FEDERAL COURT OF AUSTRALIA

DYS16 v Minister for Immigration and Border Protection [2018] FCAFC 33

Appeal from:	*DYS16 v Minister for Immigration and Border Protection* [2017] FCCA 1975
File number:	TAD 48 of 2017
Judges:	**TRACEY, MURPHY AND KERR JJ**
Date of judgment:	13 March 2018
Catchwords:	**MIGRATION** – appeal from a judgment of the Federal Circuit Court ("the FCC") – where the FCC had dismissed an application for judicial review of a decision of the Immigration Assessment Authority ("the IAA") – where the IAA had affirmed a decision of a delegate of the Minister to refuse to grant the applicant a Safe Haven Enterprise (Class XE) Subclass 790 visa – whether the FCC erred by dismissing the application for judicial review – whether the IAA had irrationally or illogically declined to have regard to "new information" constituted by a psychiatrist's opinion on the applicant's credibility because it was not satisfied that there were exceptional circumstances to permit it to do so pursuant to s 473DD of the *Migration Act 1958* (Cth) – whether the IAA had misconstrued or misapplied s 473DD
Legislation:	*Migration Act 1958* (Cth) ss 473DC(1), 473DC(2), 473DD, 473DD(a), 473DD(b)(ii)
Cases cited:	*BVZ16 v Minister for Immigration and Border Protection* [2017] FCA 958 *CHF16 v Minister for Immigration and Border Protection* [2017] FCAFC 192 *CQG15 v Minister for Immigration and Border Protection* (2016) 70 AAR 413; [2016] FCAFC 146 *DYS16 v Minister for Immigration and Border Protection* [2017] FCCA 1975 *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; [2014] FCAFC 1 *Minister for Immigration and Border Protection v SZUXN* (2016) 69 AAR 210; [2016] FCA 516 *Minister for Immigration and Ethnic Affairs v Wu Shan*

	Liang (1996) 185 CLR 259 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407; [2000] HCA 1
Date of hearing:	21 February 2018
Registry:	Tasmania
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	43
Counsel for the Appellant:	Mr F Cangelosi
Solicitor for the Appellant:	Leonard Fernandez Barristers & Solicitors
Counsel for the First Respondent:	Mr R Knowles
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	The Second Respondent did not appear

ORDERS

TAD 48 of 2017

BETWEEN:	**DYS16** Appellant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** First Respondent
	IMMIGRATION ASSESSMENT AUTHORITY Second Respondent
JUDGES:	**TRACEY, MURPHY AND KERR JJ**
DATE OF ORDER:	**13 MARCH 2018**

THE COURT ORDERS THAT:

1. Leave be granted to the appellant to commence his appeal out of time.
2. The appeal be dismissed.
3. The appellant pay the first respondent's costs of the appeal.

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

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a judgment of the Federal Circuit Court ("the FCC"): see *DYS16 v Minister for Immigration and Border Protection* [2017] FCCA 1975. The FCC dismissed an application by DYS16 for judicial review of a decision of the Immigration Assessment Authority ("the IAA") which had affirmed a decision of a delegate of the Minister for Immigration and Border Protection ("the Minister") not to grant DYS16 a protection visa.

2 DYS16 is a citizen of Afghanistan. He arrived in Australia in 2013 as an unlawful maritime entrant. In 2015 he lodged an application for a Safe Haven Enterprise (Class XE) Subclass 790 visa. He claimed to fear persecution at the hands of the Taliban because he was an educated Hazara with links to the West whose father had been targeted and killed by the Taliban because he was involved in the building of a school.

3 The review of the delegate's decision was undertaken by the IAA under Part 7AA of the *Migration Act 1958* (Cth) ("the Act").

4 During the IAA's consideration of DYS16's case an issue arose as to whether a report, from a psychiatrist, which had been prepared after the delegate's decision, should be considered by the IAA.

5 The psychiatrist had interviewed DYS16 on three occasions and taken a history from him. Following these consultations the psychiatrist had prepared a report in which he expressed the opinion that DYS16 was suffering from post-traumatic stress disorder ("PTSD"). Such a condition, he reported, caused "significant distress and sometimes … significant impairments in function, such as irritability and inattention at work". Reference was also made to "disturbances in mood and thinking and memory, such as difficulty remembering significant aspects of the traumatic events".

6 Later in his report the psychiatrist expressed the opinion that:

> I judge his [DYS16's] account of his history and current symptoms and fears to be highly credible. I base this judgment on a careful consideration of his mental state and behaviour at interview, and also the on [sic] the consistency he demonstrated when I revisited the complicated and somewhat confusing parts of his history.

7 The IAA determined that it should consider the psychiatrist's PTSD diagnosis but did not consider that it should have regard to the psychiatrist's opinion about DYS16's credibility.

8 The decision of the IAA relating to the reception of the psychiatrist's report was governed by s 473DD of the Act. That section provides:

> **473DD Considering new information in exceptional circumstances**
>
> For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment Authority must not consider any new information unless:
>
> (a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and
>
> (b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:
>
> (i) was not, and could not have been, provided to the Minister before the Minister made the decision under section 65; or
>
> (ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

9 Subsection 473DC(1) provides that the IAA may get new information. The term "new information" is defined in s 473DC(1) to mean documents or information that were not before the Minister (or delegate) when he or she made the decision under review and which the IAA considers may be relevant to performance of its statutory duties. Subsection 473DC(2) clarifies that the IAA's power to obtain new information is discretionary: the IAA "does not have a duty to get, request or accept, any new information whether the [IAA] is requested to do so by a referred applicant or by any other person, or in any other circumstances."

10 The IAA explained its reasons for its decisions relating to the psychiatrist's report as follows:

> 6. The 9 September 2016 psychiatric report provides an assessment of the applicant's mental health, a summary of the information which the applicant has provided to the treating psychiatrist, and the psychiatrist's assessment of the applicant's credibility. With regard to the applicant's mental health, the report states that the applicant is affected by many features of post-traumatic stress disorder (PTSD). This is new information. The applicant has not provided reasons as to why the psychiatric report should be considered. Nevertheless, I am satisfied that a diagnosis of the applicant's mental health by a registered psychiatrist amounts to credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. I am satisfied that there are exceptional circumstances to justify considering this new information.
>
> 7. The psychiatric report also provides a summary of the claims which the applicant has provided to the treating psychiatrist. Much of this information was before the delegate and is not new information. However, some of the information provided was not before the delegate and is new information,

including: that the applicant can only remember living in one house in Kabul (although the applicant only listed one Kabul residential address in his SHEV [Safe Haven Enterprise Visa] application he stated at the SHEV interview that he and his family had lived in different locations in Kabul); speculation as to why his father may have purchased a home in a majority Pashtun area (although the applicant introduced the claim that his father had purchased two properties in Kabul in a 14 March 2016 submission the reasons behind the locations were not previously mentioned; that he once went on a trip with a friend, on the only occasion he departed his home area, and this ended in a place with people who were very scary and threatening; that a Pashtun man belonging to the Taliban man named Mr M would hang around there [sic] house and threaten and taunt his mother for having the same pro-government attitudes as her husband, and somehow employed or extorted or expected that the applicant's mother and her sons would watch over the generators that powered the mobile phone tower located very close to their house (apparently a source of income for the man); and that Mr M had said that if his mother moved he would find her and hill her and her sons, and this made it impossible for her to move; and that his mother's only source of adult male support in Kabul, a cousin, had been killed in the Hazara demonstration bomb attack on 23 July 2016, and could thus no longer collect the rent from their rental property, the resident of which had threatened to shoot his mother if she came again to collect the rent; that he had seen people being beaten on a number of occasions in Afghanistan; that he once saw the body of a neighbour who had been shot for working with the army; and that he once saw the aftermath of a suicide bombing and also a car bombing which almost killed his cousin. He said that he had been reluctant to talk of these matters with Immigration because they would ask for details such as dates and this would be stressful.

8. The applicant has never before mentioned that his family had been threatened by a Mr M who ran the telecommunications tower on the home in which they had lived. The applicant submits that he did not do so because this would have been stressful; and the treating psychiatrist suggested that this was presumably because he would be unable to provide precise details, as well as the memories being so distressing and traumatic. I am not persuaded by this given that the applicant had the assistance of a migration agent, and given that in addition to his SHEV application and SHEV interview he also provided further information in three subsequent submissions. Moreover, the applicant's claims in these regards are not internally consistent with his previous evidence where the applicant only ever referred to having trouble with a Mr R in relation to the telecommunications tower, and that this trouble resulted from the applicant's reporting Mr R to his supervisor. The applicant now claims to fear the man who ran the tower. Even allowing for the applicant's being a youth of 17 years when he initially lodged his SHEV application, even allowing for the fact that he is affected by memory difficulties, and an unwillingness to discuss traumatic matters, the lack of internal consistency in the applicant's evidence concerning the management of the telecommunications tower and the man he fear [sic] in regard to its operations, seriously undermines the credibility of the applicant's claims. Likewise, the applicant's claims to have only every lived in one home in Kabul is inconsistent with his evidence at the SHEV interview that he and his family had moved to different homes in Kabul, and that the most recent home he had lived in with the telecommunications tower was owned by the company which owned by the tower. Moreover, and as will be discussed below, given my overall concerns about the applicant's credibility I have

> found that the applicant is not a credible source of evidence with regard to his circumstances in Kabul. I am not satisfied that the applicant's new claim – that he and his family were threatened and forced to work by a Mr M who ran the telecommunications tower – is credible. Nor am I satisfied that his claim to having only ever lived in one home is credible. I do not accept that he has witnessed the killing or beating of persons in Kabul, or that his cousin was killed in the 23 July 2016 bomb attack or that the applicant's mother's life has been threatened by a rental tenant. I am unable to be satisfied that any of the new information which he has provided to the treating psychiatrist is credible or that it could not have been provided before the delegate made his decision. I am not satisfied that s.473DD(b) is met, nor am I satisfied that there are exceptional reasons to justify considering this information.
>
> 9. The 9 September 2016 psychiatric report also provides the treating psychiatrist's opinion that the applicant's account of his history is highly credible. While I accept that there are exceptional reasons for considering treating psychiatrist's assessment of the applicant's mental health, the applicant's psychiatrist opinion as the applicant's credibility does not carry more weight than other concerns regarding the applicant's credibility which have been discussed above, and which will be discussed further below. I am therefore not satisfied that there are exceptional circumstances to justify the psychiatrist's opinion as to the credibility of the applicant's claims.

11 In his application for judicial review in the FCC DYS16 relied on two grounds. The first was that the IAA's decision not to consider the psychiatrist's opinion on his credibility was irrational and illogical. The second ground was that the IAA had misinterpreted, misapplied or failed to apply s 473DD "in that [the IAA] was not satisfied that there [were] exceptional circumstances to justify considering the psychiatrists [sic] opinion as to the credibility of [DYS16's] claim."

12 The FCC rejected both of these grounds and dismissed DYS16's application.

13 DYS16's appeal to this Court alleges that the primary judge erred in rejecting these two grounds.

14 The appeal was filed a few days outside the prescribed period. DYS16 sought leave to appeal out of time. This application was not opposed by the Minister. The Court granted leave.

GROUND 1

15 DYS16 argued that what he described as the IAA's "discretion" under s 473DD had been exercised unreasonably and that its reasoning demonstrated "extreme illogicality". He contended that his credibility was a material issue in the IAA's deliberations, that the psychiatrist's opinion had not been contradicted by other medical evidence and that it was inconsistent for the IAA to accept part of the report but not the part relating to his credibility.

16 It may be doubted that s 473DD confers a discretion on the IAA. The section contains a general restraint on the IAA considering any new information unless certain conditions are met. Whether or not one or more of the conditions is met is dependent upon the IAA being satisfied of certain matters. Relevantly, the question was whether the IAA was satisfied that there were exceptional circumstances which justified it considering the new information: see s 473DD(a).

17 The IAA is not required, by that paragraph, to be satisfied of the existence of a particular fact or facts. Rather it has to make an evaluative judgment. The distinction is important.

18 In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-276, Brennan CJ, Toohey, McHugh and Gummow JJ approved the observations of Gibbs J in *Buck v Bavone* (1976) 135 CLR 110 at 118-119. Gibbs J had said:

> It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

19 In *Minister for Immigration and Border Protection v SZUXN* (2016) 69 AAR 210 at 221-222; [2016] FCA 516 at [52] and [54]-[56], Wigney J distilled the principles relevant to determining whether a decision might be vitiated because it was "illogical" or "irrational". His Honour there said:

> 52 As Robertson J put it in *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [148], for a decision to be vitiated for jurisdictional error based on illogical or irrational findings of fact or reasoning, "extreme" illogicality or irrationality must be shown, "measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions". And as McKerracher J (with whom Reeves J agreed) emphasised in *SZOOR v Minister for Immigration & Citizenship* (2012) 202 FCR 1 (at [84]), a decision cannot be said by a reviewing court to be illogical, irrational or unreasonable simply because one conclusion has been preferred to another possible conclusion.

…

> 54 …. The judgment of Crennan and Bell JJ in *SZMDS* reveals that jurisdictional error may be able to be established on the basis of illogical reasoning or illogical or irrational findings "on the way" to the final conclusion (see [132]): see also *SZRKT* at [151]-[153]; *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 at [61]-[62].
>
> 55 Nevertheless, allegations of illogical or irrational reasoning or findings of fact must be considered against the framework of the inquiry being whether or not there has been jurisdictional error on the part of the Tribunal: *SZRKT* at [148]. The overarching question is whether the Tribunal's decision was affected by jurisdictional error: *SZRKT* at [151]. Even if an aspect of reasoning, or a particular factual finding, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result: *Minister for Immigration and Citizenship v SZOCT* (2010) 189 FCR 577 at [83]-[84] (Nicholas J); *SZNKO v Minister for Immigration and Citizenship* (2013) 140 ALD 78 at [113]. Where the impugned finding is but one of a number of findings that independently may have led to the Tribunal's ultimate conclusion, jurisdictional error will generally not be made out: *SZRLQ v Minister for Immigration and Citizenship* (2013) 135 ALD 276 [66]; *SZWCO* at [64]-[67].
>
> 56 An irrational or illogical finding, or irrational or illogical reasoning leading to a finding, by the Tribunal that the review applicant was not a credible or honest witness may in some circumstances lead to a finding of jurisdictional error. That would particularly be the case where the adverse credibility finding was critical to the Tribunal's decision that it was not satisfied that the applicant met the criteria for the grant of a visa. Whilst it is frequently said that findings as to credit are entirely matters for the Tribunal, such findings do not shield the Tribunal's decision-making processes from scrutiny: *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 at [31]. Considerable caution must, however, be exercised before too readily acceding to a proposition that adverse findings as to credit expose jurisdictional error: *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451; 67 AAR 376 at [14]-[15]. That is because assertions of illogicality and irrationality can all too readily be used to conceal what is in truth simply an attack on the merits of the Tribunal's findings and decision. In *SZMDS*, Crennan and Bell JJ (at [96]) made it plain that the deployment of illogicality or irrationality to achieve merits review should not be sanctioned.

20 Having regard to the authorities it is possible, but difficult, to impugn a decision, such as that presently under consideration, on the ground of unreasonableness. An administrative decision may be found to be "illogical" or "irrational" even if it does not involve the exercise of a discretion: see, for example, *CQG15 v Minister for Immigration and Border Protection* (2016) 70 AAR 413; [2016] FCAFC 146. Nonetheless, the "illogicality" and "irrationality" grounds of review have been circumscribed by authority.

21 Where the present ground is relied on and the decision-maker has given reasons for his or her decision, the reviewing court will concentrate on those reasons with a view to deciding

whether the reasons demonstrate a justification for the impugned decision: cf *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at 446-447; [2014] FCAFC 1 at [45]-[47] (Allsop CJ, Robertson and Mortimer JJ).

22 The IAA's explanation for its refusal to have regard to the psychiatrist's opinion concerning DYS16's credibility appears principally at [9] of its reasons. Those reasons have to be understood against the background of the three preceding paragraphs. The principal reason was that DYS16's psychiatrist's opinion about his credibility "[did] not carry more weight than other concerns regarding [DYS16's] credibility which [had] been discussed above [in the preceding paragraphs]" and which were to be the subject of further attention in the reasons.

23 One can well understand why the IAA had come to this view. The psychiatrist's opinion relating to DYS16's credibility was, as he said, founded upon the history given to him by DYS16 and the answers provided by DYS16 to questions asked by the psychiatrist. The IAA was the trier of fact. It was for it to form a judgment about DYS16's credibility: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at 423; [2000] HCA 1 at [67] (McHugh J). It was required to do so on the basis of the information which it had before it. That information was not coextensive with that before the psychiatrist. The psychiatrist, for example, did not have access to the country information which was before the IAA. The absence of contradictory medical evidence as to credibility can be of no moment. Such contrary evidence could only have been obtained from another psychiatrist who was privy to the same interviews and the same documentary materials as were considered by the author of the report on which DYS16 sought to rely. More importantly, no psychiatric opinion as to DYS16's credibility could have been binding on the IAA and it was entitled, as it did, to prefer its own assessment. It is also notable that the IAA was prepared to receive and act on the psychiatrist's PTSD diagnosis which had a potential bearing on the IAA's assessment of DYS16 as a witness. While reasonable minds might differ about the IAA's reasons for its decision the reasons which it did advance are not illogical or irrational.

24 This ground must fail.

GROUND 2

25 DYS16 submitted that the IAA had misconstrued or misapplied s 473DD when determining whether or not to have regard to the psychiatric report.

26 More specifically, his complaint was that the IAA had misconstrued the phrase "exceptional circumstances" appearing in s 473DD(a). In seeking to make good this complaint DYS16 relied, in part, on the provisions of paragraph (b)(ii) of the section.

27 DYS16 could not point to any passage, in the IAA's reasons, in which it had misdirected itself as to the construction of this provision. Rather, he contended, the error was exposed by what the IAA had said in paragraph [9] of its reasons. The IAA's error was said to lie in its failure to consider "the matters required by s 473DD(b)(ii) … in relation to its conclusion at [9] that it was 'not satisfied that there are exceptional circumstances to justify considering the psychiatrist's opinion as to the credibility of the applicant's claim'".

28 DYS16 emphasised that sub-paragraph (ii) required the IAA to make an "evaluation of the significance of the new information in the context of the referred applicant's claims more generally": *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176 at [105] (Kenny, Tracey and Griffiths JJ).

29 Counsel for DYS16 identified seven matters which, he submitted, should have, but had not, informed the IAA's assessment of whether "exceptional circumstances" existed for the purposes of paragraph (a). They were:

- DYS16 "had been subject to a determination by a ministerial delegate, adverse to his credit, on the basis of certain characteristics that his evidence bore". The "characteristics" are, as we understood DYS16's submissions, a reference to the inconsistencies in his evidence.
- In taking those characteristics into account to DYS16's detriment the IAA was required to draw an inference that the characteristics "were present because of a lack of truth in [DYS16's] assertions as to his fear of persecution."
- The psychiatrist's opinion provided an explanation for the presence of those characteristics, namely, that he was suffering from PTSD and was not, deliberately, being untruthful.
- The psychiatrist's opinion did more than offer an alternative hypothesis for the presence of the characteristics and bolstered DYS16's credit by providing expert evidence to the effect that the relevant characteristics were present "precisely because the facts asserted by [DYS16] were true."

- The psychiatric opinion was not available to DYS16 at the time at which the Minister's delegate made her decision.
- The psychiatric evidence was unchallenged.
- Had the psychiatric evidence that DYS16 was credible been received in evidence by the IAA and been accepted, it would have led to the IAA accepting the applicant's assertions and coming to a decision favourable to him.

DYS16 submitted that these matters, when considered collectively, gave rise to "exceptional circumstances" within the meaning of s 473DD(a).

30 The construction of s 473DD has been considered in a number of recent decisions by single judges and Full Courts of this Court.

31 The interaction between paragraphs (a) and (b) of s 473DD was noted by White J in *BVZ16 v Minister for Immigration and Border Protection* [2017] FCA 958. His Honour said (at [9]) that:

> The requirements of subparas (a) and (b) are cumulative but may nevertheless overlap to some extent. The Authority's satisfaction that the new information could not have been provided to the Minister at the time of the s 65 decision (subpara (b)(i)) may contribute to its satisfaction that there are exceptional circumstances to justify considering the new information. So also may the Authority's satisfaction that the new information is credible personal information which had not previously been known (subpara (b)(ii)). Accordingly, one would expect the IAA to consider the subpara (b) matters when considering in a given case whether the circumstances are exceptional. Obviously enough, however, the matters which may contribute to a finding that the circumstances in a particular case are exceptional may extend beyond those specified in subparas (b)(i) and (ii) and it seems improbable that the Authority could be satisfied, by reference to one matter only, that an applicant's circumstances are not exceptional.

32 Later in his reasons His Honour dealt with the construction of the term "exceptional circumstances" in s 473DD(a). Having referred to a number of authorities, he continued (at [41]-[43]):

> 41 Generally, consideration of whether exceptional circumstances exist will require consideration of all the relevant circumstances. That is because even though no one factor may be exceptional, in combination the circumstances may be such as reasonably to be regarded as exceptional: *Griffiths v The Queen* (1989) 167 CLR 372 at 379 (Brennan and Dawson JJ); *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [23]-[26] (Rares J); *Hasim v Attorney-General of the Commonwealth* [2013] FCA 1433, (2013) 218 FCR 25 at [65] (Greenwood J).
>
> 42 The proper construction of the term "exceptional circumstances" in s 473DD should take account of the context in which the term is used. The scheme of

> Pt 7AA of the Migration Act is to provide a means of "fast track" review of the refusal of certain applications for a protection visa. Particular elements of the scheme are that all "fast track reviewable decision[s]" are to be referred to the IAA as soon as reasonably practicable after the decision is made (s 473CA), the task of the IAA is, *prima facie*, to review the decision on the papers and without accepting or requesting new information and without interviewing the applicant (s 473DB) and, while the IAA has a discretion to "get" new information, it may consider it only in the limited circumstances specified on s 473DD. Plainly, applicants for a protection visa are expected to present all their claims and all available evidence to the Minister in relation to the decision under s 65.
>
> 43 Further, account must be taken of the reference to the exceptional circumstances being such as to "justify" consideration of the new material. In this respect, account should also be taken of the purpose of the IAA decision, namely, to affirm the refusal of the visa or to remit for reconsideration in accordance with such directions or recommendations as are permitted by regulation (s 473CC). That suggests that exceptional circumstances will be those which are out of the ordinary course and which will justify the new information being considered even though it had not been provided to the Minister at the time of the s 65 decision. A variety of matters may be capable of bearing upon those circumstances.

33 His Honour's construction of s 473DD was endorsed by the Full Court in *BBS16*: see at [102]-[106]. See also *CHF16 v Minister for Immigration and Border Protection* [2017] FCAFC 192 at [17]-[18] (Gilmour, Robertson and Kerr JJ) where another Full Court cited *BVZ16* and *BBS16* with apparent approval. In *CHF16* the IAA was found to have erred in determining that there were no exceptional circumstances to justify it considering new information because it had failed to take into account why that new information had not been brought forward previously and had not addressed the question of whether the material was credible personal information or information of such a character that, had it been known to the Minister's delegate, it may have affected the outcome of the applicants' claim: at [44].

34 In *BVZ16* the applicant was unable to point to any express misdirection in the IAA's reasons which supported the claim that the term "exceptional circumstances" had been misconstrued. White J, nonetheless, accepted a submission that there had been a constructive failure, by the IAA, to exercise its jurisdiction. This was because, in deciding that exceptional circumstances did not exist, the IAA had not sought to evaluate the significance of the new information on which the applicant wished to rely, but had treated as decisive the applicant's explanation for not having disclosed the new information earlier. This bespoke "an inappropriately narrow understanding of the reach of the term 'exceptional circumstances'": see at [47].

35 In our view the IAA did not fall in to a similar error in dealing with DYS16's case.

36 The IAA carefully examined the psychiatric report. It found that, to the extent that the report contained a diagnosis of PTSD, it incorporated new information, that that information was "credible personal information" and that the information, had it been known, may have affected the delegate's assessment of DSY16's claims. Exceptional circumstances existed and the report, insofar as it contained the psychiatrist's diagnosis, would be considered.

37 The psychiatric report had also contained a summary of the history, given by DYS16 to the psychiatrist. Much of this was not new information: it had previously been given to the Minister's delegate. Some of it was, however, "new" in the sense that it had not previously been advanced by DYS16 in support of his claims. Some of this new information was found, by the IAA, to have been inconsistent with information previously provided by DYS16. These assertions, if accepted, might have further undermined DYS16's credibility when assessed by the IAA. They led to the IAA's conclusion, at [8] of its reasons, that it was "unable to be satisfied that any of the new information which he [had] provided to the treating psychiatrist [was] credible or that it could not have been provided before the delegate made his decision." As a result, the IAA declared at [8] that it was not satisfied that the requirements of s 473DD(b) had been met or that there existed exceptional circumstances which justified consideration being given to this new information.

38 Ultimately, the IAA came to the view, recorded at [9] of its reasons (to which we have already referred above at [22] and [23]), that the psychiatrist's assessment of DYS16's credibility did not carry more weight than the IAA's own assessment.

39 This conclusion was, in our view, clearly open to the IAA in the circumstances of this case.

40 The IAA did not fail to have regard to the seven matters on which DYS16 relied to allege error. It had received and considered the psychiatrist's diagnosis and his opinion that PTSD could explain some or all of DYS16's inconsistent factual claims. It was not, however, satisfied that this condition could account for all of the discrepancies in DYS16's account. It had regard, for example, to the fact that, at the time at which a number of the inconsistent claims had been made, DYS16 was being represented by a migration agent.

41 The only part of the psychiatric report which was rejected was the author's "credibility" finding. The IAA explained why it did not consider this credibility finding to be helpful. For the reasons which we have already given, in dealing with Ground 1 (at [22] and [23]

above), the IAA's reasons were neither illogical nor irrational and did not give rise to any suggestion of misconstruction of s 473DD.

42 Ground 2 must fail.

DISPOSITION

43 DYS16 will be given leave to appeal out of time but the appeal must be dismissed with costs.

I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey, Murphy and Kerr.

Associate:

Dated: 13 March 2018