Federal Court of Australia

ATD19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 576

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| Appeal from: | *ATD19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 565 |
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| File number: |  |
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| Judgment of: | **RANGIAH J** |
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| Date of judgment: | 20 May 2022 |
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| Catchwords: | **MIGRATION –** Appeal from Federal Circuit Court – whether primary judge erred in not finding the Immigration Assessment Authority acted unreasonably in failing to invite appellants to attend interview under s 473DC of the *Migration Act 1958* (Cth) – where informational gap arose between the delegate and the Authority – failure to invite appellant to interview was not unreasonable in the circumstances – whether primary judge erred by not finding Authority’s decision was affected by apprehended bias – where irrelevant and prejudicial material was placed before Authority – where Authority gave material no weight – no apprehension of bias – appeal dismissed.  |
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| Legislation: | *Migration Act 1958* (Cth) ss 36, 46A, 473CB, 473DB, 473DC and Part 7AA  |
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| Cases cited: | *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439*CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76*MBJY v Minister for* *Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 284 FCR 152; FCAFC 11  |
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| Date of hearing: | 22 November 2021  |
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| Counsel for the Appellants: | Mr G Rebetzke with Ms C Chiang |
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| Counsel for the First Respondent: | Ms E Hoiberg |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | QUD 102 of 2021 |
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| BETWEEN: | ATD19First AppellantATE19Second Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| order made by: | RANGIAH J |
| DATE OF ORDER: | 20 MAY 2022 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellants 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

RANGIAH J:

1. On 11 February 2019, the Immigration Assessment Authority (the **Authority**) affirmed a decision of a delegate of the first respondent (the **Minister**) to refuse to grant the appellants Safe Haven Enterprise Visas (**SHEVs**).
2. The appellants appeal against a judgment of the Federal Circuit Court of Australia dismissing their application for judicial review of the Authority’s decision.
3. There are two grounds of appeal. The first asserts that the Authority was affected by apprehended bias in circumstances where the Authority was impermissibly provided with irrelevant and prejudicial material. The second asserts that the Authority unreasonably failed to exercise the power in s 473DC of the *Migration Act 1958* (Cth) (the **Act**) to invite the first appellant to an interview.
4. To give context to the appellants’ grounds, it is necessary to begin by describing the factual background and the decisions made by the delegate and the Authority.

## Factual background

1. The first appellant and second appellant are mother and son respectively. They claim to be stateless Faili Kurds who resided in Iran. They arrived by boat in Australia on 28 March 2013.
2. Following a decision by the Minister to “lift the bar” pursuant to s 46A of the Act, the appellants made a combined application for SHEVs on 22 May 2017. The second appellant was a minor at that time, having been born on 31 December 1999.
3. The first appellant claimed, relevantly, to have experienced constant abuse and violence over many years at the hand of her husband and that she had been hospitalised on several occasions. Her husband had then started a relationship with another woman. With the help of her extended family, she and her son escaped from her husband, left Iran and sought protection in Australia.
4. The application was refused by the Minister’s delegate on 9 November 2018. The delegate found that the first appellant was not a credible witness. The delegate did not accept the first appellant’s claim of statelessness, and instead found that she was an Iranian citizen.
5. The delegate turned to consider the first appellant’s claim that she had experienced domestic violence for many years and had fled Iran as a result of that violence. After the first appellant had attended an interview with the delegate, her legal representatives provided photographs which claimed to show scarring on her body caused by her husband’s violence. The delegate observed:

The applicant has provided photo evidence of the scars on her body which she claims was caused by physical abuse she received from her husband.

1. The delegate made the following findings:

I have major credibility concerns about the applicant’s claim that one of the main reasons that she left Iran was because of her husband’s violence towards her. I note that in point 15 of statement claims the applicant claims *‘….my extended family helped me to seek refuge in Australia’* in contrast that her husband helped her to leave the country. I am prepared to accept that the applicant has experienced some of sort of domestic violence from her husband during their forty years of marriage. I am however do not accept that she left the country because of this reason. It is evident from the Arrival Entry interview that the husband even wanted to travel with them but did not have sufficient funds which contradicts the notion that he was very violent towards her. If that was the case that that the applicant’s husband was violent towards the applicant as she has claimed, it was established during the interview that the applicant and her husband were separated fours before her departure from Iran and he has married with another woman. If that was the case I do not accept that he constantly committed domestic violence towards the applicant whilst they were not living together for four years. Overall I have reached the conclusion that the applicant has embellished the claim of domestic violence with her husband to raise her profile and strengthen her claims for protection.

(Errors in the original.)

1. The delegate went on to find that the first appellant was not owed protection obligations. The delegate accordingly refused to grant the SHEVs.
2. As the delegate’s decision was a “fast track reviewable decision”, it was referred to the Authority for review under Pt 7AA of the Act. The Authority conducted a review upon the material that was before the delegate, and did not invite the appellants to attend an interview.
3. On 11 February 2019, the Authority affirmed the delegate’s decision. As to the first appellant’s claims concerning domestic violence, the Authority observed that there were discrepancies between her statements concerning the extent and frequency of her contact with her husband in recent years. It noted the absence of any explanation for why her extended family helped her to flee Iran to escape her husband’s violence when she had also claimed that they would not help her during the years of violence she had experienced. The Authority considered that the “considerable fluctuation” in her evidence concerning the availability of medical treatment in Iran raised significant doubts as to whether she was ever subjected to family violence, was ever hospitalised due to the violence and was ever denied medical treatment in Iran.
4. The Authority then went on to find:

12. On 17 September 2018, five images were emailed to the delegate. These depict various marks on a leg, arm and foot, and some marks on the scalp of a person seeming to bear a likeness to the first applicant. Each image is captioned with a description suggesting the scars depicted are the result of various instance of violence against the first applicant by her husband. It is not possible to verify the origins of these scars, or even whether all the photos depict the first applicant, just from the images. I note that there is no mention in the visa application of the first applicant being scarred from the family violence, nor were any such scars mentioned at the interview with the delegate. In the statement the first applicant only referred to her husband hurting her hand, at interview she stated that he punch all of her teeth out.

(Errors in the original.)

1. The appellants’ legal representative had asserted that some details of the second appellant’s statement and visa application were prepared after the second appellant had spoken to his father. The Authority considered it implausible that the father would assist them if, as claimed, he had subjected the first appellant to serious domestic violence.
2. The Authority concluded:

17. I do not accept the applicants were subject to violence by the first applicant’s husband as claimed. I consider this claim has been fabricated in its entirety. I consider the applicant truthfully declared that she remain in regular contact with her husband when the applicant drafted her visa application form in 2016. I do not consider it plausible that the applicant’s husband would assist his wife and son to prepare a protection visa application that comprised claims to fear harm from him. The first applicant’s evidence regarding her access to hospitals because of the family violence fluctuated and was contrary to other aspects of her narrative. The submissions that she felt emotional safe to discuss the family violence with the delegate is at odds with the information suggesting she was highly stressed during that interview and suffered a panic attack. The applicant’s evolving and inconsistent evidence in respect of this matter also leads me to have significant doubts in respect of her general credibility.

(Errors in the original.)

1. The Authority then considered the appellants’ claims to be undocumented stateless Faili Kurds. The Authority found the first appellant not to be a credible witness and considered that she had demonstrated a willingness to fabricate claims. It was not satisfied that the appellants were stateless.
2. The Authority found that Australia did not owe the appellants protection obligations under ss 36(2)(a) or 36(2)(aa) of the Act. Accordingly, the Authority affirmed the delegate’s decision not to grant the SHEVs.
3. The appellants’ application for judicial review of the Authority’s decision was dismissed by the primary judge on 8 March 2021. The appellants relied upon five grounds. Only two of the appellants’ grounds are relied upon in the appeal and it is unnecessary to describe the remainder.
4. As to the ground that the Authority acted unreasonably in failing to invite the first appellant to attend an interview to confirm that the photographs showed scarring on her body, the primary judge found there was no evidence that the delegate had seen any of the scars during the interview. His Honour considered that the photographs, without anything more, did not indicate that they were photographs of the first appellant. His Honour considered, in any event, the photographs could not prove that the scars were a result of family violence, such that the Authority’s conclusion could not have been affected by seeing the first appellant in-person.
5. As to the ground alleging apprehended bias, the primary judge found the Authority expressly indicated it had given the information in the email no weight whatsoever. His Honour considered it could not be said that there was an apprehension of bias where information that could have subconsciously affected the reviewer was specifically disregarded and given no weight.
6. The primary judge dismissed the application with costs.

## Consideration

### Alleged unreasonableness by the Authority’s failure to invite the first appellant to an interview

1. The appellants presented their grounds of appeal in reverse order, and it is convenient to consider them in the order of their presentation.
2. In respect of their second ground, the appellants argue that the Authority unreasonably failed to exercise the discretion conferred by s 473DC of the Act to invite the first appellant to an interview to confirm that the photographs depicted scarring on her body. They submit the unreasonableness arose in circumstances where the Authority determined that the first appellant’s claim of domestic violence was fabricated in its entirety, despite the delegate (who had the benefit of interviewing the first appellant) accepting that she had experienced some degree of domestic violence.
3. On 3 September 2018, the Minister’s delegate conducted an interview with the first appellant. The appellants were given the opportunity to provide written submissions addressing concerns raised by the delegate. The appellants’ legal representative provided written submissions on 12 September 2018, stating:

We submit that there are physical signs of violence on the applicant’s body. The applicant is about 55 years old and has no teeth of her own in her mouth. Her son [name redacted] explained that his mother has lost all her teeth over the years as the result of being beaten by his father [name redacted]. There are also scars of cuts on her skull, above her left eye, and other parts of her body. [Name redacted] also adds that his father [name redacted], was violent towards him and he was punished by lashes with belt in different occasions.

(Errors in the original.)

1. The written submissions attached photographs described as, “Photographs evidencing family violence towards the appellant over the years”. There were five colour photographs, marked to delineate areas of scarring, and annotated with descriptions of what was depicted.
2. The first photograph is the only one depicting what is claimed to be the first appellant’s face. The photograph is a close up of a woman’s face from the bridge of the nose upwards and also shows her hair. There are four small scars visible. The photograph has been captioned, “Evidence of cuts received on forehead and eyebrow due to family violence”. I will refer to this photograph as “the **first photograph**”.
3. The second photograph shows a person’s foot, with a small scar on the upper portion of the foot. It is captioned, “Cuts of right foot due to violence”.
4. The third photograph shows a small scar on a person’s limb. It is captioned, “Cut on right leg due to violence”.
5. The fourth photograph shows an unidentifiable part of a person’s body with a small scar. It is captioned, “Cut on the shin due to violence”.
6. The fifth photograph shows a small scar on a person’s scalp. The colour of the person’s hair is the same as the colour of the person’s hair in the first photograph. It is captioned, “Cut/broken skull when chair was thrown to her head by husband”.
7. The delegate stated in relation to the photographs:

The applicant has provided photo evidence of the scars on her body which she claims was caused by physical abuse she received from her husband.

1. In this passage, the delegate appeared to accept that the photographs were of scars on the first appellant’s body, but not that the scars were caused by violence inflicted by her husband.
2. The delegate later concluded they had, “major credibility concerns about the [first appellant’s] claim that one of the main reason she left Iran was because of her husband’s violence towards her”. The delegate was, “prepared to accept that the [first appellant] has experienced some sort of domestic violence from her husband during their forty years of marriage”. However, the delegate did not accept that, “she left the country because of this reason”. Later, the delegate found, “I do not accept the [first appellant] was targeted by her husband to the extent she has claimed and forced her to leave the country”.
3. In its reasons, the Authority found:

It is not possible to verify the origins of these scars, or even whether all the photos depict the first applicant, just from the images.

1. As the first appellant had claimed that the photographs depicted scars on her body and that the scars were caused by domestic violence committed by her husband, the Authority’s non-acceptance of these claims amounted to a rejection of the credibility of these claims.
2. The Authority went on to find:

I do not accept the applicants were subject to violence by the first applicant’s husband as claimed. I consider this claim has been fabricated in its entirety.

1. The appellants observe that, although the Authority found it was not possible to verify whether all the photographs depicted the first appellant, “just from the images”, it did not seek to compare the images with the first appellant herself. They submit that the delegate had the advantage of having conducted an interview with the first appellant in person, albeit before receiving the photographs, which allowed the delegate to conclude that the photographs depicted scarring on the first appellant’s body and to accept that she had experienced domestic violence. The appellants submit that the Authority ought to have considered and exercised its power under s 473DC of the Act to get and consider new evidence, and that there was no good or sufficient reason not to invite the first respondent to an interview to place itself in as good a position as the delegate to properly assess the evidence.
2. Section 473DB(1) of the Act provides that, subject to Part 7AA, the Authority must review a fast track reviewable decision by considering the review material provided under s 473CB without accepting or requesting new information and without interviewing the referred applicant.
3. Section 473DC then provides:

**473DC Getting new information**

(1) Subject to this Part, the Immigration Assessment Authority may, in relation to a fast track decision, get any documents or information (***new information***) that:

(a) were not before the Minister when the Minister made the decision under section 65; and

(b) the Authority considers may be relevant.

(2) The Immigration Assessment Authority does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances.

(3) Without limiting subsection (1), the Immigration Assessment Authority may invite a person, orally or in writing, to give new information:

(a) in writing; or

(b) at an interview, whether conducted in person, by telephone or in any other way.

1. The appellants rely upon *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439. In that case, the appellant disclosed in the course of an in-person interview conducted by the delegate that he had been sexually tortured when detained by the Sri Lankan army. The delegate found that the appellant’s account was plausible and broadly consistent with country information, but ultimately found that the appellant did not have a well-founded fear of persecution because the conditions for Tamils in Sri Lanka had improved. In contrast, the Authority, having listened to an audio-recording of the interview, considered that the appellant’s evidence was lacking in detail and that he sounded vague and hesitant. The Authority was not satisfied that the appellant had been detained and sexually tortured, and found that the appellant did not have a profile which would bring him to the attention of the Sri Lankan authorities. On that basis, the Authority affirmed the delegate’s decision that the appellant did not have a well-founded fear of persecution.
2. In the High Court, the plurality (Keifel CJ, Bell, Gageler and Keane JJ) identified the potential for an informational gap between a delegate who has conducted an in-person interview with a visa applicant and the Authority conducting its review based only upon material provided under s 473CB of the Act. Their Honours observed:

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.”...

(Citations omitted.)

1. The plurality held at [16] that the Authority has power under s 473DC of the Act to invite the appellant to an interview in-person or by video-link to bridge such an informational gap.
2. The plurality observed that the question then became whether the Authority had failed to comply with the implied condition of reasonableness in the conduct of the review or in the consideration and exercise of its powers:

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…

…

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.

(Citations omitted.)

1. In this case, the delegate, in summary:
2. accepted that the photographs depicted scars on the first appellant’s body;
3. inferentially, may have ultimately accepted that the scars were caused by her husband’s violence;
4. accepted there had been some acts of domestic violence perpetrated by the first appellant’s husband, but not to the extent claimed by the first appellant;
5. did not accept that the first appellant had fled Iran because of her husband’s violence, finding that she had embellished her claim of domestic violence to strengthen her claims for protection.
6. In comparison, the Authority:
7. did not accept that the photographs were of the first appellant’s body;
8. did not accept that any scars were inflicted by her husband;
9. found that the appellants’ claims of domestic violence had been fabricated in their entirety;
10. did not accept that that the first appellant had left Iran because of domestic violence.
11. In light of the reasoning in *ABT17*, it is necessary to consider: first, whether there was an informational gap between the delegate and the Authority; second, whether the Authority could have bridged any such gap by inviting the first appellant to an interview; third, whether, any informational gap resulted in the Authority being disadvantaged in comparison with the delegate; fourth, whether the failure to invite the first appellant to an interview was unreasonable; and, fifth, whether that failure was material.
12. The first and second issues may be considered together. The five photographs purporting to be of the first appellant were provided to the delegate some nine days after he had conducted an in-person interview with her. The first photograph was a close-up shot of a person’s face from the bridge of the nose up. There is enough of the person’s face depicted to make it likely that the delegate would recognise the person depicted in the photograph if the delegate had recently interviewed that person. The other four photographs depict what are said to be the right foot, right leg, shin and scalp of the first appellant, but it cannot be determined from those photographs whose body is shown.
13. The delegate stated that, “The [first appellant] has provided photo evidence of the scars on her body…”. The delegate did not merely say that the first appellant *alleged* that the photographs showed scars on her body, but apparently accepted that the person depicted in the photographs was the first appellant. It should be inferred that the delegate recognised the first appellant’s face in the first photograph and then inferred that the remaining four photographs were also of the first appellant, the only alternative being the improbable scenario of the first appellant falsely submitting photographs of scarring on someone else’s body.
14. The Authority lacked the advantage enjoyed by the delegate of having seen the first appellant’s face and being able to compare it with the first photograph. While there were photographs of the first appellant in her visa application form, they are small and her hair was completely covered, unlike the first photograph. There is no suggestion the Authority thought that a comparison of the photographs cast doubt upon whether the first appellant was depicted in the first photograph. The inability of the Authority to, “verify…even whether all the photos depict the first appellant, just from the images”, stemmed from its disadvantage in not having seen the first appellant in person.
15. The Authority’s informational disadvantage could have been bridged by inviting the first appellant to attend an in-person or video interview. To assuage or verify its doubts, the Authority could have made a comparison of the first appellant’s face to the first photograph at an interview. It would also have been open to ask the first appellant to allow her scars to be viewed.
16. Accordingly, there was an informational gap between the delegate and the Authority which could have been bridged by conducting an interview with the first appellant.
17. The third issue is whether, in light of the Authority’s reasoning, the Authority was disadvantaged by the informational gap and whether it had any significant bearing on the outcome. In *ABT17*, the plurality observed at [22] that the mere existence of an informational gap will not necessarily result in the Authority being, “disadvantaged in comparison with the delegate”. The plurality also observed at [22] that, “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”. In this case, the question of whether or not the photographs depicted scarring on the first appellant’s body may not necessarily have had any significant bearing on the Authority’s determination.
18. It will be recalled that the Authority did not accept that the photographs were of the first appellant’s body, did not accept that any scars were inflicted by her husband, and found that the claim of domestic violence had been fabricated in its entirety. The Authority found that the first appellant was not a credible witness for a number of reasons. She had failed to mention the scarring in her visa application or in the interview with the delegate. There were inconsistencies concerning the extent of her contact with her husband since her arrival in Australia. There was no explanation for why her extended family would help her to escape from Iran when she claimed they had refused to help her during the years of violence she had endured. There were inconsistencies concerning hospital treatment she claimed to have received for her injuries. The first appellant’s claims of domestic violence were inconsistent with her husband having provided information to assist with her visa application. In addition, the first appellant had told the delegate that her husband obtained a passport for her that allowed for her to leave Iran, but that was inconsistent with her claim to have left Iran because of his domestic violence. The Authority considered the explanations offered by her legal representatives for why her husband may have wished to help her leave Iran to be implausible. The Authority was not satisfied that the medical evidence concerning the first appellant’s claimed psychiatric and cognitive impairments accounted for her inability to provide details in her interview with the delegate about her experiences in Iran or information in her visa application.
19. The delegate had accepted that the first appellant had the scars depicted in the photographs and accepted that she had experienced some domestic violence, but found she had embellished the extent of the violence and had not left Iran because of it. The Authority found that because she had fabricated the claim of domestic violence she could not have left Iran because of domestic violence. However, the Authority went on to also find that her claim to have left Iran because of domestic violence was not credible in light of matters including her husband assisting her to leave Iran and providing information for her visa application.
20. The Authority’s reasons for finding that the first appellant had not left Iran because of her husband’s violence substantially, although not completely, overlapped with the reasons given by the delegate for making the same finding. Although the delegate and the Authority departed on the question of whether there had ever been any domestic violence, they coalesced upon the question of whether the first appellant had left Iran because of domestic violence. They each concluded that the first appellant consequently does not have a “well-founded fear of persecution” within s 5J of the Act, and that Australia does not owe her protection obligations as outlined in s 36(2)(a) of the Act.
21. The Authority reasoned that the assistance provided to the first appellant by her husband to leave Iran and in respect of her visa application, taken together with other implausibilities and inconsistencies, demonstrated the allegations of domestic violence were fabricated. In light of these findings, even if the Authority had interviewed the first appellant and determined that the photographs were of the first appellant’s scarring, that could not have led the Authority to a view that she had fled Iran because she feared domestic violence. In my opinion, the Authority’s unwillingness to accept the first appellant’s claim that the photographs were of scarring on her body was not ultimately of any significance to its finding that the appellants did not satisfy the criteria for the grant of SHEVs.
22. The fourth issue is whether the failure to invite the first appellant to an interview was unreasonable in circumstances where the Authority departed from the delegate’s acceptance that the photographs showed scarring on the first appellant’s body.
23. In *ABT17*, the plurality held at [23]-[24] that it would ordinarily be open to the Authority to form its own assessment of credibility taking into account the delegate’s findings of fact and the evidence on which those findings were based, and that the Authority is not required to conduct an interview merely because the Authority comes to a different view as to credibility than the delegate. However, the plurality went on to observe at [25] that the Authority will act unreasonably if, without good reason, it does not invite a referred applicant to an interview in order to gauge their demeanour for itself before it decides to reject an account given in an audio recorded interview which the delegate accepted substantially on the basis of its own assessment of the manner in which that account was given.
24. I have accepted that the Authority could have placed itself in as good a position as the delegate by inviting the first appellant to an interview in-person or by video-link. The Authority did not express any reason for failing to interview the first appellant, although it may be observed that there was no submission that an interview should be conducted. It can be inferred that the Authority did not invite the first appellant to an interview because establishing that the photographs showed scarring on the first appellant’s body could not have affected the Authority’s decision. Accordingly, there was a good reason for the Authority to not invite the applicant to an interview.
25. The fifth issue is whether the Authority’s error was material to the outcome. For the reasons given in respect of the third and fourth issues, it was not. It may be observed that the appellants did not seek to argue that any failure by the Authority to deal with the credibility of the second respondent’s evidence was of any relevance in this case.
26. The Authority did not act unreasonably in failing to invite the first appellant to an interview before declining to accept her claim that the photographs depicted scars on her body. The appellants’ second ground must be rejected.

### The allegation of apprehended bias

1. The appellants’ first ground alleges that the primary judge erred in failing to find that the decision of the Authority was affected by jurisdictional error on the ground of apprehended bias.
2. In its reasons, the Authority stated:

19. Included in the referred material was correspondence suggesting the applicants may have a relative in Australia who they failed to mention, however it is does not seem this was verified. While it possibility indicates a basic familial relationship, it provides nothing of substance in relation to the questions arising before me in this review.

(Errors in the original.)

1. The correspondence was an intra-departmental email dated 9 May 2016 (the **email**). The email states relevantly:

Whilst looking into [redacted] case, I have found that his mother [the first appellant] and brother [the second appellant] have since arrived by boat and are have recently been invited to apply for a protection visa. I have had a read of her arrival interview…and found that [the first appellant] does not declare any relatives in Australia or family who have previously applied for a visa for Australia. There is also an additional brother listed in [redacted] interview [redacted] who is not mentioned as a son in [the first appellant’s] application. They all claim to be stateless Faili Kurds.

I believe that they are mother/son as [redacted] lists his father’s details as [the first appellant] state’s her husbands. They also note a sister/daughter of [redacted]. [Redacted] stated his mother as [the first appellant]…

I am referring [redacted] as he is a claimed stateless Faili Kurd but COI notes indicate that this might be false. Thought I would give you a heads up for your case but am unsure what else, if anything, you would like me to do. Please advise if you require anything more.

Just letting you know I received a response from [redacted] re another possible relative. Please see this email below.

(Errors in the original.)

1. Section 473CB(1)(c) of the Act requires the Secretary of the Department to give to the Authority, “any other material that is in the Secretary’s possession or control and is considered by the Secretary…to be relevant to the review”. Section 473DB(1) requires the Authority to consider the review material provided to the Authority under s 473CB.
2. The email was provided by the Secretary for the Authority’s consideration. The appellants submit that the email was capable of affecting the Authority’s view of the credibility of the first appellant’s evidence as it suggested that she had dishonestly failed to declare that she had relatives in Australia. They submit that the email was, as the Authority found, irrelevant to the review, and was therefore not required to be provided to the Authority under s 473CB(1)(c) of the Act. They submit that the provision of the material was prejudicial. The email was not provided to the appellants for comment. They submit that these circumstances gave rise to an apprehension of bias on the part of the Authority, and the Authority ought to have counteracted that apprehension by exercising its power under s 473DC to invite the appellants to comment on the suggestion contained in the email.
3. The appellants rely upon the judgment of the High Court in *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76. In that case, the Secretary provided the Authority with irrelevant and prejudicial material, containing assertions that the visa applicant had a history of unspecified aggressive and challenging behaviour, had been involved in unspecified incidents in detention and had been investigated for unspecified matters. The Authority’s reasons stated that it had had regard to the material provided by the Secretary, but did not make any reference to the irrelevant and prejudicial material.
4. A majority of the High Court held that the provision of irrelevant and prejudicial material that the Authority was required to consider gave rise to an apprehension of bias. Justices Nettle and Gordon observed at [95] that the appellant had not been made aware of the information provided by the Secretary and lacked any ability to comment upon it. The Secretary had apparently decided that the information was relevant. The Authority was required to consider that information. The material was prejudicial to the appellant and there was a risk that such information would lead the Authority to have a bias against the appellant. Their Honours continued:

97 Of course, it does not matter whether the IAA *actually* had such a bias, or whether the IAA in fact put the prejudicial information aside. There is a risk of subconscious bias here, and that risk cannot be cured by putting the information aside.

98 The idea that the information could or would be put aside is also difficult to reconcile with the statutory scheme. As noted above, the Secretary endorses the information which he or she gives to the IAA as “relevant” to the IAA’s task. The IAA then *has* to consider that information.

99 The Minister submitted that administrative decision-makers routinely set aside irrelevant material. But that is not the point. The material was not only irrelevant, but also *prejudicial*. Putting the material aside does not overcome the subconscious bias which might result from seeing that material. Nor did the IAA expressly state that the material had been put to one side.

(Citations omitted.)

1. Justices Nettle and Gordon concluded:

100 Returning to the test, a fair-minded lay observer might apprehend a lack of impartiality on the part of the IAA where: (i) material has been designated as “relevant” by the Secretary; (ii) the IAA *must* have regard to that material; (iii) the information is prejudicial to the applicant; and (iv) that information is hidden from the applicant. A fair-minded lay observer may well ask why prejudicial information is provided and hidden from the applicant, if that information was not to be taken into account. In those circumstances, the fair-minded lay observer might apprehend that the decision-maker might decide the case other than on its merits.

101 This conclusion depends on the facts of this case. There may be other cases in which the material given to the IAA was *somewhat* prejudicial to an applicant, but not such as might lead a fair-minded lay observer to apprehend a lack of impartiality. The *particular* point at which prejudicial information will lead to apprehended bias cannot be identified in the abstract. Here, the information was such that a fair-minded lay observer might think it would bias the decision-maker against the grant of a visa to the appellant.

102 If circumstances like this arise, a decision-maker may need to invite an applicant to comment on adverse information to counteract the apprehension of bias. Is this consistent with the statutory scheme? Yes…While the IAA “does not have a duty to get, request or accept, any new information” in any circumstances, it may still invite an applicant to comment on information under s 473DC(3) if that would be the best way of avoiding an apprehension of bias.

(Citations omitted.)

1. Justice Edelman, the third member of the majority, held:

110 ...The Secretary had provided the Authority with 48 pages of irrelevant and prejudicial material involving prejudicial opinion, innuendo and tacit suggestion, on the basis that the Secretary considered that the material was relevant to the review. A fair-minded lay observer would consider that the prejudice arising from any consideration of this irrelevant material could be substantial. Importantly, the Authority said, in a letter to the appellant, that it would make a decision on the basis of the information provided by the Secretary. The Authority acknowledged in its reasons that it had considered all of the material provided to it.

111 It appears from the index of the court book before the Federal Circuit Court that the 48 pages of irrelevant material comprised a very large part of the material provided to the Authority. And yet, the Authority, a professional decision maker, did not suggest that any of that irrelevant and prejudicial material that it had considered had been disregarded or had been given no weight. In these circumstances, a fair-minded lay observer would apprehend, at the very least, that the Authority might have taken the material into account, either consciously or subconsciously. The apprehension might be that the Authority might have formed adverse views of the appellant’s character and, consciously or subconsciously, might have acted upon those adverse views when reaching conclusions on the issues in dispute either directly, or indirectly by the effect on its assessment of the credibility of the appellant.

1. The facts of the present case are, in my opinion, materially different from those in *CNY17*. In *MBJY v Minister for* *Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 284 FCR 152; FCAFC 11, O’Callaghan and Colvin JJ distinguished potentially relevant material given to the Authority by the Secretary from that which is altogether extraneous and irrelevant. Their Honours held:

61 …It is one thing for a decision-maker to receive material that is extraneous to the nature of the statutory task. It is material that should never be before the decision-maker. It is a different thing for the decision-maker to receive material in respect of which there is a reasonable argument that it may be brought to bear in the decision making process and then claim that as it was not ultimately advanced as being relevant or was insufficient to form the basis for a reasonable finding that it is irrelevant.

62 It would appear to be unlikely that the fact that material of the latter kind was before the decision-maker could ever give rise to apprehended bias. Conceivably the material may be so prejudicial that at the point where it is accepted that the decision-maker may not act on the material the appropriate course is for the decision-maker to refer the matter to a different decision-maker. However, the fact that the process commenced in circumstances where there was a reasonable argument that the material was relevant (and therefore was material of a kind that it was proper to put before the decision-maker) must be a significant factor in determining whether the hypothetical fair-minded lay observer, properly informed of the nature of the decision and the context, would conclude that the presence of the material meant that the decision-maker may not reach an independent and impartial decision on the merits.

1. The content of the email was potentially relevant to the Authority’s consideration of the appellants’ claims for protection. The first appellant was asked in her entry interview for details of her children, and the visa application form required her to identify any other members of the same family unit in Australia but not included in the application. If, in fact, the first appellant failed to disclose that she had other family members in Australia, that had the potential to affect the credibility of her evidence. As was accepted in *MBJY* at [62], it is unlikely that the fact that material of that kind was before the decision-maker could give rise to apprehended bias.
2. The Authority dismissed the email as providing, “nothing of substance in relation to the questions arising before me”. The Authority was unwilling to give the information weight in circumstances where it was unverified. This distinguishes the matter from *CNY17* where the Authority had not mentioned the prejudicial material, giving rise to an apprehension that it may have been subconsciously influenced by that material. In this case, the Tribunal must be understood as indicating that it gave no weight to the material. That indication acts to allay any apprehension of subconscious influence.
3. I do not accept that a hypothetical fair-minded lay observer with knowledge of the material objective facts might reasonably have apprehended that the Authority might not have brought an impartial mind to the review by reason of the email having been given to the Authority.
4. The appellants’ first ground of appeal must be rejected.

## Conclusion

1. I have rejected both grounds of appeal. The appeal must be dismissed.
2. I will order that the appellants pay the Minister’s costs of the appeal.

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| I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah. |

Associate:

Dated: 20 May 2022