, the Authority may not, without sufficient reason, reject that part or those parts of the review material based on demeanour.

91 The Authority may consider any new information where it is satisfied there are exceptional circumstances, and the information was not and could not have been provided to the Minister before the Minister made their decision or was credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims[112]. Not only was the appellant's demeanour before the delegate but it was credible personal information which, at that time, was known and affected the Minister's consideration of his claims. The scheme does not permit rejection of those findings

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109 *Migration Act*, s 473DC(1); see also s 473DD(b)(i).

110 *Migration Act*, ss 473DB(1), 473DC, 473DD.

111 *CNY17* (2019) 94 ALJR 140 at 145 [7]; 375 ALR 47 at 50.

112 *Migration Act*, s 473DD.

based, at least in part, on demeanour absent a sufficient reason. None was identified.

92 It was suggested that the Authority could and should have interviewed the appellant and made an assessment of his credibility and demeanour. That step is neither permitted nor required by s 473DC. The proposition is that because the review material given to the Authority did not provide a sufficient reason to set aside the delegate's conclusion about credibility, the Authority not only could have but should have sought to obtain "new information" on which to do so. That is not what Pt 7AA provides. Section 473DC(1) relevantly identifies what is new information as information not before the delegate. The appellant's account of what had happened to him was before the delegate. Section 473DC(3) permits the Authority to get new information by conducting a new interview. But having the appellant repeat his account of what had happened to him in an interview with the Authority is not to get new information. And it does not become new information by observing that only new questions might be asked of the appellant about his account.

93 The review by the Authority prescribed by Pt 7AA is an important mechanism for ensuring that decisions by delegates to refuse protection visas are made on proper bases. As explained, in its review, on the papers, the Authority "examine[s] the review material ... in order ... to form and act on its own assessment of the relevance of that material to the review of the referred decision"[113]. That assessment includes its review of findings based on demeanour. Those findings may favour an applicant; they may not favour an applicant. But the Authority reviews all findings based on demeanour and makes its own assessment of the relevance of that material. And when, as part of that assessment, the Authority forms a view that a finding based on demeanour must be set aside because it is glaringly improbable, or for some other sufficient reason, then the Authority must identify that finding and provide the reason or reasons for setting it aside. If no sufficient reason can be identified by the Authority, then the Authority is bound to accept that finding of the delegate.

94 The alternative of video-recording the interview by a delegate or another person defeats the stated statutory purpose of Pt 7AA[114]. Not only that, but video-recording the interview (itself an additional cost in both recording and then producing a copy of the recording for it to be provided to the Authority as part of the review material and within the time limits prescribed by Pt 7AA) brings with it further and no doubt novel questions about the use of the recording when the

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113 *CNY17* (2019) 94 ALJR 140 at 145 [7]; 375 ALR 47 at 50.

114 See [79]-[81] above.

Authority conducts its review and, of course separately, then by the courts in any application for judicial review[115].

95 That leaves one final matter – the Minister's alternative contention that the Authority's error was immaterial, and therefore not a jurisdictional error. In *Minister for Immigration and Border Protection v SZMTA*[116], Nettle J and I explained why "materiality of error" should not be a criterion of jurisdictional error. One particular difficulty presented by materiality of error as a criterion of jurisdictional error is if the person challenging the decision has the burden of proving that the error could realistically have resulted in a different decision.

96 To describe an error as "harmless", or to ask whether that error was "material", is to admit that there has, in fact, been an error. This reflects the fact that, generally speaking, the law is concerned first to find whether a defendant has breached his or her duty before going on to consider the consequences of that default. This is no less true when the defendant is the executive, and is alleged to have breached some duty, statutory or otherwise. It reflects the orthodox approach to jurisdictional error, according to which the question of error is determined before one turns to the question of whether relief should be withheld in the discretion of the court.

97 Once error has been established, the question is what is the judicial response to that error. This in turn raises questions as to the proper role of the courts in reviewing executive action. These questions relate to the authority of courts in our system of government and the judicial techniques by which those courts undertake their work. In undertaking their work in this area of law, courts are concerned with the legal limits of executive power. The answers given by courts must therefore take account of a number of cardinal principles of constitutional law. These include the nature of judicial power (including its focus on deciding controversies between persons[117] or between persons and government), the separation of that power from legislative and executive powers, and the rule of law. When considering jurisdictional error, all of these principles must be addressed in the context of a particular statute. It is therefore also important to remember that the words of the statute are supreme. No court has the power to change those words.

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115 cf *Pell v The Queen* (2020) 94 ALJR 394 at 401 [36], 402 [38]; 376 ALR 478 at 485-486.

116 (2019) 264 CLR 421 at 458-460 [89]-[95].

117 Be they private persons, corporations, polities, or the community as personified in the Crown or a Director of Public Prosecutions: *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 16 [32].

98 The statute sets the playing field and the rules. Those rules apply to everybody: they apply to all people within Australia, including administrative decision-makers and the judiciary. The statute is *prospective*. That is, it sets those rules *in advance*. Those rules tell decision-makers, for example, that they must act reasonably and accord procedural fairness. "The legal standard of reasonableness must be the standard indicated by the true construction of the statute"[118]. The statute ensures that decision-makers know what is required of them when carrying out their tasks. If those rules – such as reasonableness and procedural fairness – are to be qualified or denied, the legislature must express that intention in clear language.

99 If a decision-maker breaches the rules set down by the legislature, the decision-maker commits an error. A decision-maker has breached the rules and committed an error, or the decision-maker has not breached the rules and has not committed an error. The situation is a "binary" one[119]. Thus, as McHugh J said in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[120]:

> "If the requirement to give written particulars is mandatory, then failure to comply means that the [decision-maker] has not discharged its statutory function. There can be no 'partial compliance' with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not."

100 This emphasises the importance of the point made earlier: the statute sets the rules and those rules *are known in advance*. Their content is fixed. That content is not "ambulatory"[121]. If that was not the case, a decision-maker would be unable to know what rules to abide by. Similarly, a person who is subject to the exercise of power by that decision-maker could not know whether they had been treated in accordance with the law. It is, of course, true that the circumstances of individuals vary. But this does not mean that rules shift with individuals' circumstances.

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118 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364 [67]; see also 351 [29], 362 [63], 363 [65], 370-371 [90], 376 [109]; *SZVFW* (2018) 264 CLR 541 at 575 [88]-[89].

119 Crawford, "Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power" (2019) 30 *Public Law Review* 281 at 284.

120 (2005) 228 CLR 294 at 321 [77].

121 Crawford, "Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power" (2019) 30 *Public Law Review* 281 at 282.

101 Judicial power is concerned with whether the rules set down by the statute were met. Generally, this manifests as a concern with the *manner* in which power conferred by the statute was exercised. That inquiry is, logically, concerned with the time at which the power was exercised[122] and, in cases of legal unreasonableness, also the result. The inquiry therefore has a temporal element.

102 These two principles – that statutes fix rules in advance and that error is determined at the time of the exercise of power by a decision-maker – have an important consequence. Together with the constitutional principles discussed earlier, they have the consequence that judicial power does not permit a court to inquire, in hindsight, whether an error was "material", thereby modifying the statute.

103 To make a finding that no error was committed because that error was not material is to change the statutory obligation. Consider a statutory obligation to accord procedural fairness. If a decision-maker does not accord procedural fairness in the exercise of the relevant power, they have breached that obligation. To then inquire whether that breach was "material" is to say (contrary to the previous sentence) that the obligation *may or may not* have been breached, depending on whether compliance with the obligation could have resulted in a different outcome.

104 Two things may immediately be seen from this example. First, the obligation to accord procedural fairness has been changed. It is no longer an obligation to accord procedural fairness in exercise of the statutory power. Rather, the new obligation on the decision-maker is to accord procedural fairness if (and only if) to do so would make a difference to the ultimate decision. The guarantee of procedural fairness is removed.

105 Second, the new obligation is inherently uncertain. The obligation on a decision-maker is not set in advance by the statute. Rather, its content now depends upon the particular circumstances of the decision at issue. It is difficult (if not impossible) for a decision-maker to know *in advance* what level of procedural fairness might have made a difference. The decision-maker needs to know in advance how to act in accordance with the law, but a materiality analysis is necessarily backwards-looking. Nor is the criterion of materiality any easier for the judiciary to apply: the criterion is akin to, or feels like, a form of merits review.

106 A qualification of materiality is also contrary to the principle expressed earlier: if obligations of procedural fairness are to be limited or qualified, that limit

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122 In cases of apprehended bias, this may be before active steps are taken by a decision-maker: see *CNY17* (2019) 94 ALJR 140 at 155-156 [71]-[72]; 375 ALR 47 at 64-65.

or qualification must be expressed in clear words by the legislature. Limits or qualifications cannot be imposed by way of "qualitative judgments"[123] made by courts.

107 If there is jurisdictional error, it is for the executive, not the individual affected by the exercise of the power, to establish that, notwithstanding the error, relief should be denied in a given case because that relief would be futile. The presumption that relief will go reflects the primacy of the statutory rules and the separation of powers by which courts respect those rules. It also reflects the fact that judicial power is, and must be, exercised in a way which seeks to ensure that the values that underpin our democracy will be upheld. Those values include the idea that power will not be exercised against an individual in a way that is contrary to law. At a more human level, such exercises of power must respect the integrity and the dignity of individuals who are subject to that power.

108 These principles are consistent with the proper understanding of judicial power in this context. As Allsop CJ has said, judicial power seeks to ensure that executive power which extends beyond the authority conferred on the executive is controlled. There are, as his Honour described, "deep Constitutional relationships between Parliament through statute, the Executive through statutory and inhering executive authority and Courts through the exercise of judicial power and the common law"[124]. Those relationships are, as has been said, concerned in this context with ensuring that executive power remains within the bounds set by the legislature.

109 To require an individual to show that executive power – public power – would have been exercised differently if preconditions on the exercise of that power had been met is to fail to understand these relationships and the role of judicial power. It places the onus on an individual to show why public power should be re-exercised, rather than protecting that individual from exercises of public power which are contrary to the law. And, it must be observed, at least in some cases it places the onus on an individual to show why public power should be re-exercised, without the necessary facts, or the ability to obtain the necessary facts.

110 This is not to say that every instance of jurisdictional error results in relief. As Allsop CJ has also said, it is necessary to "provide a realistic and appropriate

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123 cf *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134 [28].

124 Allsop, "The Foundations of Administrative Law", speech delivered at the 12th Annual Whitmore Lecture, 4 April 2019 at 14.

answer" to questions about the legality of exercises of executive power[125]. Consistent with the principles stated above, that answer must start by recognising that the executive has transgressed its legal limits. That is, it is necessary first to recognise that an error has been made. Subsequent to that finding, relief may be denied in those cases where the executive can show that the relief would be futile, in the sense that the error could not possibly have made a difference. A court will not award relief when it is futile to do so. That is as true in cases of jurisdictional error, including on the ground of legal unreasonableness, as in any other case. And in public law, the onus is on the executive to show that this is an appropriate step in a given case. That onus cannot rest with an individual who is challenging a decision of the executive.

111 For those reasons, the appeal should be allowed. I agree with the orders proposed by Nettle J.

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125 Allsop, "The Foundations of Administrative Law", speech delivered at the 12th Annual Whitmore Lecture, 4 April 2019 at 25.

EDELMAN J.

Introduction and agreement with other reasons

112 I have had the considerable benefit of reading in draft the reasons of Nettle J and Gordon J. Like Gordon J, I adopt the facts and the procedural history set out in the reasons of Nettle J. I agree with Nettle J and Gordon J that the Immigration Assessment Authority acted unreasonably by departing in its reasoning from the delegate's finding that the appellant's claims were plausible. As Nettle J explains, it was a legal error for the Authority, which did not have the opportunity to assess the demeanour of the appellant including the demonstration of his scarring, to depart from the delegate's assessment of the appellant's credibility[126]. There was no legal basis to depart from the findings of the delegate, which were not contrary to incontrovertible facts or uncontested testimony, or glaringly improbable, or contrary to compelling inferences, or otherwise erroneous[127].

113 I also agree with Nettle J that care sometimes needs to be taken with expressions like "hearing de novo"[128], a hearing "from the beginning", which is not an expression that appears in the *Migration Act 1958* (Cth). As his Honour explains, the nature of the review conducted by the Authority is a matter of statutory interpretation. Effect must be given to the intention of Parliament rather than superimposing upon the statute a conception of what a hearing de novo might require. The description of the review as "de novo" is only a loose description which should not distract from what is required by the scheme of Pt 7AA of the *Migration Act*. That Part contemplates only a "limited review"[129]. Relevantly to this appeal, central features that establish the limited nature of the review include: (i) the proscription upon considering "new information" unless various conditions are satisfied including that there are "exceptional circumstances"[130]; (ii) the express statutory assumption that the Authority's review will generally be conducted "on the papers" without interviewing the referred applicant[131] and

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126 At [63], [67]. See also reasons of Gordon J at [87].

127 At [63]. See also reasons of Gordon J at [87].

128 At [59].

129 *Migration Act 1958* (Cth), s 473FA(1).

130 *Migration Act*, s 473DD.

131 *Migration Act*, s 473DB(1)(b).

without a hearing[132]; and (iii) the inclusion in the review material of the delegate's reasons for decision[133] so that the Authority must not undertake its consideration without taking into account the views of the delegate.

114 Since this is one of the final decisions of Nettle J, I wish also to express my gratitude for his customary comprehensive consideration, his lucid expression, and, as always, his intellectual rigour. I seek to add observations to his Honour's reasons and the reasons of Gordon J on only two points.

A referred applicant's re-presentation of old evidence is not "new information"

115 The context in which the issue on this appeal arises is a situation that is likely to be common. Upon reviewing the papers, the Authority has doubts about the correctness of a step in the reasoning process of the delegate, which depended in part upon the delegate's usual assessment of the applicant in an interview. The review material before it is not so plain that the Authority can reach a different conclusion on that step without having had the same benefit of assessing the referred applicant's demeanour. One submission of the appellant was that, in such circumstances, the Authority's failure to exercise its power under s 473DC to invite the referred applicant to an interview would be legally unreasonable. The submission was that the Authority would be required to invite the referred applicant to "give"[134] evidence concerning the same "facts, subjects or events" that were the subject of the delegate's questions because the evidence given by the referred applicant would be given with a demeanour which would, by definition, be "new". This submission is contrary to both the terms and the purpose of Pt 7AA.

116 As to the terms of Pt 7AA, the appellant's submission that a referred applicant can "give"[135] new information simply by re-presenting old evidence is, at the very least, a strain of the English language. The natural and ordinary meaning of a referred applicant "giving" information is that the referred applicant provides facts or refers to circumstances "relating to material or documentation of an evidentiary nature"[136]. A referred applicant does not "give" their demeanour.

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132 *Migration Act*, s 473BA.

133 *Migration Act*, ss 473BB (definition of "review material"), 473CB(1)(a).

134 *Migration Act*, s 473DC(3).

135 *Migration Act*, ss 473DC(3), 473DD(b).

136 *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706 at 711 [21]; 380 ALR 216 at 222, quoting *Minister for Immigration and Border*

Rather, the demeanour of, or manner in which the evidence is given by, a referred applicant is a matter "on which the value of [the] evidence depends"[137].

117 Another major obstacle for the appellant's submission which derives from the terms of Pt 7AA is that the Authority can only consider the "new information" of the referred applicant's demeanour if the circumstances are "exceptional"[138]. Yet common circumstances, as the circumstances of this appeal might reasonably be thought to be, are usually the antithesis of exceptional circumstances: a joint judgment of this Court recently said of s 473DD that to be exceptional a circumstance "cannot be one that is regularly, or routinely, or normally encountered"[139]. Hence, if the appellant's submission were accepted then it would be legally unreasonable for the Authority not to interview a referred applicant in order to consider demeanour but any "new information" obtained from assessing the demeanour could not be considered by the Authority.

118 An acceptance of this submission by the appellant would also undermine the scheme of Pt 7AA. When that Part was introduced, the then Minister, Mr Morrison, described one of its purposes as resolving "around 30,000" outstanding claims to asylum[140]. On the appellant's submission, the Authority might often be required to ask itself whether its doubts about any conclusion of the delegate based on demeanour require it to give the referred applicant an interview. There might be many instances in which an interview is required. Further, if this submission were correct, the terms of s 473DE could require the Authority to consider giving a second interview to the referred applicant. Without more, the effect of s 473DE would be that if, in the course of deliberating, the Authority considered that the referred applicant's demeanour would be the reason, or part of the reason, for affirming the Minister's or delegate's decision then the Authority could also be required, amongst other things, to invite the referred applicant to give

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Protection v SZMTA (2019) 264 CLR 421 at 440 [28]. See also (2020) 94 ALJR 706 at 712 [30]; 380 ALR 216 at 224.

137 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1904), vol 2 at 1751 §1395, quoting *State v McO'Blenis* (1857) 24 Mo 402 at 421. See also Starkie, *A Practical Treatise of the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings*, 7th Am ed (1842), vol 1 at 582.

138 *Migration Act*, s 473DD(a).

139 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 229 [30], quoting *R v Kelly* [2000] QB 198 at 208.

140 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 September 2014 at 10545.

comments on its assessment of the referred applicant's demeanour in writing or at yet another interview.

119 It is highly unlikely that Parliament, which expressly stated that the Authority "does not hold hearings"[141], could have intended that, in circumstances likely to be common, one or two interviews might be required to be held. In the Explanatory Memorandum to the Bill which introduced Pt 7AA it was said[142]:

> "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."

The appellant's submission, if accepted, would conflict with the express statutory assumption that the Authority's limited review will generally be on the papers without interviewing the referred applicant[143]. It would negate Parliament's description of the Authority as a body that "does not hold hearings"[144]. It would subvert the express goal that the Authority "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)"[145]. Many reviews would not be limited. They would not be efficient. And they would not be quick.

120 Parliament should not be taken to have contemplated the possibility that such stultification of its statutory goals might be avoided by the introduction of new, innovative administrative techniques such as video-recording interviews between an applicant and an "officer"[146] other than the delegate who makes the decision on behalf of the Minister. Such a new practice for fast track applicants might be expected to increase the work of the Department substantially since it would require both a video-recorded interview by an officer and a viewing of that

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141 *Migration Act*, s 473BA.

142 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 131 [893].

143 *Migration Act*, s 473DB(1).

144 *Migration Act*, s 473BA.

145 *Migration Act*, s 473BA.

146 As defined in *Migration Act*, s 5(1).

interview by the delegate, who is required to have regard to that information[147]. And if, contrary to the view expressed above, a "limited review" required the Authority to be in the same position to assess credibility as the delegate, the video-recording of interviews before an officer would impose a new burden upon the Authority to scrutinise the demeanour of a referred applicant in most or all of the video-recorded interviews where the Authority has doubts about findings dependent upon the demeanour of the referred applicant. Although this scrutiny of a video-recording would be less time-consuming for the Authority than a fresh interview, it could still imperil the statutory goals of efficiency and speed, potentially without additional benefit[148], when compared with a process of the Authority making its independent assessment upon the basis of acceptance of demeanour findings by the delegate from which there is no legal basis to depart[149].

121 For these reasons, if the expression "de novo" were to be understood in literal terms as meaning a hearing entirely from the beginning then, as Nettle J explains, the review is not "de novo". It is a "limited" review. One way in which it is limited is that evidence that has already been presented before a delegate does not become "new information" simply by being re-presented to the Authority. Evidence which the delegate has heard cannot be reheard by the Authority in circumstances including the mere possibility that the referred applicant might give the evidence with a different expression. Just as the Authority cannot get, as "new information", a fresh presentation of documents, such as country information, obtained by the delegate and relied upon in making the decision under s 65[150], so too the Authority cannot get, as "new information", a fresh presentation of oral evidence that was before the delegate and relied upon in making the decision under s 65. In each case, the Authority is required to consider the findings made by the delegate by a review that is based upon, and which will usually refer to, that evidence[151]. Those findings can be rejected by the Authority unless, in the process of doing so on the papers, such reasoning would be legally unreasonable.

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147 *Migration Act*, s 56(1).

148 Compare *Fennell v The Queen* (2019) 93 ALJR 1219 at 1233 [81]; 373 ALR 433 at 451-452 on the limits to credibility assessments.

149 Compare *Pell v The Queen* (2020) 94 ALJR 394 at 401 [36], 402 [39]; 376 ALR 478 at 485-486 concerning the process of an appellate court proceeding upon the assumption that evidence is found to be "credible and reliable" in the course of making "its independent assessment of the evidence".

150 *Migration Act*, s 473DC(1)(a).

151 *Migration Act*, s 473CB(1)(a).

Unreasonableness in the process of decision-making

122 There was no suggestion on this appeal that the ultimate outcome reached by the Authority, that the decision of the delegate should be affirmed, was legally unreasonable in the sense that it was not an outcome that was reasonably open within "an area of decisional freedom"[152]. The issue was instead whether the process of reasoning deployed by the Authority, which unlike that of the delegate did not involve alternative paths of reasoning to the outcome, could be characterised as legally unreasonable. To adopt the distinction made by the Full Court of the Federal Court of Australia in *Minister for Immigration and Border Protection v Singh*[153], the legal unreasonableness in issue on this appeal was process focused rather than "outcome focused".

123 During the oral hearing of this appeal the Minister accepted that "the ultimate decision can contain jurisdictional error by reason of a legally unreasonable exercise of a step along the way". The Minister then conceded that, subject to the issue of materiality (which, depending upon the location of the onus, might better be expressed as immateriality[154]), if "a delegate makes a decision that is substantially based on demeanour then the Authority will need to have an independent evidentiary basis to depart from that decision" and that it would be legally unreasonable to reach a different view "without forming its own view about demeanour".

124 The concession of the Minister concerning jurisdictional error based on unreasonableness in the process of decision-making could not be accepted if it were to be understood as based upon a ground of legal unreasonableness which encompassed the process of decision-making generally, unmoored from the particular statutory duties, functions, and powers that govern that process. The recognition of such a new ground of review based upon legal unreasonableness in the abstract process of decision-making would be a very large step. At worst, such a step could be destructive of a distinction between the legality of the exercise of administrative power and the "merits" of that exercise. The "merits" of an exercise of administrative power include the lawful exercise of

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152 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [28].

153 (2014) 231 FCR 437 at 445 [44].

154 *OKS v Western Australia* (2019) 265 CLR 268 at 280-282 [34]-[38]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1104-1105 [66]-[67]; 373 ALR 196 at 212-213. Compare *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [46] with 459-460 [93]-[95].

power which involves "administrative injustice" or mere "error"[155]. At best, such a step would go beyond the usual, often unacknowledged, "ebb and flow" by which the judiciary has eroded this distinction[156].

125 A more orthodox conception of judicial review for legal unreasonableness in the process of decision-making recognises an implication of a duty of legal reasonableness only in the performance or exercise of a statutory duty, function, or power. Hence, decisions of this Court have recognised an implication of a requirement for legal reasonableness in the performance or exercise of specific statutory duties, functions, or powers such as the power to adjourn a review hearing[157] or a power for the Authority to invite a person to give new information in writing or at an interview[158]. And in *Minister for Immigration and Citizenship v SZMDS*[159], in taking an approach that was described as focusing upon legal unreasonableness in "the process of reasoning from facts and inferences" rather than in the outcome[160], a particular duty upon which Gummow A-CJ and Kiefel J focused was the obligation of the Refugee Review Tribunal under s 430(1) of the *Migration Act*[161] to set out findings on material questions of fact[162].

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155 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

156 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 263 [4.690].

157 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, especially at 362 [63] considering *Migration Act*, s 363(1)(b) (as it then stood).

158 *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 227 [21], 245 [86], 249 [97], considering *Migration Act*, s 473DC(3).

159 (2010) 240 CLR 611.

160 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 266 [4.720], comparing *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 625 [40]-[42] (Gummow A-CJ and Kiefel J) with 647-648 [130] (Crennan and Bell JJ).

161 As it then stood.

162 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 623 [33].

126 A passage in the decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick*[163], to which reference is made in the reasons of Kiefel CJ, Bell, Gageler and Keane JJ[164], might, on one view, call into doubt whether a duty to give reasons can be the subject of a requirement of legal reasonableness independently of whether the outcome is legally reasonable. That passage was later considered by the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*[165], which explained that "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes". Such a conception could not justify the Minister's concession of legal unreasonableness by the Authority in reaching its own decision about demeanour because it was not suggested that the ultimate outcome reached by the Authority fell outside the "range of possible, acceptable outcomes"[166].

127 More recently, however, the Supreme Court of Canada has taken a broader view of the decision in *Dunsmuir* and the role that reasons can play in judicial review for legal unreasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*[167] seven judges of that Court held that it was "mistaken" to understand the *Newfoundland and Labrador Nurses' Union* decision as confining review for legal unreasonableness only to the outcome. Hence, a decision with "formal reasons that fail to justify [it]" is invalid "[e]ven if the outcome of the decision could be reasonable under different circumstances" because "it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome". Of course, where there is no specific duty, function, or power which is said to have been unreasonably omitted or exercised, including where there is no duty to give reasons and none are given, then the focus of reasonableness can only be upon the ultimate outcome[168].

128 The Minister's concession on this appeal can be justified in light of the duty upon the Authority to set out its reasons for its decision, contained in

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163 [2008] 1 SCR 190 at 220-221 [47].

164 At [20].

165 [2011] 3 SCR 708 at 715 [14].

166 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 220-221 [47].

167 (2019) 441 DLR (4th) 1 at 70-71 [95]-[96].

168 *Canada (Minister of Citizenship and Immigration) v Vavilov* (2019) 441 DLR (4th) 1 at 86 [138]. See also *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at 446 [45].

s 473EA(1)(b) of the *Migration Act*. For the reasons above, that duty can be understood as attracting the implied duty of reasonableness in its exercise. As Nettle J explains, the step in the Authority's reasoning process involving the rejection of the demeanour assessment by the delegate was a step that was essential in the single reasoning process leading to the Authority's conclusion. Although this was not a case where an essential step in the reasoning process was unexpressed[169], the essential step that was expressed involved substantial error.

129 For these reasons, the Minister's concession should be accepted. It is necessary to emphasise that there was no submission on this appeal that the Authority's error in its reasoning process, whilst significant, was insufficient to justify a conclusion of legal unreasonableness in the performance of the duty contained in s 473EA(1)(b). It suffices to say that factors which might point to the threshold for legal unreasonableness in the performance of this duty to give reasons being high, despite the importance of the issue being decided, include: the historical background against which Parliament legislated[170], the statutory context emphasising the limited nature of the review and the need for efficiency and speed, and authorities which, using strong adjectives, had described reasons as leading to jurisdictional error where the reasons fail to provide an "intelligible justification"[171] for the decision or are "irrational or illogical irrespective of whether the same conclusion could be reached by a process of reasoning which did not suffer from the same defect"[172].

Conclusion

130 The appeal should be allowed and orders made as proposed by Nettle J.

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169 cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 224 [40] in the context of s 501G(1) of the *Migration Act* (as it then stood).

170 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230. See *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 586 [135].

171 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at 446-447 [47]. See also *Tsvetnenko v United States of America* (2019) 269 FCR 225 at 243 [83].

172 *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [287]. See also *Minister for Immigration and Border Protection v Haq* (2019) 267 FCR 513 at 534 [89].