FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v SZSNW [2014] FCAFC 145

Citation:	Minister for Immigration and Border Protection v SZSNW [2014] FCAFC 145
Appeal from:	SZSNW v Minister for Immigration & Anor [2014] FCCA 134
Parties:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZSNW and PETER MCDERMOTT IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER**
File number(s):	NSD 562 of 2014
Judge(s):	**MANSFIELD, BUCHANAN AND PERRAM JJ**
Date of judgment:	3 November 2014
Catchwords:	**ADMINISTRATIVE LAW** – appeal from Federal Circuit Court of Australia – reasons and recommendation of Independent Merits Reviewer in relation to refugee status assessment – where the reasons proceed on a false factual premise – where false factual premise destructive of applicant's credit – whether decision of Independent Merits Reviewer was unreasonable in a legal sense – whether reasons and recommendation contained legal error – whether acting on the false factual premise denied the applicant procedural fairness
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) *Federal Court of Australia Act 1976* (Cth), s 28(1)(b) *Migration Act 1958* (Cth), ss 36(2), 46A
Cases cited:	*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 *Craig v South Australia* (1995) 184 CLR 163 *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 308 ALR 280 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332

	Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 *Plaintiff M61/2010E v The Commonwealth of Australia* (2010) 243 CLR 319 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 *SZSNW v Minister for Immigration & Anor* [2014] FCCA 134 *SZRHL v Minister for Immigration and Citizenship* [2013] FCA 1093
Date of hearing:	26 August 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	111
Counsel for the Appellant:	Mr J Smith
Solicitor for the Appellant:	DLA Piper Australia
Counsel for the First Respondent:	Mr G Kennett SC with Ms B Tronson
Solicitor for the First Respondent:	SBA Lawyers

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 562 of 2014**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Appellant**
AND:	**SZSNW** **First Respondent**
	PETER MCDERMOTT IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER **Second Respondent**
JUDGES:	**MANSFIELD, BUCHANAN AND PERRAM JJ**
DATE OF ORDER:	**3 NOVEMBER 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant pay the first respondent's costs of the appeal.

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

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DATE:	**3 NOVEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

MANSFIELD J:

1 I have had the benefit of reading in draft the reasons for judgment of Buchanan J. I respectfully adopt his Honour's description of the background, the reasons of the Independent Merits Reviewer (IMR) and of the reasons of the Federal Circuit Court of Australia (FCCA).

2 With one qualification, I also respectfully agree with his Honour's reasons for the decision and the orders he proposes, namely that the appeal be dismissed with costs. That consensus extends to the disposition of the notice of contention of the first respondent that the IMR failed to consider, either cumulatively, or separately, his claims to be a refugee because he is a young Tamil male and is from the north-east of Sri Lanka.

3 Accordingly, I do not accept that the fact that the first respondent made no claim of sexual torture whilst imprisoned in Boosa in the initial entry interview (ground 1(a)(i)(1) of the grounds of appeal) and/or that the first respondent had not been detained meant that the finding that the first respondent had not been sexually tortured (ground 1(a)(i)(2)) support the

conclusion that the IMR's adverse credibility conclusion was not based on a false factual premise.

4 As Buchanan J has pointed out, the IMR's focus was on whether the first respondent whilst on Christmas Island reported sexual torture, or whether he raised it only before the IMR.

5 Clearly, the IMR was wrong about that, in circumstances where it was quite plain on the material before the IMR that such a complaint had been made whilst the first respondent was on Christmas Island. Indeed, the delegate of the appellant in his reasons for his finding referred to such a claim. Clearly, too, that false premise played a significant part in the reasons of the IMR for recommending that the first respondent not be recognised as a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

6 The qualification relates to the question whether the principle or standard of legal reasonableness can be imposed on the decision or the reasons for decision of the IMR.

7 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (*Li*) decided that the exercise of the statutory power of the Migration Review Tribunal (the Tribunal) under the *Migration Act 1958* (Cth) (the Act) whether to adjourn the hearing of an application was subject to the legal standard of reasonableness. The imposition of that standard in administrative decision-making is taken to have been intended by the legislature, unless there is a clear contrary indication: see per French CJ at [26]-[30], per Hayne, Kiefel and Bell JJ at [63]-[72], and per Gageler J at [88]-[92] and particularly concerning Part 5 of the Act governing review of decisions by the Tribunal at [93]-[97].

8 The legal context in which the decision of the IMR in this matter was made is that described, and upheld as valid, in *Plaintiff M61/2010E v The Commonwealth of Australia* (2010) 243 CLR 319 (*Plaintiff M61*). The Court (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) decided that, in performing functions under that regime, the IMR was bound to afford procedural fairness to the person whose claim to be a refugee was being reviewed, and was bound to act according to law by applying relevant provisions of the Act in the light of decided cases: at [8]. The relevant parts of their Honour's summary of the steps leading to those conclusions are in subparas (a) and (b) of [9] as follows:

> (a) Because the Minister has decided to consider exercising power under either s 46A or s 195A of the *Migration Act* in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations, the RSA and IMR processes taken in respect of each plaintiff were steps taken under and for the purposes of the *Migration Act*.
>
> (b) Because making the inquiries prolonged the plaintiffs' detention, the rights and interests of the plaintiffs to freedom from detention at the behest of the Australian Executive were directly affected, and those who made the inquiries were bound to act according to law, affording procedural fairness to the plaintiffs whose liberty was thus constrained.

9 There followed the conclusion in that case that the inquiries there made were not according to law, and were not procedurally fair. Then, their Honours in the summary explained why an appropriate declaratory order should be made.

10 In my view, the first respondent's circumstances attract the same status as the plaintiff in *Plaintiff M61*. The first respondent arrived at Christmas Island by boat, and claimed to be a non-citizen in Australia to whom Australia owed protection obligations under s 36(2) of the Act. In his case, too, he became an "unlawful non-citizen" and he was detained on Christmas Island, and subsequently at the Scherger Immigration Detention Centre, near Weipa in Queensland, where he was interviewed by the IMR.

11 The factors referred to in [9](b) in *Plaintiff M61* quoted above apply to the first respondent, and would appear to apply to all non-citizens in Australia covered by the regime under the Act referred to in *Plaintiff M61*.

12 Consequently, the limits on the way in which the Refugee Status Assessment, and then the Independent Merits Review, were to be conducted in this matter would follow the prescriptions in *Plaintiff M61* discussed from [73] ff. They include acting consistently with the principles of procedural fairness and that the review must address the relevant legal question or questions: at [77] and [78]. The Court at the end of [78] said:

> And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.

13 When addressing whether reviewable error was shown in the particular circumstances of the plaintiff in *Plaintiff M61*, the Court at [89] said:

> Although expressed generally – as whether Australia owed the plaintiff protection obligations – the fundamental question to which the assessment and review processes were directed had to be understood as whether the criterion stated in s 36(2) (73), as a criterion for grant of a protection visa, was met. Necessarily, that question had to be

> understood by reference to other relevant provisions of the *Migration Act*, and the decided cases that bear upon those provisions. If the legislation and case law were treated as no more than aids to interpretation, the assessment or review would not address the question that the Minister had to consider when deciding whether to lift the bar under s 46A.

14 In my view, having regard to the judgment of the Court in *Plaintiff M61*, there is no reason why the principle or standard of reasonableness referred to and applied in *Li*, as discussed in detail in the judgment of Buchanan J, should not also apply to the decision-making of the IMR in this matter. The principle, as *Li* shows, has its foundation in the relevant provisions of the Act, and the decided cases, to which the Court in *Plaintiff M61* said the IMR (and a person making a Refugee Assessment Report) were obliged to comply to properly exercise their powers and functions.

15 It is clear from *Li* that the principle or standard of reasonableness generally applies to decisions made under the Act, and is not confined to discretionary decisions. The reasons for judgment of French CJ addressing "Reasonableness" would appear to be directed to the exercise of a statutory discretion: see at [23], but his Honour's observations at [26]-[30] are of more general application. His Honour refers to "the rules of reason" as an essential element of lawfulness in decision-making, and to "the framework of rationality", as a descriptor of a range of what might be seen as subsets of, or illustrations of, that general principle. Some illustrations referred to do not relate to discretionary judgments. The plurality judgment at [72] made the same point, as did Gageler J at [91]-[92]. Gageler J in [91] also made the point through a reference to *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 300 that the implied condition of reasonableness covers both why a decision is made and how it is made.

16 Like French CJ in *Li* at [30], I do not find it necessary to explore whether the boundaries of rationality and reasonableness differ in principle. That is because, in this matter, notwithstanding the detailed reasons of the IMR for rejecting the claim of the first respondent, the decision of the IMR is unreasonable in the sense discussed in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J, and as explained by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234. It is not a matter where the IMR's decision is within the area of "decisional freedom" (as explained by French CJ in *Li* at [28]) because it wrongly attributes to the first respondent a failure to complain of a particular matter in circumstances

where, plainly, that complaint was made and it significantly builds on that wrongful attribution to reject the claims generally made by the first respondent.

17 The reasons of the IMR refer at some length to the asserted failure to mention sexual torture at Boosa when interviewed at Christmas Island: see at [142]-[146], including the consideration of the medical reports to which Buchanan J refers in some detail. It is clear that the IMR took an adverse view of the first respondent's credibility. In the penultimate paragraph of his reasons, namely [169], he says the first respondent is not credible. He there says the first respondent at "different times … modified his account of events to what he considers to be most advantageous to his claim". There are three or four matters specifically mentioned. The IMR then says:

> The claimant has made claims that the CID attempted to kill him in the home of his lawyer and about sexual torture: the failure of the claimant to mention these claims when he first sought the protection of Australia has caused me to come to the conclusion that his account is not reliable.

18 Buchanan J has referred also to the extensive references to this topic in the transcript of the interview by the IMR.

19 I have had regard to all the material. Notwithstanding that the IMR expressed a series of bases for concerns about the first respondent's evidence, the conduct of the hearing in the respect mentioned (that is the wrong assertion that he had not previously complained of sexual torture) and then the IMR's use of that material (with other material) to confront him unfairly with that assertion and then to reject the first respondent's evidence partly on the basis of the wrong assertion is clearly unreasonable. Moreover, it occurred in circumstances where it should have been plain to the IMR that the assertion was wrong both before the interview and more especially after the interview (in the light of the first appellant's responses) when the IMR had the opportunity to review the earlier material. For whatever reason, his post-interview review of it (which he said he had undertaken) did not expose to the IMR that he was incorrect. He could not have looked carefully at the material or at the decision of the person who did the Refugee Assessment Decision.

20 In my view, those matters support the dismissal of the appeal, on the additional basis that the Federal Circuit Court judge did not err in finding that the IMR decision was "affected by unreasonableness" (the expression in ground 1 of the grounds of appeal) and did not

wrongly apply the principles relating to reasonableness discussed in *Li* to the IMR decision (ground 2 of the grounds of appeal).

21 As I have said, for the reasons given by Buchanan J I would in any event dismiss the appeal with costs in favour of the first respondent.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 3 November 2014

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AND:	**SZSNW** **First Respondent**
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JUDGES:	**MANSFIELD, BUCHANAN AND PERRAM JJ**
DATE:	**3 NOVEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BUCHANAN J:

Procedural context

22 The central question in this appeal is whether the Federal Circuit Court of Australia ("the FCCA") was correct to make a declaration that a report and recommendation made by an Independent Merits Reviewer ("the IMR") was not made in accordance with law.

23 The IMR was appointed to recommend to the appellant ("the Minister") whether the first respondent should be recognised, for the purpose of the *Migration Act 1958* (Cth), as a person in respect of whom Australia owed protection obligations under the Refugees Convention.

24 The legal context in which reports and recommendations are made by IMRs to the Minister, and the nature of the relief that might be granted in a judicial review proceeding, were discussed by the High Court in *Plaintiff M61/2010E v The Commonwealth of Australia* (2010) 243 CLR 319 ("*M61*"). For the purpose of the present case it is relevant to note that the process which involves the participation of IMRs must address the question of whether a

particular person is someone in respect of whom Australia owes protection obligations by reference to relevant Australian legislation and case law and in accordance with the requirements of procedural fairness (see at [86]-[92]). Further, the conclusion of the High Court that it would be appropriate to grant relief framed as a declaration that an IMR had made an error of law has at least the significance that, in such a case, reliance upon the flawed report or recommendation by the Minister would be unsafe.

25 In the present case, the declaration that the IMR had made an error of law was based upon a conclusion by the primary judge that the IMR had acted "unreasonably" in the sense referred to in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ("*Li*"), as discussed by a Full Court of this Court in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1 ("*Singh*"). It will be necessary to return to the foundation for that conclusion in due course.

Background

26 The first respondent is a young Tamil male who claimed to have fled from Sri Lanka in fear of his life in 2004 and thereafter lived in Qatar for about five years. He claimed to have returned to Sri Lanka in 2009 but to have been immediately arrested at the airport. After release on bail he fled again, to Malaysia. He boarded a vessel for Australia but was intercepted by the Indonesian navy and spent about six months in Indonesia. In June 2010 he left Indonesia, bound for Australia by boat, was intercepted by the Australian navy and was taken to Christmas Island.

The entry interview

27 On 20 July 2010 the first respondent was interviewed at Christmas Island ("the entry interview"). At this stage, he had made no formal claim for protection. During the entry interview he complained about treatment he had received whilst imprisoned in Sri Lanka in 2004, before fleeing to Qatar, claiming to have been tortured with other Tamils.

The refugee status assessment

28 About one month later, on 20 August 2010, the first respondent was assisted by an IAAAS (Immigration Advice and Application Assistance Scheme) Provider to complete an application for a Refugee Status Assessment ("RSA"). The purpose of the RSA was for an assessment to be made about whether the first respondent was a person in respect of whom Australia owed protection obligations.

29 The RSA assessor found that the first respondent was not such a person. That finding led to the further consideration of the first respondent's claims by the IMR.

30 In the statutory declaration which he was assisted to complete for the RSA on 20 August 2010, the first respondent said:

> 9. I was kept at the Pusar camp for 5 months, during which time I was tortured and humiliated. …

31 During the RSA interview three days later, which took place at Christmas Island, the following exchange occurred:

> **Q.** You say you were tortured and humiliated. Why did they torture you?
> **A. INTERPRETER:** He doesn't know really but once he told them that if he ever gets out he will publish in the papers about his father's death because he was the witness, mainly because of that.
>
> **Q.** So you told them that while you were in captivity?
> **A. INTERPRETER:** Yes.
>
> **Q.** Did they question you about the LTTE?
> **A. INTERPRETER:** They just say that everyone in the camp are called LTTE members, LTTE, but they did question him about it but they were just calling Tamil.
>
> **Q.** Did they ask you questions? Did they interrogate you?
> **A. INTERPRETER:** No, they didn't ask any questions. Normally they know why they captured him.
>
> **Q.** So how many times did they beat you, every day?
> **A. INTERPRETER:** Every day they used to beat him and they used to torture him, **sexually torture him,** tie his hands and legs and they did lots of times very bad tortured him.
>
> **ADVISER: I was asked specifically if we could avoid talking about details of that particular aspect of it.**
>
> **RSA ASSESSOR:** Well there's no need to.
>
> **ADVISER:** I said I didn't think you would ask anyway but –
>
> **RSA ASSESSOR:** No that's fine. That's fine.
>
> (Emphasis added.)

and (after a break in the interview of about 13 minutes):

> **RSA ASSESSOR:** Interview resumes at 1529.
>
> **Q.** … now that we've resumed the interview is there anything you'd like to ask me or anything you'd like to tell me before we finish?

> **A. INTERPRETER:** He has been suffering a lot at Poosa, he was tortured so much and **sexually tortured as well** that he tried to commit suicide but that failed, …
>
> (Emphasis added.)

32 The references to "sexual torture" have been highlighted because of their relevance to certain conclusions stated by the IMR. Their importance will become apparent in due course. It should be emphasised that these exchanges occurred during an interview on Christmas Island which was focussed directly on the question of the first respondent's possible refugee status.

Medical reports

33 The day after the RSA interview, on 24 August 2010, the first respondent was medically examined. The medical report suggests that the purpose was for a mental health assessment at the request of the Department of Immigration and Citizenship.

34 The initial entry in the medical report was in the following terms:

> 25 year old, Single, Sri Lankan male, **Civil Engineer by trade**. Family consisting of mother, brother aged 23 and sister aged 14 all resident in Sri Lanka.
>
> (Emphasis added.)

35 The immediate source of the information I have emphasised is not apparent. As will be seen in due course the IMR concluded that the first respondent had supplied the information that he was a "Civil Engineer by trade", even though at the entry interview (the recording and written record of which was available to the IMR) the first respondent had said that he could not complete his civil engineering studies because he was arrested in 2004 when he still had one year left. This discrepancy is relevant only for the use which the IMR subsequently made of it. The IMR thought the entry reflected adversely on the first respondent's credit.

36 The medical certificate dated 24 August 2010 (which was before the IMR) also said:

> Reported a long history of enduring torture and trauma, his father was shot in front of him in 2004. He has worked in Qatar for 5 years – he reported been treat [sic] as a slave during this period. He was jailed by the authorities on his return to Sri Lanka, where he was tortured extensively until his escape.

37 The decision of the RSA assessor (who identified himself both as "Case Manager" and "Case Officer" was given on 3 March 2011. The decision was that the first respondent

should not be recognised as a person in respect of whom Australia owed protection obligations because the RSA assessor was not persuaded to accept significant aspects of the first respondent's account of events. Nevertheless, some matters, including the allegation of sexual torture, appear not to have been doubted. The RSA assessor said:

> The claimant said he was tortured while in detention. I have no reason to doubt this claim and certainly [the first respondent] appeared traumatized whenever the matter was raised.
>
> …
>
> [The first respondent] appears to have been traumatized and perhaps physically and mentally tortured and I accept that his fear of return is real. …

38 These findings were not binding in any way on the IMR, who was both entitled and expected to come to an independent view about the claims of the first respondent. Nevertheless, those claiming Australia's protection are entitled to have adequate notice if matters which have been accepted in one evaluation are to be rejected in a later one (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152)

39 At about this time, or shortly thereafter, the first respondent appears to have been transferred from Christmas Island to the Scherger detention centre at Weipa in far north Queensland. There, he was medically assessed on a number of occasions in April 2011. The medical reports were provided to the IMR.

40 A medical report, dated 22 April 2011, said the following:

> Client presented requesting a check up.
> Recent negative RSA decision and lawyer advised him that in the future he would need to disclose the swexual [sic] abuse he expwerienced [sic] in Sri Lanka as part of the evidence for his case. Client is very embarrassed about this.
>
> Young softly spoken Tamil, man, aged 24. Poor eye contact, moderate psychomotor agitation, wringing fingers and fidgeting. Clearly nervous and/or embarrassed.
>
> Informed me the [sic] he was imprisoned in Sri Lanka at age 16 for writing an article as part of a journalism project. During time of imprisonment client states the [sic] he was "sexually tortured" regularly. He now suffers some permanent injuries as a result of this.
>
> Client states that he has sustained an injury to his anus. Approximately once every six to eight weeks he experiences pain and bleeding from his anus. He states that there was some internal injury and that he never sought treatment for this due to shame.
> On examination there is a 2-3cm, white scar posterior to anus. Client indicated that this is the area that becomes painful. ?fissure [sic].

> Have referred to Dr for further examination and documentation.
>
> Client also states that ever since he was forced to have oral sex in jail he has developed lumps on thesurface [sic] of his tongue. He states that these are painful frequently but denies discharge.
> O/E several small, raised rfed [sic] lesions on surface of the tongue. Did not take swab as Pathology closed until wednesday for Easter.
>
> Referral to mental health for trauma and torture counselling.
>
> Referralt o [sic] GP for investigation of mouth lesions.

41 This report referred to sexual abuse of various kinds. The IMR appeared to connect it with the earlier report of 24 August 2010 (in a passage I will set out below) but the two reports were taken by different people, at different places, months apart. There is no suggestion that the first respondent was fabricating his symptoms, and some features which were not inconsistent with his complaints were apparently present on physical examination.

42 A specialist referral bearing the same date said:

> Client recently had a negative RSA decision.
>
> Disclosed during a consult that he was "sexually tortured" during imprisonment in Sri Lanka. Still suffers from the physical effects of this at times.
>
> Softly spoken young Tamil man, mild psychomotor agitation, wringing fingers. Poor eye contact. Expressed a sense of shame and embarrassment over his history. Was encouraged by his lawyer to seek help for his problems – medical and psychological.

43 A medical report dated 26 April 2011 said:

> Client presented as somewhat reserved and tended to avoid eye contact. He responded openly to questions however was embarrassed at times when relaying information relating to history of sexual abuse.
>
> Client reported that approximately 8 years ago his father was shot infront [sic] of him and that he was physically assaulted at the time. He was then taken into severeal [sic] military camps, the last one in which he stayed for 5 months and was the subject of ongoing physical and sexual abuse.
>
> Client received a negative RSA and appears to have been informed by his solicitor that this may have been due to not fully disclosing his history of physical and sexual abuse.
>
> Client indicated a number of current medical complaints including blisters to the tongue and throat as well as bleeding from the anus. This has been discussed with the resident doctor and an appointment is scheduled for tomorrow.
>
> Overall client appears to have adapted to his past history of physical and sexual abuse and has coping mechanisms in place that enables him to function to a relatively high

> standard. Client appears to have sound interpersonal relations and is active in recreational activities and classes.
>
> There are indications of some sleep disturbances associated with nightmares relating to past abuse however it appears to be the clients [sic] preference to cope with these issues on his own rather than engage in counselling.
> Client will be seen next week to re-assess and discuss further.

44 As I have said, all those reports were before the IMR. They were provided by those advising the first respondent. It is not my purpose to seek to evaluate their significance for the claim to protection made by the first respondent. That was a matter to be assessed by the IMR, along with other material. It is the use to which they were put, or not put, which will require consideration in due course.

The IMR interview

45 The first respondent requested an independent merits review of the decision by the RSA assessor that he should not be accepted to be a person in respect of whom Australia has protection obligations. He provided a further written statement dated 9 July 2011. That statement included the following:

> 1. I make this statement in order to respond to the RSA Delegate's decision that I am not a refugee, and to provide additional information to the Reviewer in preparation for my request for Independent Merit Review to be heard on 9 July 2011. I make this Statement with reference to my Statutory Declaration of 20 August 2010 submitted with my RSA assessment, and I continue to rely on that Statutory Declaration and all other information I provided during the RSA process.
>
> …
>
> 6. I was detained in Boosa prison from December 2004 to May 2005. Whilst there I was assaulted and tortured, and made to work very hard. Because I was small and still quite young, I could sometimes not do the things I was ordered to do, and if I refused or was unable to do them, I was hit. **As I disclosed in my RSA interview,** I was also sexually abused in Boosa prison, and still suffer from the injuries and trauma I experienced. I have attended medical officers in Australia regarding the injuries I still suffer from, and relevant sections of their reports are being provided to the IMR Reviewer.
>
> …
>
> 19. … Whilst in prison, I was severely sexually assaulted and otherwise tortured, and my injuries continue to the present time. …
>
> (Emphasis added.)

46 It appears that the IMR may not have had a record of the RSA interview at the time he conducted his own interview, also on 9 July 2011, at Scherger Immigration Detention Centre. Nevertheless, the most recent statement of the first respondent explicitly referred to the subject of "sexual torture" being raised on 23 August 2010, at the RSA interview on Christmas Island.

47 When the IMR interview commenced, the IMR reminded the first respondent that he had undertaken two previous interviews:

> **Q.** I want to tell you about the review process we're involved in. When you arrived on Christmas Island you were interviewed by an officer of the Department of Immigration.
> **A. INTERPRETER:** Yes.
>
> **Q.** The officer understood that you wished to claim protection as a refugee. You were then provided with an adviser.
> **A. INTERPRETER:** Yes.
>
> **Q.** Later on you were interviewed by a case officer employed by the Department of Immigration. The case officer decided that you were not someone entitled to protection by Australia. You were given an opportunity to ask for that decision to be reviewed. As a result your case was passed to me to carry out a review. …

48 During the interview the IMR informed the first respondent that "country information" suggested that:

> **Q.** … given the cessation of hostilities, Sri Lankans originating from the north of the country are no longer in need of international protection under broader refugee protection. …

49 In response, the first respondent said:

> **A. INTERPRETER:** … **I have already disclosed the sexual tortures to which I have gone through and other incidents. I can only explain by showing the wounds of those injuries.** I can only show you or provide you with the evidence for those. You have to give life to that, whether to accept or you have to make a decision. We have come here through a lot of problem, lot of difficulties. Please understand sir, you have to understand all the sorrows, all the persecution that we have gone through. I have no need to tell any lies. I have given you all necessary documents such as the book of my father, medical certificate and other related documents. I have nothing else to tell.
>
> **Q. Can you tell me about the medical certificates? What medical certificates do you refer to?**
> **A. INTERPRETER: That is in relation to the sexual tortures that I have undergone when I was in the Boosa gaol.**
>
> **Q.** When was that? What year?

A. INTERPRETER: 20th of December 2004 when my father was killed. From that time onwards up to 2005, 15th of May 2005.

ADVISER: We've included those medical certificates in our submissions.

(Emphasis added.)

50 The IMR disclaimed receipt of the medical certificates but they were located and the IMR suspended the interview to examine the documents, having observed that he had not seen them before.

51 Later in the interview the following exchange occurred:

Q. When you talk about torture, what year were you tortured?
INTERPRETER: When you talk about torture what do you mean?

Q. Torture, when you were tortured in gaol what year were you tortured?
A. INTERPRETER: While taking me on the way they hit on my head and broke my head here.

Q. When was that, what year?
A. INTERPRETER: 20th of December 2004. I was asked rigorously I was asked to do hard work.

Q. So you were tortured in 2004, yeah?
A. INTERPRETER: From 2004 to 2005.

Q. All right, so from 2004 to 2005 you were tortured, is that right? Whereabouts was that?
A. INTERPRETER: I have spoken, I have given before sexually I was assaulted.

Q. Yeah I know but I'm asking you now whereabouts were you tortured, what location?
A. INTERPRETER: Boosa.

Q. Were you tortured in any other years other than 2004 to 2005?
A. INTERPRETER: After they tortured me to sign a statement accepting or admitting I am a person connecting with the movement, supporter of the movement, on my way when I was returning from Qatar I was arrested at the airport.

Q. At Christmas Island did you tell them about your sexual torture?
A. INTERPRETER: Yes I disclosed.

Q. I haven't seen any reference to sexual torture in your Christmas Island statement. You mentioned an injury when you were beaten and you had a scar on your forehead and you were unconscious and you had stitches and that seems to be the only reference to any injury.
A. INTERPRETER: I have spoken about this at the case manager's interview.

(Emphasis added.)

52 Later again, the following occurred:

> **ADVISER: Just in relation to there being no reference to sexual assault in the entry interview?**
>
> **IMR:** Yeah?
>
> **ADVISER:** I'll refer you to the guidelines on Victims of Sexual Violence, and I don't have that particular reference here in front of me or even in our submissions but we can provide that to you if you like?
>
> **IMR:** Yes, please do.
>
> **ADVISER:** And it just from memory suggests it is quite common for victims to feel shame and embarrassment and not in the first instance be – being hesitant to, to relate them to interviewers.
>
> **IMR:** I actually, you know, wasn't – **until I saw this recent information today, I wasn't aware of that claim of that nature.**
>
> **ADVISER:** No, **I don't think it was even talked about at RSA.** I think it's come out in between and on our urging he's gone to see the doctor about it.
>
> **IMR:** It's not referred to in – I don't believe it's referred to in his statutory declaration.
>
> **ADVISER:** No that's right.
>
> **IMR:** Of 20 August 2010.
>
> (Emphasis added.)

53 The remark by the adviser (not the same adviser who was at the RSA interview) was incorrect. As earlier indicated, the matter was raised at the RSA interview.

The IMR decision

54 The decision of the IMR was given almost 9 months later, on 2 March 2012. There was, accordingly, no lack of opportunity for the IMR to study the relevant records, which by this time included the record of the RSA interview.

55 Early in the decision the IMR referred to the first respondent's statutory declaration dated 20 August 2010:

> He states that he was kept in the camp for five months where he was tortured and humiliated. …

and the statement dated 9 July 2011:

> He also states that whilst in prison he was sexually assaulted and otherwise tortured.
> …

56 Then the IMR summarised the IMR interview, apparently relying on a record of it. The summary referred to matters I have set out above, but not to the information provided by the first respondent that he had mentioned sexual torture to the RSA assessor. Then, the IMR said:

> 78. I asked him whether he had mentioned at Christmas Island his sexual torture in Sri Lanka: he replied that he did. I informed the claimant that there is no reference of sexual torture in his Christmas Island statement. I informed him that he mentioned an injury which was a scar to his forehead. He stated that he had spoken about this to the case manager.
>
> …
>
> 86. I told the claimant that it was only at the IMR interview that I saw a reference to sexual torture. I stated that the claimant had not made mention of this in his statutory declaration.

57 Later, but not in connection with any discussion about sexual torture, the IMR said:

> 113. After the IMR interview I obtained a copy of the interview before the RSA officer: …
>
> …
>
> 135. I have listened to the interview of the claimant before the RSA officer. …

58 Towards the end of the IMR decision the following was said:

> 142. **The claimant has maintained that he mentioned his sexual torture at Christmas Island**. He could have made such a claim at the DIAC entry interview, but I have read and listened to the record of that interview. There is no allegation of sexual torture in these records of the entry interview. I also informed the claimant that there is no reference of sexual torture in his Christmas Island statement which had been prepared with legal assistance. I informed him that there is a reference to injury which was a scar to his forehead. **He stated that he spoke about this at the case manager's interview but I do not accept this contention.**
>
> (Emphasis added.)

59 The conclusion stated in the last sentence amounts to an assertion that the first respondent had fabricated the information he provided to the IMR. Either the IMR did not read or listen to the relevant part of the record of the RSA interview, or he forgot about it. In

either case he disregarded it and reached a demonstrably false conclusion (at least in this respect) about the first respondent's veracity and reliability.

60 The IMR decision went on:

> 143. The claimant did not make any claim of sexual torture at the DIAC entry interview at Christmas Island. This interview lasted for more than four hours and the DIAC officer asked the claimant questions about his claims. If he was the victim of sexual torture then he would have had adequate opportunity to mention this claim. The DIAC officer also read out the warning to the claimant which I have earlier quoted in this report (at [33]). The terms of that warning are, in my opinion, particularly appropriate to this claim of sexual torture. I certainly have doubts about his claims of sexual torture. This also causes me to have serious reservations about the credibility of the claimant.
>
> 144. This is not a case where the claimant has stated that stated [sic] to be too embarrassed at mentioning sexual torture at the entry interview. Instead the claimant has stated that he did make a claim of sexual torture at Christmas Island. There is no mention of sexual torture in the records of the entry interview. There is also no mention of sexual torture in the statutory declaration dated 12 September 2010 that he made at Christmas Island with the assistance of his agent with expertise in refugee law. **I do not believe that the claimant made a claim of sexual torture at Christmas Island**.
>
> (Emphasis added.)

61 The first respondent did make a claim of sexual torture at Christmas Island. Again, the conclusion of the IMR is necessarily adverse to the first respondent's veracity and reliability.

62 These parts of the IMR decision were defended on the basis that the IMR was only referring to the entry interview at Christmas Island. Despite the very able way in which Mr Smith put this argument on behalf of the Minister, there are a number of reasons why I do not accept it.

63 First, the IMR's conclusory statements are not so qualified. Secondly, the IMR referred to the statutory declaration (20 August 2010, not 12 September 2010) which makes no specific mention of sexual torture (only torture and humiliation), but this statutory declaration was prepared for, and was dated only three days before, the RSA interview. The IMR's reference to it was evidently intended to support the thesis that nothing of this kind had been said at Christmas Island – but it had been, as part of the specific process for assessing protection claims established by the Department.

64 It is clear to me that the IMR disregarded the first respondent's claims in writing, and at the IMR interview, that he had raised this issue specifically, on Christmas Island, in the RSA interview and disregarded the record of the RSA interview itself.

65 Then the IMR decision went on to deal with the medical records:

> 145. In considering the claim of the claimant to be a victim of sexual torture I have examined the medical records that have been placed before me at the IMR interview.
>
> 146. In particular, I have examined one medical record dated 24 August 2010 which appears to have been completed by a nurse as it contains a reference to a referral to a doctor. **That medical record contains some statements that are certainly not correct. The claimant is described in that record as 'a civil engineer by trade' but before me he stated that he never completed the course.** There is no evidence that he has ever been a civil engineer. **The claimant stated that on his return to Sri Lanka 'he was tortured extensively until his escape'. Before me the claimant claimed that he was released from custody on bail,** there was no claim that he had escaped from custody. That medical record records the complaint that there is bleeding from the anus once every six to eight weeks. The medical record does not contain a definite diagnosis of an anal fissure condition as it contains a note 'fissure?' That record also contains the statement that he has been 'referred to Dr for further examination and documentation'. No documentation of any further medical examination is before me. The claimant may have an anal fissure. In view of the unreliable statements that are recorded in that medical record, I would not unreservedly accept his explanation of how the fissure originated.
>
> (Emphasis added.)

66 The attribution of misleading information to the first respondent seems to me to have been quite unfair. In each respect, the same version of events given to the IMR was given by the first respondent in the entry interview on 20 July 2010, more than a month before the date of the first medical record. That information was recorded in a template document in the following manner:

> **PART B**
>
> …
>
> **12 * EDUCATIONAL HISTORY**
>
> …
>
> * In the Civil Engineering course I had one year left but was arrested so couldn't complete my studies.

PART C

…

> C1. … [Velalahan] organised a lawyer for me and they released me on bail. The bail was 5 Lakhs. …

67 The statements by the IMR about those matters also conflate the contents of two different medical records from different points in time.

68 The Minister argued that the particular findings about the sexual torture issue (and some further credibility findings I will set out in a moment) were not central to the reasoning of the IMR. The difficulty with this submission is that it does not seem possible to disentangle findings about this issue from other important findings. For example, immediately before dealing with the sexual torture issue (and finding in effect that it was a recent invention) the IMR said:

> 138. At the IMR interview I advised the claimant that he has given different accounts of his experiences of the 2004 detention. In his statement of 9 July 2011 he now states that he was unconscious for a short period than he alleged in his earlier statement. The claimant explained the differences by stating that he had made 'omissions'. I have come to the conclusion that the change in his account of events has been prompted by the reservations of the RSA officer who did not accept that the claimant was unconscious for such a long time. These inconsistencies do not make it plausible that he was detained in 2004. I therefore do not consider that he was detained in 2004.
>
> 139. I have also considered the account of the claimant in relation to his arrest and detention following his return to Sri Lanka from Qatar. The inconsistencies in the account of the claimant about that detention, in particularly about whether or not he signed a confession, make me regard his account as implausible and unreliable. I do not accept that he had ever been in detention. I also do not accept that he was ever detained on his return from Qatar.
>
> 140. It is my conclusion that the claimant was not detained in either 2004 or in 2009 after his return from Qatar. There was no documentary evidence, such as Red Cross or police records, to substantiate that the claimant was detained. I [sic] not prepared to accept the account that is offered by the claimant who I do not consider him to be a reliable witness.
>
> 141. As I do not consider that the claimant was ever detained in 2004 I have come to the conclusion that he was not the victim of sexual torture that he claims to have experienced during his alleged detention.

69 Some of these findings are capable of standing independently from the findings about sexual torture, but the view of the IMR about "reliability" does not appear to be able to be separated from the issue of sexual torture, as I shall point out shortly. Moreover, if a

conclusion was readily available that the first respondent was not detained in either 2004 or 2009 (and therefore could not have then been sexually tortured) it would not have been necessary for the IMR to go on to debunk the story for other reasons. Those other reasons should be seen, in my view, as intending to provide some support for the general finding of unreliability.

70 So much is also evident from the IMR's final conclusions:

> 169. *Credibility issues.* The claimant is not a credible person. I do not accept his account of events as reliable. At different times he has modified his account of events to what he considers to be most advantageous to his claim for protection. In the post-interview submission of 26 July 2011 the agent has confirmed that the claimant did tell the RSA officer that he signed a self-incriminating document admitting involvement with the LTTE. However, during the IMR interview I twice asked the claimant whether he did sign a self-incriminating document and he denied having done so. He has changed his account of events to remove any reason why he would not be granted bail if he was charged with a terrorist offence. The claimant has provided a new statement dated 9 July 2011 in which he gives a different version of his detention at the camp. This appears to have been done to overcome the view of the RSA officer of the implausibility of his being unconscious for a long period. T**he claimant has made claims** that the CID attempted to kill him in the home of his lawyer and **about sexual torture: the failure of the claimant to mention these claims when he first sought the protection of Australia has caused me to come to the conclusion that his account is not reliable.** At the IMR interview I gave the claimant notice of my concerns about these matters.
>
> (Emphasis added.)

71 These are credibility findings based on a range of issues. The conclusions about the sexual torture allegations appear as important as the conclusions about other matters.

The FCCA proceedings

72 The proceedings commenced in the FCCA challenged the lawfulness of the IMR decision on two broad grounds: that the IMR failed to consider an integer of the first respondent's claim; and, that in various ways he had been denied natural justice.

73 The first ground of challenge was rejected, and has been renewed on the appeal by a notice of contention. It is unnecessary to deal with the notice of contention. I would not have upheld it, substantially for the reasons set out in the Minister's written submissions which it is not necessary to repeat.

74 The allegation of denial of natural justice relied, in part, on concepts of legal unreasonableness, as most recently explained in *Li* and *Singh*. This was the approach which commended itself to the FCCA.

75 Referring to the judgment of Logan J in *SZRHL v Minister for Immigration and Citizenship* [2013] FCA 1093, the primary judge said (at [46]-[47]):

> 46. Similarly, in this case the issue of sexual torture can be seen as a central issue determinative of the case. Further, in both cases there was a false factual premise. In the present case the false factual premise was that the applicant did not mention sexual torture at the interview on Christmas Island. He did. On one view that is sufficient to dispose of this case. The Minister contends, however, that the real issue for the Reviewer was the applicant's failure to mention sexual torture at the entry interview.
>
> 47. Even on that interpretation, however, I am of the view that the Reviewer acted unreasonably. …

76 The primary judge went on:

> 51. In my opinion the Reviewer acted unreasonably when considering the applicant's claim of sexual torture, and made a cursory assessment as to the validity of the claim based on the fact that the applicant had not mentioned the claim upon arrival in Australia. He found (incorrectly) that the applicant did not mention sexual torture at interview on Christmas Island and paid no regard to the applicant's reluctance to discuss the issue in detail at the RSA interview.
>
> …
>
> 55. In the present case three factors satisfy me that legal unreasonableness has been established. First, the Reviewer's adverse credibility finding against the applicant was based on a false factual premise that the applicant had made no disclosure of sexual torture whilst detained on Christmas Island. Secondly, the Reviewer paid no regard to the obvious reluctance on the part of the applicant to discuss the details of the torture at the RSA interview. Thirdly, the Reviewer failed to inform himself of the correct approach to dealing with claims of sexual torture as set out in the guidelines produced by the Minister's Department and the Tribunal. Instead, the Reviewer relied upon the fact that a box had been ticked on the report of the initial entry interview indicating that the applicant had revealed everything material to his claims at that time. This combination of circumstances satisfies me that the report and recommendation of the Reviewer insofar as it dealt with the issue of sexual torture was unreasonable in the required legal sense. Because of the importance of the Reviewer's finding to the outcome, his report and recommendation was thus fatally flawed.

The grounds of appeal

77 The Minister's appeal relies on the following grounds:

Grounds of appeal

1. His Honour the primary judge erred in finding that the decision of the Second Respondent (**IMR**) was affected by unreasonableness.

    a. The finding was based on three matters, none of which alone or in combination with each other could support a conclusion of error of law (see judgment at [55]):

        i. The IMR's adverse credibility finding against the First Respondent was based on a false factual premise, namely, that the First Respondent had made no disclosure of sexual torture on Christmas Island.

            l. The IMR found, as the First Respondent conceded to be correct, that the First Respondent had made no claim of sexual torture in the initial entry interview. The IMR's credibility finding was not based on the alleged factual premise;

            2. Further, the IMR rejected the First Respondent's claim to be [sic] have been sexually tortured in detention for an independent reason, namely, that the First Respondent had not been detained.

        ii. The IMR paid no regard to the obvious reluctance on the part of the First Respondent to discuss the details of torture at the refugee status assessor interview.

            1. The rejection of the claim of sexual torture was not central to the IMR's decision and the First Respondent's reluctance to discuss it was not so probative of its truth that any failure to consider it was not indicative of error of law.

        iii. The IMR failed to apply guidelines concerning victims of torture.

            1. Contrary to the view taken by the primary judge, none of the guidelines referred to by him dictates any approach to, or the outcome of fact-finding, but are addressed to procedures to be adopted at hearings;

            2. In any event, the guidelines are not binding in any sense.

    b. His Honour the primary judge wrongly applied the principles relating to unreasonableness in the context of the exercise of discretionary powers to a question concerning whether a decision-maker's satisfaction of refugee status was arrived at according to law.

    c. His Honour the primary judge wrongly based his decision on the merits of the IMR's findings of fact.

Legal reasonableness

78 Any application of a principle of legal reasonableness must conform to the guidance and instructions of the High Court in *Li*.

79 The judgment of the High Court in *Li* concerned the exercise of a procedural discretion (whether to grant an adjournment). The argument in the case was not limited to considerations of procedural fairness (see e.g. per French CJ at [22]) and the various judgments explained how a statutory obligation incorporates a legal presumption that a statutorily conferred discretionary power will be exercised reasonably (see e.g. per Hayne, Kiefel and Bell JJ at [63]). The majority judgment said (at [66]):

> 66 This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.
>
> (Footnotes omitted.)

and (at [72]):

> 72 The more specific errors in decision-making, to which the courts often refer, may also be seen as encompassed by unreasonableness. This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that "all these things run into one another". Further, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is "manifestly unreasonable". Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.
>
> (Footnotes omitted)

80 In *Singh*, a Full Court of this Court offered the following further analysis (at [44]):

> 44 In order to understand how the standard of legal unreasonableness is to be ascertained, it is important to see where the concept fits in terms of the Court's supervisory powers over executive or administrative decision-

> making. In *Li*, the judgments identify two different contexts in which the concept is employed. Legal unreasonableness can be a conclusion reached by a supervising court after the identification of an underlying jurisdictional error in the decision-making process: 297 ALR 225; [2013] HCA 18 at [27]-[28] per French CJ, at [72] per Hayne, Kiefel and Bell JJ; cf *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [39] per Gummow A-CJ and Kiefel J. However, legal unreasonableness can also be outcome focused, without necessarily identifying another underlying jurisdictional error. The latter occurs in what French CJ (in *Li* 297 ALR 225; [2013] HCA 18 at [28]) calls "an area of decisional freedom": it has the character of a choice that is arbitrary, capricious or without "common sense". See also the plurality at [66] referring to an area within which a decision-maker has a genuinely free discretion. The plurality in *Li* described this as an inference to be drawn because the court cannot identify how the decision was arrived at. In those circumstances, the exercise of power is seen by the supervising court as lacking "an evident and intelligible justification". …

81 In my view there are, with respect, difficulties in the present case in readily accommodating the challenge to the IMR decision within the particular rubric of legal reasonableness.

82 The present case is not (for example) one, like *Li*, where it might be said that the manner of exercise of a procedural discretion was foreign to the proper performance of a statutory task (e.g. per French CJ at [21], per Hayne, Kiefel and Bell JJ at [85], per Gageler J at [124]). No statutory function was committed to the IMR. The case is also not easily seen as one where the "the court cannot identify how the decision was arrived at", as explained in *Singh*. I therefore do not see the present case as falling apparently within the identified categories of legal unreasonableness except perhaps, as I shall discuss shortly, a failure of procedural fairness but, normally, an identified denial of an obligation of procedural fairness would need no further characterisation as legal unreasonableness.

83 However, it is clear from *M61* that a court may examine, and declare, whether an IMR has made an error of law. In my view, it is apparent that an error of that kind was made by the IMR. That leads to the same conclusion as the ultimate conclusion of the primary judge and supports the relief granted by the FCCA.

84 The legal error consisted of disregarding the plain fact that the first respondent had, while on Christmas Island, made a direct complaint of sexual torture to the RSA assessor in support of a claim for protection by Australia. That objective circumstance could not be disregarded in the reasoning which the IMR employed to conclude that, on that issue, the first respondent had fabricated the allegation or that, more generally, his statements were

unreliable. Those conclusions were important ones for the assessment of the first respondent's claims to be a refugee and to be a person in respect of whom Australia had protection obligations. The framework of the Migration Act, and the purposes to which the IMR's assessment was directed, meant that the IMR could not disregard the true position (that a complaint about sexual torture had been made on Christmas Island in support of a claim for protection) when assessing the first respondent's credibility. That matter was significant to the reasoning of the IMR. The erroneous conclusions about it were material to the rejection of the first respondent's claims for protection, based on an adverse assessment of his credibility.

85 I appreciate that the parameters of the debate were set by the grounds advanced in the FCCA and that the principal focus of the appeal has been on the reasons of the primary judge for its order. Nevertheless, the appeal is ultimately concerned with the jurisprudential foundation for the order made by the FCCA and the matters which bear on the issue of whether the IMR made an error of law were ventilated on the hearing of the appeal, without protest.

86 In that regard, the nature of the role of the IMR must be borne in mind. The IMR is an appointee of the Minister. He performs no direct statutory role but he does provide a foundation for the exercise of Ministerial discretion under the Migration Act. It is consonant with that function (and would otherwise be contrary to the purposes of the Migration Act) that neither the recommendation of the IMR, nor any subsequent decision of the Minister be based on an error of law.

87 The legal significance of the independent merits review process, as explained in *M61*, is that if an error of law occurs, and a declaration to that effect is made by a court in proceedings to which the Minister is a party (such as in the present case), the Minister will be bound in law not to incorporate the error in a subsequent exercise of his own discretion.

88 The central question for attention, therefore, is whether the IMR, as a person charged with a recommendation about matters central to the operation of the Migration Act and the discharge by Australia of its international obligations, made a relevant error of law in the discharge of that function.

89 If this case was about jurisdictional error (which it is not) it would be necessary to show that an error of law had been committed which affected the exercise of power (see

Craig v South Australia (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]-[83]). That is because jurisdictional error is not committed by mere procedural infelicity, or even by error of law, which is not material to the exercise of power.

90 In the case of judicial review of decisions of administrative decision-makers, where jurisdictional error need not be shown (e.g. cases arising under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)), courts will intervene if a decision-maker disregards a matter which must be taken into account. Again, a material effect on the exercise of power must be apparent. The test was stated by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 ("*Peko-Wallsend*") at 40:

> (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision: see, e.g., the various expressions in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*; *Hanks v. Minister of Housing and Local Government*; *Reg. v. Chief Registrar of Friendly Societies; Ex parte New Cross Building Society*. A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision: *Reg. v. Bishop of London*; *Reg. v. Rochdale Metropolitan Borough Council; Ex parte Cromer Ring Mill Ltd*..
>
> (Citations omitted.)

91 In my view, in the present case there was an error of law committed by the IMR when he disregarded the plain fact that the first respondent had raised claims to have been sexually assaulted during an interview which took place on Christmas Island directed specifically to assessing his claim to be a refugee. The IMR became bound to take that fact into account when it embarked on findings adverse to the credit of the first respondent, based on the false premise that he had not, as he asserted, made such a claim.

92 It cannot be said that those erroneous conclusions could not have materially affected the outcome, in view of the interconnected nature of the IMR's findings on reliability (see also *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26 per Crennan and Bell JJ at [97]).

93 The error, therefore, had a discernible effect on the exercise of the IMR's function. In my view, that function was not carried out in accordance with the purpose to which it was directed.

94 What then, of the procedural circumstance that the analysis above departs from the reasoning of the primary judge, and that no notice of contention has been filed to support it.

95 I do not doubt that the Court has power to uphold the orders made by the FCCA, even if it does not embrace the reasons for those orders (*Federal Court of Australia Act 1976* (Cth), s 28(1)(b)). A notice of contention gives clear warning that orders will be supported on other grounds, but it is a procedural step, not a fetter on the Court's power.

96 In my view, the possibility of a different approach to the significance of the error made by the IMR was sufficiently exposed during oral argument on the appeal to avoid any embarrassment which might otherwise arise. In particular, I am satisfied that it is not unfair to the appellant to conclude that the appeal should be dismissed, and the order of the FCCA be thereby confirmed, upon a ground other than a specific conclusion of legal unreasonableness.

An alternative approach

97 If it should be thought unfair to the appellant to depart from the procedural confines of the appeal, then I would conclude that the appeal should be dismissed in any event.

98 One proposition embedded in the argument of the first respondent to the FCCA, which was also pursued on the appeal, was that the decision of the IMR was legally unreasonable in part because the first respondent was denied procedural fairness. I would uphold that argument as an alternative basis upon which to dismiss the appeal.

99 In particular, I do not regard the present case as one which simply involved an erroneous finding of fact, without any consequence for procedural fairness.

100 The finding that was made as a result of that error was an important one. It appears to have made a not insignificant contribution to an overall conclusion that the first respondent was not credible and that his account about a number of matters was unreliable. In my view, the IMR could not reach the conclusion which it stated (that the first respondent had made no complaint about sexual torture on Christmas Island) and use it as destructive of his credit (generally or particularly) without fair warning (see *SZBEL* at [36], [47]).

101 Although the IMR asserted (at the end of the final passage of his decision set out earlier) that he had given "notice of my concerns about these matters", the first respondent was entitled to believe that he had answered those concerns by stating that he had spoken

about sexual torture "at the case manager's interview", as he also asserted in his written statement to the IMR dated 9 July 2011. The first respondent was entitled to be confident that his assertion could not reasonably be challenged. It was true, as a matter of fact. He was not on notice that the assertion might be judged to be false, and destructive of his credit.

102 If doubt or rejection of matters of incontrovertible fact was to count against him the first respondent was entitled to an opportunity to correct such a plain error. In that respect, there was a denial of procedural fairness to him. I would regard that, if necessary, as a proper basis to dismiss the appeal.

Conclusion

103 The appeal should be dismissed with costs.

I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 3 November 2014

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 562 of 2014**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Appellant**
AND:	**SZSNW** **First Respondent**
	PETER MCDERMOTT IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER **Second Respondent**
JUDGES:	**MANSFIELD, BUCHANAN & PERRAM JJ**
DATE:	**3 NOVEMBER 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

PERRAM J:

104 I agree that the Minister's appeal should be dismissed with costs. The facts and circumstances have been fully set out in the reasons of Buchanan J. Subject to the following remarks, I agree with those reasons the thoroughness of which permits me the luxury of expressing myself somewhat briefly.

105 We have it on the authority of *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 ('*M61*') that the decision-making process of which the Independent Merits Reviewer ('IMR') procedure is but an element is part of a wider consideration by the Minister of the issue of whether he should consider lifting the bar under s 46A of the *Migration Act 1958* (Cth) in respect of an offshore entry person (at 348 [62]); that such a consideration affects the rights, interests or legitimate expectations of that offshore entry person because, whilst it is being undertaken, that person will remain lawfully in immigration detention (at 354 [78]); that the Minister's power to consider whether to lift bar is therefore attended by obligations of procedural fairness and prohibitions on erroneous legal conclusion (at 354 [78]-[79]); and,

where an IMR report has been generated in breach of those requirements the Court can declare that this has occurred (at 358-360 [100]-105]).

106 The declarations made by the High Court in *M61*, whilst couched in the language of what the IMR had done, were directed therefore at the Minister's position under s 46A and the legal obligations which generated the need for declaratory relief were his. The declarations were in substance proleptic.

107 The question of whether relief for any particular ground of review is available by way of declaration in respect of a decision of an IMR is, therefore, a function of whether that ground would theoretically be available against the Minister's actions under s 46A assuming the IMR report to form the basis of his actions.

108 In this case, if the Minister were to decide not to lift the bar in reliance upon the IMR report that decision would be unreasonable in the sense that Parliament cannot have intended the power in s 46A to be exercised in circumstances such as these. One does not need *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ('*Li*') to arrive at this conclusion – even this Court's now superseded restrictive reading of *Wednesbury* unreasonableness would be sufficient to do so. As Buchanan J has explained, the IMR concluded that the respondent had lied to him about whether or not he had given a report of his sexual torture when interviewed at Christmas Island. The evidence plainly showed that he had so this finding should never have been made. If the Minister were now to exercise the discretion under s 46A to decide not to lift the bar because of this IMR report it would be a decision that would be legally unreasonable in the sense discussed in *Li*.

109 I share with Buchanan J the concern that *Li* is not about the review of facts generally but about the exercise of statutory powers. I also agree that, at first blush, there is no statutory discretion to which the reasoning in *Li* appears able readily to attach in this case. However, a dissection of *M61* shows that the declaratory relief granted in IMR cases is really about the Minister's future discretionary activity under s 46A. The discretionary power required by *Li* is supplied by that provision and the declaration is to be framed accordingly.

110 I am unable, with respect, to accept the conclusion of Buchanan J that an error of law was made by the IMR when he found that the respondent had lied to him about having mentioned his sexual torture when interviewed at Christmas Island. The relevant finding was that he had not been sexually tortured. The IMR had reasons which supported that view

which had nothing to do with the Christmas Island interview. Thus the no-evidence ground is not available. Nor is it the case that the IMR overlooked dealing with the sexual torture claim so that part of, or an integer in, the case, had not been considered. It considered it and rejected it. I can discern, therefore, no error of law in the IMR's treatment of the matter. A decision by the Minister to rely upon the IMR report would, however, be unreasonable.

111 The appeal should be dismissed with costs.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 3 November 2014