Federal Court of Australia

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CRK18 [2021] FCA 1070

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| Appeal from: | *CRK18 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2021] FCCA 267 |
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| File number(s): | SAD 31 of 2021 |
|  |  |
| Judgment of: | **KERR J** |
|  |  |
| Date of judgment: | 8 September 2021 |
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| Catchwords: | **MIGRATION –** appeal from a decision of the Federal Circuit Court of Australia – where the Minister submits that the reasoning of the plurality of the High Court of Australia in *ABT17 v Minister for Immigration* (2020) 94 ALJR 928 (**ABT17**), properly understood, is inconsistent with the analysis of the learned primary judge in his Honour’s reasons – where there is no appealable error in the primary judge’s application of the principles articulated by the plurality in ABT17 |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *ABT17 v Minister for Immigration* (2020) 94 ALJR 928  *DGZ16 v Minister for Immigration and Border Protection & Anor* (2018) 258 FCR 551  *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134  *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210  UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3 |
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| Solicitor for the Appellant: | Australian Government Solicitor |
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| Counsel for the First Respondent: | Mr Barnes |
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ORDERS

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|  | | SAD 31 of 2021 |
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| BETWEEN: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  Appellant | |
| AND: | CRK18  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| order made by: | KERR J |
| DATE OF ORDER: | 8 September 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellant pay the First Respondent’s costs as agreed, or in default of agreement, as assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KERR J

1. This an appeal by the Minister advanced on two grounds from a decision of the Federal Circuit Court of Australia (**FCCA**): *CRK18 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2021] FCCA 267.
2. In the court below the primary judge made orders in the nature of a writ of certiorari setting aside an earlier decision of the Immigration Assessment Authority (**IAA**) which had affirmed a decision of a delegate of the Minister (the **Delegate**) to reject the first respondent’s (the **Respondent**) application for a Safe Haven Enterprise (Class EX) (Subclass 790) visa (**visa**) and, consequentially to require the decision to be reconsidered and remade according to law.
3. I have concluded that the appeal is to be dismissed.

# Background

1. The factual context in which this appeal arises is set out in the primary judge’s decision. Neither party suggests his Honour’s summary is insufficient or inaccurate. It is therefore convenient simply to reproduce the relevant passages of his Honour’s reasons:

3. The applicant is a Sri Lankan Tamil and a Catholic. He arrived in this country as an unauthorised maritime arrival in September 2012. Once the statutory bar was lifted the applicant applied for the visa in July 2016. He is a fast-track applicant. He was interviewed by a delegate of the first respondent in June 2017. The application for the visa was refused by the delegate in July 2017. As is required, the matter was referred to the IAA. The applicant was at that time being assisted by the Refugee Advocacy Service of South Australia and provided a written submission to the IAA. The decision of the delegate was affirmed by the IAA.

4. The claims of the applicant essentially revolve around his fear of harm due to his Tamil ethnicity and because of his imputed links to the Liberation Tigers of Tamil Eelam (‘LTTE’). In particular, his fear was based on the fact that he had been employed for a person who sold fuel to the LTTE in 2008 and 2009.

5. In his original statement of claims, the applicant identified a number of matters which he says caused him to depart from Sri Lanka. One of those claims was that in 2007 he worked for a company whose main business was the transportation of fish from fishing vessels to the marketplace in Colombo. He also claimed that he protested against the construction of a Buddhist temple on the island upon which he lived. The Sri Lankan police and the Sri Lankan Navy were both in favour of constructing the temple. Members of the Christian population on the island (such as himself) and of the Muslim population, lobbied against this. As a result, he was subjected to beatings and the holding up of the grant of his fishing permit. He also claims to fear harm as a failed asylum seeker returning to Sri Lanka.

6. When the applicant was interviewed by the delegate for his Protection Visa Interview (‘PVI’) he expanded his claims and provided further information which he says was the reason for his imputed association with the LTTE. It was in the process of doing this that he made the claims about making deliveries to the LTTE including fuel. He said that his employer was supplying fuel to the LTTE without his knowledge and that he was given directions to deliver fuel by boat but was unaware that was provided to the LTTE at a large profit.

7. The delegate made the following finding:

I accept that the applicant worked for a Singhalese (sic) employer in a fish transport business in Kalpitya Sri Lanka. I accept that his involvement in making deliveries to the LTTE has imputed his involvement with the LTTE.

8. In considering the implications of that finding, the delegate noted country information which suggested that past membership or connection to the LTTE did not give a Sri Lankan Tamil a profile of interest to the authorities unless they had, or were perceived to have had, a significant role in the organisation or if they were, or were perceived to be, active in post-conflict Tamil separatism. The reasons of the delegate state as follows:

I note the applicant claims that by following his employer’s instructions he has been imputed LTTE involvement. However, I find the applicant’s profile not be of interest to Sri Lankan authorities for the reasons outlined below ...

... Noting the applicant has not had any high level involvement in the LTTE and the fact that they do not claim to have been involved in any separatist activities, I find that they would not have a profile of interest with any Sri Lankan authorities. I have given the UK report significant weight as it is based on the evidence provided through a visit to Sri Lanka in 2016 by a United Kingdom delegation which sought a range of views from multiple stakeholders.

9. In other words, the delegate concluded that a person with a low profile such as the applicant would not be of any interest to the authorities should he return to Sri Lanka.

**The IAA Decision**

10. As I have noted above, the applicant provided a written submission to the IAA. That submission addressed some of the findings of the delegate with respect to his claimed imputed LTTE links. The submission noted that the delegate had accepted his claim to have taken part in deliveries to the LTTE.

11. The IAA had regard to those parts of the applicant’s written submissions which were responsive to the delegate’s decision. It did not consider certain new claims and information which the applicant sought to provide about fishing permits and the plan to build a resort on his island and relocate the residents. The IAA was not satisfied that exceptional circumstances existed which would justify considering that material. Similarly, it did not have regard to certain pre-existing country information which was not before the delegate, on the basis that there were no exceptional circumstances justifying it in doing so. The IAA was prepared to consider new information from the UN Special Rapporteur and the International Truth and Justice Project, finding that exceptional circumstances existed to do so.

12. The IAA accepted some aspects of the applicant’s claims. Relevantly, for the purpose of this application, the IAA departed from the finding made by the delegate as to the applicant having transported fuel. It did not accept that he transported fuel to the LTTE on behalf of his former employer. It did not accept that his former employer had provided information about him to the Navy. The IAA reasoned as follows:

I note the applicant did not raise the claim regarding fuel deliveries to the LTTE during arrival processing or in his written statement of claim. The delegate asked him why he had not mentioned this claim earlier, and the applicant indicated he was very frightened when he first arrived in Australia that information will be given to Sri Lankan authorities, but now he feel (sic) confident to tell the truth. I accept an asylum seeker may be reluctant to disclose an association with an organisation such as the LTTE in their initial encounter with a foreign government, however I am not satisfied such fears prevented the applicant from providing those details in his statement of claims prepared a number of years later. I find the applicant’s failure to mention the claim regarding interactions with the LTTE in his statement of claims is extremely significant. In that document he provided a detailed description of events in 1997, and some details about his work with ND Transport, issues regarding the Buddhist Temple, and trouble with the Navy, but fails to make any mention of any involvement with the LTTE, including delivering fuel to them. Taking into account the applicant’s escalating claims regarding the number of times he was beaten by Navy officers, and recent disclosure of supplying fuel to the LTTE, I am of the opinion the claim has been recently fabricated to support his claim for protection. I do not accept the applicant transported fuel to the LTTE.

13. The IAA was not satisfied that the applicant had left Sri Lanka for the reasons he claimed, that the Navy continued to enquire as to his whereabouts, or that his wife had had to relocate as a result of persistent enquiries from the Navy. It found that he did not meet either the refugee or the complimentary protection criteria.

(footnotes omitted)

1. The reasoning of the primary judge as was dispositive of the outcome then was as follows:

33. It is correct to observe that in the delegate’s decision record, there was no use by the delegate of the term ‘demeanour’ or other words which suggest that the way in which the applicant gave his evidence had an influence over the delegate’s acceptance of his claim to having delivered fuel for the LTTE. The delegate did not appear to have regarded that claim to have been fundamentally far-fetched. He simply accepted that part of the claim. Similarly, the transcript of the recording made of the interview does not mention demeanour or any doubts held on the part of the reviewer. I note that the interview appears to have been audio recorded and not videoed.

34. Since this matter was argued, the High Court has delivered its reasons in *ABT17 v Minister for Immigration and Border Protection*. In that matter, the IAA departed from the assessment of the delegate with respect to a claim by the applicant to have been sexually tortured. It did so, having listened to an audio recording of the interview, on the basis of its own assessment of the credibility of the applicant’s account due a general lack of detail, some vagueness in the manner in which the applicant expressed himself, and his hesitancy in giving his account. It should be noted that in *ABT17* the delegate had apparently not made comments about the demeanour of the applicant and had regarded the claim as *“plausible”*. The Court held that the IAA will be acting unreasonably *“if, without good reason it does not invite an applicant to an interview in order to gauge his or her demeanour for itself before it decides to reject an account given by the 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”*.

35. The High Court considered the question of demeanour but in a slightly different context to that which arose in *DPI17* and *FOA18*. As I have noted above, the delegate in *ABT17* did not place any particular emphasis on demeanour. The IAA then made its own assessment of the credibility of the applicant. The High Court found that the manner in which the content of the interview with the delegate was presented to the IAA was significant and drew a distinction between matters in which an audio as opposed to a video recording had been made. It noted that either method of recording the interview was mandated by the relevant Code of Procedure but found as follows:

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.

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. “That has “long been recognised” and continues to be appreciated despite awareness on the part of sophisticated decision-makers that “an ounce of intrinsic merit or demerit” measured by reference to objectively established facts and the apparent logic of events “is worth pounds of demeanour.

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.

36. On the above analysis, this present case is one which has an informational gap of the type identified by the High Court. An audio recording was made. It should also be noted that the High Court did not, in the above analysis, place any apparent emphasis on the seeming lack of reliance by the delegate on considerations of demeanour. Further, the present case could also be regarded as a matter in which the IAA was not convinced by country information alone to uphold the delegate’s ultimate decision irrespective of the applicant’s plausibility. The IAA made no reference to country information when rejecting the applicant’s account relating to the fuel deliveries. It is apparent that it was the content and circumstances of the account itself that gave rise to the finding. The IAA finding was made on the basis of the applicant’s failure to raise the fuel delivery claim at his entry interview or in his written statement of claims and the consequent inconsistencies in the version he gave to the delegate. Further, it was made on the basis that his explanation of being frightened as the reason for not having raised the matters earlier given the amount time which had elapsed since his arrival in Australia, was not objectively plausible.

37. In my view, it is significant that the High Court referred to “the potential significance of demeanour” when discussing the credibility findings made by the IAA which departed from the finding of plausibility made by the delegate. That potential significance will be an active consideration in any matter where the IAA departs from a credibility assessment made by the delegate in relation to a significant matter and not just a matter where the IAA specifically refers in its reasons to the demeanour of an applicant, having listened to an audio recording of the interview with the delegate. The need for a finding of exceptional circumstances to warrant conducting a further interview was addressed in *ABT17*. The Court continued:

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 and which was not before the Minister when the delegate made the referred decision. 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 decision 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.

38. I am satisfied that Mr Barne’s submission as to the failure to consider exercising the s 473DC discretion is correct. The IAA specifically considered the discretion in the context of receiving or not receiving the new information which it identified and to which I have referred at paragraph 11 above. It gave reasons for the decisions that it made in that regard. It also specifically considered the exercise of the discretion in the context of the applicant’s request for a further interview to explain why he disagreed with the delegate’s decision. It gave as its’ reason the ample opportunities it regarded him as having had to put his case. It should be noted that that request made by the applicant drew specific attention to the fact that his claims with respect to delivering fuel had been accepted by the delegate. I am not satisfied that either of those decisions with respect to the exercise of the discretion can be regarded as having encompassed a consideration of whether or not to exercise the discretion to interview the applicant in the context of the significant reservations it had about the fuel delivery claim and its’ ultimate decision to decide that question differently to the delegate. In my view, it did not have good reason not to invite the applicant for an interview to gauge his demeanour for itself before it decided to reject an account given by the applicant in an audio recorded interview which the delegate accepted. In my view, it can readily be inferred that the IAA did not consider inviting the applicant for an interview for that purpose. Whilst it was not required to give reasons for procedural decisions, it clearly chose to do so in this matter. It made no reference to having considered the discretion in that context and in the circumstances it can be inferred that had it done so, reference would have been made to it. The IAA was operating with an informational gap of the kind identified by the High Court. An assessment of the demeanour of the applicant at an interview would have afforded the IAA the opportunity to make its own assessment and would have filled the gap. The demeanour of the applicant could have been particularly important when considering whether or not to reject his explanation of being frightened as the reason for not having made the fuel delivery claim at an earlier time. That is particularly so given the IAA rejected the explanation of his subjective fears by reasoning objectively about how persons in his situation would ordinarily behave. The failure to consider exercising the discretion in s 473DC was, in the circumstances of this matter, legally unreasonable. I am satisfied that the applicant has demonstrated jurisdictional error by reason of a constructive failure on the part of the IAA to review the decision as required by Part 7AA.

(footnotes omitted)

# Grounds of Appeal

1. The Minister’s Grounds of Appeal are:
2. The learned primary judge erred in finding that the Immigration Assessment Authority (IAA) had failed to consider exercising the discretion in s 473DC of the Migration Act 1958 (Cth) (Reasons [38]).

1.1. The IAA considered and rejected the First Respondent’s request for an interview in para 12 of its decision.

1.2. The learned primary judge’s finding in Reasons [38] that it could be inferred that the IAA did not consider inviting the First Respondent for an interview “for that purpose” (that is, to assess his demeanour before deciding to reject his account that was accepted by the delegate) wrongly conflates whether the IAA had considered exercising the s 473DC discretion, and the merits of the IAA’s decision not to exercise that discretion.

1. The learned primary judge erred in finding that the IAA did not have a good reason not to invite the First Respondent to an interview to gauge his demeanour for itself before rejecting an account that was accepted by the delegate in relation to the First Respondent’s claim to have delivered fuel for the LTTE in 2008 or 2009 (the “fuel claim”) (Reasons [38]).

2.1. Neither the delegate nor the IAA made any reference to the First Respondent’s demeanour in their reasons dealing with the “fuel claim”.

2.2. The IAA in paras 24 and 25 of its decision rejected the “fuel claim” because of inconsistencies between that claim and other claims made by the First Respondent during arrival processing, and because it was “extremely significant” that the First Respondent had not made that claim in a written statement of claims prepared a number of years after his arrival in Australia, which contained detailed description of other events around that time.

2.3. In these circumstances, the IAA’s different conclusion in respect of the “fuel claim” was based on its own assessment of the review materials which did not include an assessment of the First Respondent’s demeanour from the audio recording: cf ABT17 v Minister for Immigration and Border Protection (2020) 94 ALJR 928 at [25], [87].

## Ground 2

1. The Minister’s written submissions as address the subject of Ground 2 are premised on the contention that the reasoning of the plurality of the High Court of Australia in *ABT17 v Minister for Immigration* (2020) 94 ALJR 928 (**ABT17**) properly understood, is inconsistent with the analysis of the learned primary judge at [37] of his reasons. The Minister submits that instead the plurality’s reasons, properly understood, apply only to a circumstance in which the IAA has relied on demeanour as the central basis for it departing from a credibility finding of a delegate. It is only if demeanour is central to the IAA’s findings that it will be legally unreasonable for the IAA not to invite an applicant to an interview. To engage such an obligation the reliance must be express and overt.
2. The Minister’s written submissions as advance those propositions are as follows:

32. Crucially for this case, the plurality in *ABT17* held that the IAA is not required to interview a referred applicant merely because credibility is in issue, or merely because the IAA comes to a different view as to credibility than did the delegate. Instead, for the plurality, the result in *ABT17* turned on the IAA’s use of demeanour in making its decision:

The IAA 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. (emphasis added)

33. That is, the reason that the IAA’s decision was unreasonable in *ABT17* is that it rejected an account that had been accepted by the delegate “wholly or substantially on the basis of its own assessment” of *ABT17*’s demeanour. Contrary to J [37], the “potential significance” of demeanour recognised by the plurality did not mean that the IAA would be required to conduct an interview whenever it was proposing to depart from a credibility finding made by the delegate on a “significant matter”. Rather, in *ABT17* the IAA relied on ABT17’s demeanour to reject a “central part” of an account that the delegate had accepted as plausible and generally consistent with country information. The IAA’s reliance on demeanour in *ABT17* was express and overt, with the IAA making a finding that *ABT17* sounded vague and hesitant when making the sexual assault claim: see [28.2] above.

34. The other members of the Court in *ABT17* took a different approach, focusing more on the role of demeanour in the delegate’s decision. However, the ratio decidendi of *ABT17* is the approach of the plurality set out above.

35. Accordingly, *ABT17* merely sets out another example of when it will be unreasonable for the IAA to reach a different finding from a delegate without conducting an interview under s 473DC. *ABT17* does not work some fundamental change to the scheme of Pt 7AA, and the authority of Federal Court cases such as *DGZ16* and *DPI17* is undisturbed. The more recent decision of *Minister for Home Affairs v DUA1626* confirmed that legal unreasonableness in the context of s 473DC imposes a “high threshold”.

1. The Minister submits at [36] that it had been “for those reasons” that there had been no requirement for the IAA to have interviewed the Respondent before it made a different finding:

36. **No requirement to interview CRK18**: For these reasons, there was no requirement for the IAA to interview CRK18 before making a different finding on the “fuel claim”. Nothing in the delegate’s decision suggests that CRK18’s demeanour was a substantial part of the delegate’s decision (cf DPI17, discussed in [26.2] above). And, unlike ABT17, the IAA placed no reliance on demeanour in reaching its conclusion. Instead, the IAA relied on objective circumstances, such as the failure to make the claim in a timely fashion, and inconsistencies between this claim and the Applicant’s other claims: see IAA [24]-[25], summarised in [10] above.

37. That is, the IAA reviewed the material before it (which had also been before the delegate), and reached a different conclusion on that material. That approach is supported by DGZ16 and DYK16: see [25] above. It is true that the IAA did not have the benefit of seeing the Applicant in person (cf J [38]); however, that is a built-in feature of the scheme of Pt 7AA and does not suggest any error. To the contrary, to require the IAA to interview an applicant every time the IAA was minded to reach a different conclusion on credibility would be to subvert the scheme of Pt 7AA. The primary judge misunderstood the scope of ABT17, and that misunderstanding led his Honour to erroneously conclude in J [38] that it was legally unreasonable to reach a different finding.

(footnotes omitted)

## Ground 1 is subsumed by Ground 2

1. At the commencement of the hearing of the appeal the Court raised with the parties that notwithstanding each had advanced comprehensive submissions on Ground 1, having regard to the way in which the Minister advanced his submissions in support of Ground 2, the resolution of Ground 1 might properly be approached as subsumed by and contingent upon the proper disposition of Ground 2.
2. The Court noted that the Minster’s written submissions in respect of Ground 2 were pressed on the basis that, separately from any requirement to consider exercising inviting the referred applicant to an interview, doctrines of legal unreasonableness had not required the IAA to exercise the power in s 473DC of the *Migration Act 1958* (Cth) (**Migration Act**) on the facts of this proceeding.
3. It therefore appeared to the Court that submissions would most usefully focus on Ground 2.
4. I observed that if the Minister’s submissions in support of Ground 2 were correct that in the circumstances before the IAA it had been lawfully open to the decision maker on review to have reached a different conclusion to that which had been reached by the Delegate in respect of the Respondent’s claim without interviewing him as to his credit, then a prior failure on the IAA’s part to have considered permitting that course necessarily could not have been a material error.
5. Conversely, if the reasoning of the plurality in ABT17, properly understood, required the primary judge to reason on the basis that it was legally unreasonable for the IAA to have made a finding of recent invention in the absence of it having first invited the Respondent to be heard in relation to that question and his credit then any prior failure on the IAA’s part to consider issuing such an invitation necessarily would have involved jurisdictional error. I note in that regard that counsel for the Minister, Mr Hill, did not dispute that the Delegate’s reasons had involved his accepting the Respondent’s evidence on the truth of his testimony. That had involved, implicitly at least to that degree, an acceptance of his credit.
6. The Court having made those observations, the parties indicated that they were content to proceed on that basis and to rely on their written submission in support of Ground 1 to any extent as might remain relevant in the circumstances of the appeal.
7. Oral argument was confined to Ground 2.

# The Minister’s submissions

1. I have noted much of what the Minister advances in writing in support of Ground 2 at [7]–[9] above. I need not repeat those passages. However, it is important to provide some greater detail of the submissions Mr Hill relies on to make good the Minister’s proposition that the “unreasonableness doctrine” (as the submissions describe it) expounded by the plurality in ABT17, properly understood, did not require the IAA to interview the Respondent before it made a contrary finding to that of the Delegate. The Minister’s written submissions on that subject, as were relied on in oral argument, were as follows:

**Ground 2: Unreasonableness doctrines did not require the IAA to interview**

**CRK18 before making a different finding on the “fuel claim”**

23. Second, it was not legally unreasonable for the IAA in this case to make a different finding on the “fuel claim” without interviewing CRK18. The primary judge’s conclusion appears to rest on the statement in **J [37]** that demeanour will be potentially significant (and, it appears, the IAA will be required to conduct an interview) “in any matter where the IAA departs from a credibility assessment made by the delegate in relation to a significant matter”. As explained below, that statement is in error and, in particular, is not supported by ABT17. To the contrary, the plurality in ABT17 expressly held that the IAA is not required to interview a referred applicant merely because the IAA comes to a different view as to credibility than did the delegate: see further [31]-[33] below.

24. **Scheme of Pt 7AA:** The requirements of legal unreasonableness must take account of the particular statutory scheme. Here, the scheme of Pt 7AA is that the IAA will generally conduct a review on the papers, and will not interview an applicant.

24.1. Review under Pt 7AA is normally on the papers (s 473DB(1)); the IAA has power to invite an applicant to give new information (s 473DC(3)), but does not have any duty to get, accept or request new information (s 473DC(2)); and the IAA will only consider new information if there are exceptional circumstances to justify doing so (s 473DD(a)).

24.2. Division 3 of Pt 7AA, together with ss 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA (s 473DA(1)).

25. **No obligation to interview applicant before reaching a different finding:** Accordingly, there is no obligation on the IAA to interview an applicant merely because it is considering taking a different view of the material considered by the delegate. Equally, there is no general obligation to interview an applicant merely because the IAA is minded to make an adverse credibility finding against an applicant – if the IAA were compelled to invite an applicant to an interview merely because his or her credibility is called into question, the result would be that the IAA would generally come under an obligation to issue an invitation, which would defeat the purpose of Pt 7AA.

26. There are exceptions to this general rule. The power to get new information in s 473DC must be exercised reasonably although, given the limit in s 473DA, this requirement is not analysed using a “natural justice lens”.

26.1. For example, it was unreasonable for the IAA to make a decision on the basis of internal relocation without exercising its power to get new information from an applicant when internal relocation was not a live issue before the delegate. In that situation, it was necessary to get further information from the applicant “in order [for the IAA] to complete the review”.

26.2. Further, in DPI17, the Full Court held that it was unreasonable for the IAA to reach a different conclusion from the delegate, when (1) the delegate’s decision “was based primarily” on the delegate’s assessment of DPI17’s demeanour; and (2) the delegate’s reliance on demeanour had the consequence that DPI17 did not address the inconsistencies in his written claims that would become critical before the IAA.

27. As explained below, the plurality in ABT17 held (consistently with DGZ16 and other decisions in this Court) that generally the IAA is not required to conduct an interview before departing from a delegate’s findings on credibility. Thus the statement in **J [37]** is too broad, and has led the primary judge into error.

28. **ABT17 and demeanour:** In ABT17, the IAA rejected a claim that had been accepted by the delegate, based in part on the IAA’s assessment of ABT17’s demeanour.

28.1. The delegate had accepted ABT17’s claims, but found on the basis of country information that the situation in Sri Lanka had changed for the better since ABT17 had departed. The delegate made no mention of ABT17’s demeanour in her decision.

28.2. The IAA, by contrast, rejected ABT17’s claim to have been sexually assaulted by the Sri Lankan army, partly on the basis that ABT17’s evidence on the audio recording sounded vague and hesitant (and also on the basis of inconsistencies in the account).

29. The High Court unanimously held that the IAA’s decision was legally unreasonable. However, there was a divergence of approaches between the plurality (Kiefel CJ, Bell, Gageler and Keane JJ), and the other members of the Court. The plurality’s approach concentrates on the IAA’s reliance on demeanour to reject a claim that had been accepted by the delegate.

30. Plurality approach turns on IAA’s reliance on demeanour: The plurality held that the usual practice of the delegate conducting an interview in person with the visa applicant, and the IAA relying only on an audio recording, created the potential for an “informational gap”. In ABT17, the IAA rejected a central part of ABT17’s account, which the delegate had accepted as plausible and generally consistent with country information. The IAA did not suggest that the delegate’s findings were inherently improbable.

31. The plurality held that the legal unreasonableness consisted of the IAA failing to exercise the power in s 473DC to get new information to place itself in as good a position as the delegate. However, the IAA was not always required to hold an interview before departing from credibility findings of the delegate: for example, given country information and other information, a referred applicant’s credibility may not have a significant bearing on whether he or she should get a visa. Or, having regard to country information and other information contained in the review material, the referred applicant’s demeanour in the interview with the delegate will not necessarily have a significant bearing on the IAA’s assessment of his or her credibility.

(emphasis in original; footnotes omitted)

1. In oral submissions Mr Hill then summarised the Minister’s case as involving three propositions.
2. The first was that cases that had been decided before ABT17 had made it clear that the IAA did not need to hold an interview merely because it was minded to reach a different credibility finding from a delegate.
3. The second proposition was that *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134 (**DPI17**), a case in which a Full Court of this Court had set aside a decision of the IAA which had set aside a decision based on its own different assessment of an applicant’s credibility was, properly understood, confined to an instance in which the delegate’s finding had been overtly and significantly based on an assessment of demeanour.
4. The third proposition, accepted to be fundamental to the case the Minister was advancing, was that what the High Court had decided in ABT17 had not fundamentally changed the scheme of Part 7AA of the Migration Act as reflected in the prior jurisprudence. It had merely dealt with another specific situation akin to that in DPI17 where the authority’s decision was substantially or significantly based on an assessment of demeanour.

# The Respondent’s submissions

1. The Respondent’s written submissions joined issue with the Minister as to the correct understanding of the decision of the plurality in ABT17. It is convenient to cite the written submissions: as in the instance of the Minister, the oral submissions of counsel for the Respondent, Mr Barnes, sought principally to support the premises upon which their respective contentions had been earlier advanced in writing. The written submissions of the Respondent under the heading “Ground 2” were as follows:

28. The Respondent does not suggest that it is incumbent on the IAA to exercise the power to interview an applicant merely because it is considering taking a different view of the material before it. This is well-recognised and has now been reaffirmed by the High Court in ABT17 at [22].

29. The relevant principles addressing the question whether a failure to exercise the discretion to get new information are set out by the plurality in ABT17 at [13]-[25]. The essential points are these:

(1) There is a potential for an “information gap” to arise in the review material where the interview has been conducted by the Minister’s delegate in person and has been audio but not video recorded. Missing from the material will be the visual impression of the applicant – his or her demeanour: [13].

(2) The question is when if at all compliance with the implied condition of reasonableness in the conduct of the review and exercise of the power to get and consider new information might compel the IAA to exercise its power under s. 473DC: [18].

(3) Compliance with this implied condition of reasonableness requires not only that the decision has an “intelligible justification” but also that the decision has been arrived at through an “intelligible decision-making process”: [20].

(4) That question in turn requires “an examination of the decision-making pathways reasonably open to the Authority in reviewing the decision of the 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.”: [21].

(5) Although the IAA is not required to interview a referred applicant merely because credibility is in issue or the IAA comes to a different view as to credibility [23], [24], “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.”: [25].

30. The Minister’s Outline at [26] refers to several recent decisions of this Court which are said to fall into the exceptions to the “general rule” as illustrative of situations where it is necessary to get further information to complete the review. Each of these decisions post-date the High Court’s decision in ABT17. None of them turn on the narrow reading of ABT17 now proffered by the Minister.

31. The most recent of these is *AYT18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 597 (4 June 2021), where the IAA made adverse credibility findings against an applicant where the delegate had not, and specifically found that a document the applicant had supplied to the delegate was false. The falsity or otherwise of the document was not raised by the delegate and was not in issue before the IAA’s decision was made. Justice Moshinsky allowed the appeal from the FCC. The applicant had not been on notice that there was any issue as to the document, and therefore would not be aware of any reason to supply further information about it: [30]. The failure to exercise the power in s. 473DC was unreasonable: [31].

32. Similarly, here the Respondent had no reason to consider that the IAA was harbouring doubts as to the credibility of his claim of having delivered fuel to the LTTE based on his failure to raise it in his initial interview or in his Statement of Claims, and in circumstances where the fuel claim was accepted by the Delegate without comment.

33. Although not cited by the plurality in ABT17, the Full Court decision in *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134 remains good law. The Minister does not suggest that the primary Judge erred in referring to it: Judgment [29]-[30] (AB 448-9), nor to the decision of White J in *FOA18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 815: Judgment [31] (AB 450).

34. The flaw in the Minister’s analysis is to suggest that the guidance in those two cases and the ratio in ABT17 is to be confined to cases where either the applicant’s demeanour formed a substantial part of the delegate’s decision or the IAA’s own review comments adversely upon it.5 This was advanced by the Minister before the primary Judge, and rejected, including by reference to the absence in ABT17 of an explicit comment by the delegate on demeanour: Judgment [36] (AB 452). The Judge’s reference to ABT17 at [15] and the potential significance of demeanour is apposite: Judgment [37] (AB 452-3).

35. It was, to conclude, legally unreasonable for the IAA not to exercise the power in s. 473DC to interview the Respondent so as to raise with him the IAA’s doubts with respect to the timing of the fuel claim and its absence from the Respondent’s earlier statements concerning this aspect of his application. It is of importance that this formed a substantial part of the Respondent’s case that he would be in danger if returned to Sri Lanka due to actual or imputed links to the LTTE. The failure by the IAA to exercise the power resulted in the “informational gap” impacting on the assessment of the truthfulness of his account and the overall assessment of the credibility of the claim.

# Consideration

## Two preliminary points

1. While not in contest I should first deal with two points which go to whether or the doctrine enunciated by the High Court in ABT17 might be engaged.
2. It is uncontentious that in its referred review the IAA was provided with only an audio recording by the Secretary. It was not provided with a video recording of the Respondent’s interview with the Delegate.
3. There is no ground of appeal to challenge the primary judge’s conclusion that for that reason, for the purposes of ABT17, an “information gap” potentially arose. As that premise is unchallenged I proceed on the basis that the primary judge was correct in that regard.
4. Nor is it in dispute that the IAA then proceeded on the basis that, in respect of the findings it made regarding the Respondent’s account (necessarily including any assessment of his credit), it had no duty to invite the Respondent to an interview to fill that information gap. The IAA reasoned as follows:

12. …The applicant was advised at the SHEV interview he may not have another chance to provide information to support his claim. I am satisfied the applicant has had an opportunity to present his claims, including in his submission. I am not satisfied in the circumstances of this application that an interview is required. I am not satisfied it is reasonable not to exercise the discretion in this case, and accordingly I have not invited the applicants (sic) to attend an interview.

1. The IAA’s reasons at [25] as to why it reached a finding contrary to that of the Delegate then reveal that it was aware that the Delegate had not simply accepted the Respondent’s account of his being involved in the delivery of fuel to the LTTE without testing it. The IAA thus accepted that the Respondent had been asked about why he had not previously said anything about that claim. It recorded that the Respondent had “indicated [to the Delegate] that he was very frightened when he first arrived in Australia that information would be given to Sri Lankan authorities, but now he feel (sic) confident to tell the truth”. The IAA was of the opinion that that explanation had not justified the Delegate accepting the Respondent’s credit. For the reasons it expressed (repeated below) it had substituted its own different and adverse conclusion.

25. I note the applicant did not raise the claim regarding fuel deliveries to the LTTE during arrival processing or in his written statement of claim. The delegate asked him why he had not mentioned this claim earlier, and the applicant indicated he was very frightened when he first arrived in Australia that information would be given to Sri Lankan authorities, but now he feel confident to tell the truth. I accept an asylum seeker may be reluctant to disclose an association with an organisation such as the LTTE in their initial encounter with a foreign government, however I am not satisfied such fears prevented the applicant from providing those details in his statement of claims prepared a number of years later. I find the applicant’s failure to mention the claim regarding interactions with the LTTE in his statement of claims is extremely significant. In that document he provided a detailed description of events in 1997, and some detail about his work with ND Transport, issues regarding the Buddhist Temple, and trouble with the Navy, but fails to make any mention of any involvement with the LTTE, including delivering fuel to them. Taking into account the applicant’s escalating claims regarding the number of times he was beaten by Navy officers, and the recent disclosure of supplying fuel to the LTTE, I am of the opinion the claim has been recently fabricated to support his claim for protection. I do not accept the applicant transported fuel to the LTTE.

## The Delegate made an unqualified implied finding of credit in respect of a critical issue

1. While the findings of the Delegate as to the Respondent’s demeanour and credibility on the critical point are implicit rather than express, I am satisfied that the Delegate’s acceptance of the Respondent’s credit was recorded without ambiguity. The Delegate, having first tested the Respondent’s credit by asking him about his claim having not been earlier advanced, recorded the following finding:

I accept that the applicant worked for a Singhalese (sic) employer in a fish transport business in Kalpitya Sri Lanka. I accept that his involvement in making [fuel] deliveries to the LTTE has imputed his involvement with the LTTE.

1. The sole foundation for that accepted claim was the Respondent’s assertion of it. Such a finding could not have been made without the Delegate having accepted that the Respondent was truthful in his account of having delivered fuel to the LTTE notwithstanding his not having earlier advanced it. As Mr Hill accepts, that involved the Delegate making a favourable, albeit implicit, finding with respect to the Respondent’s credit.
2. The Delegate’s unqualified acceptance of the Respondent’s claim was highly material. In Part 4 of his reasons the Delegate had noted the claim he accepted was a critical integer of the Respondent’s case.

**Part 4: Protection claims**

The applicant’s claims for protection, including those provided at interview, and supporting evidence are contained in CLF2015/78265. The applicant’s claims for protection are summarised below:

* He claims that he worked for a person who had links to the LTTE and who illegally supplied the LTTE with fuel. The applicant claims that he was making deliveries to GPS coordinates by boat, unaware that it was LTTE members who were picking up the supplies. He claims that it is imputed that he had knowledge of the LTTE and was himself a supporter of the LTTE.

…

1. It was not because of scepticism on the Delegate’s part as to the provenance of that claim that he notwithstanding rejected the Respondent having an entitlement to Australia’s protection.
2. Rather the Delegate’s reasons reveal that he was satisfied that a person who had conducted himself as the Respondent had, but who otherwise had not had any high level involvement with the LTTE and who did not claim to have been involved in any separatist activities, would be of limited interest to the Sri Lankan authorities.
3. It was that reasoning which led the Delegate, having regard to the country information before him, to conclude that the Respondent had a profile that would be of no interest to any Sri Lankan authorities such that “there is a negligible chance of [him] being detained under the PTA now or in the reasonably foreseeable future”.
4. The Delegate rejected the Respondent’s protection claims relating to the fuel supply issue solely on that basis.

## Referred review to the IAA

1. I am satisfied that in the above circumstance it was entirely predictable that the Respondent’s submissions to the IAA, including his request to adduce new information in his referred review under Part 7AA of the Migration Act, were confined to what he was seeking to adduce as would permit him to challenge the adverse findings the Delegate had made. He sought to be permitted to adduce responsive information to the effect that his accepted conduct would, contrary to the Delegate’s findings, impute to him a profile as would still put him at risk of retribution if returned to Sri Lanka.
2. The Respondent’s submissions to the IAA in so far as they were material to his accepted account simply noted that the Delegate had accepted his claim to have taken part in fuel deliveries to the LTTE.
3. It is common ground that in conducting the Respondent’s referred review the IAA regarded itself at liberty to, and did, substitute the Delegate’s finding that the Respondent’s claim of having transported fuel to the LTTE was to be accepted, with its finding that that claim was to be rejected.
4. That claim was rejected because, contrary to the Delegate’s (implicit but unqualified) acceptance of the Respondent’s credit the IAA was of the opinion, having regard to that claim not having earlier been advanced, that he had recently fabricated that account to support his claim for protection. That IAA reasoning (fully set out above at [27]) thus necessarily involved the IAA rejecting, without hearing from the Respondent, his credit in respect of the favourable findings that the Delegate had earlier made. But the IAA’s reasoning went even further. The IAA found as a fact that the Respondent had invented the account to support his claim for protection: that is that he had lied.
5. A transcript of the interview between the Respondent and the Delegate that was in evidence before the primary judge reveals that the Delegate had not put to the Respondent that in contrast to his fear shortly after his arrival in late September 2012 when first interviewed, the fear he held at the time he had provided a statement of claims in support of his protection claims on 1 June 2016 (prepared with the assistance of the Refugee Advocacy Service of SA Inc) may have stood in a different position. It was the latter omission which the IAA viewed as “extremely significant”.
6. However, the adequacy or otherwise of the Delegate’s testing of the Respondent’s credit can be of no consequence if, in the actual circumstances applying, the true position was that the plurality's reasoning in ABT17 meant, as the primary judge concluded, it was legally unreasonable for the IAA not to have interviewed the Respondent in relation to that particular circumstance before setting aside a finding implicitly premised on the Delegate’s acceptance of the Respondent’s credit.

## The Minister’s three propositions

1. The first of the three propositions Mr Hill advanced in oral argument as underpinned the Minister’s submissions was that cases that had been decided before ABT17 had made it clear that the IAA did not need to hold an interview merely because it was minded to reach a different credibility finding from a delegate.
2. That proposition may be accepted but two observations must be made in qualification to it.
3. The first is that a number of those earlier cases involved the Court’s rejection of the proposition that the ordinary principles of procedural fairness remained operative notwithstanding the terms of Part 7AA of the Migration Act. However, as *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210 is but an early example, the IAA is not discharged in the conduct of its decision making from the implied condition of legal reasonableness.
4. The second qualification is that whatever might otherwise be the authority of earlier decisions of this Court to the extent the reasoning of the High Court is to the contrary it is the latter which prevails.
5. The second proposition Mr Hill advances is that the ratio of DPI17 (a case in which a Full Court of this Court set aside a decision where the IAA had substituted its view of an applicant’s credibility) is, properly understood, confined to an instance in which the delegate’s overturned finding had been overtly and significantly based on an express assessment by the delegate of the applicant’s demeanour.
6. That too may be accepted: but the necessary qualification is that DPI17 was decided prior to the reasoning of the High Court in ABT17 being available to the Full Court. Any expression of principle express or implied in DPI17 as might be understood to confine the operation of the principles of legal unreasonableness to any circumstance must be accommodated to whatever the High Court subsequently determined.
7. The third proposition, which Mr Hill accepted to be fundamental to the case the Minister was advancing, was that what the High Court had decided in ABT17 had not fundamentally changed “the scheme of Part 7AA as reflected in the prior jurisprudence”. It had merely dealt with another specific situation akin to that in DPI17 confining that circumstance to where the authority’s decision was wholly or substantially based on an assessment of demeanour. However it is not readily to be assumed that the reasoning of the High Court is to be read subject to the prior jurisprudence of this Court. Such a starting point unless justified by a clear foundation in the High Court’s reasoning involves turning the hierarchy of authority on its head.
8. If the reasoning of the plurality of the High Court in respect of the principles of legal unreasonableness as would vitiate the IAA’s decision were, as the primary judge held them to be, engaged in the facts of this matter, then I am equally bound by the High Court’s reasoning whatever might be understood to have been the prior jurisprudence.
9. I therefore turn to the killing ground of this appeal: whether in the actual and concrete circumstances of that which was before the Delegate and the IAA, the principles expressed by the plurality in ABT17 rendered it legally unreasonable for the IAA to have reached a different conclusion to that of the Delegate without it having invited the Respondent to an interview to allow him the opportunity to allay the concerns the IAA must have at some point at least tentatively formed regarding his credibility.
10. In that regard I reject the submission the Minister advances at [32] of his written submissions that the reasoning of the plurality in ABT17 at [25] compels the conclusion that the appeal be allowed. That submission is as follows:

32. Crucially for this case, the plurality in ABT17 held that the IAA is not required to interview a referred applicant merely because credibility is in issue, or merely because the IAA comes to a different view as to credibility than did the delegate. Instead, for the plurality, the result in ABT17 turned on the IAA’s use of demeanour in making its decision:

The (sic) IAA 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. (emphasis said to be added but omitted)

(citations omitted)

1. That submission compresses the detailed reasoning of the plurality to a misleadingly brief summary. The passage the Minister quotes as authority for the submission advanced omits the introductory word “However” as commences the plurality’s statement at [25]. When that word is incorporated it directs attention to how that reasoning fits with what the plurality had stated in the preceding text. Contrary to the implication of the Minister’s submission I am satisfied that in context the passage at [25] does not stand alone as the distillation of the High Court’s reasons, rather it is to be read an aspect of the significantly detailed analysis of the operation of the principles of legal unreasonableness as might intersect with credibility findings which was undertaken by the plurality in ABT17 (Kiefel CJ, Bell, Gageler and Keane JJ) as follows:

[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”. 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”. 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. 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.” That has “long been recognised” and continues to be appreciated despite awareness on the part of sophisticated decisionmakers that “an ounce of intrinsic merit or demerit” measured by reference to objectively established facts and the apparent logic of events “is worth pounds of demeanour”.

[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 and which was not before the Minister when the delegate made the referred decision. 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 decision 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.

[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, the Authority would come under an obligation to explain that to the referred applicant and to invite the referred applicant to comment. 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 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.

[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” 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”.

[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” but also that the Authority comes to that decision through an intelligible decision-making process. 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 to get and if appropriate to consider, as new information, further information capable of being provided by the referred applicant.

[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”. 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 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.

[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.

1. The reference in the plurality reasons at [22] to the IAA not being required to interview a referred applicant merely because credibility is in issue and the passage at [25] that the Minister relies upon are thus not to be understood as stand-alone propositions of law.
2. I discern nothing in the detailed consideration of the subject matter addressed by the plurality to suggest, as the Minister submits, that the High Court was intending in some unstated manner to defer to the prior existing jurisprudence of this Court. To the contrary I discern a focussed attention on the plurality’s part to explicate the principles that decision makers must apply when an information gap exists, as would guide (and bind) the IAA, the judges of the Federal Circuit Court and this Court in the application of the relevant law.
3. I do not ignore the Minister’s submission that “at the very least DGZ16 is good law because it is expressly cited by the plurality”. However *DGZ16 v Minister for Immigration and Border Protection & Anor* (2018) 258 FCR 551 was not a case involving an alleged “information gap”. Its citation by the plurality for the purpose of acknowledging that in most cases the IAA will have no duty not to reach a different conclusion to that of the Delegate on the basis of the materials before it, and that the lens through which any criticism of such reasoning is to be understood is that of legal unreasonableness rather than procedural fairness is consistent with rather than inconsistent with the plurality’s reasons and in particular those expressed at [22]–[23].
4. There is nothing inconsistent in DGZ16 with the guidance the plurality in ABT17 provides at [22]–[23] with respect to the kinds of circumstances in which the principles of legal unreasonableness will not vitiate a decision the IAA has in contemplation reaching, and does form in an instance in which there is relevantly an “information gap” without it first having invited the referred applicant to an interview to afford him or her the opportunity to address the IAA’s incipient concerns.
5. Applying that guidance, for the reasons that follow, I am satisfied that the circumstances identified in [22] and [23] do not apply in the present instance.
6. It is convenient to first address their Honours’ reasoning at [22]. It will be recalled that it is in the following terms:

[22] The mere existence of an informational gap will not necessarily result in the Authority being “disadvantaged in comparison with the delegate”. 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.

1. In the present case it may or may not have been lawfully open to the IAA to have affirmed the Delegate’s decision on the simple basis that, accepting that the Respondent had conducted himself as the Delegate had found he had, but otherwise had not had any high level involvement with the LTTE and did not claim to have been involved in any separatist activities, he would not be at risk of persecution by the Sri Lankan authorities. In such a hypothetical instance the credibility of the referred applicant would not have had a significant bearing on the IAA’s determination of whether the criteria for the grant of a protection visa had been met. The condition referred to in [22] of the plurality’s reasons would be satisfied.
2. However that was not the course adopted by the IAA. It never got to that point because, it had concluded on the basis of its own assessment of the Respondent’s want of credit, notwithstanding his truthfulness having been accepted by the Delegate, that he had lied about a previously unarticulated claim: it was a mere recent invention.
3. Nor was there country information before the IAA such as meant that how the Respondent may have presented to the Delegate could be concluded to be insignificant in respect of any assessment of his credibility. There was no such objective material of that nature before the Delegate and there was none before the IAA. His accepted claim turned exclusively on his credit: as did the IAA’s rejection of it.
4. I turn now to what the plurality in ABT17 stated at [23]. It is as follows:

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

1. Hypothetically such a circumstance might have applied had the Delegate had pressed his enquiry as to the Respondent’s fears to the circumstance that the IAA regarded as “highly significant” to the degree entitling it to reach a finding of “recent invention” to which the respondent had provided a wholly implausible answer. That might have entitled the IAA to have reached a finding of “recent invention” within what the plurality identifies would have been available to it in [23].
2. But the Delegate’s questioning of the Respondent had not gone to that point. As the transcript reveals (CB 423) the question asked of the Respondent about his prior non-disclosure was as follows:

In your arrival interview, you stated that you left Sri Lanka because you couldn’t get a job. Um you didn’t mention any of the claims you made, that you have in your application

1. The IAA’s reasons identify nothing it found to be implausible about the Respondent’s answer to that question. To the contrary it expressly accepted that an asylum seeker might be reluctant to disclose an association with an organisation such as the LTTE during his first encounter with officials of a foreign government. The Delegate reached a state of satisfaction as to the Respondent’s credit on that basis. To have reached an affirmative degree of satisfaction that the claimed events had occurred without testing that further proposition might be thought to have been naïve on the Delegate’s part but there was nothing in the referred review as could engage with the principles stated in [23]. The materials before it were not such as on that principle permitted the IAA to reach a contrary credit finding (on the premise of a question neither asked nor answered) without any need for the IAA assessment of credibility to coincide with that of the Delegate.
2. The Court has earlier observed that it is satisfied that the text in [25] of the plurality’s reasons in ABT17 is to be understood and applied having regard to their Honour’s earlier more detailed analysis. It is in that more comprehensive analysis that, to use a perhaps inelegant metaphor, the principles to be applied in sorting the sheep (when an invitation must be issued) from the goats (when it need not be) is identified by the plurality.
3. On that basis I reject the Minister’s submission that the text in [25] that singularly focusses on an particular instance in which the plurality then more particularly identified as one in which the IAA “will act unreasonably” is to be understood, in the negative, to describe the universe of such circumstances—rather I am satisfied that the specificity of that observation is directed towards focussing the generality of the plurality’s earlier reasoning on their application in a factual matrix requiring specific attention as the plurality proceed to address in greater detail immediately following at [26]–[29] under the heading “The principles applied”.
4. It may be that in strict law the earlier reasoning in ABT17 is “obiter”. However the primary judge was correct to have regarded himself as subject to the duty, if not formally bound, to apply the law as had been stated in considered reasoning of a majority of the High Court.
5. I therefore reject that the circumstance that the Respondent’s claim had been made for the first time only during the hearing is a circumstance that justified the IAA dispensing with itself being required to interview the referred applicant before rejecting his credit. That a claim has not been earlier advanced may well have been a sound reason for scepticism—but, particularly in the case of persons who are claiming to have fled persecution from civil and military authority in their home country in the absence of testing the want of a good reason for not speaking before is not open to be assumed: see for example UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3 at [198].
6. In any event to proceed on that premise would be inconsistent with what the plurality in ABT17 states at [23]. That in turn is reinforced by their Honour’s earlier reasoning at [14] which prefaces their analysis in respect of the position of credit findings as follows:

[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.” That has “long been recognised” and continues to be appreciated despite awareness on the part of sophisticated decision makers that “an ounce of intrinsic merit or demerit” measured by reference to objectively established facts and the apparent logic of events “is worth pounds of demeanour”.

(citations omitted)

1. The primary assessor of the Respondent’s credit in this matter was the Delegate. The Delegate was aware that the Respondent’s claim had not been earlier advanced. He had tested the truth of the Respondent’s claims perhaps less robustly than might have other decision makers but it cannot be suggested that the Delegate ignored that issue. Having tested the Respondent’s explanation (and by necessary implication his honesty in that regard) the Delegate accepted the Respondent’s claim to have transported fuel to the LTTE. Other claims he rejected. The benefit the Delegate was entitled to have enjoyed in making those findings (necessarily dependent on his assessment of the Respondent’s demeanour and truthfulness; his credit) was an advantage the plurality in ABT17 specifically acknowledged.
2. The scheme of Part 7AA of the Migration Act provides for a statutorily confined system of merits review. That confined system entirely excludes the operation of the ordinary rules of procedural fairness as would otherwise have required the IAA to hear from the Respondent before substituting for the Delegate’s finding one dependent of it having formed an adverse view of the Respondent’s credit and honesty. However as the plurality in ABT17 reconfirms nevertheless there are circumstances in which the IAA can transgress the bounds of legal unreasonableness by treating particular information as the reason or part of the reason for the decision to which it comes without first exercising its powers to get and if appropriate to consider, as new information, further information capable of being provided by a referred applicant.
3. To the extent that the Minister may be correct that the primary judge expressed his reasoning at [37] too broadly, I nonetheless apprehend no appealable error in his Honour’s application of the principles articulated by the plurality in ABT17.
4. I would dismiss Ground 2 of the Minister’s appeal.

## Two concluding points

1. The Minister’s written submissions conclude, inter-alia, as follows:

37. …It is true that the IAA did not have the benefit of seeing the Applicant in person (**cf J [38]**); however, that is a built-in feature of the scheme of Pt 7AA and does not suggest any error. To the contrary, to require the IAA to interview an applicant every time the IAA was minded to reach a different conclusion on credibility would be to subvert the scheme of Pt 7AA. The primary judge misunderstood the scope of ABT17, and that misunderstanding led his Honour to erroneously conclude in **J [38]** that it was legally unreasonable to reach a different finding.

1. I make the following observations with respect to that submission.
2. First, long standing judicial authority has consistently recognised that the scheme of Pt 7AA does not exclude the operation of legal unreasonableness.
3. Second, the Minister’s submission that to require the IAA interview a referred applicant where there was an information gap and credit was in issue if the outcome would otherwise be legally unreasonable would be to subvert the scheme of Pt 7AA was bluntly rejected by the plurality in ABT17:

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

It was not in the hands of the primary judge to cavil at the plurality’s conclusions in ABT17 or to crib back ground lost by the Minister in that proceeding. It was the primary judge’s duty to apply the law as it has been stated by the High Court.

1. Third, as the plurality in ABT17 identifies at [17] the burden on the IAA is hardly such as could be said to “subvert the scheme”. In that passage the plurality noted:

[17] …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 [I interpose or not affirming] the fast track reviewable decision. The reason would remain the unalloyed concerns of the Authority in relation to the appellant’s account of his personal circumstances.

1. I have dismissed Ground 2 of the Minister’s appeal. For the reasons the Court has averted to at [10]–[15] above it follows that Ground 1 must also be dismissed.
2. I dismiss the appeal. I will order that the Minister pay the Respondent’s costs as agreed, or if not agreed, as may be assessed.

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| I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kerr . |

Associate:

Dated: 8 September 2021