BSF16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 61

|  |  |
| --- | --- |
| Appeal from: | *BSF16 v Minister for Immigration & Anor* [2019] FCCA 3194 |
|  |  |
| File number(s): | NSD 2020 of 2019 |
|  |  |
| Judgment of: | **GREENWOOD J** |
|  |  |
| Date of judgment: | 7 February 2022 |
|  |  |
| Catchwords: | **MIGRATION** – consideration of an application for leave to adduce fresh evidence on the appeal – consideration of an application for leave to amend a notice of appeal – consideration of the grounds of appeal as amended to the extent granted by leave |
|  |  |
| Legislation: | *Evidence Act 1995* (Cth), s 76*Federal Court of Australia Act 1976* (Cth), s 27*Federal Court Rules 2011* (Cth), rr 33.29, 36.57*Migration Act 1958* (Cth), ss 5(1), 103, 108, 109 |
|  |  |
| Cases cited: | *Briginshaw v Briginshaw* (1938) 60 CLR 336*NASB v Minister for Immigration and Multicultural Affairs and Citizenship* [2004] FCAFC 24  |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 90 |
|  |  |
| Date of hearing: | 11 September 2020 |
|  |  |
| Counsel for the Appellant: | The appellant appeared in person |
|  |  |
| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

|  |  |
| --- | --- |
|  | NSD 2020 of 2019 |
|   |
| BETWEEN: | BSF16Appellant |
| AND: | MINISTER FOR IMMIGRATOIN, CITIZENSHP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| order made by: | GREENWOOD J |
| DATE OF ORDER: | 7 FEBRUARY 2022 |

THE COURT ORDERS THAT:

1. The application for leave to adduce fresh evidence is refused.
2. The application for leave to amend the notice of appeal is allowed in part, save for ground 5 of the Amended Notice of Appeal.
3. The appeal, as amended, is dismissed.
4. The appellant pay the costs of the first respondent of and incidental to each application for leave and the appeal.
5. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published from Chambers.

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

REASONS FOR JUDGMENT

GREENWOOD J:

## Background

1. These proceedings are concerned with an appeal from orders of the Federal Circuit Court of Australia (constituted by Judge Street, the “primary judge”) dismissing the appellant’s application before that Court for the grant of the constitutional writs in relation to a decision of the Administrative Appeals Tribunal (the “Tribunal”) affirming a decision of the Minister’s delegate to cancel, under s 109 of the *Migration Act 1958* (Cth) (the “Act”), a Class XA Subclass (Protection) 866 visa (the “visa”) granted to the appellant on 14 April 2011. The visa was cancelled on 24 July 2015 under the power conferred by s 109 of the Act on the ground that the appellant had failed to comply with ss 101 and 103 of the Act.
2. In these appeal proceedings, the appellant is not assisted by any legal adviser and accordingly in these reasons, the Court will attempt to identify, as clearly as possible, the basis of the appeal sought to be agitated by the appellant, the context of the decision of the primary judge under challenge and the factors that influenced the decision of the Tribunal (including aspects of the delegate’s determination which was before the Tribunal).
3. Section 101 of the Act provides that a non‑citizen must fill in or complete his or her visa application form in such a way that all questions on the form are answered and *no incorrect answers* are given or provided.
4. Section 103 of the Act provides that a non‑citizen *must not* give, present, produce or provide to, put simply, the Minister, the Minister’s delegate, an officer of the Department or the Tribunal performing a function or purpose under the Act, “a *bogus document* or cause such a document to be so given, presented, produced or provided” [emphasis added].
5. The term “bogus document” has at all relevant times relating to the appellant’s circumstances been defined in the following terms (notwithstanding that the definition of the term is now contained in s 5(1) of the Act rather than, as it was, in s 97 of the Act, with no change to the text):

***bogus document***, in relation to a person, means a document that the Minister *reasonably suspects* is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

[non‑bold italic emphasis added]

1. At the centre of the matter before the delegate and the review before the Tribunal was whether the appellant had given incorrect answers in completing his visa application form and whether he had provided bogus documents in relation to a contended proceeding before an Iranian Court and, in particular, a document described as a contended “verdict” document (and an arrest warrant) concerning particular criminal proceedings. These documents (and matters reflected in particular answers) had been relied upon by the appellant as a basis for asserting a well‑founded fear of persecution should he return to Iran. The delegate concluded that the documents were bogus documents and that the appellant had not completed answers correctly on the visa application form, which resulted in the cancellation of his protection visa.
2. The Tribunal affirmed that decision.
3. The primary judge concluded that the Tribunal had not engaged in jurisdictional error (on any contended ground advanced before the primary judge) in affirming the delegate’s decision.
4. The appellant now contends for error on the part of the primary judge. The appellant has filed a notice of appeal but now seeks leave to rely upon affidavit material which annexes a proposed amended notice of appeal by which the appellant seeks to rely upon additional grounds of error on the part of the primary judge. The appellant also seeks to adduce fresh evidence in support of the appeal. It will be necessary to address each of these matters.
5. Before doing so, it is necessary to explain some of the background circumstances.
6. The appellant applied for the visa on 3 February 2011. In support of the application, the appellant submitted a number of Iranian documents with translations. Included in those documents was a document referred to as the verdict document in support of the claim that the appellant had been sentenced in Iran to a period of imprisonment. On 15 October 2013, the appellant was given, under s 107 of the Act, a *Notice of Intention to Consider Cancellation* of the visa under s 109 of theAct (the “NOICC”). The NOICC noted that the Minister’s delegate considered that the appellant had not complied with ss 101 and 103 of the Act and that his visa may be cancelled on those grounds. The NOICC identifies factual contentions suggesting non‑compliance with ss 101 and 103 of the Act.
7. The concerns identified in the NOICC were these:
	1. During the period that the appellant’s protection visa application was being considered by the Department, the appellant had approached the Iranian Embassy in Canberra (thus dealing with Iranian officials) concerning a power of attorney which had been submitted as part of his wife’s visa application process, notwithstanding that he had claimed that he feared persecution from the Iranian government.
	2. The appellant had left Australia in reliance upon a travel document described as a *Titre de Voyage* (a document issued by Australian authorities to persons recognised as refugees), on 29 May 2011 (six weeks after the grant of the protection visa on 14 April 2011), travelled to *Tehran* and returned to Australia on 9 July 2011. The concern recited in the NOICC was that if the travel document was used by the appellant to enter Iran, he would have had to apply for a visa from the Iranian authorities and would have had to announce his presence to those authorities. If, however, the appellant had used his Iranian passport (which he still held), use of that passport would also have announced his presence in Iran to the Iranian authorities. The NOICC notes that the appellant’s return to Iran was documented by flight records that show that the appellant arrived in Tehran on 30 May 2011 (from Dubai, Emirates Flight EK971) and departed Tehran on 8 July 2011 (to Dubai, Flight EK974), suggesting a period of approximately five weeks in Iran.
	3. The incoming passenger card filled out by the appellant when returning to Australia recites, however, that the appellant had spent most of his time in the United Arab Emirates.
8. In relation to the “verdict” document, the NOICC put these matters to the appellant (at p 4 of the document):

You gave a document in Farsi and an English language translation of that document called “The verdict” in support of your application for a protection visa. The document in Farsi was purportedly issued by the ‘Esfahan appeal court – sixth division’. In September 2013 these documents were sent to the Australian embassy in Tehran for checking [although] Iranian authorities were not contacted [so as to avoid disclosure of any matters relating to the appellant].

1. The NOICC then quotes, at p 4, the written expression of opinion by a departmental integrity officer in the Australian Embassy in Tehran in these terms:

I examined the details of the “verdict” issued by the Branch # 6 of Esfahan Court of Appeal to find that the document bears neither the signature nor the stamp of the relevant branch. It is [the practice] that such [an] official document should at least bear the stamp of the issuing authority.

…

The name of the [lawyer] acting on behalf of [the appellant] has been given on the “Verdict” to be a certain lawyer by the name of [Mr X, and the name here is anonymised for present purposes but recited in full in the NOICC]. I was able to locate the lawyer on his cell phone number which I could obtain from [the] Esfahan bar of lawyers. The lawyer, [Mr X], stated [that] he had never heard of a client by the name of [the appellant], and that he (the lawyer) would not accept the files from the clients who have been accused of [conduct] against Iran’s internal security.

1. The NOICC then recites (at p 4) the concern put to the appellant (for comment), in these terms:

It is difficult to understand why the document in Farsi translated as ‘The verdict’ does not show the signature or the stamp of the issuing authority and reads [that] you were represented by a lawyer who does not recognise your name and does not take on cases involving Iran’s internal security. These things alone indicate that the document is not genuine. Further, despite arriving and departing Iran through an international airport and despite being in Iran for about five weeks you were not arrested indicating authorities had no interest in you which is consistent with [‘The verdict’] document being a fake and there actually being no conviction in existence upon which authorities might have arrested you.

Overall, your actions have not been those of a person who feared contact with the Iranian authorities in Australia or Iran. There are indications ‘The verdict’ document upon which your protection claims were based is not genuine. When returning to Australia you did not disclose the fact you had stayed five weeks in Iran.

1. Having recited those matters (and the earlier references), the delegate recites (at p 4) that “[b]ased on the information currently before me, I am satisfied that you did not fear imprisonment if you returned to Iran”. At p 5, the delegate essentially repeats the matters of concern as quoted at [15] of these reasons and concludes, in terms of the statutory text of the definition of “bogus document”, as follows:

I reasonably suspect that the document in Farsi translated as ‘The verdict’ is counterfeit in that it has been created to be passed‑off as a genuine document or it is another genuine document that has been altered in some way so that it looks to be a genuine court document.

1. The delegate then concluded that based on the information before him, he was satisfied that the document in Farsi translated as “The verdict” is a “bogus document” in terms of the Act. The delegate concluded that the document fell within s 103 of the Act and thus the appellant had not complied with the requirements of that section: see [4] of these reasons.
2. As to s 101 of the Act, the delegate concluded that the following answer to the question, “[w]hat do you think may happen to you if you go back to that country?” was an incorrect answer:

My fear is imprisonment. As you can see in the attached documents, I have received a verdict which sentenced me to 6 years imprisonment and 10 years Prohibition of social activities which means that I will also lose my job. But the worst thing in this matter is they have sentenced me on the wrong allegations and wrong and unfair accusations. …

1. On 29 October 2013, the appellant provided a written response to the NOICC.
2. In the response, the appellant said that he was prepared to go to the Iranian Embassy in Canberra because a lot of inquiries had been made as to how officials in the Embassy would deal with an Iranian refugee. He said that he went to the Embassy in relation to the power of attorney and produced his birth certificate but not his passport. He also said that he had spent his entire time in the United Arab Emirates and had never entered Iran. As to the verdict, he said that the document “does bear the stamp of the ‘Esfahan Appeal court division’” and that the “stamp is the top right stamp down the bottom of my verdict and this is exactly consistent with your departmental officer words in Iran who has examined my verdict”. As to the lawyer, the appellant said, in effect, that his lawyer had denied that he had acted for the appellant because the lawyer was “scared and intimidated by the Iranian intelligence ministry”. As to entry into Iran, the appellant again asserted that he had *never* travelled to Iran since the grant of the protection visa and had spent the entire five weeks overseas in Dubai staying in a friend’s house.
3. On 18 September 2014, the Department of Immigration and Border Protection commenced an assessment described as an *International Treaties Obligations Assessment* (“ITOA’) as part of the process of assessing whether the appellant’s protection visa was to be cancelled (or not) and also to assess whether the circumstances of the appellant’s case engaged Australia’s *non‑refoulment* obligations. The assessment was completed on 11 June 2015 with a finding that Australia’s non‑refoulment obligations were not engaged in the appellant’s case.
4. As a part of that process, the appellant was interviewed on 5 March 2015. In that interview, the appellant accepted that notwithstanding his response to the NOICC, he *in fact* had travelled to Iran and had not spent the entire five weeks in Dubai. His explanation for the contrary assertion in his written response of 29 October 2013 was that he was afraid that he might be returned to Iran. He said that he travelled to Iran to see his mother who was very ill and near death. As to his documents, the appellant said, in the course of the interview, that unfortunately he had lost his passport, his birth certificate and other documents. He said that his son had accidentally thrown a box containing all of his documents into the rubbish bin.
5. In the course of the interview, the appellant asserted that he was subject to a pending term of imprisonment in Iran of six years and a 10 year ban on involvement in public life. In the interview, the departmental officer observed that the change in position about travel to Iran called the appellant’s credibility into doubt. The appellant asked how he could demonstrate that the verdict document was a genuine document. The departmental officer observed that a copy of the verdict document had already been submitted and examined by a departmental officer in Tehran as a result of which its authenticity had been questioned. The appellant was asked whether that was his only copy of the document and he responded that he had another copy of the document.

## The delegate’s decision

1. These matters were considered by the delegate. The appellant’s visa was cancelled under s 109 of the Act on 24 July 2015. The decision was supported by detailed reasons given by the delegate.
2. The delegate observed that the appellant’s willingness to knowingly make incorrect statements that he did not return to Iran in 2011 significantly undermined his general credibility. The delegate did not accept the appellant’s explanation of having successfully entered and left Iran by bribing relevant Iranian officials. As to the verdict document, the delegate said this:

The [NOICC] explained [that] ‘the verdict’ shows neither the signature nor the stamp of the Esfahan Appeal Court Division. The visa holder submitted [that] the missing stamp “is the top right stamp down the bottom of my verdict and this is exactly consistent with your departmental officer words in Iran who has examined my verdict”. The stamp the visa holder says is from the court appears to be the slightly fuzzy, black, rectangular stamp third from the left [on the document the relevant portion of which exhibiting the stamps is reproduced in the delegate’s decision].

About one week after the protection visa was granted the visa holder provided further documents to the department. His reason is unclear. Documents included a photograph of his second wife, evidence of him receiving a Ministry of Education pension, and a document in Farsi with no translation that appeared to be nearly identical to ‘the verdict’ given with the application. These documents had gone unnoticed by me at the time of sending the [NOICC].

[The delegate then reproduces a section of this other document given after the grant of the protection visa which shows a single rectangular stamp].

I asked departmental staff in Tehran to comment on this document. I was informed the stamp in question can be translated as “Original Sighted, Esfahan court of Reconsideration”, however, “anyone can design these sort of stamps and have them made easily for them at the bizarre”.

I now accept that ‘the verdict’ given with the [NOICC] does show a stamp purportedly from the Esfahan Appeal Court but I do not consider this particular stamp is significant. I have little doubt the officer in Tehran who first said there was no stamp meant there was no official stamp from the particular branch of the court that is said to have issued the original document. The visa holder did not comment about why the document does not show a signature.

Overall, the document is not convincing in appearance and it reads the visa holder was represented by a lawyer who does not know his name and who does not take on cases involving internal security. Despite twice passing through the airport and staying about five weeks in Iran he was never arrested indicating authorities had no interest in him which is consistent with there being no conviction in existence upon which authorities might have arrested him. *Together*, these things indicate to me that the document is not genuine and that it was not issued by the Esfahan appeal court – sixth division.

[emphasis added]

1. The delegate concluded that he reasonably suspected that the document was counterfeit and thus it was a “bogus document” of the type described in s 5(1)(b) of the Act.
2. In the result, having considered the operation of s 108 of the Act and the appellant’s written response to the NOICC, the delegate concluded that the appellant had failed to comply with s 101(b) and s 103 of the Act. Having considered s 109 of the Act and the prescribed circumstances set out in Reg 2.41, the delegate exercised a discretion to cancel the appellant’s visa under s 109 of the Act.

## The decision of the Tribunal

1. The Tribunal’s decision of 5 June 2016 is best reflected in its own language.
2. At [37], the Tribunal said this:

As set out above, [the appellant] does not contest the fact that, as referred to in the decision under review …, he returned to Iran travelling on his Iranian passport on 30 May 2011 and that he left on 8 July 2011 using the same passport. *Contrary* to his representatives submissions, I consider that [the appellant’s] return to Iran on his Iranian passport is clearly *relevant*, as a matter of *logic*, to whether it is true that, as he said in his application for a protection visa, he *feared imprisonment* if he returned to Iran and also to whether the purported court verdict which he produced, sentencing him to imprisonment, is a genuine document. …

[emphasis added]

1. The Tribunal then notes the appellant’s evidence that he returned to Iran to see his dying mother; that his brother in Iran bribed an officer at the airport to allow him to enter and leave Iran; that he had been scared to return to Iran but his mother was on her deathbed and he took the risk of returning having paid a lot of money to enable him to do so. At [38], the Tribunal said this:

[Having expressed some observations about ease of crossing borders and related matters, the Tribunal continued] … it is *difficult to accept* that [the appellant] would have been able to leave Iran if he had in fact been sentenced to six years’ imprisonment on national security charges as he claimed. … He said that his travel to Iran and the whole thing had been arranged by his two brothers and that he had not had anything to do with the planning of it, especially since he had had no information about the fact that he was not allowed to go back to Iran with a protection visa. However, it is not the case that [the appellant] was not allowed to go back to Iran because he had been granted a protection visa: if the holder of a protection visa returns to the country where they have said they fear being persecuted this is obviously relevant to whether they in fact ever had a well‑founded fear of being persecuted if they return to that country.

[emphasis added]

1. The Tribunal then recites at [39] that it has taken into account the appellant’s desire to see his dying mother and the arrangements made by his brothers to enable that to occur and then expressed these observations at [39]:

I do not accept on the evidence before me that it is *credible* that he would have taken the risk of returning to Iran travelling on his Iranian passport, passing through the airport, and leaving again in the same way, if it were true that, as he has claimed, he has been sentenced to six years’ imprisonment in Iran. I consider that his decision to return to Iran in this way logically demonstrates that he did not in fact fear being imprisoned and that it also demonstrates that the court verdict which he produced indicating that he has been sentenced to imprisonment is not a genuine document. I find that he breached paragraph 101(b) of the Act by claiming in his application for a protection visa that he feared imprisonment if he returned to Iran which was incorrect and he breached section 103 of the Act by producing a bogus document, namely the court verdict dated 23 January 2011. For these reasons, I find that there was non‑compliance with paragraph 101(b) and section 103 of the Act by the [appellant] in the way described in the section 107 notice [NOICC].

[emphasis added]

1. In the result, the Tribunal affirmed the delegate’s decision.

## Federal Circuit Court proceedings

1. The procedural history of the Federal Circuit Court proceedings is a little complicated. The appellant was, over the course of the proceedings, represented by three sets of legal representatives. The appellant was initially represented by a solicitor. He was then unrepresented for a significant period of time. By the time of the initial hearing on 11 June 2019, counsel appeared on his behalf, representing him on a “direct access” basis.
2. The hearing on 11 June 2019 was adjourned due to the appellant’s reliance on an *amended application* made immediately prior to the hearing, having regard to arguments which were developed during the course of the hearing. The hearing was adjourned to enable the first respondent to file further evidence and submissions with a view to the matter being determined on the papers. Part of the further evidence to be provided concerned documents not contained within the Court Book which the primary judge considered to be relevant as they concerned copies of the “verdict” document referred to in email communications included in the documents the subject of a certificate under s 438 of the Act (the importance of which is discussed later in these reasons). Following the hearing, counsel for the appellant became unavailable due to health issues.
3. Incoming counsel was then appointed to represent the appellant instructed by new solicitors.
4. The proceeding before the primary judge was listed for a further hearing on 25 October 2019. By that time, further evidence of the first respondent had been filed as well as an affidavit from the appellant. The appellant’s affidavit was admitted by the primary judge although only for limited purposes. At the further hearing, the appellant’s counsel advised the primary judge that the appellant relied on the grounds as advanced by his previous counsel at the hearing on 11 June 2019.
5. By the amended application, the appellant contended that there were two certificates issued under s 438 of the Act and that neither of these had been disclosed to the appellant by the Tribunal: one dated 24 August 2015 and one dated 4 November 2015.
6. Section 438 of the Act provides that the section *applies* to a document or information if the Minister has certified that the disclosure of any matter contained in a document, or the disclosure of information, would be contrary to the public interest for any reason specified in the certificate (that meets the elements of s 438(1)(a) of the Act). Alternatively, if the document, any matter contained in the document, or the particular information was given to the Minister, or to the Department *in confidence*, s 438 also applies. If the section applies, and if in compliance with a requirement of the Act, the Secretary gives a document or information (to which s 438 applies) to the Tribunal, the Secretary “must” notify the Tribunal in writing that the section applies to the document or information and “may” give the Tribunal advice about the significance of the document or information: s 438(2)(a) and (b). If the Tribunal is given a document or information and is notified that s 438 applies in relation to it, the Tribunal “may”, for the purpose of exercising its powers, have regard to any matter contained in the document or information (s 438(3)(a)) and it “may”, if it thinks it appropriate to do so (having regard to the Secretary’s advice, if any), “disclose any matter contained in the document, or the information, to the applicant”.
7. Later in these reasons, I will return to s 438 and its relationship with the certificate dated 24 August 2015.
8. During the 11 June 2019 hearing, counsel for the appellant, Mr Williams, clarified that there was only a single ground on which the appellant relied, being the non‑disclosure of the s 438 certificate dated 24 August 2015 and the documents the subject of that certificate: primary judge, [30]. It was submitted that the non‑disclosure of the certificate and the documents and information referred to in it gave rise to a “practical injustice” in the conduct of the review before the Tribunal of the delegate’s decision.
9. As to the second s 438 certificate issued on 4 November 2015, it was agreed that it concerned only documents that went to the appellant’s identity and did not give rise to any practical injustice to the appellant by reason of the non‑disclosure of the certificate or the documents the subject of the certificate: primary judge, [31].
10. The submissions for the first respondent in the present proceedings usefully summarise the material disclosed in the documents the subject of the 24 August 2015 s 438 certificate. These passages have been extracted below:

21. … The post [(Australian Embassy in Iran)] was asked to make inquiries about whether it was possible to confirm that the arrest warrant and conviction were genuine and whether the lawyer could be contacted (p 55). The post advised it was not possible to make inquiries directly with any government or judiciary organisation and the only possible route was through the Ministry for Foreign Affairs. At p 56, the post advised that the lawyer was contacted and had stated that he had never heard of the appellant, nor would he accept a case involving an accusation of breach of Iran’s internal security. The post also advised that, from an inspection of the document, it did not have the signature of the stamp of the relevant branch.

22. The officer then noticed another document in the bundle of material provided to the Department which was thought may be relevant (at p 54). At p 53, the post confirms that the additional document is not relevant and also now confirms that there is a stamp on the verdict document which states “Original Sighted, Estafan court of Reconsideration” but that such a stamp can be easily made in the bazaar. This information is replicated at the documents at pp 36-39 which appears to be a duplicate. The information is also replicated, although in an email format rather than report format throughout pp 6-35.

1. In the 11 June 2019 hearing before the primary judge, the appellant contended that there had been jurisdictional error on the part of the Tribunal in reaching its decision as the Tribunal had failed to disclose the existence of the 24 August 2015 s 438 certificate. As to the *materiality* of the email communications included in the documents the subject of that certificate, Mr Williams focussed on the steps taken to verify whether the “verdict” document was genuine. Mr Williams referred to the step taken to send a document to Australian authorities working in Iran, and steps taken to contact the lawyer said to have represented the appellant. In one of the emails sent during the course of these steps (namely the one dated 9 October 2013), there is a reference to an “attached document that appears to be the ‘Verdict’ document”, as well as another document that “does show signatures and a wet [weak] impression” (the document bearing the page number marking in handwriting “86” in the top right‑hand corner).
2. Both documents had been provided by the appellant.
3. Counsel for the appellant before the primary judge submitted that the effect of the email communications meant that the officer who reviewed the document, had a copy of the “verdict” document without the relevant stamp and signature and submitted that the person who assessed the document did not have the correct copy, that is, the one showing the signature and stamp impression. Further, counsel before the primary judge submitted that as no *formal verification* had been made by the Department, and the appellant was not privy to the information in the documents the subject of the s 438 certificate, the appellant “was denied procedural fairness giving rise to a practical injustice”: primary judge, [38].
4. At [39], the primary judge observed that the circumstances of the case presented difficulty in accepting the appellant’s submissions on the materiality of the non‑disclosure of the s 438 certificate and the documents and information referred to in it. At [39], the primary judge said this:

The difficulty with the applicant’s case is that the a*pplicant was squarely on notice of the substance of the communications and information* the subject of the relevant s 438 certificate. *All those matters* the subject of the s 438 certificate in respect of the *lawyer not knowing* the applicant and *not representing* clients in proceedings of the kind the applicant alleged, the issue of the *genuineness* of the verdict document, the concern in relation to the *stamp* and the *authenticity* of the same *were identified in the notice of intention to cancel*. The genuineness of the verdict document was *squarely raised by the Tribunal member* with the applicant *at the hearing*.

[emphasis added]

1. At the hearing on 25 October 2019 before the primary judge, the appellant’s new counsel, Mr Anforth, contended that by reason of the non‑disclosure of the 24 August 2015 s 438 certificate documents, the appellant had lost the opportunity of being able to “input further” on the verdict document the subject of “some assessment” as to its authenticity: primary judge, [43]. The primary judge observed that the topic of the authenticity of the verdict was addressed “at length” in the delegate’s decision, which, of course, was provided to the appellant and was the subject of review before the Tribunal. Further, the primary judge observes at [44]:

The delegate’s decision made 31 July 2015 *put up in lights* the fact of two different verdict documents that had been provided *by the applicant*. One version had been attached to the notification of cancellation under s 109 of the *Act*. The delegate’s decision identified information in respect of the lawyer denying that the applicant was his client in the context of considering whether the verdict document was genuine.

[emphasis added]

1. The primary judge notes that the delegate’s decision identified a second “nearly identical” copy of the verdict document in Farsi (with no translation) which had been provided to the Department by the appellant in a bundle of further documents one week after the protection visa was granted. This version of the verdict document displayed *one* of the stamps but *no signature*. The relevant portion of each verdict document is reproduced in the delegate’s decision: Appeal Book, pp 332‑3. The extract of the verdict document reproduced in the delegate’s decision marked with *four stamps* and a *signature* is described in this way: “Bottom part of ‘the verdict’ as given **with** the protection visa application and given **with** the [NOICC]” [emphasis added]: Appeal Book, p 332. Immediately following that extract, is the extract of the second document (the one with only one stamp but no signature) described by the delegate in this way: “Bottom part of ‘the verdict’ as given **after grant** of the protection visa” [emphasis added]. It would be convenient to reproduce (for ease of reference here) in these reasons the two extracts. However, with a view to avoiding any risk to the anonymity of the appellant, neither extract is reproduced here. Immediately following the reproduction of the bottom section of the verdict document provided by the appellant *after* the grant of the protection visa, the delegate makes these observations (at p 333):

I asked departmental staff in Tehran to comment on this document. I was informed the stamp in question can be translated as “Original Sighted, Esfahan court of Reconsideration”, however, “anyone can design these sort of stamps and have them made easily for them at the bazaar”.

I now accept that ‘the verdict’ document given with the notice does show a stamp purportedly from the Esfahan Appeal Court but I do not consider this particular stamp is significant. I have little doubt the officer in Tehran who first said there was no stamp meant there was no official stamp from the particular branch of the court that is said to have issued the original document. The visa holder did not comment about why the document does not show a signature.

1. This sequence of observations on the part of the delegate was discussed by the primary judge and led to the primary judge’s observations at [51] to [53] of his Honour’s reasons in the following terms:

51. The applicant was clearly on notice of the substance of the two different versions of the verdict, which the applicant himself had supplied, and was on notice as to the issue of assessment of authenticity. The assessment issue as to authenticity made reference to the absence of a stamp, meaning there was no official stamp from any particular Branch of the Court. In these circumstances, the applicant suffered no practical injustice by reason of the non‑disclosure of the certificate or the documents the subject of the certificate in the present case.

52. Mr Anforth in his submissions sought to annex only the two summonses and the verdict documents the subject of argument as to why the applicant had suffered a practical injustice. Mr Anforth submitted that the applicant lost the opportunity to press for a formal verification by the Iranian Ministry of Foreign Affairs.

53. It was perfectly apparent in both the notice of cancellation [NOICC] and the delegate’s decision that no such formal verification had taken place, nor could such a verification take place as it would clearly not be possible in the context of preserving the applicant’s anonymity and from preventing crystallisation of the applicant’s claimed fears of harm. The absence of reference to the Iranian Ministry of Foreign Affairs for verification does not identify any practical injustice suffered by the applicant in the process of the review [by the Tribunal] by reason of the non‑disclosure of the certificate and documents the subject of the certificate.

[emphasis added]

1. The primary judge therefore did not accept that there was any information in the documents the subject of the s 438 certificate that could be said to be *material* and of which the appellant was *not* squarely on notice. It followed for the primary judge that the appellant suffered no practical injustice by reason of non‑disclosure of the certificate or the documents the subject of that certificate. Further, the appellant was aware of the delegate’s information regarding the verdict document; facts concerning his overseas travel and return to Iran; and the issues concerning the purported use of a lawyer in Iran. The primary judge found that there had been no practical injustice in the circumstances and that there had been no jurisdictional error on the part of the Tribunal.

## Issues on appeal

1. The appellant now contends for five grounds of appeal in an amended notice of appeal (an additional three grounds to those set out in the initial notice of appeal) and applies for leave to adduce fresh evidence.

## Fresh evidence application

1. The relevant provisions are s 27 of the *Federal Court of Australia Act 1976* (Cth) (which provides a discretionary power in the Court to receive further evidence on appeal), and r 36.57 of the *Federal Court Rules 2011* (Cth), which concerns an application for leave to adduce further evidence when the Court is exercising its appellate jurisdiction. The first respondent identifies, in particular, r 36.57(2)(d), which requires (amongst other things) an explanation as to why such evidence was not adduced in the court below.
2. In a decision engaging with the exercise of the discretion to admit fresh evidence on appeal, the Full Court in *NASB v Minister for Immigration and Multicultural Affairs and Citizenship* [2004] FCAFC 24 at [42] identified two conditions that ought to be satisfied in order to receive further evidence:

… **first**, the party seeking to adduce the evidence must show that it could not, with reasonable diligence, have been adduced at the trial; and, **secondly**, the evidence must be such that very probably the result would have been different. … The second condition has been variously expressed in the cases, but the point made in all of them is that it is not enough that the new evidence was relevant and otherwise admissible, and may have affected the result. Language referring to, at the lowest, ‘probability’, and at the highest, ‘certainty’, of a different result, has been used …

[emphasis added]

1. The appellant seeks leave to adduce four further pieces of evidence. As to the first condition, the appellant submits that he did not have the “fresh evidence” until “two months ago”.
2. Specifically, the *first document* comprises two pages annexed to the appellant’s 2 September 2020 affidavit filed in support of the appellant’s application to adduce further evidence (the “Further Evidence Affidavit”) at BZS‑2. The first page is described as a *translation* of the original lower court verdict document (the verdict document provided in support of his application for the protection visa described as being the “appeal court” verdict document) and the second page is described as a copy of the original lower court verdict document. The date of translation appearing at the top of the document is 1 April 2020. Although that date is after the conclusion of the Federal Circuit Court proceeding, it is a translation of a document that predates the appellant’s application for the protection visa.
3. The *second document* is described as the “original subpoena” from the “same Appeal court in Iran” that affirmed the imprisonment sentence and is annexed to the Further Evidence Affidavit at BZS‑3. It also contains a translation of the “original subpoena” which is dated 30 May 2020. Again, although this date is after the conclusion of the Federal Circuit Court proceeding, it is also a translation of a document that predates the appellant’s application for the protection visa.
4. The appellant’s explanation as to why this fresh evidence was not in his possession “until very recently” is that he recently asked his brother and his family in Iran “to dig in all [his] belongings before [he] left Iran in 2011 and try to find any original document of [his] matter in Iran”: appellant’s submissions, [5]. The documents at BZS‑2 and 3 are said to be documents the appellant’s family found when conducting that search and were only sent to the appellant in March 2020. As the first respondent correctly observes in submissions, there is no explanation as to why this request could not have been made in 2013 when the appellant received the NOICC, or any time thereafter leading up to and during the Tribunal proceeding (or the Federal Circuit Court proceedings).
5. The *third document* is annexed to the Further Evidence Affidavit at BZS‑4 and is a letter from the Iranian court that bears the date 21 July 2020. The translation of the letter (which was prepared on 1 August 2020), indicates that this letter confirms a sentence of six years imprisonment ordered against the appellant, and it also notes that the appellant has not “commenced his serving time yet”. The appellant explains that he acquired this document recently after his “brother in Iran went through an ordeal and miles out of his way to obtain this confirmation from the appeal court in Iran”. The first respondent accepts in submissions that this document appears to have been recently obtained. Nevertheless, the first respondent contends that the document concerns circumstances that occurred in 2011 and issue is again taken with the lack of explanation as to why such a document was not requested and obtained earlier.
6. The *fourth document* is a report from the *Public Library of US Diplomacy* annexed at BZS‑5 to the Further Evidence Affidavit. This document bears the date “8/18/2020” in the top left corner of each page. However, it concerns a decision made on 15 May 2006. Again, the first respondent contends that no explanation has been provided by the appellant as to why the search he conducted to obtain this document could not have been completed prior to the Tribunal proceeding (or the Federal Circuit Court proceedings).
7. The appellant also seeks to rely on the document at BZS‑1 of the Further Evidence Affidavit, which appears to be a downloaded version of the *Code of Procedure of Public and Revolutionary Courts of the Islamic Republic of Iran*. This document is the same document that the appellant sought to rely upon before the primary judge. The primary judge admitted the document *subject to* relevance, but ultimately excluded it as not relevant.
8. In terms of the explanation provided by the appellant as to why the four new documents that the appellant now seeks to adduce on this appeal were not available earlier, I am not satisfied that the request made of his brother in Iran to conduct a search of his possessions or to obtain a letter to the effect of the letter at BZS‑4 could not have been made earlier such that, at the very least, the documents could have been made available to the primary judge to consider in the Federal Circuit Court proceedings (subject to admissibility in those proceedings in any event). Similarly, I am not satisfied that the report from the *Public Library of the US Diplomacy* could not have been obtained through a search conducted prior to the hearing of the Federal Circuit Court proceeding.
9. Nevertheless, I will now consider the relevance of each of these documents, in any event.
10. The appellant makes the following submissions as to the relevance of each of the four new documents.
11. As to the first two documents (which comprise copies of the Iranian documents and corresponding translations, and concern the lower court verdict and subpoena issued in the appeal proceedings), the appellant submits these documents demonstrate as a matter of fact that the previously provided verdict document “was not ‘bogus’”. As to the third document, which is the letter from the Iranian court, the appellant submits this document further confirms as a matter of fact that he *does have* a conviction in the Appeal Court in Iran. As to the fourth document, the appellant submits that this document “clearly reports that an Iranian dissident student who was serving his time in jail and had come out on leave only temporarily managed to exit Iran undetected by bribing the airport officials”. The appellant argues that this supports his assertions on the facts before the Tribunal that he *was able* to enter and exit Iran in 2011 by bribing airport officials, even with a jail sentence ordered in his name.
12. The first respondent submits that once the primary judge had determined that there had been no practical unfairness in failing to disclose the s 438 certificate by the Tribunal, the documents the appellant now seeks to rely upon could not be *relevant* to any issue before the Federal Circuit Court as they were not material provided to or considered by the Tribunal. Further, once the primary judge had concluded that the appellant was *on notice* of all of the issues arising from the references covered by the certificate, whether through the NOICC or the delegate’s decision, the time for providing the further evidence and seeking to rely upon it was when the matter was before the Tribunal.
13. The first respondent contends that jurisdictional error cannot arise in relation to the Tribunal’s treatment of this issue by relying on information or material *not before* the Tribunal when the decision was made, in circumstances where the appellant was found to have been on notice of the issue of the genuineness of the verdict document and the circumstances relating to that matter which the Tribunal was considering.
14. The first respondent contends that what the appellant is, in effect, seeking to do is to engage in an impermissible review of matters of fact found by the Tribunal (otherwise called merits review) by inviting this Court to consider material which was not before the Tribunal in order to impugn the Tribunal’s findings about the factual issue of whether the verdict document was genuine or not.
15. As mentioned later in these reasons, I am satisfied that the primary judge did not err in finding that there was no jurisdictional error in the Tribunal’s decision due to the failure to disclose the s 438 certificate and the documents the subject of that certificate. I am satisfied that the primary judge was correct to conclude that the appellant was on notice of all of the issues arising from the material referred to in that certificate. I accordingly accept the first respondent’s submissions that the fresh evidence the appellant now seeks to rely upon is not relevant to the present appeal as a contended basis for impugning the decision of the Tribunal. The decision of the primary judge could not have been different because the fresh evidence could not have made a difference in the primary judge’s determination of whether the *Tribunal* fell into jurisdictional error when it made its decision.
16. As to the document at BZS‑1 of the Further Evidence Affidavit, the appellant again is faced with the same problem. The Court is not in a position to receive fresh evidence that seeks to be used to show that the Tribunal made an error of fact in assessing the documents (and contentions about the verdict document) put to it by the appellant, in support of a contention that the primary judge fell into *appellable error* by failing to find *jurisdictional error* on the part of the Tribunal when it failed to accept the verdict document as a genuine document. I am satisfied that the document is not admissible for the purposes of establishing contended jurisdictional error on the part of the Tribunal.
17. It follows that the appellant’s application for leave to rely upon fresh evidence must be refused.

## Grounds of appeal

### Grounds 1 & 2

1. In the initial notice of appeal, the appellant relied on two grounds:

1. The Judge has erred in paragraph 52 & 53 of the Judgement that my barrister ever asked that my documents should have been sent to the Iranian Ministry of Foreign Affairs for verification.

2. The Judge has erred in paragraph 3 of the Judgement about my appearance in the court in Iran.

1. As to the first of these grounds, the cited passages of the primary judge’s reasons concern the finding that (contrary to the appellant’s submission that the appellant had lost the opportunity to press for formal verification of the verdict documents by the *Iranian Ministry of Foreign Affairs*), the appellant had suffered no practical injustice. The primary judge concluded that this was so because it was “perfectly apparent” in both the NOICC and the delegate’s decision that no such formal verification had taken place and “nor could such a verification take place as it would clearly not be possible in the context of preserving the applicant’s anonymity and from preventing crystallisation of the applicant’s claimed fears of harm”: primary judge, [53].
2. The appellant, in this first ground of appeal, seeks a finding that the primary judge fell into error in noting that his counsel had ever asked for his documents to be sent to the Iranian Ministry of Foreign Affairs for verification. The reasons of the primary judge do not make such an observation. Rather, they speak to a contended lost opportunity to press for a “formal verification” by the Ministry. It is clear that the appellant was on notice that the Iranian authorities would not be contacted in order to verify the authenticity of the documents in order to preserve the anonymity of the appellant. At [53], the primary judge recognises that the foundation of the appellant’s visa is a “protection” visa as he claims a well‑founded fear of persecution should he return to Iran and thus the preservation of the anonymity of the appellant was one of the matters relevant to “preventing [the] crystallisation of the [appellant’s] claimed fears of harm”.
3. The second ground refers to an error in [3] of the reasons of the primary judge. That paragraph merely recites background facts alleged by the appellant (and other background facts as put to the appellant in the NOICC dated 15 October 2013). Paragraph [3] is in these terms:

The [NOICC] referred to the applicant alleging he had hired a lawyer and on 25 June 2009, attended Court in relation to ‘committing crime against Iran internal security and giving propagandas against the Government’. The notice noted that, on 24 September 2009, the applicant attended Court in relation to ‘committing crime against the Iran internal security and giving propagandas against the Government’. The notice referred to the applicant arriving in Australia on 16 November 2010 and that, on 23 January 2011 and whilst the applicant was in Australia, an appeal Court sentenced the applicant to one year’s imprisonment for ‘propaganda against Iran’, five years’ imprisonment ‘due to co‑operation with Iran’s enemies’ and ‘10 years prohibition on social activities’. The applicant alleged that his lawyer informed him of his sentence.

1. The appellant does not identify any specific error made by the primary judge at [3] of the reasons.
2. The first two grounds of appeal are to be dismissed.

### Amended Notice of Appeal

1. The appellant has also filed an application for leave to file and rely on an amended notice of appeal. The additional grounds of appeal the appellant seeks to advance are set out in BZS‑1, annexed to the affidavit of the appellant filed on 2 September 2020 in support of that application (the “Amended Notice Affidavit”).
2. The three new grounds are as follows:

3. The Primary judge erred in finding that there was no jurisdictional error in the Tribunal’s decision on account of breach of Procedural fairness when the Tribunal failed to disclose the certificate and the documents subject of the certificate.

Particulars

i. By reason of the non-disclosure of the certificate and the documents the subject of the certificate, the appellant lost the opportunity of being able to *input further* on the *version* of the *verdict document* that was the subject of some assessment as to its *authenticity*.

ii. The confusion as to what had been the subject of the examination of the verdict issued by Branch #6 of the Esfahan Court of Appeal was an opportunity that the appellant had lost because of the non-disclosure of the certificate and documents the subject of the certificate.

iii. The appellant lost the opportunity to press for a formal verification of the documents by the Iranian Ministry of Foreign Affairs, in a situation whether the appellant has always maintained that the documents i.e. court verdicts and subpoena were genuine.

4. The Primary Judge erred in concluding that Exhibit C i.e. ‘The Code of Procedure of Public and Revolutionary Courts of the Islamic Republic of Iran (Crime Affairs) could not be received in evidence in respect of the substantive merits and that the document was not admissible to establish any alleged jurisdictional error.

Particulars

i. The document was marked as an exhibit and as such was admissible to establish that the court documents provided by the appellant were not fake rather were in the form as required by the Exhibit C.

5. The Primary Judge erred in not finding that both the determination of the delegate and the Tribunal that the appellant’s court documents were fake and the consequent cancellation of the appellant’s visa were undertaken in an arbitrary fashion and without any independent evidence from the relevant court of appeal or the Iranian authorities.

Particulars

1. It is not in dispute that no formal verification of the Iranian Court orders and a verdict were made by the Department to the Iranian Ministry of Foreign Affairs.
2. The first respondent had the burden to prove that the court documents were fake. The allegation that the court documents were fake is a serious allegation of fraud and as such it required the application of “Briginshaw” standards.
3. The Tribunal engaged in an invalid reasoning process when it made the finding about the genuineness of the court documents on the premises that the appellant had safely entered and exited Iran. This is clearly a mechanical comparison of probabilities and is in breach of the Briginshaw principles.
4. The Tribunal’s finding that the court documents were fake was based on the subjective opinion of the officer of the Australian Embassy in Tehran which evidence is not admissible under section 76 of the Evidence Act 1995 (Cwth) to prove that the court documents were fake.
5. The primary judge erred in not finding that a formal verification of the court documents was required to determine the authenticity or otherwise of the documents.
6. It was unreasonable for the primary judge to conclude that a formal verification could not have taken place in the context of preserving the applicant’s anonymity and from preventing crystallisation of the applicant’s claimed fears of harm.
7. The manner and nature of the alleged contact with the appellant’s lawyer in Iran and the alleged conversation between the embassy officer and the lawyer is insufficient and unsatisfactory for the purpose of establishing that the documents were not genuine.

[emphasis in italics added]

#### Ground 3

1. Ground 3 concerns the primary judge’s reasoning that the failure of the Tribunal to disclose the s 438 certificate of 24 August 2015 (and the documents and information to which it relates) (by not exercising the discretion under s 438(3)(a)), did not constitute a failure of procedural fairness giving rise to jurisdictional error. The contended jurisdictional error is particularised as a lost opportunity of being able to “input further” on the version of the verdict document that was under assessment as to its authenticity (and to seek formal verification of the documents by the Iranian Ministry). The Tribunal reached its decision on a number of grounds (see [29] to [31] of these reasons) including its consideration of, and findings made concerning, the validity of the verdict document submitted to it by the appellant. The procedural fairness role of the NOICC was to put to the appellant for comment the elements of the matters put in support of the visa application (information and documents) by the appellant which were of concern to the decision‑maker. As mentioned in the earlier discussion, it was apparent from the NOICC of 15 October 2013 put to the appellant that the validity of the verdict document was in issue and “squarely raised” with the appellant (see [39] of the primary judge’s reasons). That is why the primary judge extensively described all of the elements of the NOICC and the matters the NOICC put to the appellant for comment: see [2] to [20] of the primary judge’s reasons. See also [11] to [15] of these reasons. Once these matters were put to the appellant and his attention and focus was brought to the concerns raised by the NOICC, he knew and understood that those matters would inform the delegate’s reasoning and, once the delegate’s decision was subject to review before the Tribunal, those matters would also be considered as matters of fact going to the Tribunal’s reasoning and its decision. Ground 3 in substance agitates a ground of contended jurisdictional error as agitated before the primary judge and contends for error on the part of the primary judge in not characterising the Tribunal’s failure to disclose the certificate (and the documents and information the subject of the certificate) as a material breach of procedural fairness.
2. The matters relating to the s 438 certificate of 24 August 2015 as agitated before the primary judge are described at [40] to [47] of these reasons. In this case, the Tribunal had before it the delegate’s decision and the NOICC that had squarely put to the appellant the matters of concern to the decision‑maker about the genuineness of the verdict documents put to the decision‑maker by the appellant.
3. Again, see the primary judge’s discussion at [2] to [20] and the matters at [11] to [15] of these reasons. All of the matters of concern raised by the s 438 certificate were put to the appellant under the NOICC. I am not satisfied that the primary judge fell into error by finding that the Tribunal had not fallen into jurisdictional error.

#### Ground 4

1. As to ground 4 which concerns *The Code of Procedure of Public and Revolutionary Courts of the Islamic Republic of Iran*, I am not satisfied that the document is relevant. It was not a document before the Tribunal. Nor is it a document that is relevant to the question of whether the appellant was denied procedural fairness by reason of the non‑disclosure of the s 438 certificate or the documents referred in it. The document is concerned with the manner in which a verdict may be enforced and filed. It does not address the elements or particularities of what might amount to a “certified copy” of a judgment or verdict. The primary judge did not fall into error in the way his Honour treated that document in the proceedings below.

#### Ground 5

1. As to ground 5, it is important to remember that the decision‑making on the part of the delegate and the Tribunal engages an exercise of administrative decision‑making, not decision‑making in the context of adversarial proceedings. The second thing to remember about ground 5 is that it was not argued before the primary judge and leave is now required to rely upon the ground. By ground 5, the appellant seeks to introduce into a consideration of whether the Tribunal fell into jurisdictional of error, questions of whether the *Briginshaw* (*Briginshaw v Briginshaw* (1938) 60 CLR 336) standard applies in any relevant respect and the extent to which the issue of jurisdictional error on the part of the Tribunal should be a function of an analysis of whether the first respondent bears an *onus* of demonstrating that the verdict document (or documents as put to the delegate by the appellant) is genuine or not. I accept the proposition that these concepts are not appropriate considerations in the context of non‑curial decision‑making processes where parties are not involved in an adversarial contest of opposing arguments. I also accept that the delegate, in exercising the discretionary power under s 109 of the Act, was satisfied that the verdict document was not genuine for a number of reasons including the circumstance, importantly, that the appellant had voluntarily returned to the country in which he claimed to fear imprisonment for six years due to the verdict document. As to that matter, the appellant in his submissions before this Court (on his own behalf) sought to explain that the Department and the Tribunal had not believed his explanation of the basis upon which he was able to enter and exit Iran by bribing airport officials in Iran. The appellant invited the Court to consider his explanation of the basis upon which he was able to enter and exit Iran with a view to the Court reaching its own conclusion about that matter and its relationship with the Tribunal’s rejection of the genuineness of the verdict document. The appellant put it this way at para 4 of his submissions before this Court:

I request the Court to accept my assertion that I was able to bribe the airport officials to enter and subsequently exit Iran in 2011 undetected when I travelled to Iran to visit my dying mother. I risked my life at that time as my love to see my dying mother outweighed my fear of being arrested at that time and I luckily survived.

1. The appellant then goes on to explain that by reference to his fresh evidence, the verdict document of the Iranian Appeal Court is not bogus. These factual matters were matters put to a departmental officer on 27 March 2015 by the appellant’s then authorised representative, Mr Willem Oostdyck of Christopher Levingstone & Associates. In that submission, Mr Oostdyck referred to the appellant’s “compelling circumstances to see his dying mother, who passed away on 16 June 2011” as having “outweighed his fear of persecution by Iranian authorities”.
2. The difficulty is this (and for a person who is self‑represented in matters such as these, the point of distinction is likely to be very difficult to come to grips with). The question is not whether a judge of the Court looking at a body of fact *could* or *would* or *might* come to a conclusion that there is an explanation of contextual circumstances which would cause such a person to reach a particular conclusion on the facts. The question for the primary judge (and for this Court to the extent that an appellant seeks to assert error on the part of the primary judge) was whether the conclusion reached by the Tribunal was open to it on the evidence before it (either as a matter of primary fact or as a matter of inference from other facts). If the conclusion was open and reaching the conclusion was not unreasonable in the legal sense, the primary judge could not set aside the decision of the Tribunal on the ground of *jurisdictional error* and this Court cannot find error on the part of the primary judge in refusing to set aside the decision of the Tribunal. As indicated in the quoted passage at [83] of these reasons, the appellant has requested the Court to accept his assertion that he was indeed able to enter and exit Iran and that being so, in effect, no inference arises about any aspect of the genuineness of the verdict document. Unless there is a deficiency in the *legality* of the decision‑making of the Tribunal giving rise to jurisdictional error (and error on the part of the primary judge), this Court cannot do what is requested of it by the appellant.
3. The appellant also complains that the opinion of an official of the Australian Embassy is not evidence admissible under the *Evidence Act 1995* (Cth). However, the administrative decision‑making on the part of the delegate, and the process of reasoning before the Tribunal, are not subject to the provisions of the *Evidence Act* or the rules of evidence at common law. The decision‑making on the part of the Tribunal involves a process of *administrative decision‑making* in which *inferences* can be drawn from *facts* and *material of relevance* can be taken into account by the decision‑maker in reaching *conclusions* about matters going to such factors as whether the appellant is to be believed about matters put to it in support of a review of the delegate’s decision. The *rules of rationality* apply in evaluating material and, of course, all of the jurisprudence applicable to determining whether the process of reasoning has miscarried in a jurisdictional sense apply. That said, the process before the Tribunal is not an adversarial one.
4. The first respondent also observes, correctly, that the primary judge did not *base his decision* on any finding that verification of the verdict document could not have taken place while preserving the applicant’s anonymity. Rather, the primary judge at [51] to [53] quoted earlier in these reasons was concerned with ensuring that there was no practical injustice to the appellant as it was clear that no formal verification of the verdict had occurred. The matter of very considerable relevance to the primary judge was whether the appellant had been *put on notice* by the delegate and by the NOICC of the matters of concern. The primary judge was satisfied that the appellant’s mind was very clearly drawn to the matters of concern and thus any failure to disclose the certificate was, in the primary judge’s view, not material.
5. The first respondent also correctly observes that the information obtained from the appellant’s lawyer was a sufficient basis for the delegate to conclude that the verdict document was not genuine. It is also important to remember that the issue of the genuineness of the verdict document was not the only factor supporting the Tribunal’s decision.
6. I am satisfied that there is no appellable error demonstrated on the part of the primary judge in not concluding that the Tribunal engaged in jurisdictional error.
7. The orders will be that the application for leave to adduce fresh evidence is refused; the application for leave to amend the Notice of Appeal will be allowed in part as to grounds 3 and 4 but not as to ground 5. The appeal is dismissed. The appellant will be ordered to pay the costs of the first respondent of and incidental to the applications for leave and the appeal.

|  |
| --- |
| I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Greenwood. |

Associate:

Dated: 7 February 2022