

LIV Judicial Review Training Part 2.3

HYPOTHETICAL CASE STUDIES

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Hypothetical #1

A is from Sri Lanka. He is a single father, and arrived in Australia by boat in January 2013, with his 6 year old son. A is Tamil, and claims he would be at risk of being imprisoned and tortured at the hands of the Sri Lankan government, because he would be imputed with a pro-Tamil Tiger political opinion. He also claims that he would be mistreated on return to Sri Lanka, because of his illegal departure from Sri Lanka and because he claimed protection in Australia. He says that he has no close family or friends in Sri Lanka.

The IMA PV Case Officer of the DIPB (the delegate) accepts that A is Tamil, and lived an isolated life with his son in Sri Lanka. The delegate relies on country information that says there is no substantial evidence of Sri Lankan government targeting of Tamils in recent years. The delegate also relies on country information saying that Sri Lankan government officials never hold returned asylum seekers for a period longer than 12 hours and that the conditions of this detention are poor but, for a short period, endurable.

The IAA also finds that the risk of harm to Tamils at the hands of the government has diminished. It relies on a guidance decision which the AAT President has directed be complied with, in assessing the risk of persecution faced by Tamils undergoing processing on return to Sri Lanka. The guidance decision says that the conditions of detention are poor, but that detention of people being returned is usually not for a long period, and would only badly affect people with severe physical or mental health conditions. The guidance decision also notes that many people being returned are bailed by family members or friends, reducing their period of detention. The guidance decision is not given to A to comment.

DISCUSSION

Answers from participants:

- Top priority for JR would be the failure to consider all relevant facts – the DM relied on the guidance decision, not clear that the claims had been given serious intellectual consideration.
- Other pathway – the guidance decision can be distinguished – the facts or circumstances are distinguishable, e.g. this applicant has a son, lived an isolated life with son in Sri Lanka – contrasted with the guidance decision which found friends and family can bail applicant out

Facilitators:

- JT: We would add the grounds that there was a failure to consider arguments:
 - o fail to separately consider claims of son
 - o fail to consider all material, by deferring to guidance and distinguish this case from the facts in guidance
 - MA: I would also add to that – the first challenge on a guidance decision, whether they unlawfully fetter or undermine the power of the IAA. Regardless of the decision, courts would be at pains to knock out guidance decisions.
 - JT: Issue - procedural fairness and guidance decisions, and absence of statutory obligation and apparent exclusion beyond that. The GD will probably be publicly available, so probably that's a non-starter.
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Hypothetical #2

B is from Iran. He worked in a secure militarised zone as a contractor. During the course of the work he took some photos on his camera phone in the zone. B was searched and his phone was discovered. He was detained in Tehran, questioned, accused of acting against the regime and tortured. After he was released from detention, B's home was raided by authorities and his ID documents were taken. B was informed of the raid and made arrangements to flee Iran.

B contacted a smuggler in Tehran who arranged false ID documents and using these B obtained a false passport in the name of Y. B departed from Iran using this passport. On arriving in Australia, B says his name is X. After he arrives in Australia, B's family is questioned and summonses are issued for his arrest. B's business partner sends summonses and a driver's licence in the name of X to him in Australia.

During the assessment of his claims B is asked to give ID documents under s91W(1) and is warned that a visa cannot be granted if he refuses, fails to comply or produces a bogus document. B provides the false driver's licence in the name of X. This is sent to the DIBP's Document Examination Unit who finds it is inconsistent with the security features of a genuine Iranian licence. B also provides the court summonses in the name of X. The DIBP writes to B twice and asks him to provide an explanation.

In his responses, B explains that his name is actually B, not X. He says the primary reason that he gave the name X when he arrived in Australia and continued to use this false name is because he is wanted by the authorities in Iran, and feared that if he gave his real identity, someone in Australia might pass his details to the Iranian authorities. B is scared the authorities will find and bring him to Iran to face charges of acting against the regime, with a potential death penalty. B says that he asked his friend to make the licence in the name of X, and to change the name on the court summonses to X, because he was scared of being found, returned, tortured and killed. B provides his real name and a photocopy of a licence in that name. The delegate accepts that the photocopy is of a genuine licence and does not question it.

The delegate does not accept B's explanation of why he provided false documents as reasonable. The delegate does not accept B's explanation that he provided false documents because of his fear of being found by the Iranian authorities if he used his real name, because the delegate is not satisfied that B is wanted by the authorities. One of the reasons the delegate does not accept this is that the name on the court summonses is not B's real name, so the delegate also considers them 'bogus' documents and does not give them any weight in support of B's claims. Because the delegate does not accept B is wanted by the authorities, the delegate does not accept being wanted is a reasonable explanation for providing bogus documents.

The delegate refuses the application because he found that B did not satisfy section 36(2) of the *Migration Act* 1958 – a non-citizen in Australia to whom Australia owes protection obligations. The delegate also refuses the application under section 91W(2) of the Act because the delegate finds that B provided a bogus document in response to a request under section 91W(1) to produce documentary evidence of his identity, nationality or citizenship, without a reasonable explanation for doing so.

Because the delegate finds that B does not satisfy the criteria under 36(1A)(b) of the Act, the delegate does not consider the criteria under section 36(1A)(a).

The decision record notes that B is an excluded fast track review applicant as defined in the Act. As an excluded applicant, B has no right to merits review. B's Bridging Visa will cease 28 days after being taken to be notified of the decision. He is not eligible for a BV after this time because he is not eligible for merits review. He is informed that if he does not hold another visa, he must depart Australia.

Answers from participants:

- DM makes a completely circular argument – the fact that bogus docs were bogus to prove that reasons for providing them are not reasonable – can't be reasonable.
- Illogicality argument or unreasonable – jurisdictional error – excluded applicant status/conclusive certificate would be undermined.

Facilitators:

- JT – Q to Charlie – relevance of refugee claims in deciding whether someone had a reasonable explanation of providing bogus docs?
- CP – complication, this is an issue we haven't touched on either session – applicants can now be refused PVs because they have provided a bogus doc – can form substantive reason for refusal as well as reasons for refusal to review.
- Question whether DM can determine if there is a reasonable reason for providing a bogus doc without assessing the refugee claim grounds? Question whether an exclusion decision can be properly made - substantive visa assessments are new. No case law guiding how criteria will be applied, overlap between what could be visa refusal – without assessment – and what is a review.
- Circumstances where it may be quite hard – the fact that I'm owed protection is an exceptional circumstance. Not possible to determine whether it is a reasonable explanation unless you know the applicant is fleeing harm. If a delegate goes through this process and doesn't consider those claims, question what effect that has on an exclusion decision.
- JT: HCA if you don't consider protection claims at all in considering whether they had a reason to get a bogus document to get out of the country
- CP – direct appeal to JR on that exclusion decision.
- JT – there are two decisions being made and this raises an interesting question of bias. Subjective element to decision – first DM saying explanation not good enough, refusing visa and excluding from review. There is an argument that the second of those decisions is affected by apprehended bias of the first.
- CP – we were going to seek JR on the basis of the decision
- JP – the first decision is under 91WA and then there is secondly a decision whether to be referred to IAA
- MA – are persons excluded by default? I'm not convinced there's a second decision. [**topic for further exploration*]

Hypothetical #3

C is an 18 year old from Afghanistan. When he first arrives in Australia and when he is interviewed by DIBP delegate, he says that he is a Hazara from Afghanistan and is fearful of the Taliban because they killed his uncle and brother on the road travelling between Jaghori and Kabul. C appears very introverted and anxious. The delegate does not ask C why his relatives were specifically targeted, or about his demeanour. The delegate refuses C's application. He does not accept that C as a Hazara is at risk of serious harm from the Taliban in Jaghori, and also finds that C can return and live in Kabul without being persecuted.

At the IAA interview, C tells the reviewer that since he has left, and after his DIBP interview, another member of his family has disappeared and is presumed kidnapped by Taliban. The IAA asks a number of questions about this. C initially says it was his mother's sister, but later says it was his father's sister. The IAA reviewer does not ask the Interpreter to clarify.

Further, at the interview, C also divulges that he had been detained when he was 14 years old by the Taliban and had escaped when he was 17. C says he finds this very difficult to talk about, and has only begun to discuss it since he had access to a counsellor. C says he hoped he would not have to discuss it, and that his family's experiences would be enough for the delegate accept he was at risk of serious harm.

The Reviewer finds that the new information about C's experience cannot be considered because there is no reasonable explanation for C not providing this earlier. The Reviewer finds that the new information about the family member who has disappeared could not have been provided to the Minister earlier, as it happened after C's interview. However as C provided no supporting evidence and C's evidence about which relation it was changed, the Reviewer does not accept it as credible.

The Reviewer requests a report from C's counsellor within 14 days about the experience he has revealed. C does not provide a report. The reviewer finds that such an important experience would have been at the forefront of C's mind when he was asked about why he fled Afghanistan, and if it was credible he would have disclosed it earlier, and that his refusal to provide a report indicates it is not credible. The IAA upholds the delegate's decision to refuse to grant a TPV.

DISCUSSION

Answers from participants:

- New information - two pieces – first the applicant's experience of being detained and secondly his family.
 - Arguable grounds for both in **473DD**. We think the DM applied the wrong legal test by jumping straight to the conclusion that there is no reasonable explanation – DM should have worked through 473 DD, decided whether new information, and then whether there were exceptional circumstances.
 - Strangely DM decided couldn't that consider and then made findings about it being not credible.
 - Re: the family – DM didn't consider the test in **473DD** properly – didn't consider whether exceptional.
 - DM requested new information and then made a decision about not providing the report. Doesn't seem open to DM to make this finding.
 - Delegate did not ask applicant about reasons or his demeanor. This signals how limited the IAA processes are – it cannot cure the problems in delegate decision.
 - We don't think the hearing was a meaningful opportunity. IP defects, as well as other problems – it may not be a meaningful I/V at all. Broader ground - whether it was actually a review – or narrower argument as Matt outlined earlier.
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Hypothetical #4

The applicant D fears being subjected to serious harm if returned to Pakistan because of her political opinion and her religious beliefs. At the primary stage, the delegate's treatment of D's evidence in relation to her religion is cursory. She questions D for only a few minutes toward the end of the interview and D does not have an opportunity to provide detailed evidence in person.

The IAA invites D to attend a telephone interview. In the letter of invitation to attend the interview, D is advised that she will be questioned about her religious beliefs. At interview, the Reviewer questions D in detail about her religious views. D provides consistent and detailed

evidence in response. D does not make new claims but she expands on her existing religious claims under the Reviewer's questioning.

Following this questioning, the Reviewer tells D that she has now provided new information at interview and asks her to address s473DD criteria:

MIGRATION ACT 1958 - SECT 473DD

Considering new information in exceptional circumstances

For the purposes of making a decision in relation to a fast track reviewable decision, the Immigration Assessment Authority must not consider any new information unless:

- (a) the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and
- (b) the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:
 - (i) was not, and could not have been, provided to the Minister before the Minister made the decision under [section 65](#); or
 - (ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

D writes to explain that she was not asked about details of her religious claims at the first interview, and so did not have the opportunity to provide all the details she was able to at IAA stage, and that they are consistent with her previous claims. The IAA finds that the further details D provided about her religion are new information, and that she could have provided this to the Minister earlier, and she does not have a reasonable reason for not doing so. The Reviewer decides on this basis she cannot consider the information and so upholds the delegate's decision to refuse the visa.

DISCUSSION

Answers from participants:

- This was not a meaningful or genuine process to invite the hearing – point 7 of the grounds Matt raised.
- Other – creative way – how new information should be viewed.
- Question – how is new information defined in the Act?
- Joel – not a helpful definition.
- Wondering if it is really new information if only an expansion of information the applicant has already provided – already provided claims and now expanding on that. Fact that it could not have been provided as applicant was never asked.
- Building on what is new information, hypothetical #3 involves new information - still related to the same sort of the grounds, but distinct new situations for the client – whereas in this case it is more detail added to a claim and information that already before the IAA – we could distinguish.
- Hypothetical #3 raises an issue of corroborating evidence – for e.g. if an applicant told a story of a road attack in their country at primary stage i/v and was not believe, and then turn up to IAA hearing with a news story about the attack – would that be considered new information or just corroborating information?