FEDERAL COURT OF AUSTRALIA

AIB16 v Minister for Immigration and Border Protection

[2017] FCAFC 163

Tracey, Mortimer and Moshinsky JJ

17 August, 16 October 2017

Immigration — Visas — Protection visa — Request for documentary evidence of identity, nationality or citizenship of protection visa applicant — Bogus document provided by visa applicant — Whether bogus document provided without reasonable explanation — Whether bogus document provided in support of application for protection visa — Migration Act 1958 (Cth), ss 5(1)(a), 91W.

Section 91W of the *Migration Act 1958* (Cth) (the Act) provided that the Minister for Immigration and Border Protection (the Minister) could request an applicant for a protection visa to provide documentary evidence of the applicant's identity, nationality or citizenship. The Minister was required to refuse to grant the protection visa if the applicant either refused to comply or produced a bogus document in response to the request without a reasonable explanation. A "bogus document" was a document which the Minister reasonably suspected was one which purported to be but was not issued in relation to the visa applicant, was a counterfeit document, or was obtained by a false or misleading statement.

By s 5(1)(a) of the Act, a person who in the opinion of the Minister provided a bogus document in support of an application for a protection visa without a reasonable explanation was deemed to be an "excluded fast track review applicant". The consequence of a visa applicant being deemed an "excluded fast track review applicant" was to preclude the applicant from accessing merits review in respect of a decision to refuse to grant a visa.

A delegate of the Minister requested the appellant, a citizen of Iran, to provide documentary evidence of his identity, nationality or citizenship in support of his application for a protection visa. The appellant provided documents which were later found to be "bogus documents" by the delegate. In response to an invitation from the delegate to comment upon the documents he had provided, the appellant said that he had maintained a false identity in Australia due to a fear of being discovered by the Iranian authorities. The delegate refused to grant the protection visa, in part because the appellant had provided bogus documents without a reasonable explanation for doing so. The delegate informed the appellant that he was deemed to be an "excluded fast track review applicant" within the meaning of s 5(1)(a) of the Act because he had provided bogus documents in support of his application. An application to the Federal Circuit Court for judicial review of the delegate's decision was dismissed.

On appeal to the Federal Court, the appellant submitted that he did not fall within the definition of "excluded fast track review applicant", because the bogus

documents were not provided "in support of" his visa application but were provided in response to a request from the delegate under s 91W of the Act. The appellant also submitted that the delegate had misconstrued s 91W by considering his claim of a well-founded fear of harm from the Iranian authorities in deciding whether he had a reasonable explanation for providing the bogus documents.

Held: (1) A protection visa applicant who provides documentary evidence of identity, nationality or citizenship in response to a request under s 91W of the Act necessarily provides that evidence "in support of" the protection visa application for the purposes of the definition of "excluded fast track review applicant" in s 5(1)(a) of the Act. [68]

BGM16 v Minister for Immigration and Border Protection (2017) 252 FCR 97, followed.

(2) In considering whether a visa applicant has given a reasonable explanation for providing a bogus document for the purposes of s 91W of the Act, it is open to a delegate of the Minister to examine and assess the visa applicant's claims to protection. [93]

Per curiam: The word "reasonable" for the purposes of s 91W of the Act connotes an explanation that is not fanciful, is believable in the circumstances and has sufficient rational connection to how and why the bogus document was provided. Reasonable minds may differ as to whether an explanation is reasonable. [91]

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611, applied.

Cases Cited

BGM16 v Minister for Immigration and Border Protection (2017) 252 FCR 97.

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293.

Gill v Minister for Immigration and Border Protection (2016) 248 FCR 398.

Immigration and Citizenship, Minister for v SZMDS (2010) 240 CLR 611.

Kioa v West (1985) 159 CLR 550.

Plaintiff S297/2013 v Minister for Immigration and Border Protection (2014) 255 CLR 179.

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294.

Singh v Minister for Immigration and Border Protection (2016) 247 FCR 554.

Trivedi v Minister for Immigration and Border Protection (2014) 220 FCR 169.

Appeal

L De Ferrari, for the appellant.

NM Wood, for the respondent.

16 October 2017

The Court

1 This appeal raises a number of complex questions about the construction and operation of the *Migration Act 1958* (Cth), not all of which need to be answered in order to dispose of the appeal.

2 The grounds of appeal from the orders of the Federal Circuit Court ("the FCC") concern the construction and operation of two relatively recent amendments to the protection visa framework in the *Migration Act*. The first is

s 91W, which imposes, subject to s 91W(3), a duty to refuse to grant a protection visa if an applicant is requested to produce evidence of their identity and either refuses to comply or "produces a bogus document in response to the request" without a reasonable explanation. The second is Pt 7AA, which creates a "fast track review process" in relation to certain protection visa decisions, but excludes from that process those applicants deemed to be "excluded fast track review applicants".

3 There is no factual dispute in this proceeding that the appellant had provided a "bogus document" in answer to a request made under s 91W(1) to provide evidence of his identity. Rather, the dispute concerns the effect of the provision of the bogus document on the appellant's protection visa application and eligibility for fast track review, and the requirements of statutory and common law procedural fairness. There are nine grounds of appeal raised, but not all of them need be determined, for reasons we set out at [61] below.

4 For the reasons set out below, the appeal should be dismissed.

5 Before turning to the factual background, the delegate's decision and the decision of the FCC, it is appropriate to set out the legislative provisions engaged by the issues in this appeal.

The legislative framework

6 Putting the "fast track application" and decision-making process to one side for the moment, after a visa application is made (as to the need for this, see s 45), and consideration of such an application by the Minister or her or his delegates in accordance with Subdivs AA and AB of Pt 2, Div 3 of the Act, the application process culminates in the Minister making a decision to grant or refuse to grant a visa under s 65 of the Act. Section 65 provides:

> 65 Decision to grant or refuse to grant visa
>
> (1) Subject to sections 84 and 86, after considering a valid application for a visa, the Minister:
>
> (a) if satisfied that:
>
> (i) the health criteria for it (if any) have been satisfied; and
>
> (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
>
> (iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and
>
> (iv) any amount of visa application charge payable in relation to the application has been paid;
>
> is to grant the visa; or
>
> (b) if not so satisfied, is to refuse to grant the visa.
>
> Note 1: Section 84 allows the Minister to suspend the processing of applications for visas of a kind specified in a determination made under that section. Section 86 prevents the Minister from granting a visa of a kind specified in a determination under section 85 if the number of such visas granted in a specified financial year has reached a specified maximum number.

> Note 2: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.
>
> Note 3: Decisions to refuse to grant protection visas to fast track review applicants must generally be referred to the Immigration Assessment Authority: see Part 7AA.
>
> (2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

7 The appellant made some submissions about the proper characterisation of s 65, in particular whether it is appropriately described as a power or a duty. The authorities tend to describe it in mandatory terms and therefore as a duty or obligation, although of course at base all a statute can do is confer a power, or a function, or both, and the character of the power or function may mean it is more aptly described as a duty. It is not a matter which need be pursued to any conclusion on this appeal. In *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [41] the plurality (Gleeson CJ, Gaudron, Gummow and Hayne JJ) described s 65 in the following way:

> … [Section] 65(1) provides that, if the Minister is satisfied that the criteria prescribed by the Act and regulations for a particular class of visa are satisfied, that the grant of a visa is not prevented by the Act or other Commonwealth law, and that the application fee has been paid, the Minister "is to grant the visa" and, if not so satisfied, "is to refuse to grant the visa". Thus, although the Minister's satisfaction (or, in the case of the Tribunal, its satisfaction) is still required, s 65(1) imposes an obligation to grant a visa, as distinct from conferring a power involving the exercise of a discretion. The satisfaction that is required is a component of the condition precedent to the discharge of that obligation.

(Footnote omitted.)

8 And in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [34], Crennan, Bell, Gageler and Keane JJ said:

> The decision to be made by the Minister in performance of the duty imposed by s 65 is binary: the Minister is to do one or other of two mutually exclusive legally operative acts — to grant the visa under s 65(1)(a), or to refuse to grant the visa under s 65(1)(b) — depending on the existence of one or other of two mutually exclusive states of affairs (or "jurisdictional facts") — the Minister's satisfaction of the matters set out in each of the sub-paragraphs of s 65(1)(a), or the Minister's non-satisfaction of one or more of those matters. The decision is not made, the duty is not performed, and the application is not determined, unless and until one or other of those legally operative acts occurs: that is to say, unless and until the Minister either grants the visa under s 65(1)(a) or refuses to grant the visa under s 65(1)(b). The Minister grants a visa by causing a record of it to be made (s 67).

(Footnote omitted.)

9 This characterisation in *Plaintiff S297/2013* might also have been important in considering the appellant's contentions about s 65, which we do not need to decide.

10 Section 65(1)(a)(iii) refers, amongst other provisions, to the "prevention" of the grant of a visa under s 91W. Section 91W was inserted in 2001 by the *Migration Legislation Amendment Act (No 6) 2001* (Cth), but was substantively amended in 2015. In its previous form, it provided:

> 91W Documentary evidence of identity, nationality or citizenship
>
> (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
>
> (2) If:
>
> (a) the applicant has been given a request under subsection (1); and
>
> (b) the applicant refuses or fails to comply with the request; and
>
> (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request; and
>
> (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the applicant's identity, nationality or citizenship in the event that the applicant refuses or fails to comply with the request;
>
> then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's identity, nationality or citizenship.

11 The 2015 amendments relevantly introduced the concept of "bogus documents" to s 91W. Importantly, while the previous form of s 91W(2) allowed the Minister to draw unfavourable inferences following non-compliance with s 91W(1), the current form of s 91W requires the refusal of a protection visa following non-compliance. The current form of s 91W is the same as at the date of the delegate's decision, and provides:

> 91W Evidence of identity and bogus documents
>
> (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
>
> (2) The Minister must refuse to grant the protection visa to the applicant if:
>
> (a) the applicant has been given a request under subsection (1); and
>
> (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
>
> (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
>
> (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
>
> (i) refuses or fails to comply with the request; or
>
> (ii) produces a bogus document in response to the request.
>
> (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
>
> (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
>
> (b) either:
>
> (i) produces documentary evidence of his or her identity, nationality or citizenship; or
>
> (ii) has taken reasonable steps to produce such evidence.
>
> (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

12 The term "bogus document" is a defined term. Section 5(1) provides:

> ***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.

13 The term "false or misleading" in relation to bogus documents has been construed, in the context of Public Interest Criterion 4020 in Sch 4 to the *Migration Regulations 1994* (Cth), to mean "purposely untrue" and not merely a document produced "accidentally" or a statement that is merely "wrong": see *Trivedi v Minister for Immigration and Border Protection* (2014) 220 FCR 169 at [29]-[44] (Buchanan J; Allsop CJ and Rangiah J agreeing). That construction should also be applied to the term "false or misleading" in the context of the s 5(1) definition of "bogus documents".

14 Note 3 to s 65(1) refers to the requirement that "fast track review applicants" generally must be referred to the Immigration Assessment Authority under the provisions in Pt 7AA of the Act. The decision whether or not to grant a visa to a person classified as a "fast track applicant" nevertheless remains a decision to be made under s 65 of the Act, in the sense that Pt 7AA contains no freestanding visa decision-making power independent of the power in s 65.

15 The concept of "fast track applicant", and the mechanism for review of a "fast track decision" under Pt 7AA, was inserted in 2014 as part of the amendments introduced under the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). It is unnecessary to address or consider in detail the purpose of Pt 7AA.

16 "Fast track applicant" is defined in s 5(1):

> ***fast track applicant*** means:
>
> (a) a person:
>
> (i) who is an unauthorised maritime arrival and who entered Australia on or after 13 August 2012, but before 1 January 2014, and who has not been taken to a regional processing country; and
>
> (ii) to whom the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1) does not apply to an application by the person for a protection visa; and
>
> (iii) who has made a valid application for a protection visa in accordance with the determination; or
>
> (b) a person who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(b).
>
> Note: Some unauthorised maritime arrivals born in Australia on or after 13 August 2012 may not be ***fast track applicants*** even if paragraph (a) applies: see subsection (1AC)

17 The decision to refuse the grant of a protection visa to a "fast track applicant" becomes, subject to limited exclusions not presently relevant, a "fast track decision" under s 5(1) of the Act. Fast track decisions are subject to limited merits review only if they are made in relation to "fast track review applicants". That is, such visa applicants do not have access to the merits review system by the Administrative Appeals Tribunal for which Pt 7 provides.

18 Section 473BB defines "fast track reviewable decision":

> ***fast track reviewable decision*** means:
>
> (a) a fast track decision in relation to a fast track review applicant; or
>
> (b) a fast track decision determined under section 473BC;
>
> but does not include a fast track decision in relation to which the Minister has issued a conclusive certificate under section 473BD.

19 The conclusive certificate process under s 473BD need not be considered on this appeal.

20 "Fast track review applicant" is defined in s 5(1):

> ***fast track review applicant*** means a fast track applicant who is not an excluded fast track review applicant.

21 In relation to fast track reviewable decisions, Pt 7AA applies, which provides for a limited form of review of these decisions. Review occurs because of a referral by the decision-maker. It is the question of whether or not to comply with the referral duty in s 473CA that was the question facing the delegate in this matter. Inherent in deciding whether or not the duty in s 473CA must be performed is the need to make a decision whether a person is, or is not, an "excluded fast track review applicant". Section 473CA provides:

> The Minister must refer a fast track reviewable decision to the Immigration Assessment Authority as soon as reasonably practicable after the decision is made.

22 It can be seen from the definition of "fast track reviewable decision", that it must be a decision in relation to a "fast track review applicant". And it can be seen from the definition of that phrase in s 5(1) (see [20]) that a person who is an "excluded fast track review applicant" is carved out of the definition.

23 An "excluded fast track review applicant" is not able to have her or his visa refusal decision referred for review to the Immigration Assessment Authority. In plain words, a harsh consequence befalls an unsuccessful visa applicant who falls within the definition.

24 "Excluded fast track review applicant" is defined in s 5(1), which relevantly provides that the provision of a bogus document without reasonable explanation may render a fast track applicant an "excluded fast track review applicant":

> ***excluded fast track review applicant*** means a fast track applicant:
>
> (a) who, in the opinion of the Minister:
>
> …
>
> (vi) without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; or

25 Unless the Minister determines otherwise under s 473BC, excluded fast track review applicants are not able to access any form of merits review. Their visa applications are considered "finally determined" under s 5(9)(c) and are subject only to judicial review.

26 The terms of s 57 should also be set out. Section 57 was formerly applicable only to the decision-making process leading to a decision under s 65 of the Act. However, when the fast track process was introduced, s 57 was also amended. The amendment can be seen in s 57(1). However there is no correlative amendment in s 57(2). This matter was raised during argument on the appeal. In our opinion the section as currently drafted is problematic in its purported

application to decisions about whether a person is an excluded fast track applicant. Again however, that is not a question which this Court need determine in order to dispose of this appeal.

27 Section 57 provides:

> 57 Certain information must be given to applicant
>
> (1) In this section, ***relevant information*** means information (other than non-disclosable information) that the Minister considers:
>
> (a) would be the reason, or part of the reason:
>
> (i) for refusing to grant a visa; or
>
> (ii) for deciding that the applicant is an excluded fast track review applicant; and
>
> (b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and
>
> (c) was not given by the applicant for the purpose of the application.
>
> Note: ***Excluded fast track review applicant*** is defined in subsection 5(1).
>
> (2) The Minister must:
>
> (a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and
>
> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and
>
> (c) invite the applicant to comment on it.

28 We turn now to the factual background to the appeal, and the decisions under consideration.

Background

29 The appellant is a citizen of Iran, and arrived in Australia on 11 October 2012. In July 2015, the Minister "lifted the bar" which exists under s 46A (which prevents a person who is an "unauthorised maritime arrival" in Australia from making a valid visa application). Accordingly, the appellant applied for a Class XA (subclass 785) Temporary Protection visa. The details of the appellant's claims to fear persecution are not relevant to the disposition of the appeal.

30 The appellant's visa application was considered and determined under Pt 7AA of the Act, colloquially known as the "fast track" process. As the extrinsic material to which the FCC referred in its reasons demonstrates, the descriptor "fast track" is intended to signify an approach to the consideration and determination of protection visa applications which will assist in reducing the delays which have notoriously beset the protection visa application process under the Act.

31 As part of his protection visa application, the appellant provided translated Iranian court documents which referred to him by what he later admitted was a false name. The FCC identified the two names the appellant had used as "S1" and "S2" and we shall adopt the same approach in these reasons. The Iranian court documents bore the name S1. At this stage, the appellant also supplied a photocopy of an Iranian driver's licence in the name of S1. In his visa application, where he listed this driver's licence, he ticked the box indicating

the licence was provided "with" his protection visa application. We note here that it is this driver's licence, the "original" of which the appellant subsequently supplied to the delegate in circumstances we discuss below, which was found by the delegate to be a "bogus document" within the meaning of that phrase in s 5 of the Act.

32 On 25 August 2015, the delegate wrote to the appellant, advising the appellant that an interview was scheduled for 8 September 2015. He asked the appellant to bring to the interview, amongst other things, "originals of any identity documents you hold". Later in the letter, another request for evidence of the appellant's identity was made, in the following terms:

> You are requested to produce documentary evidence of your identity, nationality or citizenship for inspection by an officer of the department. This request is made under subsection 91W(1) of the *Migration Act 1958* (the Act).
>
> If you:
>
> - refuse or fail to comply with this request under subsection 91W(l) or if you produce a bogus document in response to this request; and
> - the Minister is not satisfied that you have a reasonable explanation for refusing or failing to comply with the request, or for producing a bogus document
>
> then under subsection 91W(2) of the Act the Minister must refuse to grant you a protection visa.
>
> Further, if at any stage you:
>
> - provide a bogus document as evidence of your identity, nationality or citizenship; or
> - if the Minister is satisfied you have destroyed or disposed of documentary evidence of your identity, nationality or citizenship, or you have caused such documentary evidence to be destroyed or disposed of; and
> - the Minister is not satisfied that you have a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence then under section 91WA of the Act the Minister must refuse to grant you a protection visa.
>
> You must provide a reasonable explanation if you do not provide documentary evidence in response to this request. If an officer of the department is satisfied as to the explanation provided, you must either provide the documentary evidence or demonstrate that you have taken reasonable steps to provide documentary evidence. If you do not comply with these steps, the Minister must refuse to grant you a protection visa.
>
> Please provide certified copies of any documentary evidence of your identity, nationality or citizenship and bring original documents to interview. This may include, but is not limited to:
>
> - your passport issued by your country of origin
> - your national identity card issued by your country of origin
> - your birth certificate
> - your driver's licence.

33 The appellant did not provide any original identity documents to the delegate at the interview on 8 September 2015. Instead, the following day, 9 September 2015, he provided an original driver's licence which, the evidence demonstrates and the appellant accepted, is a hard copy of the photocopied licence he had provided with his protection visa application, with the name of S1.

34 Shortly thereafter, the licence was referred by the delegate to the Department's "Document Examination Unit". That Unit completed its

assessment on 13 October 2015 and the delegate then wrote to the appellant. It was common ground, and the letter stated, that he did so pursuant to his obligations under s 57 of the Act. The delegate informed the appellant:

> In accordance with section 57 of the Act, I am writing to advise you that information has been received which a delegate of the Minister considers would be the reason, or a part of the reason, for refusing to grant a visa.
>
> The Iranian Driver's Licence that you provided has been assessed to be a bogus document. A 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.
>
> The document you provided contained characteristics of concern and was referred to the department's Document Examination Unit (DEU) for assessment. The DEU has assessed the document to be counterfeit as some of the security features are missing or not consistent with genuine documents. Furthermore, some of the characteristics of the production of the document are not consistent with genuine examples of Iranian Driver's Licences.
>
> If it is assessed that you have produced a bogus document in response to the section 91W(l) request, and you do not have a reasonable explanation for producing the bogus document, then your visa application must be refused under section 91W(2) of the Act.
>
> You may provide comment on the above information.
>
> **Opportunity to provide a reasonable explanation for producing the bogus document**
>
> I am writing to give you an opportunity to provide a reasonable explanation for producing a bogus document, and to either:
>
> • produce documentary evidence of your identity, nationality or citizenship; or
> • take reasonable steps to produce such evidence.
>
> If the Minister is not satisfied that you have a reasonable explanation and you do not produce documentary evidence, or take reasonable steps to produce such evidence, then your visa application must be refused under section 91W(2) of the Act.

35 On 2 November 2015, the appellant provided a written response to the delegate, including an explanation for producing the driver's licence. He said he was wanted by Iranian authorities, which prompted him to adopt a false identity as S1 and procure a fake passport in order to leave Iran.

36 He claimed that he maintained his false identity while in Australia due to a fear of being discovered by the Iranian authorities, saying:

> … since I left Iran I didn't tell my real name to anyone because I was thinking I can be in serious trouble if Iranian regime find out where I am, everyone in Australia knows me by [redacted] name even my housemate!, I was too scared to tell the true to anyone!

(Identifying information redacted.)

37 With this response, the appellant included a scanned copy of another Iranian driver's licence. This licence, as it appeared in a photocopy in the evidence before the Court on appeal, was in quite a different form in comparison to the first driver's licence and contained no photograph. It bore, the parties agreed,

the name S2, which the appellant claimed was his true identity. The document is in Persian but we take the state of the evidence from the parties' agreement before the Court.

38 The Department then sent the appellant a second s 57 letter on 17 December 2015. It relevantly stated:

> In accordance with section 57 of the Act, I am writing to advise you that information has been received which a delegate of the Minister considers would be the reason, or a part of the reason, for refusing to grant a visa. This information could also form part of the reason for deciding that you are an excluded fast track applicant. As explained to you at your protection visa interview on 8 September 2015, if you are determined to be an **excluded fast track applicant**, you will not have a right to have a Protection visa refusal reviewed by the Immigration Assessment Authority (IAA).
>
> You were previously requested to produce documentary evidence of your identity, nationality or citizenship for inspection by an officer of the department under section 91W(1) of the *Migration Act 1958* (the Act). When this request was made, you were given a warning that the Minister cannot grant a protection visa to you if you refuse or fail to comply with the request or **produce a bogus document** in response to the request.
>
> The original driver's licence you provided to the department on 9 September 2015 in response to the 91W(1) request (using the name [redacted]) has been assessed to be a bogus document. A 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.
>
> The document you provided contained characteristics of concern and was referred to the department's Document Examination Unit (DEU) for assessment. The DEU has assessed the document to be counterfeit as some of the security features are missing or not consistent with genuine documents. Furthermore, some of the characteristics of the production of the document are not consistent with genuine examples of Iranian Driver's Licences.
>
> This information is potentially adverse to your application for a protection visa for the following reasons:
>
> * **It supports the assessment that you may have provided the department with a false identity.**
> * **It supports the assessment that the court documents you provided to the department as evidence of your claims are also bogus.**
> * **It potentially undermines your overall credibility regarding your claims and other information you have provided to the department in support of your claims.**
>
> If it is assessed that you have produced a bogus document in response to the section 91W(1) request, and you do not have a reasonable explanation for producing the bogus document, then your visa application must be refused under section 91W(2) of the Act.
>
> I also wish to advise you that failure to provide a reasonable explanation for producing a bogus document to an officer of the Department or to the Minister may result in you being determined to be an **excluded fast track review applicant**, as defined by Section 5 of the Act.

> **Opportunity to provide a reasonable explanation for producing the bogus document**
>
> I am writing to give you an opportunity to provide a reasonable explanation for producing a bogus document, and to either:
>
> - produce documentary evidence of your identity, nationality or citizenship; or
> - take reasonable steps to produce such evidence.
>
> If the Minister is not satisfied that you have a reasonable explanation and you do not produce documentary evidence, or take reasonable steps to produce such evidence, then your visa application must be refused under section 91W(2) of the Act.
>
> I am also inviting you to provide comment on why you should not be considered an excluded fast track applicant.

(Emphasis in original; identifying information redacted.)

39 The appellant provided a response by email to this second letter on 14 January 2016. In this response, he maintained his explanation that he retained a false identity out of fear of the Iranian authorities:

> As I explained to you on my previous statement I was charged with acting against Iranian regime and penalty for this crime is death!
>
> I had to live by another name cuz if Iranian regime find out I'm in Australia they will do anything to get me back, or they will do anything to kill me!

40 On receipt of this email from the appellant, and on the same day, the delegate sent him an email, which relevantly stated:

> I apologise for sending you what might seem like the same letter twice. However, if a person has provided the Department of Immigration and Border Protection with a bogus document they must provide documentary evidence of their true identity and a reasonable explanation as to why they provided a bogus document. If that person does not do this then that person not only must be refused a Protection visa under section 91W(2) of the Migration Act, they might also be assessed to be an "excluded fast track review applicant". My first letter advised you of the former, but not the latter. I sent you a second letter in order to advise you of this and offer you an opportunity to comment. Failure to do so would have be [sic] a legal error on my part.
>
> I would like to remind you that being assessed to be an excluded fast track review applicant means that you would not have the right to have a protection visa refusal review by the Immigration Assessments Authority. You would, however, still be entitled to have a refusal reviewed by the Federal Court. If you require more information on this matter I suggest you contact a refugee advocacy group such as The Asylum Seekers Resource Centre, or engage the services of a registered migration agent.
>
> Thank you for providing me with a copy of your Iranian driver's licence confirming your identity as [redacted]. By doing this, you have partly satisfied 91W(3) of the Migration Act. I must now make an assessment as to whether your explanation for providing the department with a fake name and bogus identity document is reasonable. If you satisfy 91W(3) of the Migration Act then 91W(2) does not apply and you will not be refused on the grounds that you provided a bogus document to the department. I will make my assessment shortly.

(Identifying information redacted.)

41 The delegate made his decision a few days later.

Delegate's decision

42 On 20 January 2016, the delegate sent the appellant a letter informing him

that his application for a protection visa had been refused, and attached the decision record. Both the letter and the decision record expressed the basis for the refusal in the same way.

43 First, each referred to the delegate not being satisfied the appellant met the criteria in s 36(2) of the *Migration Act* for the grant of a protection visa. This basis, it was not disputed, relied on the decision-making process required under s 65 of the Act.

44 Second, the letter and the decision record then stated that the application was "also refused" under s 91W(2) of the *Migration Act*, because the appellant had produced a bogus document in response to a request to provide documentary evidence of identity, nationality or citizenship, without a reasonable explanation for the production of the bogus document.

45 The letter then informed the appellant there was no right of merits review from his decision because the appellant had been found to be an "excluded fast track applicant" as defined in the *Migration Act*. The letter did not inform the appellant of his rights to judicial review of the decision.

46 In the decision record, both the non-satisfaction of s 36(2) criteria and the s 91W(2) finding were expressed in separate paragraphs under the heading "Refusal Decision".

47 The structure of the decision record was as follows. After summarising the refusal decision, the record went through (in what was described as "Part 1") the application's history, its validity, the material before the delegate and a summary of the protection claims made by the appellant. In what was headed "Part 2", the delegate then set out his findings "preliminary to assessment of protection claims". It was in this Part that the delegate dealt with the request under s 91W and the evidence provided by the appellant about his identity.

48 The delegate found the identity initially adopted by the appellant (S1) was a false one. He found the driver's licence initially produced as evidence of identity was false. The appellant had confirmed as much, as we have set out above. The delegate also found the appellant did not have a reasonable explanation for the production of the bogus document. It is important to set out the delegate's reasoning on this issue, as it is relevant to the appellant's grounds of appeal:

> I am not satisfied the applicant has provided a reasonable explanation for providing the department with a bogus identity document (and identity) in either of his two responses to the section 57 natural justice letters. In both of his natural justice letter responses, the applicant's primary argument for maintaining a bogus identity (and therefore providing the department with a bogus identity document) is that he fears that Iranian authorities would learn of his whereabouts if he used his real name and date of birth. However, for reasons outlined in Findings of Fact, I am not satisfied the applicant was or remains wanted by Iranian authorities. This assessment is reinforced by the applicant's admission in both responses that the name on the Iranian "court documents" provided by him as evidence of his interest to Iranian authorities is not his real identity. This admission confirms that they too are bogus; no weight can be placed on them as evidence of the applicant's claims. As I am not satisfied the applicant is wanted by Iranian authorities, I am not satisfied the applicant feared that by revealing his true identity in Australia, his presence in Australia would be alerted to Iranian authorities, either by persons sympathetic to the Iranian regime, or by Australian authorities, exposing him to a risk of being located, retrieved, and/or harmed by the Iranian Information Ministry and/or Revolutionary Guard.

> As I am not satisfied the applicant was wanted by Iranian authorities at the time of his departure, I am not satisfied the applicant needed to conceal his true identity from Iranian authorities in order to depart the country. Consequently, I am not satisfied the applicant required and acquired a bogus passport. At his TPV interview, the applicant claimed that he fraudulently obtained a genuine passport using the services of men named [redacted] and [redacted]. The applicant claimed that these men produced a fake birth certificate (shenasnameh) and military service completion card, with [redacted] accompanying him to the passport office. He claims he received his passport from authorities several days later. However, the applicant has not provided the department with any evidence that he was once in possession of a passport, military service completion card, or shenasnameh in the name of [S1], the false identity he provided to Australian authorities, including the Department of Immigration and Border Protection. Country information indicates that when applying for a passport in Iran, Iranian male citizens over 18 must submit their shenasnameh, national identity card, and military service completion card to the issuing authorities. The national identity card is a distinct document, not a category of documents that potentially includes a driver's licence. The Department of Foreign Affairs & Trade (DFAT) advised in 2011 that at the time of departure from Iran, "[w]here there is doubt about a person's identity, or their passport, they may be asked to provide another piece of identification. This could include a driver's licence, or identity papers." On this basis, a driver's licence might occasionally be required in addition to a passport in order to depart Iran. However, a shenasnameh, national identity card, and military service completion card would still be needed to be provided to the issuing authority in order to acquire a passport. The applicant has provided no evidence to the department that he had such documents manufactured, let alone for the purpose of acquiring a passport under a false name in order to depart Iran. The only evidence of bogus documents the applicant has provided to the department is in the form of a bogus driver's licence and two bogus court documents. As I am not satisfied that the applicant is wanted by Iranian authorities or had a bogus passport, shenasnameh and military service completion [card] manufactured, the logical assessment is that the applicant produced a bogus driver's licence and bogus court documents primarily for purpose of deceiving Australian authorities; not for the purpose of departing Iran.

(Identifying information redacted.)

49 The delegate found that the appellant's true identity was S2, that the second driver's licence he produced was evidence of his true identity, and that there were no concerns with the authenticity of that document.

50 The delegate then turned to the assessment under s 36(2), first setting out his findings of fact, and then (in Part 3) setting out his assessment of the criteria for the purposes, first, of s 36(2)(a) and then (in Part 4), s 36(2)(aa). As we have noted, the delegate found the appellant did not satisfy either criterion.

51 The delegate signed and dated the decision record at this point. On the next consecutive page there was a further section headed "Assessment as to whether the applicant is an excluded fast track review applicant". In this part of the document the delegate then made findings for the purposes of each part of the definition of excluded fast track review applicant in s 5(1) of the *Migration Act*. The delegate concluded this document with a section headed "Finding", in which he stated:

> 122. In making this assessment against the definition of an excluded fast track review applicant in subsection 5(1) of the Act, I consider that section 57 of the Act does apply.
>
> 123. I have relied on information that was not provided by the applicant for the

purpose of the application. The applicant was invited to comment on adverse information throughout this assessment process. As noted above, the applicant meets the definition of an excluded fast track review applicant based on his provision of a bogus identity document to the department in response to a request for documentary evidence of his identity under subsection 91W(l) of the Act. As noted above, the DEU's assessment indicating the counterfeit nature of the document was put to the applicant in natural justice letters dated 13 October 2015 and 17 December 2015. The letter of 17 December 2015 fully complies with section 57 of the Act.

124. I am satisfied that the applicant meets the definition of an excluded fast track review applicant in subsection 5(1) of the Act, specifically subsection 5(1)(a)(vi) of the definition of an excluded fast track applicant in the Act: excluded fast track review applicant means a fast track applicant:

(a) who, in the opinion of the Minister:

(vi) without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application.

Federal Circuit Court decision

52 In the FCC, the appellant was represented and relied on seven grounds of review dealing with both s 91W and the assessment that the appellant is an excluded fast track review applicant. The grounds of review and aspects of the FCC decision which are relevant on appeal were the first to fifth grounds. Those were:

(1) The decision that the appellant is an "excluded fast track review applicant" is vitiated by jurisdictional error, on the basis that the jurisdictional fact of a bogus document provided by the appellant "in support of his or her application" did not exist. The argument was that the bogus document was supplied following a request under s 91W, and it was therefore not supplied "in support of his or her application".

(2) The "excluded fast track review applicant" decision was made in breach of s 57 of the Act, on the basis that the delegate failed to give particulars of the information which he used to make the adverse decision.

(3) The delegate misconstrued s 91W and the decision refusing the protection visa under s 91W was vitiated by jurisdictional error. The argument was put that the delegate erred in considering the appellant's claim of a well-founded fear of harm from the Iranian authorities in deciding whether he had a reasonable explanation for providing the bogus document.

(4) The s 91W decision was made in breach of natural justice, on the basis that the 17 December 2015 letter did not satisfy the natural justice obligation of affording an opportunity to the appellant to give an explanation for the bogus document, and that the letter did not put the appellant on notice as to how or why either of the "court documents", or a "potential undermining" of his overall credibility might be relevant to a decision to refuse the visa under s 91W.

(5) The decision refusing the appellant the grant of a protection visa under s 65 of the Act was made without power, on the basis that a decision was made under s 91W, and there was therefore no longer an undetermined valid application for a visa.

53 The FCC dismissed all seven grounds of review.

54 The Court dismissed the first ground (at [29]-[31]), finding that, contrary to the appellant's submissions, and although produced in answer to an identity request under s 91W, the driver's licence was provided by the appellant "in order to continue to pursue his visa application". Thus it was, as the definition of excluded fast track review applicant required, provided "in support" of his visa application. The Court also noted that a copy of the false driver's licence was supplied with the initial protection visa application, prior to the s 91W request.

55 The second ground was dismissed on the basis that, contrary to the appellant's contention, there was no contravention of s 57 in relation to the request under s 91W. The Court found the second s 57 letter was "quite clear, and exhibit[ed] a genuine effort to provide the applicant with a clearly stated explanation of the significant issues flowing from providing the bogus document" (at [34]). His Honour also found, at [35], that the letter satisfied any common law procedural fairness requirement, if in fact any such requirement applied.

56 Ground 3 was also dismissed, on the basis that contrary to the appellant's submissions, there was a legitimate link between the appellant's s 36(2) claims and the provision of the bogus document. The Court found the appellant's claim of fear of harm by the authorities "was the basis of his explanation for providing the bogus document" (at [37]). His Honour considered that (at [39]):

> In this case, the findings of fact as to whether or not the applicant was at risk of harm were relevant not only to the substantive visa conditions, but also the reasonableness of any explanation for providing bogus documents. The applicant's claim to fear harm was the explanation he gave for having provided a bogus document.

57 Ground 4 was dismissed on the basis that even if common law natural justice obligations applied to the provision of information about the possible effects of s 91W, which his Honour did not decide, such obligations were satisfied (at [43]). In particular, his Honour accepted counsel for the respondent's submissions that, first, the appellant conceded that the first letter satisfied the natural justice obligations, and so even if the second letter did not, there could have been no "practical injustice", and second, as with ground 2, the second letter was not "confusing".

58 The merits of ground 5 were not substantively decided, as his Honour considered (at [49]) that whether the refusal of the grant of the visa was made under s 65 or s 91W(2) was not a question that made a difference in the outcome of this particular application. His Honour added at [60] that even if there was an error of law as to which of s 91W and s 65 applied, only one outcome was possible and relief should be refused.

59 The remaining grounds and the Court's decision on them need not be set out in detail as they concern matters this Court does not need to decide.

The grounds of appeal

60 The grounds of appeal raised before this Court in the amended notice of appeal are substantially similar to those raised before the FCC. The appellant raises nine grounds of appeal:

(1) The learned judge erred in failing to find that the decision of the delegate that the appellant was an excluded fast track review applicant was vitiated by jurisdictional error.

(2) The learned judge erred in finding, at [29] of his reasons, that a document given in response to a request made under s 91W is one provided "in support of his or her application".

(3) The learned judge erred in finding, at [29], that a copy of a false driver's licence supplied with the initial visa application was relevant to whether the appellant was an excluded fast track review applicant, and in failing to take into account, at [30], that the s 91W request was for an original of the driver's licence.

(4) The learned judge erred in finding, at [30], that, when the appellant gave the original of the driver's licence in the false name, he provided a document outside the terms of the s 91W request.

(5) The learned judge erred in failing to find that the excluded fast track review applicant assessment was made in breach of s 57 of the Act.

(6) The learned judge erred in failing to find that the decision of the delegate refusing the grant of a visa to the appellant under s 91W was vitiated by jurisdictional error, on the basis of misconstruing s 91W.

(7) The learned judge erred in failing to find that the s 91W refusal decision was made in breach of natural justice.

(8) The learned judge erred in failing to find that the decision of the delegate in refusing the grant of a visa to the appellant under s 65 was made without power.

(9) Alternatively to ground 8, the learned judge erred in failing to find that the s 65 refusal decision was made in breach of natural justice.

Resolution

61 This matter can be resolved by a consideration of the appellant's first to fifth grounds, (which we shall call the EFTRA grounds), and by a consideration of the appellant's sixth and seventh grounds concerning the operation of s 91W. This consideration can be undertaken on the assumption, in favour of the appellant, that he is correct in his submissions about there being no power to refuse to grant the protection visa under s 65 of the Act. If he is correct about the s 65 matters, then what stands between him and the appeal being allowed are the s 91W grounds.

62 We emphasise that we express no view on the correctness of the appellant's contentions about there being a bifurcation between an exercise of power under s 91W and an exercise of power under s 65, but even if it is correct, we consider the appellant fails in his contentions concerning the operation of s 91W. In those circumstances, the appeal must inevitably be dismissed. There is no reason to consider the appellant's eighth and ninth grounds concerning s 65, nor the asserted interrelationship between s 47 and s 65.

63 The Minister contends it is necessary for this Court to determine the EFTRA grounds first. He based that submission on a further contention that if those grounds succeed alone, the matter cannot be remitted to the FCC, because that

Court has no jurisdiction to review (by itself) a decision for the purposes of s 473CA that a person is an excluded fast track applicant. The Minister relies on the matters in s 476 of the Act for that submission. We do not accept the Minister's submission is necessarily correct, but once again this matter need not be decided because we have concluded none of the appellant's EFTRA grounds should succeed.

64 Section 476(2) provides that the Federal Circuit Court has no jurisdiction in relation to, amongst other matters, a "primary decision". The term "primary decision" is defined in s 476(4):

> ***primary decision*** means a privative clause decision or purported privative clause decision:
>
> (a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or
>
> (b) that would have been so reviewable if an application for such review had been made within a specified period; or
>
> (c) that has been, or may be, referred for review under Part 7AA (whether or not it has been reviewed).

65 The Minister relies on the terms of para (c) of that definition. It will be noted the text refers to a privative clause decision which has been, or may be referred for review. It does not refer to a privative clause decision which will not be referred for review (because the person has been determined to be an excluded fast track applicant). There may be a real question concerning whether the FCC does have jurisdiction over a decision such as the one made in relation to the appellant. However the resolution of that question should await a case in which it must be decided. Like many other issues concerning the operation of Pt 7AA, these are weighty matters.

66 Nevertheless, we turn first to consider the EFTRA grounds and explain why they are not made out.

The EFTRA grounds

67 In this part of our reasons, given that ground 1 is a conclusionary allegation based on grounds 2 to 4, we deal first with grounds 2 to 4 before returning to ground 1.

Ground 2: "in support of"

68 The appellant's contentions concerning the terms of subpara (a)(vi) of the definition of "excluded fast track review applicant" in s 5(1) of the Act should be rejected. The appellant's circumstances were capable of falling within the terms of subpara (a)(vi) of that definition because it was open to the delegate to find that the appellant had "provide[d], give[n] or presente[d]" a bogus document "in support of his … application".

69 It is clear from the terms of s 91W, which only applies to protection visa applicants, that a request for evidence of identity is a request which occurs in the context of a protection visa application. Indeed, the Full Court recently rejected a broader submission made by the Minister in relation to the relevantly identical part of s 91WA, to the effect that a document unconnected to a person's protection visa application could provide the foundation for the refusal of a protection visa under s 91WA. In rejecting that submission, in *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97 the Full Court said at [60]-[66] (Mortimer and Wigney JJ, Siopis J agreeing):

60. In our opinion, the purpose of these provisions is to ensure the identity, nationality and citizenship of applicants for protection visas is accurately ascertained, by creating a disincentive for applicants to persist, through the protection visa process, with concealing their true identities. That is the purpose of sub-ss 91V(1) to (3) which deals with verification of applicants for protection visas, and of s 91W, which deals with requests for documentary evidence of identity, nationality or citizenship, and of s 91WA. The disincentive in s 91V is that reasonable adverse inferences can be drawn about the applicant's credibility from non-compliance, or the manner of compliance with, a request for information. The disincentive in s 91W is refusal of a protection visa if there is non-compliance with a request to provide documentary evidence or the production of a bogus document in response to the request. And the disincentive in s 91WA is refusal of a protection visa without consideration of the merits of the claim if "bogus" identity documents are provided, or identity documents are destroyed, without reasonable explanation and provision of a person's accurate identity information.
61. The object of the *Migration Act* is stated in s 4(1) to be a singular one:

> The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

62. Essential to regulating the coming into and presence in Australia of non-citizens is to understand who they are, and where they have come from. The role of false documentation in the movement of people around the world is a notorious fact. It is unsurprising the legislature has seen fit to deal with the provision of false or inaccurate documentation in express terms in many places, and in many ways, in the *Migration Act* as an essential part of securing the objective in s 4(1).
63. More particularly, an individual's identity, nationality and citizenship are critical in the assessment of a protection visa application. This information goes to the fundamentals of the decision-making process, such as the country of nationality against which a person's claims are to be assessed. This information will often go to the core of an applicant's claims, because who a person is and where she or he comes from are integral aspects of why she or he claims to have a well-founded fear of persecution, or to fear significant harm for the purposes of complementary protection. Finally, whether an individual's claims are accepted as credible will often depend on the decision-maker being satisfied of a person's true identity.
64. Ascertainment of true identity and nationality as a purpose is confirmed by several aspects of s 91WA itself. The two limbs of sub-s (1) deal with the two ways in which a person's true identity may be concealed: the giving of "bogus documents", or the destruction of identity documents so a person has none. Both kinds of conduct are apt to frustrate the need to be able to establish who a protection visa applicant really is in order properly to process and assess her or his claims.
65. The terms of s 91WA(2)(b) also confirm this purpose because, to secure the benefit of the exculpatory provision, a person must prove to the satisfaction of the Minister her or his true identity, or at least attempt to prove her or his true identity.
66. Finally, the use of the phrase "as evidence of" in s 91WA(1) ("the applicant provides bogus documents **as evidence of** the applicant's identity") is consistent with the purpose we have outlined above. It ties the provision of such documents to the need for an applicant to prove her or his identity as part of the protection visa assessment process.

(Emphasis in original.)

70 The only purpose in the delegate requesting the appellant to provide evidence of his identity was for the purposes of his protection visa application. If the appellant did not do so, the clear implication was that his true identity would remain unconfirmed and his protection visa application would be highly likely to fail. As the Full Court in *BGM16* observed, ascertaining a person's true identity is a key aspect of the protection visa application process.

71 The definition of "excluded fast track review applicant" in s 5 also only applies to protection visa applicants, and not to other visa applicants. That is apparent from the definition of "fast track applicant". In contrast, other parts of the legislative scheme apply the concept of a bogus document as defined in s 5 to a larger group of visa applicants: see for example Public Interest Criterion 4020 (PIC 4020), contained in Sch 4 to the *Migration Regulations*.

72 The definition of excluded fast track review applicant in s 5(1) has a number of distinct components, which are not related to each other. For example subpara (a)(i) relates to persons who may have access to protection in other countries. Subparagraph (a)(ii) concerns people who have previously made an unsuccessful application for a protection visa and have re-entered Australia to make a further application. Subparagraph (a)(iii) concerns people whose claims for protection have been made and refused in another country, and similarly subpara (a)(iv) relates to people who have been refused protection under a UNHCR assessment scheme. Inexplicably, there is no subpara (a)(v).

73 These five reasons comprehend a range of policy reasons the Parliament has decided should result in an unsuccessful protection visa applicant not having access to merits review. It might be said the first subparagraph contemplates the person has protection elsewhere. The second, third and fourth concern the prospects of success of the person's application, based on previous decisions. The fifth, and relevant one, would appear to evince a policy that persons who have been dishonest with the Minister and her or his delegates throughout the process should not be given access to any further review of their claims.

74 Evidence of identity is critical to the grant of any visa, but as the Full Court explained in *BGM16*, particularly to a protection visa because of the frequent connection between identity and the claims to protection which are made. In that sense, evidence of identity will always be provided "in support of" a protection visa application because without satisfactory evidence, a person will not secure the grant of a protection visa.

75 Whether the words "in support of" extend, for example, to any information provided in answer to an invitation under s 56(2) where that information is adverse to a protection visa applicant, is not a matter which need be determined on this appeal.

Ground 3: original vs copy

76 On the uncontested evidence, the appellant submitted a photocopy of his false Iranian driver's licence with his protection visa application. He did so as evidence of his identity and, even on the appellant's construction of the term "in support of", he gave that licence to the Minister's delegate "in support of" his protection visa application. Contrary to the appellant's submissions on ground 3, there is no relevant distinction, for the purpose of the definition of "bogus document" in s 5 of the Act between an "original" and a copy of the same document. We place the word "original" in inverted commas because on the evidence this Iranian driver's licence was a false one. It was an "original"

document in the sense that it was a tangible, hard copy version of a driver's licence, rather than a document which had been produced by reproducing an image from another document. In any event as we have noted, the Act makes no distinction between originals and copies, and in context it is readily understandable why it would not.

Ground 4: provision of driver's licence outside the terms of s 91W

77 We note ground 4 as expressed was not developed in oral or written submissions. Paragraph [30] of the FCC's reasons is, it must be accepted, not easy to follow. We suspect that is because the submissions the learned judge was attempting to answer were also not easy to follow. All the FCC is saying at [30], it seems to us, is that a request under s 91W(1) is not properly seen as satisfied if a bogus document is produced, because the premise of the provision is that genuine identity documents will be produced. That is self-evident. Section 91W(2) deals with what must happen if the premise is not met. It is not inapt to describe what occurs as the provision of a document "outside" the terms of the s 91W request. No argument was developed about how any asserted error by the FCC at [30] related to any jurisdictional error by the delegate. This ground fails.

Ground 1: whether jurisdictional error in the EFTRA decision

78 Ground 1 was a conclusionary allegation based on the more particular arguments in grounds 2 to 4. No separate basis for jurisdictional error was advanced under this ground. Since the other grounds fail, so must this one.

Ground 5: breach of s 57

79 We have set out our concerns about the structure of s 57 after the introduction of the fast track review process and the amendments to s 57(1) but not s 57(2).

80 Whatever the proper construction, and assuming for the purposes of this appeal that the obligation in s 57(2) extends to the decision whether a person is an excluded fast track review applicant, and further assuming that there may be a residual common law procedural fairness component to a delegate's obligation to put any material that is credible, relevant and significant to a visa applicant (*Kioa v West* (1985) 159 CLR 550 at 629 (Brennan J)), the FCC did not err in rejecting this ground. The appellant relies, by analogy, on *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

81 Assuming the appellant is entirely correct about the nature of the procedural fairness obligation, on the evidence there was no breach of the obligation by the delegate.

82 The first letter sent by the delegate on 13 October 2015 (see [34] above) informed the appellant that the Department's Document Examination Unit had assessed the driver's licence in the name of S1 to be counterfeit, and why. The delegate's second letter, on 17 December 2015 repeated that information and then explained, in bold highlighted text, why that information was relevant to the delegate's decision.

83 Both letters gave the appellant an opportunity to comment and he took up both opportunities.

84 The second letter was supplemented by an email from the delegate on 14 January 2016 (see [40] above) in which the delegate explained why he may decide the appellant is an excluded fast track review applicant. The email

explained the consequences for the appellant of being put into that category, and explained how the appellant would only have judicial review and not merits review rights.

85 The FCC was correct to conclude (at [42]-[43]) that even if common law procedural fairness applied, the delegate had not breached those obligations. The delegate informed the appellant of the information which may be relevant to his decision, both under s 91W and in relation to the categorisation of the appellant as an excluded fast track review applicant, and the delegate explained how that information might be relevant. In circumstances where there are no grounds reliant on the appellant's language or intellectual abilities, or his absence of legal representation or migration assistance, we consider the appellant could not reasonably have been under any misapprehension about the relevance and significance of him having provided what the Document Examination Unit had advised the delegate was a false Iranian driver's licence.

86 The delegate's letter of 17 December 2015 (see [38] above) particularised the "relevant information" in the way that the delegate considered appropriate in the circumstances. The delegate thereby complied with s 57(1)(a).

87 Likewise, the delegate's second letter — considered alone or in combination with its later email of 14 January 2016 — ensured as far as was reasonably practicable that the appellant understood why the information was relevant to the consideration of the application (ie whether or not to grant the visa). The delegate was not required to explain why the information was relevant to the EFTRA decision, which logically and temporally succeeds the making of a visa decision. But the delegate did so anyway. Indeed, the appellant's email response demonstrated his understanding, and demonstrated he appreciated the need to explain why he had provided a false driver's licence. He gave the explanation in some detail, but he was not believed.

88 We turn now to the grounds of appeal concerning s 91W which involve the Tribunal's factual findings about not believing the appellant's explanation.

Ground 6: misconstruction of s 91W

89 The delegate did not misconstrue s 91W, or fail to understand or perform his task under that provision. How a delegate decides whether a protection visa applicant has given a "reasonable explanation" for the provision of a bogus document will always depend on the particular factual circumstances before the delegate. It will not always be the case that there will be a necessary connection between the explanation given for the provision of a bogus document and the visa applicant's account of why she or he fears persecution in her or his country of nationality.

90 For example, and transposing the facts to a protection visa application, in the Full Court cases of *Singh v Minister for Immigration and Border Protection* (2016) 247 FCR 554 and *Gill v Minister for Immigration and Border Protection* (2016) 248 FCR 398, the explanations given by each visa applicant for the provision of fraudulent documents to the delegate was that in each case the visa applicant had been the innocent victim of a fraud by his migration agent. That could also occur with a protection visa applicant. Then, the narrative about his or her claims to protection and the narrative about why a bogus document was provided will not coincide.

91 Without wishing to state the obvious, the provision requires there to be an explanation for the provision of a bogus document: that is, the narrative told

must explain, and connect to, the provision of the bogus document. Second, the delegate must be satisfied the explanation is "reasonable". The word reasonable connotes an explanation that is not fanciful, that is believable in the circumstances and which has sufficient rational connection to how and why the bogus document was provided. Reasonable minds between delegates may differ on this: see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131] per Crennan and Bell JJ.

92 It is also obvious that for an explanation to be reasonable, it must first be accepted as genuine. Not all genuine explanations will be reasonable, but all reasonable explanations will be genuine.

93 We accept the Minister's submissions about the delegate's reasoning. In the appellant's explanation, which he volunteered, there was a common substratum of facts between his claim to fear persecution and his explanation for the provision of a bogus document. In order for the delegate to determine whether he was satisfied the appellant had given a reasonable explanation about the bogus document, it was open to the delegate to examine and assess the appellant's claims to protection. Had the appellant's narrative about what happened to him in Iran been accepted, it is likely the delegate would have found there was a reasonable explanation for the purposes of s 91W. However, if the delegate found the appellant's protection claims not to be credible, it was almost inevitable the appellant's explanation would not be accepted as reasonable. The structure of the delegate's reasoning reflects an approach that was plainly open to him.

94 This ground must fail.

Ground 7: "denial of procedural fairness under s 91W"

95 For the reasons we have already given at [80]-[87] above, there was no denial of procedural fairness (however the obligation be expressed) in relation to the decision to apply s 91W. This ground must fail for the same reasons.

Conclusion

96 As we have noted above, it is not necessary to decide grounds 8 and 9 of the amended notice of appeal.

97 The appeal must be dismissed. There is no basis in the material for anything but the usual order as to costs.

Orders accordingly

Solicitors for the appellant: *Asylum Seeker Resource Centre*.

Solicitors for the respondent: *Australian Government Solicitor*.

WILLIAM THOMAS