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## **PROTECTING VULNERABLE REFUGEES: PROCEDURAL FAIRNESS IN THE AUSTRALIAN FAST TRACK REGIME**

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*Refugee Status Determination is a powerful example of the way in which vulnerability and the law interact. This article examines this interaction by analysing a case study: the special protection visa application procedure in place for certain asylum seekers in Australia (the ‘Fast Track Assessment’ process) and the implications of this for procedural fairness. We conclude that the current legislative framework for the Fast Track Assessment process operates to exacerbate the circumstances of vulnerability of asylum seekers. Efficiency measures are an important way of avoiding delays in decision-making. However it also increases the propensity of such measures to lead to serious legal errors. Considering the serious consequences of an improperly made decision in this context, we argue that high standards of procedural fairness and an oral hearing are required. The article also demonstrates that a central purpose of due process should be to mitigate (rather than exacerbate) circumstances of vulnerability or marginalisation.*

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## I INTRODUCTION

*'It is ... plain that asylum decisions are of such moment that only the highest standards of fairness will suffice'.<sup>1</sup>*

Refugee status determination ('RSD') is a complex and difficult process requiring decision-makers to make findings on a wide range of evidence which is often highly contested. Key aspects of the process raise particular issues for fairness: central facts are often not able to be verified by documentation;<sup>2</sup> cases often turn on findings about an applicant's credibility and country information (the latter of which may be conflicting and unclear);<sup>3</sup> and decisions involve speculative, prospective assessments about likely harm to applicants upon return to their home country.<sup>4</sup> Often applicants are vulnerable within the process as they typically do not speak English and have little understanding of the Australian legal system.<sup>5</sup> These factors, together with the seriousness of the subject matter of the decision, suggest that a high standard of procedural fairness should be given to applicants.<sup>6</sup> However, RSD is also usually a high volume area which means that decision-makers must make these decisions with both accuracy and *efficiency*. Given the complex nature of refugee law adjudication, the balance to be struck between fairness and efficiency is a difficult one.

As a result of these tensions, RSD represents a powerful illustration of the way in which vulnerability and the law interact. This article examines the theme of vulnerability through the prism of refugee protection by analysing a case study: the protection visa application procedure in place for certain asylum seekers in

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<sup>1</sup> *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402, 414 (Bingham LJ).

<sup>2</sup> For instance, many asylum seekers do not have passports or documentary evidence of persecution: see James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700, 700–1.

<sup>3</sup> See discussion in Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing, 2011) 168–71.

<sup>4</sup> See the Full Court of the Federal Court of Australia in *CSO15 v Minister for Immigration and Border Protection* (2018) 353 ALR 666, 671 [23] (Tracey, Mortimer and Moshinsky JJ):

Both the refugee and complementary protection criteria, insofar as they require a focus on risk of harm (whether for specific reasons or not), require the decision-maker to engage in a predictive and therefore somewhat speculative task about what is likely to happen to a person in the reasonably foreseeable future on return to her or his country of nationality ...

<sup>5</sup> This may be exacerbated if the applicant does not have legal assistance. On the importance of legal representation, see Maria O'Sullivan and Dallal Stevens, 'Access to Refugee Protection: Key Concepts and Contemporary Challenges' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017) 3, 25–6; Sule Tomkinson, 'The Impact of Procedural Capital and Quality Counsel in the Canadian Refugee Determination Process' (2014) 1 *International Journal of Migration and Border Studies* 276.

<sup>6</sup> The importance of the subject matter of the decision, which in refugee cases may involve risks to life or freedom if an asylum seeker is returned to their country of origin, has been recognised as requiring high procedural fairness standards in a number of cases: see, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. See particularly McHugh J at 102 [146]: 'The consequences for him include returning to face serious threats to his personal security, if not to his life. The subject matter of the legislation is undeniably important – it enacts Australia's international obligations towards some of the world's most vulnerable citizens'.

Australia – the ‘fast track’ assessment process – and the implications of this for procedural fairness.

The fast track system is a somewhat controversial process introduced in late 2014<sup>7</sup> to deal with a ‘legacy caseload’ of approximately 30,000 Unauthorised Maritime Arrivals (‘UMAs’).<sup>8</sup> These are persons who arrived by boat without a visa between 2012 and 2014<sup>9</sup> who were not permitted to lodge an application for a protection visa in Australia.<sup>10</sup> The fast track process for certain boat arrivals is unusual as it provides only a limited form of merits review and, in some instances, no independent merits review at all.<sup>11</sup> These legacy cases are not reviewed by the Administrative Appeals Tribunal (‘AAT’) as are other refugee applications, but by a special body: the Immigration Assessment Authority (‘IAA’).<sup>12</sup>

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<sup>7</sup> *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

<sup>8</sup> Section 5AA(1) of the *Migration Act 1958* (Cth) (‘*Migration Act*’) provides that:

For the purposes of this Act, a person is an unauthorised maritime arrival if:

- (a) the person entered Australia by sea:
  - (i) at an excised offshore place at any time after the excision time for that place; or
  - (ii) at any other place at any time on or after the commencement of this section;
 and
- (b) the person became an unlawful non-citizen because of that entry; and
- (c) the person is not an excluded maritime arrival.

Further provisions deal with persons born to parents who are unauthorised maritime arrivals and persons born in a regional processing country.

<sup>9</sup> The precise dates are: arrival on or after 13 August 2012 and before 1 January 2014: *Migration Act* s 5 (definition of ‘fast track applicant’). These are persons who were not taken to Nauru or Papua New Guinea for offshore processing. The way in which members of this group were determined is linked to the negotiations which took place to secure the passage of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). An in-depth study of this aspect of the fast track process is outside the scope of this article. However, for further detail, see Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (2014) 1–2 [1.2]–[1.3].

<sup>10</sup> These are persons who entered Australia on or after 13 August 2012, for whom the Minister has lifted the bar preventing the Unauthorised Maritime Arrival from making a valid visa application under the *Migration Act* s 46A(1), and who have subsequently made a valid application for a protection visa in Australia. The Refugee Council of Australia notes that

‘[m]ost asylum seekers who came to Australia by boat after 13 August 2012 waited for well over three years for the opportunity to lodge a protection application. This is because from August 2012 until the year 2015, refugee status determination (RSD) was suspended for this group’.

Refugee Council of Australia, *Recent Changes in Australian Refugee Policy* (8 June 2017)

<[www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/](http://www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/)>. It is noteworthy in terms of fairness that a significant number of this legacy caseload (approximately 7500 applicants) were then told by the Department that they had to lodge their application for protection by 1 October 2017, a deadline which was seen by many refugee advocacy groups as insufficient notice: Ben Doherty, ‘Peter Dutton Gives Asylum Seekers in Australia Deadline to Apply for Refugee Status’, *The Guardian* (online), 21 May 2017 <[www.theguardian.com/australia-news/2017/may/21/peter-dutton-gives-asylum-seekers-in-australia-deadline-to-apply-for-refugee-status](http://www.theguardian.com/australia-news/2017/may/21/peter-dutton-gives-asylum-seekers-in-australia-deadline-to-apply-for-refugee-status)>.

<sup>11</sup> These are what are known as ‘excluded fast track applicants’, discussed in Part III of this article.

<sup>12</sup> *Migration Act* ss 487CA, 500(1) [Note].

The fast track process undertaken by the IAA is significant in two ways: applicants do not have a right to an oral hearing or interview by the Authority,<sup>13</sup> and there is no obligation on the reviewer to consider new information from the applicant.<sup>14</sup> This is in contrast to the ‘mainstream’ merits review system provided to other asylum seekers by the AAT, which conducts a full merits review of the matter and has an obligation to hold an oral hearing.<sup>15</sup> The rationale for this difference is that the IAA is dealing with the legacy caseload of 30,000 applicants which requires an emphasis on efficiency. Further, it is premised on an assumption that applicants should present all their claims and evidence at the first interview, which is conducted by the Department of Home Affairs (‘Department’).<sup>16</sup> The fast track system assumes applicants will receive procedural fairness at that stage and, as such, the granting of full procedural fairness (such as an oral interview) is unnecessary at the review stage.<sup>17</sup> We query this assumption in our article.

As a result of these limitations on procedural fairness, a large number of non-governmental organisations objected to the introduction of the fast track system when it was considered by Parliament in 2014.<sup>18</sup> One of the aims of this article is

<sup>13</sup> *Migration Act* s 473DB. When using the term ‘oral hearing’, we refer to an opportunity for the applicant to appear before the IAA in person to present their claims and answer questions or comment on any evidence that is put to them. This does not necessarily only refer to a *public* hearing, as is available in the AAT General Division or during judicial review. Whilst we acknowledge that an oral interview is not the *only way* in which the IAA can obtain information and comments from the applicant, we argue that the IAA should be guided by the procedural fairness ‘content’ factors established by Australian case law: see Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6<sup>th</sup> ed, 2016) 504–23. We argue in this article that the decision-making context in refugee matters means that there may be circumstances where the issues cannot be decided fairly by written submissions alone.

<sup>14</sup> *Migration Act* s 473DC. See discussion of the operation of this provision in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 353 ALR 600, 607–10 [23]–[34] (Gageler, Keane and Nettle JJ) (‘*Plaintiff M174*’).

<sup>15</sup> *Migration Act* s 425. Note there are exceptions to this, such as where the Tribunal intends to find in favour of the applicant, but most reviews are completed using oral hearings. Section 425 provides:

- (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
- (2) Subsection (1) does not apply if:
  - (a) the Tribunal considers that it should decide the review in the applicant’s favour on the basis of the material before it; or
  - (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
  - (c) subsection 424C(1) or (2) applies to the applicant.
- (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

<sup>16</sup> Formerly the Department of Immigration and Border Protection.

<sup>17</sup> The IAA stated in their correspondence to the authors that applicants are advised in writing and in person of the need to present their claims in full at the Department stage: Email from Immigration Assessment Authority to Maria O’Sullivan, 2 May 2018 (copy on file with authors). Whilst applicants may receive such notifications, we believe that despite any ‘warnings’, there are a variety of other factors that contribute to the need for an oral hearing at the IAA stage, for example, any specific vulnerabilities that an applicant may experience or where *sur place* claims arise. These issues are further discussed in Part V(B) of our article.

<sup>18</sup> These are summarised in Senate Standing Committee on Legal and Constitutional Affairs, above n 9, 23–5 [3.24]–[3.28]. See also Migration Law Program, ANU College of Law, Submission No 168 to Senate

to establish whether some of those concerns have been realised. In doing so, we focus on the ramifications of the absence of an oral hearing requirement in the fast track process.

In discussing some of the problems associated with the IAA and the fast track system, this article will examine what is required under procedural fairness principles and, in particular, how to reconcile the competing values of fairness and efficiency. We refer in our analysis to the theoretical underpinnings of procedural fairness whilst also offering a practical insight into what fairness might require of the IAA. We do this to determine whether Parliament has achieved a proper balance between these two central principles and, in turn, how the process may exacerbate the vulnerability of affected asylum seekers.

In order to examine these themes, Part II of this article will discuss the various ways in which refugee applicants may be vulnerable within the RSD process, before going on in Part III to discuss the nature of the fast track procedures utilised by the IAA. We will then present a number of case studies from the IAA to illustrate some of the problems associated with the regime, before assessing these procedures in light of the requirements of procedural fairness in Part V. In our conclusions, we discuss the implications of this for the broader question of vulnerability and the law.

## II THE VULNERABILITY OF ASYLUM SEEKERS AND REFUGEES

Vulnerability is a concept underlying many aspects of refugee protection. It is used by the United Nations High Commissioner for Refugees ('UNHCR') to prioritise humanitarian assistance<sup>19</sup> and resettlement applications.<sup>20</sup> As a general proposition, it can be argued that refugees are per se vulnerable because they have fled persecution and are outside their country of origin. Their vulnerability stems from the discrimination and violence they have suffered and the fact that they cannot seek the protection of their own state. The vulnerability of asylum seekers as a group has been recognised in a number of judicial decisions. For instance, McHugh J in the influential High Court of Australia case of *Miah* noted that the subject matter of the *Migration Act* was 'undeniably important' in assessing procedural fairness and that the legislation 'enacts Australia's international obligations towards some of the world's most vulnerable citizens'.<sup>21</sup> In the landmark case of the European Court of Human Rights *MSS v Belgium and Greece*, the Court held that it 'must take into account that the applicant, being an

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Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Maritime and Migration Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 4 November 2014, 10 [30], 12 [41].

<sup>19</sup> See, eg, United Nations High Commissioner for Refugees, 'Vulnerability Assessment Framework Guidance Note' (14 February 2017) <[data.unhcr.org/syrianrefugees/download.php?id=12857](http://data.unhcr.org/syrianrefugees/download.php?id=12857)>.

<sup>20</sup> United Nations High Commissioner for Refugees, *UNHCR Resettlement Handbook*, (revised ed, 2011) 37.

<sup>21</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 102 [146] (McHugh J) ('*Miah*').

asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'.<sup>22</sup> Further, the Court noted that the applicant's distress was 'accentuated by the vulnerability inherent in his situation as an asylum seeker'<sup>23</sup> and that, as an asylum seeker, the applicant was 'a member of a particularly underprivileged and vulnerable population group in need of special protection'.<sup>24</sup>

However, there is some debate in the literature about whether assessments of vulnerability should be based on membership of a group (eg, *asylum seekers*) or on an individual basis (under which only *some asylum seekers* may be vulnerable).<sup>25</sup> The latter approach is illustrated by the findings of the UK Joint Committee on Human Rights which has said that '[s]ome groups of asylum seekers, because of their special needs, are especially vulnerable'.<sup>26</sup> The Committee did so without categorising all asylum seekers as per se vulnerable. The conception of vulnerability as an individual rather than group characteristic is also reflected in the way in which vulnerabilities have been recognised in some Australian cases involving asylum seekers.<sup>27</sup> Whilst we are not suggesting that this latter approach is incorrect, it highlights a conceptual difference between an assumption that most if not all asylum seekers will have a certain level of vulnerability, versus an emphasis on the identification of aspects of vulnerability such as lack of legal representation.

<sup>22</sup> *MSS v Belgium and Greece* [2011] I Eur Court HR 255, 311 [232] ('*MSS v Greece*'). On the issue of trauma, see Zachary Steel, Naomi Frommer and Derrick Silove, 'Failing to Understand: Refugee Determination and the Traumatized Applicant' (2004) 27 *International Journal of Law and Psychiatry* 511.

<sup>23</sup> *MSS v Greece* [2011] I Eur Court HR 255, 312 [233].

<sup>24</sup> *Ibid* 315 [251]. We note that this finding on general vulnerability was specifically challenged in the Partly Concurring and Partly Dissenting Opinion of Judge Sajó at 367:

To my mind, although many asylum seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group, in the sense in which the jurisprudence of the Court uses the term (as in the case of persons with mental disabilities, for example), where all members of the group, due to their adverse social categorisation, deserve special protection.

<sup>25</sup> See, eg, Ivona Truscan, 'Considerations of Vulnerability: From Principles to Action in the Case Law of the European Court of Human Rights' (2013) 36(3) *Retfaerd* 64 <[http://retfaerd.org/wp-content/uploads/2015/10/Retfaerd\\_3\\_2013\\_5.pdf](http://retfaerd.org/wp-content/uploads/2015/10/Retfaerd_3_2013_5.pdf)>.

<sup>26</sup> Joint Committee on Human Rights, Parliament of the United Kingdom, *10<sup>th</sup> Report* (2007) [62] <<https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm>>.

<sup>27</sup> See, for instance, *AMF15 v Minister for Immigration and Border Protection* where the Full Court of the Federal Court held there had been a breach of procedural fairness in proceedings involving the asylum seeker before the primary judge in the Federal Court. The Court considered that the relevant circumstances in this case were that: the applicant was unrepresented; his primary language was not English; he was unfamiliar with court process; and he had insufficient time to respond to the Court Book: (2016) 241 FCR 30, 48 [44] para (g), 52 [49].

For the purpose of our article, we adopt the position that all asylum seekers possess a certain level of vulnerability arising from the fact that they are outside their country of origin and are claiming the protection of Australia on the basis that they are unable to obtain the protection of their home state. However, we recognise that this vulnerability will be heightened due to factors such as age, health, language and education skills, and past experiences of torture or trauma.<sup>28</sup> As a result, we acknowledge that certain cohorts of refugees are particularly vulnerable; for example, child refugees, women refugees, and those with a disability.<sup>29</sup> This is important in the context of refugee status determination, as UNHCR has demonstrated that refugee applicants may face procedural hurdles in substantiating their applications due to their physical and mental health, literacy levels, gender and sexuality.<sup>30</sup>

As the focus of this article is on the procedural protections which should be granted to asylum seekers in the RSD procedure, it is important to briefly discuss the broader institutional and political context in which the IAA operates. First, one must understand the context of the power relations at play in RSD – that there is an imbalance in power, knowledge and resources between the state and an asylum seeker. For instance, the Department of Home Affairs and IAA have a far greater capacity to obtain legal advice and information about the situation in a particular country of origin. This is significant in the fast track process as there is no obligation on the IAA to give the applicant notice of that country information prior to making a negative decision rejecting their claim.<sup>31</sup> Second, the IAA is an administrative body which operates in a very different manner to that of a court. For instance, it is not bound by technicalities, legal forms or rules of evidence.<sup>32</sup> This means that it has more discretion to consider evidence which would not ordinarily be accepted by a court (eg, hearsay evidence). The breadth of evidence

<sup>28</sup> We note that this is also the approach taken by others, see for instance, the European Council for Refugees and Exiles who note that:

[Vulnerability] points to a *definition*, whether describing the precarious and sensitive position of all people seeking protection, not least due to their legal status, or demarcating specific classes of individuals who face distinct needs due to their particular physical, mental or social circumstances.

Minos Mouzourakis et al, 'The Concept of Vulnerability in European Asylum Procedures' (Report, European Council on Refugees and Exiles, 2017) 7 (emphasis in original)

<[www.asylumineurope.org/sites/default/files/shadow-reports/aida\\_vulnerability\\_in\\_asylum\\_procedures.pdf](http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_vulnerability_in_asylum_procedures.pdf)>.

<sup>29</sup> For instance, the European Court of Human Rights has recognised that child asylum seekers are particularly vulnerable: see *Mayeka v Belgium* (European Court of Human Rights, Chamber, Application No 13178/03, 12 January 2007) 17 [55]. In relation to the vulnerability of female asylum seekers, some researchers have raised concerns about the gendered nature of vulnerability and suggested that international organisations should look instead at the conditions in which the refugee is living: see Lewis Turner, 'Are Syrian Men Vulnerable Too? Gendering the Syria Refugee Response' (Essay, Middle East Institute, 29 November 2016) <[www.mei.edu/content/map/are-syrian-men-vulnerable-too-gendering-syria-refugee-response](http://www.mei.edu/content/map/are-syrian-men-vulnerable-too-gendering-syria-refugee-response)>.

<sup>30</sup> United Nations High Commissioner for Refugees, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013) 57–74 <[www.unhcr.org/en-au/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html](http://www.unhcr.org/en-au/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html)>.

<sup>31</sup> This was recognized by Barker J in *DBE16 v Minister for Immigration and Border Protection* [2017] FCA 942, [63].

<sup>32</sup> *Migration Act* s 473FA.

which the IAA is able to consider increases the need for procedural fairness, particularly as oral interviews in refugee matters are not held in open hearings as are other migration matters.

Third, refugee policy is highly politicised in Australia (as indeed it is elsewhere).<sup>33</sup> This is illustrated by the fact that certain visa and refugee decisions made by the AAT have been the subject of a series of criticisms by governmental representatives (both past and present). For instance, in 1997, significant pressure was placed on tribunal members when the Minister for Immigration, Philip Ruddock, publicly stated that Refugee Review Tribunal members should not expect their contracts to be renewed if they purported to ‘re-invent’ the definition of a refugee.<sup>34</sup> More recently, government ministers have openly criticised the AAT for certain visa decisions.<sup>35</sup> These broader institutional pressures must be considered in analysing how the fast track procedure operates, to appreciate the way in which applicants may be vulnerable to institutional and political power, and the way in which the law should operate to ensure the process functions independently and fairly despite these political pressures.

Finally, we underline the vulnerable position of asylum seekers in terms of return to their home country and the importance of the standards utilised in the RSD process. One of the central protections for asylum seekers is Article 33 of the 1951 *Convention Relating to the Status of Refugees* (‘*Refugee Convention*’), which prohibits refoulement of a refugee to a place where they may face persecution.<sup>36</sup> Application of this prohibition means that return of asylum seekers to their country of origin without properly ascertaining if they are refugees is considered to be contrary to Article 33. Indeed, both UNHCR and refugee law scholars have emphasised the importance of maintaining an adequate system of status determination to ensure refugees are not returned to harm pursuant to Article 33.<sup>37</sup> In practice, this means asylum seekers must be given an effective opportunity to

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<sup>33</sup> As Trish Luker has stated, ‘refugee status determination is particularly vulnerable to political climate and influence’: Trish Luker, ‘Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal’ (2013) 25 *International Journal of Refugee Law* 502, 506.

<sup>34</sup> ‘Ruddock Warns Tribunal’, *The Canberra Times* (Canberra), 27 December 1996, 6, cited in *ibid* 506. See also Susan Kneebone ‘The Australian Story: Asylum Seekers outside the Law’ in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009) 171, 180–3.

<sup>35</sup> Michael Koziol, ‘George Brandis Clears Out “Infuriating” Administrative Appeals Tribunal’, *The Sydney Morning Herald* (online), 28 June 2017 <[www.smh.com.au/federal-politics/political-news/george-brandis-clears-out-infuriating-tribunal-20170628-gx0711.html](http://www.smh.com.au/federal-politics/political-news/george-brandis-clears-out-infuriating-tribunal-20170628-gx0711.html)>.

<sup>36</sup> Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), supplemented by the 1967 *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>37</sup> For example, ‘Conclusion on Protection Safeguards in Interception Measures’ in United Nations High Commissioner for Refugees, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, UN GAOR, 58<sup>th</sup> sess, Supp No 12A, UN Doc A/58/12/Add.1 (1–5 October 2003) [22], para (a)(iv); Mark Pallis, ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes’ (2002) 14 *International Journal of Refugee Law* 329, 342; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 528; James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 158–60.



express their need for international protection and access to a fair and effective RSD process.

We will now turn to examine the operation of the IAA and the fast track process in terms of fairness and vulnerability of refugee applicants.

### III THE IAA AND THE FAST TRACK PROCEDURE

#### A The Rationale and Development of the Fast Track System

##### 1 Overview and Aims

As noted above, the primary purpose of the fast track system is to deliver efficiency in relation to a defined cohort of asylum seekers. This emphasis on efficiency is reflected in the objects clause for the fast track process in the *Migration Act*, which states that the IAA is to provide a review that is ‘efficient, quick, free of bias’ and consistent with the *Migration Act*.<sup>38</sup> This can be contrasted to the legislative aims of the AAT, which are to be ‘fair, just, economical, informal and quick’<sup>39</sup> and to give procedural fairness ‘in a way that is fair and just’.<sup>40</sup> The omission of fairness from the legislative aims of the IAA is indicative of its role as a limited merits review body with significantly reduced procedural fairness protections. The Minister’s Second Reading Speech introducing the legislation also emphasised the value of efficiency. In particular, it explicitly referred to the assumption that many claims will be ‘unmeritorious’:

The fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority – to be known as the IAA. These measures are specifically aimed at addressing the backlog of IMAs – some 30,000 – and will ensure their cases progress towards timely immigration outcomes, either positive or negative.<sup>41</sup>

<sup>38</sup> *Migration Act* s 473FA(1): ‘The Immigration Assessment Authority, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)’. The inclusion of efficiency in the objects clause was influential in the reasons of Edelman J in *Plaintiff M174* (2018) 353 ALR 600. His Honour held that ‘the second reason the plaintiff’s submission is inconsistent with legislative intention is that it is contrary to the statutory goal of efficiency’, and that ‘there could be significant inefficiency if any jurisdictional error by the Minister or delegate prevented the Authority from conducting a review’: at 623 [96].

<sup>39</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(b) (emphasis added).

<sup>40</sup> *Migration Act* s 422B:

- (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.
- (3) In applying this Division, the Tribunal must act in a way that is fair and just.

<sup>41</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10,547 (Scott Morrison, Minister for Immigration and Border Protection).

## 2 Procedural Requirements in the Migration Act

Due to the emphasis on efficiency in the fast track system, the procedural obligations of IAA reviewers are codified in detail in Part 7AA of the *Migration Act* and departure from those provisions is only permitted in ‘exceptional circumstances’.<sup>42</sup> The most significant statutory limitation is that the IAA is only obliged to consider information that was available to the *Department* when it made the decision to refuse the visa. There is no *obligation* on the IAA to obtain, request or accept new information.<sup>43</sup> The *Migration Act* provides that the IAA is not ordinarily permitted to accept or request new information from the applicant, nor interview them.<sup>44</sup> The exception to this rule is when the IAA decision-maker makes a finding that the new information was not, and could not have been, before the Minister when the original decision was made<sup>45</sup> or the new information relates to credible new personal circumstances.<sup>46</sup> Further, there must be exceptional circumstances that can justify the IAA’s consideration of this new information.<sup>47</sup> The Explanatory Memorandum to the Act indicates that one example of this would

<sup>42</sup> In *Plaintiff M174*, the plurality judgement of the High Court (Gageler, Keane and Nettle JJ) found that ‘[t]he word “exceptional” ... is not a term of art but “an ordinary, familiar English adjective”’: “[t]o be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered”’: (2018) 353 ALR 600, 609 [30], quoting *R v Kelly* [2000] QB 198, 208 (Lord Bingham CJ for the Court), as quoted in *BVZ16 v Minister for Immigration and Border Protection* (2017) 254 FCR 221, 231 [40] (White J) (*‘BVZ16’*). In *BVZ16*, White J stressed that exceptional circumstances must be interpreted in context, but generally will mean something ‘unusual’ or ‘out of the ordinary’: at 230 [39].

<sup>43</sup> *Migration Act* s 473DC(2).

<sup>44</sup> *Migration Act* s 473DB(1):

Subject to this Part, the Immigration Assessment Authority must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:

- (a) without accepting or requesting new information; and
- (b) without interviewing the referred applicant.

<sup>45</sup> *Migration Act* s 473DD(b)(i).

<sup>46</sup> *Migration Act* s 473DD(b)(ii). In addition, the IAA must consider the information to be relevant:

*Migration Act* s 473DC(1).

<sup>47</sup> *Migration Act* s 473DD(a); Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 133 [907]. In *Plaintiff M174*, the High Court noted that: ‘The precondition set out in s 473DD(a) must always be met before the Authority can consider any new information. Whatever the source of new information, the Authority needs always to be satisfied that there are “exceptional circumstances” to justify considering it’: (2018) 353 ALR 600, 609 [29] (Gageler, Keane and Nettle JJ). An example of how the IAA applies the ‘exceptional circumstances’ requirement is *IAA17/02041* where the applicant’s written submission to the IAA stated that the applicant’s mother had been participating in a protest regarding enforced disappearances in Sri Lanka prior to him lodging his IAA submission. The applicant argued that as a result, the Sri Lankan authorities would impute him with anti-government sentiments. The IAA reviewer held that:

I accept this new information could not have been provided before the delegate’s decision. I am also satisfied that the decision of the applicant’s mother to engage in these activities, on its face, it represents a change in personal circumstances not within the control of the applicant. I am satisfied exceptional circumstances exist to justify considering this information.

*IAA17/02041* (Immigration Assessment Authority, Natalie Becke, Reviewer, 6 September 2017) 2 [5] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702041\\_6September2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702041_6September2017.pdf)>.

However, the IAA has rejected applicant material in a number of other cases: see, eg, *IAA16/01076* (Immigration Assessment Authority, Alison Nesbitt, Reviewer, 16 December 2016)

<[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601076\\_16December2016.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601076_16December2016.pdf)>.

be ‘a sudden and highly significant change of conditions in the referred applicant’s country of origin’.<sup>48</sup> In such cases, the IAA is able to invite applicants to give new information in writing or during an interview, which may be held over the phone, in person or any other way.<sup>49</sup>

We also note that the fast track process is about *review*. The original decision to grant a protection visa remains with the Department of Home Affairs. The IAA does not ‘stand in the shoes’ of the primary decision-maker (in this case the Minister for Immigration and Border Protection, or a delegate of the Minister) and is not able exercise all of the primary decision-maker’s powers. Thus, the IAA is unable to set aside a fast track reviewable decision and to substitute its own decision.<sup>50</sup>

Although there is some discretion vested in the IAA to conduct an oral interview with applicants,<sup>51</sup> statistics indicate that this is rarely exercised. Data supplied by the IAA to the authors shows that only 1.2 per cent of applicants have been granted an oral interview by the IAA.<sup>52</sup> This is a very low figure and indicates that the legislative presumption against an oral interview is being very strictly applied by the Authority. Further, the IAA informed the authors that, ‘[f]or the period 18 April 2015 to 27 February 2018, 45% of finalised cases considered new information’.<sup>53</sup> However, this leaves a significant number of cases (55 per cent) where the IAA did *not* consider new information. It also does not indicate how the

<sup>48</sup> Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 132 [903].

<sup>49</sup> *Migration Act* s 473DC(3). Significantly, a 2017 Practice Direction from the President of the AAT to the IAA encourages telephone rather than in person interviews, stating that ‘[i]nterviews will generally be conducted by telephone’: Immigration Assessment Authority, *Practice Direction No 1 – Practice Direction for Applicants, Representatives and Authorised Recipients*, 6 February 2017, 4 [36] <[www.iaa.gov.au/IAA/media/IAA/Files/Practice%20Directions/Practice-Direction-1-Applicants-Representatives-and-Authorised-Recipients.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Practice%20Directions/Practice-Direction-1-Applicants-Representatives-and-Authorised-Recipients.pdf)>.

<sup>50</sup> This was recognised by the High Court in *Plaintiff M174* (2018) 353 ALR 600, 606 [17], 612 [42] (Gageler, Keane and Nettle JJ). The High Court plurality noted at 612 [42] (citations omitted):

Unlike the Administrative Appeals Tribunal, the former Refugee Review Tribunal, and the former Migration Review Tribunal, the Authority is not empowered to set aside the decision under review and to substitute its own decision, nor is the Authority empowered to “exercise all the powers and discretions that are conferred” on the person who made the decision under review.

Although as the Court noted earlier in its judgement at 606 [18]:

The effect of the Authority affirming the fast track reviewable decision under review is that it is no longer solely the decision of the Minister or delegate to refuse to grant the visa, but rather the decision as affirmed by the Authority, that constitutes the determination of the fast track applicant’s valid application for a protection visa.

The Court also noted that the IAA had the power to remit the decision of the Minister or delegate to refuse to grant the visa for reconsideration by the Minister in accordance with a direction (as distinct from a recommendation). The Court held that ‘[t]he Minister has a duty not only to consider again the remitted decision but to comply with any permissible direction given by the Authority when undertaking that reconsideration’: at 606 [19].

<sup>51</sup> *Migration Act* s 473DC(3).

<sup>52</sup> Emails from Immigration Assessment Authority to Maria O’Sullivan, 19 January 2018 and 24 January 2018 (copy on file with authors). The IAA reports that the total number of interviews conducted between 01 July 2015 and 31 December 2017 is 33 and that a total of 2823 cases were finalised by the IAA in this period. This represents 1.2 per cent of the total decisions made by the IAA.

<sup>53</sup> Email from Immigration Assessment Authority to Maria O’Sullivan, 2 May 2018 (copy on file with authors).

IAA ‘considered’ the information in a qualitative sense – that is, if they examined the information but held that it carried little weight or was not credible.

Further, we note that certain applicants who fall within the definition of ‘excluded fast track review applicant’ in section 5(1) of the *Migration Act* do not have access to merits review by the IAA at all.<sup>54</sup> These applicants include persons who, in the opinion of the Minister, have made a claim for protection in another country that was refused; give or present a ‘bogus document’<sup>55</sup> in support of their application; or make a claim that is ‘manifestly unfounded’. Such applicants will only have access to internal departmental review of the first instance decision on their refugee claim.<sup>56</sup> Interestingly, when the fast track system was the subject of a Senate Inquiry in 2014, the Department of Immigration and Border Protection submitted that ‘[a]s the majority of [irregular maritime arrival] cases in the backlog relate to people from known refugee producing countries, the percentage of cases expected to fall under the definition of an excluded fast track review is small’.<sup>57</sup> According to statistics supplied by the Department of Home Affairs to the Senate Estimates Committee, the Department had (as of February 2018) finalised 39 primary refusals for persons defined as ‘excluded fast track applicants’.<sup>58</sup> Thus, this does in fact appear to be a relatively small number compared to the overall caseload.<sup>59</sup> To date, it appears that those who have been classified as ‘excluded fast track review applicants’ have been those who are suspected of having bogus documents.<sup>60</sup> However, without further information from the Department, we cannot make any clear conclusions on this aspect of the process.

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<sup>54</sup> The IAA cannot review decisions in respect of ‘excluded fast track review applicants’ (unless the Minister has determined that such a decision should be reviewed under s 473BC), or applicants in respect of whom the Minister has issued a conclusive certificate under s 473BD: see *Migration Act* ss 5(1) (definition of ‘fast track review applicant’), 473BB (definition of ‘fast track reviewable decision’), 473CA, 473CC.

<sup>55</sup> The definition of ‘bogus document’ in s 5(1) of the *Migration Act* is quite broad:

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.

<sup>56</sup> See Migration Law Program, ANU College of Law, above n 18, 9 [24].

<sup>57</sup> Department of Immigration and Border Protection, Submission No 171 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Maritime and Migration Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 4 November 2014, 15.

<sup>58</sup> Department of Home Affairs, ‘Question on Notice No 87’ (Portfolio Question No AE18/090, Additional Estimates 2017–18, Senator Nick McKim, Senate Standing Committee on Legal and Constitutional Affairs, Home Affairs Portfolio, asked 26 February 2018, answered 12 April 2018).

<sup>59</sup> A total of 14,834 applications were finalised as at 4 January 2018: Department of Home Affairs, ‘IMA Legacy Caseload Report on the Processing Status and Outcomes December 2017’ (January 2018). Although the finalised statistics do not differentiate between fast track and non-fast track cohorts, the overall statistics show that the vast majority of the legacy caseload applications are designated as fast track.

<sup>60</sup> See, eg, *AIB16 v Minister for Immigration* [2017] FCCA 231, where the Minister had found that the applicant provided a bogus document and ‘declined to forward the application for review in accordance with section 473CA of the Act on the basis that it fell within the definition of an “excluded fast-track review assessment”’: at [1] (Judge Riethmuller).

## B How the IAA Compares to the AAT

The IAA's legislative regime is substantially different to the 'normal' pathway for review of Department decisions – the AAT – which permits the Tribunal to 'get any information that it considers relevant',<sup>61</sup> sets out a right to an oral hearing,<sup>62</sup> and requires the AAT to give parties a 'reasonable opportunity to present his or her case'.<sup>63</sup> In particular, there is also no equivalent to the important notification provision applicable to the AAT: section 424A of the *Migration Act*.<sup>64</sup> That is, the Authority does not appear 'to be required to give to the appellant particulars of any information that the Authority considers would be the reason, or a part of the reason, for affirming the decision under review'.<sup>65</sup> It is notable that Federal Court of Australia recently raised concerns about aspects of the IAA's review process and its contrast to the merits review provided by the AAT. In *BMB16 v Minister for Immigration and Border Protection*, Charlesworth J of Federal Court noted that:

the form of review tasked to the Authority under Pt 7AA of the Act lacks features that might be considered desirable or optimal when compared with the form of merits review that has become familiar since the introduction of the AAT Act.<sup>66</sup>

Academic commentators have put this comparison into stronger language, with Linda Kirk stating that '[t]he review function of the IAA is vastly inferior to that of the AAT'.<sup>67</sup>

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<sup>61</sup> Migration Act s 424:

- (1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.
- (2) Without limiting subsection (1), the Tribunal may invite, either orally (including by telephone) or in writing, a person to give information. ...

<sup>62</sup> *Migration Act* s 425. The AAT is obliged to invite an applicant to an oral hearing unless a positive decision can be made on the papers, the applicant consents to the decision being made without an oral hearing, or the applicant has failed to provide information in one of the ways covered by s 424C.

<sup>63</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 39(1):

Subject to sections 35, 36 and 36B, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.

<sup>64</sup> *Migration Act* s 424A. Section 473DE of the *Migration Act*, relating to the IAA, contains a more limited obligation, only requiring disclosure of 'new information' which would provide a reason for affirming the departmental delegate's decision.

<sup>65</sup> This was recognised by Barker J in *DBE16 v Minister for Immigration and Border Protection* [2017] FCA 942, [63].

<sup>66</sup> (2017) 253 FCR 448, 473 [91]. Charlesworth J also added, however, that

it is for Parliament to decide whether or not mechanisms for external administrative review (as opposed to judicial review) of executive action are to be provided for at all and, if so, the form that the external review process should take. These are considerations of policy that do not inform the particular question of law raised in the grounds of appeal.

<sup>67</sup> Linda Kirk, 'Accelerated Asylum Procedures in the United Kingdom and Australia: "Fast Track" to *Refolement*?' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017) 243, 268.

### C Comparisons to Fast Track Systems in Other Jurisdictions

The need to avoid delays in RSD and to adopt a level of efficiency in RSD has been recognised in a number of comparable jurisdictions. Thus, introduction of this accelerated procedure in Australia follows similar moves elsewhere, notably the use of ‘accelerated procedures’ in the European Union (pursuant to the *EU Procedures Directive*)<sup>68</sup> and Canada.<sup>69</sup>

Despite the fact that international practice influenced the development of the Australian fast track system, there are significant differences between those examples and the Australian model. It is these differences which illustrate some of the central problems with the Australian model. First, the use of accelerated procedures elsewhere is generally limited to those asylum claims considered to be ‘manifestly unfounded’ or where the asylum seeker is from one of a list of countries that are ‘generally’ considered to be safe.<sup>70</sup> For example, the UK accelerated system does not apply to those who came by boat, but only to those applicants deemed to have ‘unfounded’ claims because they come from a ‘safe country of origin’ or whose applications are certified as ‘clearly unfounded’ on an individual basis.<sup>71</sup> It is also noteworthy that the UK Court of Appeal in 2015 held that a fast-track appeal process for review of applications for asylum made by those in detention was ‘structurally unfair and unjust’.<sup>72</sup> Lord Dyson MR stated that:

in view of (i) the complex and difficult nature of the issues that are often raised; (ii) the problems faced by legal representatives of obtaining instructions from

<sup>68</sup> *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)* [2013] OJ L 180/60 (*‘EU Procedures Directive’*). This is a ‘recast’ directive which amends the previous directive issued in 2005. As the European Council on Refugees and Exiles notes:

The recast Directive makes a more visible normative distinction between prioritisation and acceleration of processing applications in the asylum procedure. On the one hand, Member States are encouraged to *favourably* prioritise applications from persons with manifestly well-founded claims or vulnerabilities warranting special procedural guarantees. On the other, unfounded or manifestly unfounded applications can be accelerated under a *less protective procedural regime*, on the assumption that they will most likely be rejected.

European Council on Refugees and Exiles and Asylum Information Database, ‘Accelerated, Prioritised and Fast-Track Asylum Procedures: Legal Frameworks and Practice in Europe’ (Legal Briefing, May 2017) 2 (emphasis in original) <[www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief\\_AcceleratedProcedures.pdf](http://www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief_AcceleratedProcedures.pdf)>.

<sup>69</sup> Immigration and Refugee Board of Canada, ‘Policy on the Expedited Processing of Refugee Claims by the Refugee Protection Division’ (18 September 2015) <[www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/polRpdSprExpProAcc.aspx](http://www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/polRpdSprExpProAcc.aspx)>.

<sup>70</sup> This was also recognised by the ANU College of Law in a parliamentary submission on the fast track assessment legislation: ‘[Fast track procedures] are almost always limited to categories of persons thought to be at no serious risk of persecution, such as individuals from “safe countries of origin” in the European regime’: Migration Law Program, ANU College of Law, above n 18, 11 [33].

<sup>71</sup> See Asylum Information Database, ‘Country Report: United Kingdom 2016 Update’ (5 March 2017) 38 <[http://www.asylumineurope.org/sites/default/files/report-download/aida\\_uk\\_2016update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_uk_2016update.pdf)>. Note that there are two kinds of accelerated procedures used in the UK: the non-suspensive appeal procedure (‘NSA’) and the detained fast-track procedure (‘DFT’): *ibid.* The DFT is currently suspended due to the court ruling in *R (Detention Action) v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341: see United Kingdom, *Parliamentary Debates*, House of Commons, 2 July 2015, vol 597, col 51 WS (James Brokenshire, Minister for Immigration).

<sup>72</sup> *R (Detention Action) v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341, 5354 [45] (Lord Dyson MR).

individuals who are in detention; and (iii) the considerable number of tasks that they have to perform ... the timetable for the conduct of these appeals is so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases under the [fast track] regime.<sup>73</sup>

Although this finding was made in light of the particular concerns raised by the use of the accelerated review of those in *detention*, we argue that these concerns about the use of expedited procedures are also applicable more broadly to all asylum seekers who are not able to access the full protection of the legal system.<sup>74</sup>

Likewise, whilst there are certain similarities between the Canadian and Australian fast track systems, there are also some significant differences. The Canadian procedure has similar provisions limiting submission of new information at the review stage<sup>75</sup> and evidence and arguments are typically considered in a paper-based process with no oral hearing.<sup>76</sup> However, the relevant Canadian legislation provides that oral hearings may be held where the evidence raises a potentially determinative *credibility issue* that is central to the claim.<sup>77</sup> This is of interest in relation to the Australian fast track system as there is no such exception set out in the *Migration Act*.

Having examined the exclusion of certain procedural fairness principles in the *Migration Act* within the Australian fast track process, we now turn to examine the procedural fairness requirements that should be applied.

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<sup>73</sup> Ibid 5352 [38].

<sup>74</sup> The comparison between the UK accelerated procedure and that of the Australian fast track system is comprehensively analysed in Kirk, above n 67.

<sup>75</sup> Appellants may only present evidence that ‘arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection’: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 110(4). See discussion in Angus Grant and Sean Rehaag, ‘Unappealing: An Assessment of the Limits on Appeal Rights in Canada’s New Refugee Determination System’ (2016) 49 *UBC Law Review* 203.

<sup>76</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 110(3):

Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

<sup>77</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 110(6):

The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
- (b) that is central to the decision with respect to the refugee protection claim; and
- (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

## IV REFUGEE STATUS DETERMINATIONS AND PROCEDURAL FAIRNESS

### A Procedural Fairness and Its Requirements

#### *1 Procedural Fairness under the Common Law and Exclusion in the Migration Act*

Broadly speaking, procedural fairness requires a person affected by a decision to ‘know the case sought to be made against him and to be given an opportunity of replying to it’.<sup>78</sup> It is also accepted that ‘the concern of the law is to avoid practical injustice’.<sup>79</sup> The concept of ‘procedural fairness’ is recognised in many common law jurisdictions, but it is particularly well-developed in Australia.<sup>80</sup> Indeed, it has been a highly-litigated ground in Australia and, as such, the approach of the courts has changed quite significantly over time. Perhaps the best indication of the High Court’s current approach is set out in the 2016 case of *Minister for Immigration and Border Protection v SZSSJ* where the Court held that:

it must now be taken to be settled that procedural fairness is implied as a condition of the exercise of a statutory power through the application of a common law principle of statutory interpretation. The common law principle, sufficiently stated for present purposes, is that a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual. The presumption operates unless clearly displaced by the particular statutory scheme.<sup>81</sup>

Procedural fairness is a central principle of Australian law and is regarded as a cornerstone of the rule of law, with former Chief Justice of the Australian High Court, Chief Justice French, describing procedural fairness as ‘indispensable to justice’.<sup>82</sup> Despite its importance, successive governments have expressed frustration at the way in which courts have interpreted the principle and have sought to limit its application via statutory amendments. For instance, in 1992, amendments were made to the *Migration Act* which limited judicial review of specified classes of decision under the Act to certain specified grounds.<sup>83</sup> One of the grounds which was excluded was procedural fairness. This meant that common law principles of procedural fairness were not permitted to be argued in any judicial review application lodged in relation to decisions by the Refugee Review

<sup>78</sup> *Kioa v West* (1985) 159 CLR 550, 582 (Mason J).

<sup>79</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 13–14 [37] (Gleeson CJ).

<sup>80</sup> Maria O’Sullivan has noted the existence of ‘strong procedural fairness jurisprudence’ in Australia: Maria O’Sullivan, ‘Interdiction and Screening of Asylum Seekers at Sea: Implications for Asylum Justice’ in Maria O’Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017) 93, 98–9.

<sup>81</sup> (2016) 259 CLR 180, 205 [75] (The Court).

<sup>82</sup> Chief Justice Robert S French, ‘Procedural Fairness – Indispensable to Justice?’ (Speech delivered at the Sir Anthony Mason Lecture, University of Melbourne Law School, 7 October 2010) 22–3 <[www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf](http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf)>.

<sup>83</sup> See *Migration Reform Act 1992* (Cth).



Tribunal.<sup>84</sup> Further limitations on judicial review were instituted via the insertion of a privative clause in the *Migration Act* in 2001<sup>85</sup> which was the subject of a successful challenge in *Plaintiff S157*.<sup>86</sup> However, in the years following this decision, further codification of procedural fairness in the *Migration Act* has occurred, which has narrowed the scope of this ground of review.<sup>87</sup> As has been commented elsewhere:

While perhaps preferable to those situations where Parliament simply excludes procedural fairness altogether, these codified requirements are often more limited than those that the courts would otherwise imply. As a result of this ‘super codification’ of procedural fairness, there is now very little room for the courts to add to these statutory requirements.<sup>88</sup>

It is well-accepted in Australian law that the right to a hearing under procedural fairness principles may be excluded by Parliament if this is reflected in the statute by way of ‘clear manifestation of a contrary statutory intention’<sup>89</sup> and ‘irresistible clearness’.<sup>90</sup> We acknowledge that, in the case of the IAA, the right to an oral hearing has been excluded by Parliament.<sup>91</sup> This is clearly stated in section 473DA(1) of the *Migration Act* which says that the relevant provisions are to be ‘taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority’.<sup>92</sup> Thus, we do not seek to engage in a debate about whether additional common law principles of procedural fairness can be applied to the fast track

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<sup>84</sup> The amendment introduced s 166LB(2)(a) of the *Migration Act* which precluded judicial review in the Federal Court in relation to Refugee Review Tribunal decisions where ‘a breach of the rules of natural justice occurred in connection with the making of the decision’: s 166LB(2)(a), as inserted by *Migration Reform Act 1992* (Cth) s 33. To respond to concerns about this change, codified procedures were inserted into the *Migration Act*: see the Explanatory Memorandum to the Migration Reform Bill:

The specific codified procedures in the Reform Bill, and those to be set out in the *Migration Regulations*, replace the current uncertain rules with regard to natural justice and statutory criteria for decision-making will clarify the matters which must be considered in making a decision.

Explanatory Memorandum, Migration Reform Bill 1992 (Cth) 9 [45].

<sup>85</sup> *Migration Amendment (Judicial Review) Act 2001* (Cth) sch 1 item 7, inserting *Migration Act* s 474.

<sup>86</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (‘*Plaintiff S157*’).

<sup>87</sup> For a history of these changes, see Chief Justice Robert French, ‘The Role of the Courts in Migration Law’ (Speech delivered at the Migration Review Tribunal and Refugee Review Tribunal Annual Members’ Conference, Torquay, Victoria, 25 March 2011) <[www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj25mar11.pdf](http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj25mar11.pdf)>; see especially at 13–17; Susan Kneebone, above n 34, 178–85.

<sup>88</sup> Maria O’Sullivan, ‘Fairness and Efficiency in the Migration “Fast Track” Process’ on Gilbert + Tobin Centre of Public Law, *AUSPUBLAW* (14 May 2018) <<https://auspublaw.org/2018/05/fairness-and-efficiency-in-the-migration-fast-track-process/>>.

<sup>89</sup> *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

<sup>90</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>91</sup> *Migration Act* s 473DB. A number of recent Federal Court decisions have recognised that the common law rules of procedural fairness have been excluded by the legislative provisions on the fast track process in the *Migration Act*: see, eg, *DBE16 v Minister for Immigration and Border Protection* [2017] FCA 942, [62] (Barker J). See also *AMA16 v Minister for Immigration and Border Protection* (2017) 317 FLR 141, 145–6 [18]–[21] (Judge Riley); *AFK16 v Minister for Immigration and Border Protection* [2016] FCCA 1826.

<sup>92</sup> *Migration Act* s 473DA(1). This is noted in *Plaintiff M174* (2018) 353 ALR 600, 607 [20] (Gageler, Keane and Nettle JJ).

process as a matter of statutory interpretation – the statute is clear on that issue and the answer is that those principles are excluded. What we *do* seek to do in this article is to question the balance which has been struck between fairness and efficiency in the provisions and to question the way in which that legislative limitation (particularly in relation to the application of the ‘exceptional circumstances’ term) is being *interpreted* by the IAA. Here, we note that although Parliament has clearly limited merits review for fast track applicants, it does give a small amount of discretion (albeit limited) to the IAA. However, the fact that only 1.2 per cent of persons are being granted an oral interview<sup>93</sup> indicates that the statutory requirements are being very strictly applied and could, instead, be applied to ensure greater fairness for asylum seekers.

We therefore question whether the IAA could exercise its discretion more fully to increase the procedural fairness standards for asylum seekers subject to the fast track procedure, particularly in light of the vulnerability of that group. In doing so, we believe that an examination of the theory underlying procedural fairness and fairness more generally is useful in determining what fairness might require in the IAA context.<sup>94</sup>

## 2 *The Underlying Rationales for Procedural Fairness and Applicability to RSD*

As the focus of this article is on the way in which the fast track system interacts with vulnerability, it is pertinent to consider the rationale for procedural fairness and the values which it serves in order to establish whether the tension between fairness and efficiency has been adequately balanced. The two main schools of thought in relation to procedural fairness are usually classified as dignitarian and utilitarian.<sup>95</sup> Broadly speaking, a dignitarian approach looks at the way in which procedural fairness can enhance individual dignity, whilst a utilitarian (or instrumentalist) rationale focuses on the effect of procedural fairness on the

<sup>93</sup> Email from Immigration Assessment Authority to Maria O’Sullivan, 19 January 2018 (copy on file with authors).

<sup>94</sup> Although the focus of this article is on procedural fairness, we also recognise that procedural fairness and unreasonableness are linked. This has been acknowledged in recent jurisprudence on the IAA. For instance, Judge Driver has held that the statutory discretions of the Authority must be exercised reasonably: *DZU16 v Minister for Immigration and Border Protection* (2017) 321 FLR 306, 333–4 [120]–[122]. It was also agreed by the parties in the High Court litigation in *Plaintiff M174* that the various powers conferred on the Authority by Div 3 of Pt 7AA are conferred on the implied condition that they are to be exercised within the bounds of reasonableness, in the sense explained in *Minister for Immigration and Citizenship v Li*, with the consequence that an unreasonable failure to exercise such a power can render invalid a purported performance by the Authority of the duty imposed on it by s 473CC to conduct a review and either to affirm or to remit the decision under review.

*Plaintiff M174* (2018) 353 ALR 600, 607 [21] (citations omitted).

<sup>95</sup> Or, alternatively: non-instrumentalist and instrumentalist. The rationales for procedural fairness have been very well analysed in a number of articles published in the *Australian Journal of Administrative Law* and elsewhere: see Matthew Groves, ‘The Unfolding Purpose of Fairness’ (2017) 45 *Federal Law Review* 653 and the authorities cited therein; James Edelman, ‘Why Do We Have Rules of Procedural Fairness?’ (2016) 23 *Australian Journal of Administrative Law* 144; Kristen Rundle, ‘The Stakes of Procedural Fairness: Reflections on the Australian Position’ (2016) 23 *Australian Journal of Administrative Law* 164; Justice Alan Robertson, ‘Natural Justice or Procedural Fairness’ (2016) 23 *Australian Journal of Administrative Law* 155.

outcome of the decision.<sup>96</sup> The dignitarian theory is illustrated by Lord Reed in the UK case of *R (Osborn) v Parole Board*, where his Honour stated that

justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.<sup>97</sup>

Further, Lord Reed noted that the purpose of holding an oral hearing is

not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.<sup>98</sup>

In contrast, the focus of a utilitarian rationale is to promote efficient, accurate, certain, cost-effective decision-making. In this light it is clear that the fast track process gives effect to the utilitarian value of efficiency but does not give full effect to the participatory, dignitarian rationale of procedural fairness. We recognise, of course, that at times there will be overlap between the two rationales. Mathew Groves, commenting on the value of participation of an individual in the decision-making process, notes that such participation:

fulfils instrumental justifications by enabling officials to make better quality decisions, by ensuring evidence is received and tested. Allowing people to participate in processes that may affect them also fosters the intrinsic justification of the respectful treatment. Allowing people to speak and listening to what they wish to say both serve to recognise the value of what people might say, but also the value of affected people themselves.<sup>99</sup>

We believe it is useful in refugee matters to underline the core values that underpin procedural fairness in situations where applicants are particularly vulnerable. And here the significant knowledge, power and resource imbalance between asylum applicants and state authorities must be borne in mind. As Kristen Rundle has pointed out:

dignitarian considerations are important ... for their contribution to an understanding of the exercise of administrative authority as a *relationship* between those who possess government power and those who are subject to it.<sup>100</sup>

<sup>96</sup> As Matthew Groves notes, one instrumentalist rationale is the contribution procedural fairness can make to the accuracy of decisions: 'Fairness in the form of the rights to receive notice, disclosure and put one's own views can thus increase the quality of material upon which decisions are made': Groves, 'The Unfolding Purpose of Fairness', above n 95, 670.

<sup>97</sup> [2014] AC 1115, 1149 [68] (Lord Reed JSC with whom Lord Neuberger PSC, Baroness Hale DPSC, Lord Kerr and Lord Clarke JJSC agreed). Mathew Groves notes that

[m]any recent Australian cases echo this endorsement of dignitarian justifications for fairness. Judges have variously suggested that constitutional requirements that oblige courts to hear both sides of a case protect the institutional integrity of courts that also 'respects human dignity and individuality'. The requirements of fairness that courts zealously protect in the conduct of hearings under migration legislation similarly 'involves the recognition of the dignity of the applicant' whose interests are at stake.

Groves, 'The Unfolding Purpose of Fairness' above n 95, 672 (citations omitted).

*R (Osborn) v Parole Board* [2014] AC 1115, 1153 [82].

<sup>99</sup> Groves, 'The Unfolding Purpose of Fairness', above n 95, 672.

<sup>100</sup> Rundle, above n 95, 165. In the context of refugees, we find Rundle's comments on utilitarian rationales at 167 particularly compelling:

Precisely because its concerns lie with outcomes, not process, the gaze of the utilitarian perspective is directed to the position of the repository of authority and the wider institutional frame within which that

The context in which RSD operates must also be borne in mind. As we have referred to earlier, there is a significant power imbalance between the Department of Home Affairs/IAA and refugee applicants. This imbalance stems from a number of factors. In the first place, there are significant resource differences between the two groups: the Department and IAA have a much greater ability to obtain country information and, increasingly, applicants face difficulties in obtaining legal representation due to changes in publicly funded legal assistance.<sup>101</sup> The ability of the Department and IAA to obtain country information is of particular importance as this is often decisive in an assessment of whether an asylum seeker fears persecution or harm in their country of origin. Further, many decisions also depend on the findings as to the applicant's credibility, which is often a highly subjective opinion made by the individual decision-maker, holding considerable power over the applicant in doing so.

In light of this, we argue that dignitarian, non-instrumentalist rationales should be more influential in RSD than those of utilitarian values. We acknowledge that the focus in RSD should not *only* be on dignitarian ideals, without regard to expediency and practicality. However, given that the decision of the Department and IAA is to radically and fundamentally change the circumstances of the life of an asylum seeker (via the grant or refusal of a protection visa), and due to the vulnerability of refugee applicants, there should be a strong presumption for participation of an individual in any decision made on refugee status. We would underline here that the IAA has a significant degree of discretion over the applicant (in that it can refuse or admit new information and refuse or grant an oral interview) which other bodies do not possess.<sup>102</sup> Procedural fairness can provide a means to redress this imbalance and empower the individual to make their case.

This leads on to the next (and perhaps more complex) question, which is: how is the balance to be struck – how much procedural fairness is required when dealing with vulnerable asylum seekers in an environment where efficiency is also required so as to avoid undue delay? If there is a powerful administrative decision-maker and a vulnerable applicant, is the question whether that decision-maker has afforded the vulnerable individual a *reasonable* opportunity to be heard? Can that be fulfilled by provision of an oral hearing at the primary level?<sup>103</sup>

In the Australian context, the most relevant case on the provision of oral hearings is that of *WZARH*, where Kiefel, Bell and Keane JJ asserted that the scope 'depends on the practical requirements of procedural fairness in the circumstances

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repository operates. It is not directed to the position and experience of the subject who ultimately has no power to direct the outcome of the repository's exercise of authority beyond the influence afforded to her or him in the process leading to it.

<sup>101</sup> Due to changes instituted in March 2014, protection visa applicants are currently not entitled to publicly-funded legal assistance. Previous to this, the Immigration Advice and Application Assistance Scheme (IAAS) was available for assistance at the departmental and tribunal stages, see Kirk, above n 67, 263.

<sup>102</sup> For instance, the Refugee Division of the AAT is obliged to grant a hearing to an applicant under s 425 of the *Migration Act*.

<sup>103</sup> We note here that an oral hearing can encompass a formal hearing or a more informal interview (depending on the legislative and institutional context). Here, we note the unusual characteristic of the IAA: that it does not have an obligation to hear *directly* from applicants.

of the case<sup>104</sup> and will not demand that an applicant always be given an oral hearing.<sup>105</sup> Therefore, the appropriate inquiry is whether ‘a fair opportunity to be heard requires such a hearing’.<sup>106</sup> We will now examine some case studies from the IAA to establish whether a fair opportunity to be heard in some of those decisions did in fact require an oral hearing and the consideration of new information.

## V FAIRNESS AND VULNERABILITY IN THE IAA – CASE STUDIES

In order to establish whether the fast track process is exacerbating the vulnerability of refugee applicants, we consider a number of IAA decisions as case studies to see how procedural fairness is applied in practice. We discuss these by reference to two themes: consideration of credibility and acceptance of new information.

### A Overview: Operation of the IAA in Practice and Analytical Methodology

#### 1 *The IAA in Practice – Caseload Data and Statistics*

As noted earlier, the fast track process in Australia is a targeted procedure, as only *certain* refugee applicants are subject to this process: those who arrived by boat on or after 13 August 2012 and before 1 January 2014<sup>107</sup> and those classified as UMAs.<sup>108</sup> The fact that the IAA deals exclusively with asylum seekers who arrived by boat is very significant. As a number of other commentators have pointed out, this group are more likely to be successful in their protection visa applications than other applicants.<sup>109</sup> In terms of the numbers of cases which the IAA has ‘remitted’ to the Department (how many applications the IAA has accepted), the rates are comparatively low. The IAA remitted the decision of the Department in 28 per cent of cases in 2015–16 and in only 16 per cent of cases in 2016–17.<sup>110</sup> This is a relative low rate of remittal. Indeed, the Refugee Council of Australia notes that: ‘[i]n contrast, the last available statistics from the previous review system (for people claiming asylum by boat between 2009–2013) show

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<sup>104</sup> *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 336 [33]: ‘Whether an oral hearing is required in order to accord procedural fairness to a person affected by an administrative decision depends on the practical requirements of procedural fairness in the circumstances of the case’.

<sup>105</sup> *Ibid* 336 [32] (Kiefel, Bell and Keane JJ).

<sup>106</sup> *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130, 136 [14] (Flick and Gleeson JJ).

<sup>107</sup> Department of Immigration and Border Protection, *Fast Track Assessment Process* (19 June 2017) <<http://webarchive.nla.gov.au/gov/20170816153305/www.border.gov.au/Trav/Refu/Illegal-maritime-arrivals/applying-protection-visa/assessment-process>>.

<sup>108</sup> Section 5AA of the *Migration Act* sets out the definition of UMAs.

<sup>109</sup> Kirk, above n 67, 261; Law Council of Australia, Submission No 129 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 5 November 2014, 28 [100], citing the views of the NSW Bar Association.

<sup>110</sup> Administrative Appeals Tribunal, ‘Annual Report 2016–17’ (2017) 60 <<http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-Annual-Report-2016-17.pdf>>.

much higher rates of remittal, ranging from 60–90 per cent for the same nationalities'.<sup>111</sup> In this regard we note that the caseload of the IAA includes applicants from countries which have been widely accepted as having strong refugee claims – these include Afghanistan, Myanmar and Iraq.<sup>112</sup> We note that many reports have set out evidence which raise concerns about the return of asylum seekers to these countries, particularly Afghanistan<sup>113</sup> and Iraq.<sup>114</sup> In Table 1 below we have set out the differences in the remittal rates for the IAA and AAT in relation to applicants from Afghanistan to illustrate the contrast between the two systems. This shows that in the past two years, the AAT set aside rate for citizens of Afghanistan has ranged from 63 to 81 per cent,<sup>115</sup> whereas it has only been from 19 to 24 per cent for decisions made by the IAA.

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<sup>111</sup> Refugee Council of Australia, 'Statistics on Review of Fast-Tracking Decisions' (Statistics, 14 June 2018) <[www.refugeecouncil.org.au/getfacts/statistics/aust/asylum-stats/review/](http://www.refugeecouncil.org.au/getfacts/statistics/aust/asylum-stats/review/)>.

<sup>112</sup> For instance, in 2016–17, the top five countries of origin of referred applicants to the IAA comprised Sri Lanka, Iran, Afghanistan, Iraq and Vietnam: Administrative Appeals Tribunal, *Annual Report*, above n 110, 59. We note that RSD will depend on an assessment of an *individual's* specific claims. However, there are countries for which country information suggests applicants will have a prima facie case. Indeed, this approach is formalised in the UK where, since 2002, the Upper Tribunal (Asylum and Immigration Chamber) has operated a system of in-depth examination of particular country issues in asylum cases, producing Country Guidance determinations: see discussion in Douglas McDonald-Norman, 'Country Guidance Decisions in the UK and Australia' on Gilbert + Tobin Centre of Public Law, *AUSPUBLAW* (7 July 2016) <<https://auspublaw.org/2016/07/country-guidance-decisions/>>.

<sup>113</sup> See, eg, *The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General*, UN GAOR, 72<sup>nd</sup> sess, Agenda Item 39; UN SCOR, 72<sup>nd</sup> sess, UN Docs A/72/768 and S/2018/165 (27 February 2018) [24], [38], [55]. Indeed, a number of AAT decisions have recognised refugee status for citizens of Afghanistan: see, eg, *1716870 (Refugee)* [2018] AATA 233, where the AAT remitted the application to the Department based on a finding that 'the applicant has a well-founded fear of persecution for the combined reasons of his Shia religion, his Hazara ethnicity and his political opinion in his home area of Kabul': at [48] (Member Murphy). See also *1420197 (Refugee)* [2016] AATA 3924.

<sup>114</sup> See, eg, Department of Foreign Affairs and Trade, 'DFAT Country Information Report Iraq' (26 June 2017) 9 [2.33] <<http://dfat.gov.au/about-us/publications/Documents/country-information-report-iraq.pdf>>: 'Overall, the security situation in Iraq, including and [sic] the Kurdish region, is fragile and susceptible to rapid and serious deterioration with large-scale conflict in some areas. A number of areas remain under [the Islamic State of Iraq and the Levant] control in the west, north and central areas'.

<sup>115</sup> The AAT statistics show that in the year 2017–18, the set aside rate for Afghanistan is 64 per cent and for Iraq, 24 per cent: Administrative Appeals Tribunal, 'Migration and Refugee Division Caseload Report: Financial Year to 31 May 2018' (3 June 2018) 5 <<http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2017-18.pdf>>. In 2016–17 the set aside rate for Afghanistan was 81 per cent and for Iraq, 51 per cent: Administrative Appeals Tribunal, 'Migration and Refugee Division Caseload Report: Financial Year to 30 June 2017' (14 July 2017) <<http://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2016-17.pdf>>.

**Table 1: Affirmation or Remittal of Departmental Decisions by AAT and IAA – Afghanistan Caseload<sup>116</sup>**

	Year	Remittal/Set aside of Departmental decision (approval of applicant's claim) (%)
AAT	2017–18	64
AAT	2016–17	81
IAA	2017–18 <sup>117</sup>	17
IAA	1 July 2015–30 June 2017 <sup>118</sup>	24

Further, as noted earlier, IAA statistics supplied to the authors indicate that an oral interview has been given to only 1.2 per cent of the 2823 cases finalised by the IAA.<sup>119</sup>

## 2 Methodology of Our Analysis

In order to analyse the IAA processes, we examined all IAA decisions published online from 14 December 2015 to 31 December 2017, which totals 122 decisions.<sup>120</sup> In making our findings, we acknowledge that this analysis is not based on the full spectrum of decisions made by the IAA, but only based on selected decisions published on the IAA's website that could be accessed. We note that only a very small percentage of IAA decisions appear to be published online.<sup>121</sup> As a result of this, we have used those IAA decisions in our case analysis

<sup>116</sup> The 2017–18 figures are until 31 May 2018 for AAT and 31 March 2018 for IAA. We note that comparisons may be influenced by the fact that applicants in the AAT are required to lodge an application for review, while non-excluded fast track applicants are automatically referred to the IAA. Therefore, AAT applicants could enjoy a higher rate of remittal to the Department despite any differences in procedural fairness. This is because AAT applicants may be more likely to seek legal assistance and advice as to the prospects of their success, before lodging an application. However, we submit that the table above does illustrate some broader, systemic trends about decision-making in the two tribunals. Asher Hirsch from the Refugee Council of Australia has also compared the decisions of the (former) Refugee Review Tribunal with the IAA and has found that the IAA refuses three times as many asylum seekers as the Refugee Review Tribunal: see Asher Hirsch, on Jack Dorsey et al, *Twitter* (8 June 2018) <<https://twitter.com/ashhirsch/status/1004956584202592256>>.

<sup>117</sup> Immigration Assessment Authority, 'Caseload Report' (31 March 2018) 2 <[www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2017-18YTD.pdf](http://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2017-18YTD.pdf)>.

<sup>118</sup> Immigration Assessment Authority, 'Caseload Report' (30 June 2017) 2 <[www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2016-17.pdf](http://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2016-17.pdf)>.

<sup>119</sup> Email from Immigration Assessment Authority to Maria O'Sullivan, 19 January 2018 (copy on file with authors).

<sup>120</sup> A total of 123 decisions were listed for this period, but one decision had been taken down from the website, leaving 122 which have been 'published' (and are available) online. Note that 14 December 2015 is the date of the IAA's first decision: see Immigration Assessment Authority, *Decisions* (29 June 2018) <<http://www.iaa.gov.au/about/decisions>>.

<sup>121</sup> In an *Academics for Refugees Report*, Sara Dehm and Anthea Vogl estimate that the IAA 'only releases 4 per cent of its decisions (as the IAA publicly released 68 decisions for the period from 1 January 2016 to 30 June 2017 out of a total of 1734 decisions made during that period)': Sara Dehm and Anthea Vogl, 'An Unfair and Dangerous Process: A Legal Analysis of the Ministerial Deadline to Apply for Asylum and Use of Executive Power in the Legacy Caseload', (Report, Academics for Refugees, October 2017)

which we have determined best illustrate some of the procedural concerns of the fast track process – the handling of new information and the making of credibility assessments in the absence of a personal oral interview. We have also considered those IAA decisions which have been the subject of jurisprudence relating to the fast track process, particularly recent decisions of the Federal Circuit Court<sup>122</sup> and Federal Court of Australia.<sup>123</sup>

## B Case Studies from IAA Decisions

### 1 Credibility Assessments by the IAA

It is widely recognised that credibility is a key consideration in the assessment of refugee status<sup>124</sup> and that an oral hearing is usually required where credibility is at issue.<sup>125</sup> Unusually, however, it is the practice of the IAA to read the transcript or to listen to a recording of the departmental level interview when making a review determination.<sup>126</sup> This is unusual because this is not a common practice in other comparable jurisdictions, unless there is a valid reason for doing so.<sup>127</sup> A number of IAA decisions illustrate the difficulties encountered when a decision-maker makes credibility findings based on a recording or transcript of the applicant, rather than holding a fresh, oral interview. In *IAA17/02041* (6 September 2017; Sri Lanka), the IAA reviewer listened to a recording of the applicant's interview and found that the applicant's evidence was 'vague and unconvincing',

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19 n 70 <<https://academicsforrefugees.files.wordpress.com/2017/10/an-unfair-and-dangerous-process-final.pdf>>.

<sup>122</sup> The Federal Circuit Court jurisprudence on the IAA is extensive, but see, eg, *CSJ17 v Minister for Immigration and Border Protection* (2018) 328 FLR 431; *CSR16 v Minister for Immigration and Border Protection* (2017) 324 FLR 364; *DFZ16 v Minister for Immigration and Border Protection* [2017] FCCA 2427.

<sup>123</sup> See, eg, *BVZ16* [2017] FCA 958; *CHF16 v Minister for Immigration and Border Protection* [2017] FCAFC 192; *BMB16 v Minister for Immigration and Border Protection* (2017) 253 FCR 448.

<sup>124</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (revised ed, 2011) 131 <[www.unhcr.org/en-au/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html](http://www.unhcr.org/en-au/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html)>; United Nations High Commissioner for Refugees, *Beyond Proof*, above n 30, 13.

<sup>125</sup> See below Part V(C).

<sup>126</sup> See, eg, *IAA16/01076* (Immigration Assessment Authority, Alison Nesbitt, Reviewer, 16 December 2016) <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601076\\_16December2016.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601076_16December2016.pdf)>: 'I have reviewed the applicant's TPV application, the recording of the TPV interview, and the records of two earlier interviews with officers of the Department': at 3 [8].

<sup>127</sup> Indeed, in the Full Federal Court decision in *WZARH*, Flick and Gleeson JJ noted that:

Listening to a tape recording or reading a transcript is no substitute for extending to the appellant the opportunity which he was first given and which he was led to believe he would be given, namely an opportunity to impress upon the person who made the recommendation the merits and genuineness of his claims.

*WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130, 142 [28]. Whilst the Full Federal Court findings as to legitimate expectation were not upheld on appeal to the High Court, we argue that the comments relating to tape recordings remain valid as the High Court held that fairness did not require an oral hearing in every case, but instead depended on context. In this regard, Flick and Gleeson JJ did accept that 'there is no universal requirement for an oral hearing before an administrative decision is made': see discussion of this by the High Court in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 332 [16] (Kiefel, Bell and Keane JJ).



which led the reviewer to make a negative credibility finding with respect to his claim:

In the applicant's written SHEV statement he claimed that in the lead up to the 2011 elections, a Kilinochchi-based CID officer, Mr K, coerced the applicant's [relative] into standing as an EPDP candidate, by threatening to detain the applicant on LTTE charges. *I found the applicant's oral evidence* regarding this to be vague and unconvincing and I have concerns regarding the credibility of this claim, given he did not raise it prior to his 2016 SHEV application.<sup>128</sup>

Similar findings were made in *IAA16/01401* (12 September 2017; Sri Lanka).<sup>129</sup> Here the reviewer did acknowledge aspects of the individual's vulnerability in assessing credibility by finding that:

In assessing the applicant's evidence I have taken into account the difficulties of recall over time, the scope for misunderstanding in interpreted material, cross cultural communication issues, and the problems people who have lived through trauma may experience in presenting their story in a cohesive narrative.<sup>130</sup>

Despite this, the IAA reviewer disputed the credibility of the applicant, referring to the way in which the applicant had answered questions in the recording by the Department:

Nevertheless, having considered his overall evidence, I have serious concerns about the credibility of the applicant and the truthfulness of some of his evidence.

The applicant was, *based on the recording, an unimpressive witness at the TPV [Temporary Protection Visa] interview*. On a number of occasions he had to be asked a question several times before he would respond directly to the question. When parts of his evidence were challenged he frequently changed parts of his answer. ...

In light of the significant changes, inconsistencies and implausibility in the applicant's evidence, I am satisfied that he has exaggerated, embellished and fabricated aspects of his evidence in order to boost his claims for protection.<sup>131</sup>

We contend that a process in which reviewers base their credibility findings about applicants on the way in which they respond and sound on a recording which has been carried out by *another decision-maker* carries with it a significant risk of error. It is problematic as it is based on the responses of an applicant in an interview which has not been conducted by the *reviewer*. Therefore, the reviewer is making findings based on incomplete evidence.

The decision in *IAA16/01509* (4 January 2017; Iraq), particularly illustrates the disadvantage experienced by an applicant in not having access to an oral interview at the IAA level. Here the IAA reviewer assesses claims made by the applicant about text messages and telephone calls received in Iraq from persons from whom the applicant feared harm:

*At the SHEV [visa] interview*, the applicant stated that in 2012, he received a text message on his phone from AAH requesting him to join them and stop working

<sup>128</sup> *IAA17/02041* (Immigration Assessment Authority, Natalie Becke, Reviewer, 6 September 2017) 6 [22] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702041\\_6September2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702041_6September2017.pdf)> (emphasis added).

<sup>129</sup> *IAA16/01401* (Immigration Assessment Authority, Mark Oakman, Reviewer, 12 September 2017) 5–6 [20]–[22], 7 [26] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601401\\_12September2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601401_12September2017.pdf)>.

<sup>130</sup> *Ibid* 5 [20].

<sup>131</sup> *Ibid* 5 [20]–[21], 7 [26] (emphasis added).

with [Company 1]. He stated that two days later, he received a phone call from AAH. AAH told him that they sent him a message; he ignored it and did not reply. AAH requested him to attend their office. They told him that they knew he was working in [Company 1] and that next time when they sent him something, he had to reply. He apologised to the AAH and told them that he would attend their office. But he did not attend their office as he was fearful of what they would do with him.

*There was no mention of having received a text message from AAH, or that the AAH requested the applicant to attend their office in the applicant's written statement. The written statement only mentioned about a threatening telephone call from AAH and the subsequent home attack and arson attack against the applicant's [business].*<sup>132</sup>

We emphasise the words in italics above to indicate that the consideration of credibility of the applicant's claims here was based on very static queries – there is a reliance on the *omission* by the applicant of certain claims in the departmental interview and the written statement. However, as the IAA did not interview the applicant to establish why those claims were not included in the first interview, we query the veracity of these findings. This is an example of the need for the type of personal, responsive and direct interaction which occurs in an oral interview – the reactive questioning that allows the decision-maker to obtain the full picture as to the applicant's credibility and claims.

In a number of decisions, there is a complete rejection of the central facts of an applicant's claims, despite the fact that no interview has taken place. For instance, in *IAA16/01509*, the reviewer failed to conduct an oral interview and instead listened to the departmental interview. The reviewer rejected the applicant's claim for both refugee status and complementary status and, in doing so, said they had rejected key aspects of the applicant's factual submissions.<sup>133</sup> Similarly, in *IAA17/02069* (18 October 2017; Myanmar), the IAA held that it did not accept a new claim from the applicant because it was 'lacking in detail' and 'appear[ed] to have been contrived to strengthen [the applicant's] claims to protection'.<sup>134</sup> More generally, the reviewer considered the applicant's answers to the departmental questions at the first instance hearing and used these to reject his claims. This is despite the fact that the reviewer explicitly raised concerns about the ability of the applicant to have fully understood the questions being asked of him at that first stage interview:

I have some concerns as to whether the applicant fully understood the questions being asked by the delegate about his citizenship status in Myanmar. Nevertheless,

<sup>132</sup> *IAA16/01509* (Immigration Assessment Authority, Grace Ma, Reviewer, 4 January 2017) 4 [16]–[17] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601509\\_04January2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601509_04January2017.pdf)> (emphasis added).

<sup>133</sup> *Ibid* 10 [50]:

I have not accepted that the applicant was threatened, or that his home or [business] was attacked, burnt or destroyed by AAH, JAM, or other Shia militant groups or Sunni armed groups relating to his work as [occupation] or his work with a foreign company [Company 1], or for being a non-practising Muslim, or for any other reason. I have not accepted that the applicant will face a real chance of being perceived as an apostate, 'kafir', a secularised enemy who has collaborated with foreign companies, or holding an anti-Islamic view, or being opposed to the militias, or hostile to the radical Islamist goal of establishing Iraq as an Islamist state.

<sup>134</sup> *IAA17/02069* (Immigration Assessment Authority, Denny Hughes, Reviewer, 18 October 2017) 9 [40] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702069\\_18October2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702069_18October2017.pdf)>.

there are a range of factors that indicate to me that the applicant *is not stateless or Rohingya as claimed*.<sup>135</sup>

We note that the absence of an oral interview is a significant problem given that RSD assessors commonly make findings on evidential inconsistencies in an applicant's claims. The following two decisions highlight that findings on inconsistencies are often based on very subjective assessments. In *IAA16/00830* (10 March 2017; Afghanistan), the IAA reviewer considered the inconsistencies between the applicant's statement (that he had participated in armed conflict) and other evidence (which indicated that he had merely received some weapons training).<sup>136</sup> The reviewer held that despite 'some variance in the detail of his specific role' the applicant had been 'broadly consistent'.<sup>137</sup> Therefore, the reviewer did not find that the inconsistencies had 'resulted from an effort to mislead', and did not believe that the applicant's credibility had been compromised as a result.<sup>138</sup> However, in *IAA16/01076* (16 December 2016; Pakistan), the IAA reviewer found that despite 'the amount of time that ha[d] elapsed since [the] incidents were claimed to have occurred, and the applicant's level of education and numeracy', those considerations could not account for the four-year discrepancy in dates provided by the applicant.<sup>139</sup> This finding led the reviewer to reject that an event described by the applicant had occurred.<sup>140</sup>

The subjective nature of inconsistency assessments provides a strong argument to support the granting of an opportunity to comment on or explain those inconsistencies in the form of an oral interview, rather than simply by way of a decision 'on the papers'.<sup>141</sup> Further, the IAA decision analysis above demonstrates that credibility can only be assessed comprehensively through gaining a personal impression of the applicant. Therefore, in order to make an accurate determination of whether an applicant has truthfully and adequately explained any inconsistencies, fairness is likely to require that they be granted the right to do so via an oral hearing.

The analysis of the subjective approach to inconsistencies explored above indicates that when an applicant is not given the opportunity to explain or comment on inconsistencies that the Department delegate has identified, or when the IAA reviewer discovers an inconsistency that the Department delegate did not, then fairness would particularly demand provision of an oral hearing at the review level.<sup>142</sup> However, some may argue that there may be justification for limitation on

<sup>135</sup> Ibid 5 [18] (emphasis added).

<sup>136</sup> *IAA16/00830* (Immigration Assessment Authority, Jessica McLeod, Reviewer, 10 March 2017) 6 [17] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1600830\\_10March2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1600830_10March2017.pdf)>.

<sup>137</sup> Ibid 5–6 [15].

<sup>138</sup> Ibid 5–6 [15], 6 [17].

<sup>139</sup> *IAA16/01076* (Immigration Assessment Authority, Alison Nesbitt, Reviewer, 16 December 2016) 6 [22] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601076\\_16December2016.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601076_16December2016.pdf)>.

<sup>140</sup> Ibid.

<sup>141</sup> United Nations High Commissioner for Refugees, *Beyond Proof*, above n 30, 44–5.

<sup>142</sup> We note that the principles of legal unreasonableness might require such a right to be heard. See, eg, discussion of the obligation to get new information from the applicant in *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475. Here the Court held that 'it was legally unreasonable, in the circumstances, not to consider getting documents or information from the respondent': at 494 [82]

hearing rights in certain situations. For instance, if inconsistencies have been put to the applicant for comment or explanation during an oral hearing at the Department, and the IAA *agrees* with the Department's decision to make an adverse credibility finding, it could be argued that fairness may not require a *second oral hearing at the IAA*.

In response to this argument, we emphasise the need to consider procedural fairness in context and in light of the *practical injustice* which may still occur in such circumstances. This will include consideration of the situation of the applicant at the departmental decision stage. Was the applicant expected to address inconsistencies on the spot and without the advice of a legal representative at the departmental level? If so, this would raise fairness concerns. This is because the applicant may not have had sufficient time to prepare their response or seek professional advice on the suitability of that response. Such circumstances would provide a strong argument to support the holding of an oral hearing at the review stage.

## 2 Considerations of Vulnerability

Whilst we argue that all refugee applicants have a certain level of vulnerability arising from their flight from their country of origin, it is important to consider an applicant's specific vulnerabilities when determining what fairness might require of the decision-making process.

We present here some examples of where vulnerability of the applicant may not have been fully considered. In *IAA16/01076*, the IAA reviewer identified a number of inconsistencies in the applicant's oral evidence to the Department.<sup>143</sup> Whilst the reviewer considered the applicant's illiteracy and low level of numeracy, they did not find that it could override all of the inconsistencies identified.<sup>144</sup> Further, in *IAA16/00549* (11 November 2016; Iraq), the IAA reviewer considered the concerns raised by the applicant with respect to the interpretation issues that had occurred during their interview with the Department.<sup>145</sup> The applicant noted that three interpreters were used during the interview (the first was physically present and the other two were telephone interpreters) and he had difficulty understanding them and responding to questions from the Department decision-maker.<sup>146</sup> Despite these issues, the IAA reviewer

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(The Court). The Minister was refused special leave to appeal this decision in the High Court: *Minister for Immigration and Border Protection v CRY16* [2018] HCASL 102.

<sup>143</sup> *IAA16/01076* (Immigration Assessment Authority, Alison Nesbitt, Reviewer, 16 December 2016) 6 [22] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601076\\_16December2016.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601076_16December2016.pdf)>:

I have considered whether the amount of time that has elapsed since these incidents were claimed to have occurred, and the applicant's level of education and numeracy, may account for these discrepancies.

However, while I accept that these factors might account for some variation in dates, I do not think they can adequately account for the great difference between an event claimed to have occurred approximately eight years ago before his departure for the [country 1], and an event claimed to have occurred just under four years ago after he returned from the [country 1] to Pakistan.

<sup>144</sup> *Ibid.*

<sup>145</sup> *IAA16/00549* (Immigration Assessment Authority, Urvi Bhatt, Reviewer, 11 November 2016) 2 [3] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1600549\\_11November2016.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1600549_11November2016.pdf)>.

<sup>146</sup> *Ibid.* The IAA decision notes:

stated that they had listened to and considered the interview recording ‘carefully’, addressed the concerns raised by the applicant, and concluded that the applicant was given ‘an opportunity to present his case’.<sup>147</sup> Ultimately, the reviewer rejected the applicant’s account of events on the basis that it was inconsistent, vague and unconvincing.<sup>148</sup>

The reviewers in both decisions have considered the applicants’ specific vulnerabilities and claim to have taken them into account when determining their overall credibility. However, the reviewers’ ability to fully appreciate the effect that an applicant’s vulnerabilities may have on their overall credibility by listening to a recording of an interview is debateable. Observing an applicant’s vulnerabilities in person is likely to give reviewers a more insightful appreciation of how they may affect an applicant’s ability to give evidence.<sup>149</sup> Further, applicants may be uncomfortable with, or incapable of revealing the nature and extent of their vulnerabilities at the first stage of the determination process (particularly if they are unrepresented).<sup>150</sup> This suggests that they should be afforded the full suite of procedural fairness rights, including an oral hearing at the IAA stage in order for fairness to accommodate those vulnerabilities. Therefore, it is likely that with respect to those protection visa applicants who have added vulnerabilities, fairness would be especially demanding of an oral hearing at the IAA.

### 3 *Speculation about Future Action of the Applicant*

As noted above, RSD requires a speculative assessment about the future risk of harm to an applicant if returned to their country of origin. The way in which an applicant is likely to behave and where they will live is central to this, particularly where the internal relocation principle is applied by the decision-maker. This is where a reliance by the IAA on dialogue between the applicant and the Department, without interviewing the applicant themselves, is problematic. For instance, In *IAAI7/02069*, the IAA found that:

The applicant only claimed to have once been politically active, but given his past experiences (notably the disappearance of his father), I accept he may be politically active or outspoken in the future. However, I consider any such involvement would be low level, infrequent and peaceful, as it has been in the past. I also *do not*

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The applicant submits that he was unable to clarify certain discrepancies and respond to questions during the SHEV interview as three interpreters were used during the interview and he had difficulty understanding them. The first was physically present and the last two were telephone interpreters. He claimed to have difficulty understanding the first interpreter and stated that she also had trouble explaining certain terminology used by the delegate. He stated there was a lot of interference with the second interpreter used via phone and that the questions he was asked with the third interpreter were difficult to answer when the interpreter was not physically present. For example he was asked to describe supporting photos but the interpreter could not see what he was explaining which made it difficult for him to explain.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid 4 [15].

<sup>149</sup> Kirk, above n 67, 254.

<sup>150</sup> Ibid 249.

*consider he would take any active role in his political opinion, such as in organising others.*<sup>151</sup>

Although the IAA had regard to written submissions filed by the applicant, it did not conduct an oral interview. Yet the reviewer made assumptions about the likely behaviour of the applicant upon return. Similarly, in *IAA16/01273* (22 June 2017; Afghanistan), the reviewer found: ‘There is *no evidence before me* to indicate the applicant has been previously unable to support his family in the past and I find he could establish himself in Kabul or Mazar-e-Sharif’.<sup>152</sup> Again, the reviewer is basing their finding on the *absence* of evidence in a procedure which *limits* the ability of the applicant to provide evidence to it and which clearly provides that oral interviews are not to be undertaken to elicit such new evidence.

Thus, in both cases, the reviewer based assessments of likely future conduct on an interview undertaken by *another decision-maker*, supplemented by brief written submissions to the IAA. We question whether such predictions can be fully supported in the absence of a direct interview with an applicant. We highlight that relying on evidence told by the applicant to the original decision-maker during a review process, places the reviewer at high risk of making a factual finding without all the relevant material before them – including (importantly) firsthand testimony from the applicant about what he or she is likely to do upon return to their country of origin. This is particularly so given that this future action is likely to change given the length of time between the departmental first interview and the IAA decision. Change of future action is even more likely if asylum seekers have been living in Australia for some time and may have changed their behaviours and attitudes during this time (eg, a woman from Afghanistan may be more likely to act against social expectations in Afghanistan after spending some years in the community in Australia).

## C Analysis: Procedural Fairness Concerns in the Fast Track Process

### 1 Concern 1: Lack of an Oral Hearing by the IAA

An applicant’s first-person testimony plays a critical role in RSD. The analysis above raises the question: can it be said that asylum seekers are given a real opportunity to reply to adverse information within the IAA process given the lack of oral hearings?

The above analysis of the IAA case studies illustrates the subjective nature of much of RSD. Whilst credibility is based on some objective criteria, decision-makers also apply subjective judgments to the assessment.<sup>153</sup> We argue that this suggests that reviewers should gain a personal impression of applicants via an oral

<sup>151</sup> *IAA17/02069* (Immigration Assessment Authority, Denny Hughes, Reviewer, 18 October 2017) 13 [65] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702069\\_18October2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702069_18October2017.pdf)> (emphasis added).

<sup>152</sup> *IAA16/01273* (Immigration Assessment Authority, Scott MacKenzie, Reviewer, 22 June 2017) 15 [57] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601273\\_22June2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601273_22June2017.pdf)> (emphasis added).

<sup>153</sup> United Nations High Commissioner for Refugees, ‘Credibility Assessment in Asylum Procedures: Expert Roundtable – Budapest, Hungary, 14–15 January 2015’ (Summary of Deliberations, 5 May 2015) [30] <[www.refworld.org/docid/554c9aba4.html](http://www.refworld.org/docid/554c9aba4.html)>.

hearing in order to properly make those subjective judgments.<sup>154</sup> Overall, it is unlikely that the assessment of applicant credibility through consideration of their demeanour, reconciling inconsistencies and paying attention to an applicant's individual vulnerabilities can be done comprehensively without gaining a personal impression via an oral hearing. This has also been acknowledged by the High Court of Australia in *WZARH*. In the joint judgment, Kiefel, Bell and Keane JJ noted that '[t]he benefit to a decision-maker of seeing a witness advance his or her case should not be exaggerated, but ... it cannot be dismissed as illusory'.<sup>155</sup> Similarly, Gageler and Gordon JJ stated that:

The opportunity that had been given [to the respondent] was an opportunity personally to convince an identified individual who was to make the assessment, including by responding to specific questions which that person raised. The opportunity became, in retrospect, an opportunity to present a case to an unknown assessor by way of a record of oral evidence and of written submissions.<sup>156</sup>

Given that the focus of this article is on the processing of refugee claims, guidance formulated by UNHCR – the body given supervisory status under Article 35 of the *Refugee Convention* – and the practice of other asylum states is also of great relevance. UNHCR guidelines clearly state that the only justification for excluding an applicant's right to an oral interview is where the claim is going to be approved.<sup>157</sup> A similar approach is reflected in the legislation governing the RSD in Canada which provides that an oral hearing may only be dispensed with if the decision-maker is going to accept the claim.<sup>158</sup> Further, internal policy of the Immigration and Refugee Board of Canada underlines the need for what it calls 'system integrity' and emphasises that refusal of an oral hearing is exceptional, not

<sup>154</sup> UNHCR has also made this argument, see United Nations High Commissioner for Refugees, Submission No 138 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, 19 [79].

<sup>155</sup> *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 339 [44].

<sup>156</sup> *Ibid* 344 [64]. See also similar comments made at the Federal Court level in *WZARH*, where Nicholas J observed:

The one situation in which oral hearings are most often thought to be desirable is where questions arise as to a witness's credibility. An oral hearing will often assist in the resolution of credibility issues by allowing the decision-maker to interact directly with the witness by asking the witness questions, considering his or her answers, and having regard to the witness's demeanour.

*WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130, 148 [54]. This paragraph was quoted with approval by the High Court of Australia in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 338–9 [41] (Kiefel, Bell and Keane JJ).

<sup>157</sup> UNHCR, 'Aide-Memoire and Glossary of Case Processing Modalities, Terms and Concepts Applicable to Refugee Status Determination [RSD] under UNHCR's Mandate' (2017) 4

<[www.refworld.org/docid/5a2657e44.html](http://www.refworld.org/docid/5a2657e44.html)>. This document relates to RSD undertaken by UNHCR.

However, UNHCR has also made similar comments about the importance of oral hearings in relation to RSD by states. For instance, in 2016 it responded to proposed changes to Icelandic migration legislation by stating: 'With regards to the right to request an oral hearing, UNHCR submits that a protection applicant should be given the possibility to request an oral hearing on appeal, in particular where facts or credibility are at issue': UNHCR Regional Representation for Northern Europe, 'UNHCR Observations on the Proposed Amendments to the Icelandic Act on Foreigners' (1 April 2016) 4 [12]

<[www.refworld.org/docid/56fe7ba74.html](http://www.refworld.org/docid/56fe7ba74.html)>.

<sup>158</sup> Section 170(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 provides that the Refugee Protection Division may allow a claim for refugee protection without a hearing, unless the Minister has notified the Division of the Minister's intention to intervene.

the norm.<sup>159</sup> It states that a hearing must be provided where there are ‘serious credibility issues’ or the country information is inconsistent with the information given by the applicant.<sup>160</sup>

In this context, we query whether a decision-maker can properly determine an applicant’s credibility in the absence of being able to observe their demeanour.<sup>161</sup> We argue that lack of an oral hearing means that IAA reviewers are unable to consider an applicant’s facial expressions and body language and can only listen to an applicant’s tone of voice in a recording.<sup>162</sup> This results in a restricted understanding of an applicant’s demeanour and could result in reviewers making an incomplete credibility assessment.<sup>163</sup> The UNHCR has clearly stated that it is essential for a review body to be able to obtain a personal impression of the applicant.<sup>164</sup> Indeed, this point was recently argued before the Full Federal Court in *BMB16 v Minister for Immigration and Border Protection* where the applicant pointed to the fact that the Authority is not obliged to conduct an oral hearing. The appellant submitted that this restricts ‘the demeanour (and accordingly credibility) findings that may be made by the Authority’.<sup>165</sup> Whilst Besanko J agreed that there was ‘some substance in this point’ and that it was ‘suggestive of a review limited in scope’,<sup>166</sup> his Honour held that ‘the point is not decisive and, in fact, does not take the matter very far’. Besanko J concluded that:

As much as a lawyer might consider an oral hearing a necessary part of a ‘review’ which might lead to different credibility findings and, indeed, findings of primary fact, the Parliament addressing a particular issue may assess the different and sometimes conflicting objectives (efficiency, speed, absence of bias, consistency with the Act and the natural justice hearing rule; see ss 473DA and 473FA) in a different way.<sup>167</sup>

In emphasising the need for an oral hearing in refugee decisions, we recognise that oral hearings present problems for some asylum seekers. A number of commentators have undertaken studies of oral hearings in refugee context and have

<sup>159</sup> The policy says: ‘Allowing claims without a hearing pursuant to paragraph 170(f) of the *IRPA* is the exception at the RPD, and will be carried out only in appropriate claims identified under this policy’: Immigration and Refugee Board of Canada, ‘Policy on the Expedited Processing of Refugee Claims by the Refugee Protection Division’ (18 September 2015) pt IV <[www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/polRpdSprExpProAcc.aspx](http://www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/polRpdSprExpProAcc.aspx)> (emphasis in original).

<sup>160</sup> Ibid.

<sup>161</sup> In referring to demeanour, we understand that to include an applicant’s responses to questions, facial expressions, tone of voice, physical movements, general integrity, intelligence and powers of recollection: United Nations High Commissioner for Refugees, *Beyond Proof*, above n 30, 185.

<sup>162</sup> Administrative Appeals Tribunal, ‘Migration and Refugee Division Guidelines on the Assessment of Credibility’ (July 2015) 3 [7], 7 [34] <[www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Assessment-of-Credibility.pdf](http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Assessment-of-Credibility.pdf)>.

<sup>163</sup> Therefore, even where applicants have themselves submitted new information to the IAA, the reviewer is unable to test the credibility of this fresh evidence by asking questions and assessing the response of the applicant during this exchange.

<sup>164</sup> United Nations High Commissioner for Refugees, Submission No 138, above n 154, 19 [79]. UNHCR emphasise that ‘[w]here the personal credibility of the applicant is at issue, the opportunity for the appeal authority to hear from and gain a personal impression of the asylum seeker is particularly important’.

<sup>165</sup> *BMB16 v Minister for Immigration and Border Protection* (2017) 253 FCR 448, 456 [29] (Besanko J).

<sup>166</sup> Ibid 456 [30].

<sup>167</sup> Ibid.



raised concerns about the process.<sup>168</sup> Indeed, some have argued the provision of an oral hearing may in fact be ‘less fair’ than written communication in that typically written submission processes allow an applicant a period of time in which to formulate a response.<sup>169</sup> Whilst we recognise that for some applicants, an oral interview may be stressful and that some may prefer to lodge their claim solely via a written submission, we argue the choice of an oral interview should at least be available to applicants to ensure there is some flexibility in the process to enhance fairness in the individual circumstances of a case.

In assessing the fast track process utilised by the IAA in Australia, we do recognise that the value of efficiency is a necessary part of the concept of good administration and that undue delay, particularly in RSD, is an unwelcome aspect of a decision-making system. Many RSD processes, both in Australia and elsewhere, have been beset by significant issues of delay.<sup>170</sup> Obviously undue delay is not beneficial to either the applicant nor the governmental authorities operating the RSD, particularly in relation to those asylum seekers being held in detention. As Callinan and Heydon JJ noted in *NAIS*: ‘nothing, apart from bias or unfairness, is more likely to bring public administration and the law into disrepute than inexplicable prolonged delay in the disposition of matters’.<sup>171</sup>

Indeed, delay can contribute to uncertainty and stress on the part of individuals as well as impairing an applicant’s ability to substantiate their claim – matters which are exacerbated for those in detention.<sup>172</sup> We therefore acknowledge that the

<sup>168</sup> See, eg, Anthea Fay Vogl, *Refugee Status Determination, Narrative and the Oral Hearing in Australia and Canada* (PhD Thesis, University of British Columbia, 2016), <<https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0305029>>. This thesis analysed refugee applicants’ oral testimony before the Canadian Immigration and Refugee Board (‘IRB’) and the Australian Refugee Review Tribunal (‘RRT’). The author undertook a qualitative, narrative-based analysis of 14 refugee applicants’ oral hearings before the RRT or IRB between 2012 and 2014. See also Audrey Macklin, ‘Asylum and the Rule of Law in Canada: Hearing the Other (Side)’ in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009) 78.

<sup>169</sup> See for instance, *Migration Act* ss 424A, 424B relating to the AAT. The possible advantages of written submissions are something which Matthew Groves has referred to in a recent article on interpreters and fairness. As he points out ‘[w]ritten processes are typically cheaper, more convenient and can be fairer because they provide time to make a considered response’: Matthew Groves, ‘Interpreters and Fairness in Administrative Hearings’ (2016) 40 *Melbourne University Law Review* 506, 519 n 62.

<sup>170</sup> In Australia, see Michael Lavarch, *Report on the Increased Workload of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT)* (Department of Immigration, 2012). Delays in RSD have been particularly problematic in the UK. For instance, in 1991, 72,070 asylum applications were awaiting an initial decision by the Home Office. Although this figure dropped in 1993 to 45,805, it rose again in 1995 to 69,650 applications: see discussion in Maria O’Sullivan, ‘The Intersection between the International, the Regional and the Domestic: Seeking Asylum in the UK’ in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009) 228, 255. Those backlogs and delays continue today despite the introduction of accelerated procedures for certain applications. See Alan Travis, ‘Half Asylum Claims “Non-straightforward” and as a Result Face Long Delays’, *The Guardian* (online), 29 November 2017 <<https://www.theguardian.com/uk-news/2017/nov/28/half-of-asylum-claims-classed-as-non-straightforward-face-long-delays>>.

<sup>171</sup> *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 522 [161].

<sup>172</sup> As Michael Kagan has argued, delays in status determination have a number of effects on the ability of applicants to substantiate their claim. For instance, ‘[t]he applicant’s memory may fade, hurting their

value of efficiency is for both applicants and the state. However, for the reasons discussed in this article, we do not believe that the current balance between fairness and efficiency in the fast track process is a correct one in its context.

In terms of context, we point to the types of legal issues and factual findings which are now routinely made as part of RSD. Here we emphasise that RSD involves speculative assessments about future risk of harm to an individual – to make predictions about what may happen in the future to an asylum seeker.<sup>173</sup> In particular, we highlight that that many refugee and complementary protection cases are now increasingly focused on the likely behaviour of an applicant upon return.<sup>174</sup> This is largely due to the increasing use by RSD authorities of concepts such as relocation<sup>175</sup> and behaviour modification.<sup>176</sup> We argue that the factual questions which need to be asked as part of such assessments can only be adequately answered by way of a responsive oral interview (not merely by way of written submissions). This is particularly so because questions of relocation often turn on the intentions and likely action of an applicant if returned to the frontiers of their country.<sup>177</sup> This is problematic as the Minister interprets the fast track

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credibility and ability to present a compelling narrative when the case is finally adjudicated. ... In many countries, asylum seekers languish in detention while their cases wait to come to the top of the pile': Michael Kagan, '(Avoiding) the End of Refugee Status Determination' (2017) 9 *Journal of Human Rights Practice* 197, 200.

<sup>173</sup> See summary in a recent Full Federal Court decision: *CSO15 v Minister for Immigration and Border Protection* (2018) 353 ALR 666:

Both the refugee and complementary protection criteria, insofar as they require a focus on risk of harm (whether for specific reasons or not), require the decision-maker to engage in a predictive and therefore somewhat speculative task about what is likely to happen to a person in the reasonably foreseeable future on return to her or his country of nationality ...

At 671–2 [23] (Tracey, Mortimer and Moshinsky JJ), citing *Minister for Immigration and Ethnic Affairs v Liang* (1996) 185 CLR 259, 277–9 (Brennan CJ, Toohey, McHugh and Gummow JJ); *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10, 7 [13] (Gray, Tamberlin and Lander JJ); *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788, 10 [27] (Heerey, Moore and Goldberg JJ); *SZQXE v Minister for Immigration and Citizenship* (2012) 134 ALD 495, 496–7 [7] (Flick J).

<sup>174</sup> For a discussion of the 'acting discreetly'/behaviour modification case law in Australia, see Maria O'Sullivan, 'Minister for Immigration and Border Protection v SZSCA: Should Asylum Seekers Modify Their Conduct to Avoid Persecution?' (2014) 36 *Sydney Law Review* 541.

<sup>175</sup> According to this principle, if a person is found to face a well-founded fear for a *Refugee Convention* reason in their country of origin, they may *not* be found to be a refugee if there is a place *within* their country of origin in which they do not face such a fear and to which they can reasonably be required to relocate. Relocation has been applied routinely by both the AAT and IAA: see *I316262 (Refugee)* [2016] AATA 3691; *IAA17/02632* (Immigration Assessment Authority, Ailsa Wilson, Reviewer, 10 August 2017) <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702632\\_10August2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1702632_10August2017.pdf)>; *IAA16/01273* (Immigration Assessment Authority, Scott MacKenzie, Reviewer, 22 June 2017) <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601273\\_22June2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1601273_22June2017.pdf)>. See also the many relocation cases decided in Australia cited in James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2<sup>nd</sup> ed, 2014) 332–61.

<sup>176</sup> See, eg, *IAA17/01887* (Immigration Assessment Authority, Denny Hughes, Reviewer, 21 September 2017) 10 [44] <[www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1701887\\_21September2017.pdf](http://www.iaa.gov.au/IAA/media/IAA/Files/Decisions/IAA1701887_21September2017.pdf)>. See also discussion in O'Sullivan, 'Minister for Immigration and Border Protection v SZSCA', above n 174, 441–56.

<sup>177</sup> See comments by the Full Federal Court in *CSO15 v Minister for Immigration and Border Protection* (2018) 353 ALR 666 where their Honours were summarising their understanding of Gageler J in previous jurisprudence:

provisions of the *Migration Act* as *not* obliging the IAA to put the applicant on notice of the fact that the reviewer may find that he or she could relocate within their country of origin.<sup>178</sup>

We note here that an individual's intentions for the future may change after the refugee has resided in Australia for some time. For instance, an asylum seeker who has lived here on a bridging visa for a number of years (as some of the 'legacy caseload' have done), may in fact wish to more prominently display religious or political beliefs. This would change the nature of the case such as to make it different from Department to IAA level and something that would be best answered in a responsive exchange, rather than the more limited written submission mechanism. Whilst we recognise that the IAA does in fact have the *ability* to allow new information in some circumstances under the *Migration Act* provisions, we note that it should also be *encouraged* to do so where relocation or behaviour modification is at issue.

We argue that the vulnerability of many asylum seekers (discussed earlier in this article) heightens the need for such a responsive exchange.. This has been explicitly recognised by the High Court of Australia in *WZARH*, where the joint judgement (Kiefel, Bell and Keane JJ) held:

the opportunity for a decision-maker to clarify areas of confusion or misunderstanding, and to form an impression based on personal observation as to whether an applicant is genuinely confused or seeking deliberately to mislead, may be especially important to a fair assessment of a claim to refugee status when English is not the applicant's mother tongue and he or she is obliged to seek to communicate through an interpreter.<sup>179</sup>

Thus, we argue that IAA must consider whether the applicant had any opportunity to be heard on the key issue before the delegate. If not, they must allow new information and conduct an oral interview with the applicant. This is particularly where the application turns on relocation and/or behaviour that the applicant is likely to undertake if returned to their country of origin.

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a decision-maker may have to look at whether it is reasonable and practicable to expect a person to avoid travelling to another region of his or her country of nationality, which is outside the region the decision-maker has found is safe for the person, *and is the place to which a person is likely to return.*

At 674 [30] (emphasis added). See also Mortimer J in *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307, 10 [49] (emphasis added):

The appellant's objections to relocation were not dealt with in a way that enabled the Tribunal to assess reasonableness and practicality for the appellant, *as an individual*. The assessment of whether a person who has been found to have a well-founded fear of persecution in one part of her or his country of nationality, can relocate to another region or part of that country of nationality *is not to be approached only by reference to the risk of harm ...*

<sup>178</sup> See summary of Ministerial submissions made in *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475, 483 [25] (The Court) (emphasis added):

The Minister submitted that one relevant effect of s 473DA(1) was that the scope and the criteria for the exercise of the discretionary powers in s 473DC(1) and (3) were *not informed by any underlying obligation to put an affected person on notice of the critical or important issues upon which an administrative decision-maker's decision may turn, such as would arise under normal principles of procedural fairness.* That would include the respondent's opportunity *to be put on notice of the fact that the Authority may find that he could relocate to Beirut.* This view was said to be supported by ss 473DB(1) and 473DC(2).

<sup>179</sup> *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 338 [41].

## 2 Concern 2: Fresh Consideration of Claims and Confirmation Bias

We also question whether the fast-track process may lead to ‘confirmation bias’ on the part of the IAA, particularly given that the IAA relies significantly on the findings and interview at the departmental level, does not conduct a full de novo review and does not ordinarily consider information directly from the applicant.<sup>180</sup> UNHCR has acknowledged that the repetitive nature of a refugee status decision-maker’s role means that there is a risk that they will, consciously or unconsciously, apply predetermined assumptions of an applicant’s credibility to their assessment.<sup>181</sup> This can make it difficult for decision-makers ‘to remain objective and impartial’.<sup>182</sup> In addition, constant exposure to stories of torture, violence, or inhuman and degrading treatment can have adverse psychological impacts on refugee status decision-makers.<sup>183</sup> As a result, they may experience ‘[c]ase-hardening, credibility fatigue, emotional detachment, stress and vicarious trauma’.<sup>184</sup> This can compromise their impartiality when considering an applicant’s claims.<sup>185</sup> For example, decision-makers may struggle to believe especially traumatic applications because denial and disbelief is a common coping strategy.<sup>186</sup> Further, attempts by decision-makers to decrease their emotional attachment to an applicant’s claims in order to remain objective may result in cynicism and disengagement.<sup>187</sup> Additionally, UNHCR has observed the difficulties that decision-makers can face in avoiding ‘confirmation bias’, where they might reach a conclusion based on their own preconceptions and avoid considering other explanations.<sup>188</sup> We argue that IAA reviewers may be at a greater risk of experiencing ‘confirmation bias’ because they only conduct a very limited merits review role.<sup>189</sup> Therefore, reviewers might be more likely to agree with the Department’s treatment of evidence and final determinations.

Given the above, the opportunity to interact directly with an applicant may assist decision-makers in making a determination based purely on the facts and allow for an applicant’s personal impression to show the individualised nature of their circumstances. This may decrease the likelihood of personal mind-sets impacting on the IAA’s decision-making process.

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<sup>180</sup> In *Plaintiff M174*, the High Court of Australia held that although the IAA undertakes a ‘limited form of review’, it still undertakes a de novo review: *Plaintiff M174* (2018) 353 ALR 600, 606 [17] (Gageler, Keane and Nettle JJ), 620 [85] (Gordon J), 621–3 [92]–[95] (Edelman J). We question whether it can be said that a body undertakes a ‘limited de novo review’. We also question whether the IAA does in fact undertake a ‘de novo review’ given the legislative constraints on it (that is, where is not permitted to consider new information or conduct an interview as a matter of course, but must meet strict thresholds).

<sup>181</sup> United Nations High Commissioner for Refugees, *Beyond Proof*, above n 30, 79.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid* 79–81.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid* 80.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> United Nations High Commissioner for Refugees, ‘Credibility Assessment’, above n 153, [84].

<sup>189</sup> *Migration Act* s 473DB(1).

### 3 Concern 3: Assumption of Fairness of Departmental Decision and New Information

A central purpose of the fast track process is to compel applicants to make their complete case at the departmental stage (which it can then not ‘reopen’ at the IAA stage). It also presumes that procedural fairness is granted at that first instance decision level. However, it is important to view the IAA’s decision-making process in the context of the entire fast track application process. Observers must view the decision ‘in its entirety’<sup>190</sup> and question whether the process ‘should be treated as a whole, or as a series of distinct decisions’.<sup>191</sup> This is because fairness may not require an oral hearing at every stage when only one body within the statutory regime is making the ‘operative’<sup>192</sup> or ‘final’<sup>193</sup> decision. In the case of *O’Shea*, Mason CJ held that when an oral hearing has been provided at the initial stage of a decision-making regime (eg, the Department), that oral hearing can satisfy the requirements of procedural fairness with respect to the final decision, provided that it does not take into consideration any matters or material that the applicant has not had an opportunity to discuss via oral hearing at that initial stage.<sup>194</sup> This idea was solidified in the case of *Haoucher*, where the Court required the Minister to grant the applicant a hearing because policies required him to deal with issues additional to those dealt with by the AAT.<sup>195</sup> Aronson, Groves and Weeks have also suggested that a fair hearing at the initial stage of decision-making can satisfy the requirements of procedural fairness in relation to the final decision, ‘provided that the final decision-maker does not take account of matters or materials which the affected person has not had an opportunity to address at the earlier stage’.<sup>196</sup> This suggests that when new information is submitted under exceptional circumstances to the IAA, fairness requires that applicants be given the right to an oral hearing on that evidence. It also suggests that when the IAA identifies any inconsistencies that the Department delegate was either not aware of, or had not put to the applicant, then fairness would require that the applicant have the right to an oral hearing. Here we note that in a recent Federal Court case of *DBE16 v Minister for Immigration and Border Protection*, the court held that the IAA can make different factual findings to those made by the original decision-maker.<sup>197</sup> This illustrates that the two processes are in fact different and should not

<sup>190</sup> *South Australia v O’Shea* (1987) 163 CLR 378, 389 (Mason CJ).

<sup>191</sup> Aronson, Groves and Weeks, above n 13, 468 [7.300].

<sup>192</sup> *Greyhound Racing NSW v Cessnock and District Agricultural Association* [2006] NSWCA 333, [79] (Basten JA).

<sup>193</sup> *South Australia v O’Shea* (1987) 163 CLR 378, 386 (Mason CJ).

<sup>194</sup> *Ibid* 389 (Mason CJ).

<sup>195</sup> *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 655 (Deane J).

<sup>196</sup> Aronson, Groves and Weeks, above n 13, 476 [7.330], citing *South Australia v O’Shea* (1987) 163 CLR 378.

<sup>197</sup> [2017] FCA 942, [59] (Barker J):

I accept the Minister’s submissions that no denial of natural justice arises from the mere fact that the Authority made different findings to those findings made by the delegate on the limited merits review system available under the fast track scheme. The Pt 7AA merits review system appears to operate on the understanding that the reviewer reconsiders all facts and so may make factual findings different to those of the original decision-maker. There is nothing in Pt 7AA of the *Migration Act* that suggests that the Authority is unable to make findings adverse to an applicant where the delegate made a finding

be viewed as a composite decision.<sup>198</sup> Thus, the need for procedural fairness should be assessed at each level as a separate issue.

On the other hand, it may be argued that written submissions by an applicant are sufficient where applicants are aware that there will be no oral interview upon review. In that regard, whilst the *WZARH* case has shed light on the strong contribution that an oral hearing makes to the overall fairness of a refugee determination procedure, its facts can be distinguished from the process used by the IAA.<sup>199</sup> In *WZARH* – a case focused on the (maligned) legitimate expectation doctrine – it was common ground in the litigation that the decision-maker was obliged to give the applicant procedural fairness and the applicant was ‘led to believe’ he would be given an oral hearing.<sup>200</sup> The position for applicants who are being reviewed by the IAA is slightly different because the *Migration Act* clearly says that applicants will normally not be granted an oral interview.<sup>201</sup> Therefore, the Department would argue that applicants subject to the fast track process are made aware that they will not have the right to an oral hearing at the IAA stage. This may be an argument against the provision of an oral interview at the review stage because, theoretically, applicants know that they need to raise all of their claims and provide all evidence at the primary departmental stage. However, we would argue that fairness must be determined in light of the surrounding circumstances. Those protection visa applicants who are illiterate, do not read or speak English, or do not have legal representation are unlikely to be aware that they are required to present all claims and supporting evidence at the primary stage. As such, simply stating in legislation that fast track protection visa applicants do not have a right to an oral hearing at the IAA is unlikely to remedy any of the unfairness that applicants might experience in practice.

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favourable to the applicant in relation to the same issue. In this regard, there is force in the Minister’s submission that the principles in *SZBEL v Minister for Immigration* (2006) 228 CLR 152 ... do not apply to reviews under Pt 7AA of the *Migration Act*. I note, without needing to interrogate the proposition further, that the Federal Circuit Court has accepted the proposition in such decisions as *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [101]; *AFK16 v Minister for Immigration & Anor* [2016] FCCA 1826 at [11]–[12].

<sup>198</sup> We note that the question of whether the departmental delegate and IAA decisions should be viewed as a single process was recently litigated before the High Court of Australia in *Plaintiff M174*. In this case, the plaintiffs argued that if a jurisdictional error is committed at the departmental stage, such error renders the IAA without jurisdiction (because there was no ‘fast track reviewable decision’ capable of referral by the Minister to the Authority, and/or no ‘fast track reviewable decision’ capable of review by the IAA). In a unanimous decision (Gageler, Keane and Nettle JJ, Gordon and Edelman JJ agreeing), the High Court found that a failure by the Department to comply with the procedural requirements in s 57(2) of the *Migration Act* does not deprive the IAA of jurisdiction to review the Department’s decision. The Court held that the jurisdiction of the IAA under Pt 7AA of the *Migration Act* is to review decisions that are made in fact, with no requirement that those decisions be legally effective. Further, the IAA had not acted unreasonably by declining to exercise its powers to interview persons relevant to the applicant’s claim. The High Court held that the exercise of discretion by the IAA in this case in relation to the new information was open to the IAA and was supported by the reasons it gave: *Plaintiff M174* (2018) 353 ALR 600. For further analysis of this case, see O’Sullivan, ‘Fairness and Efficiency’, above n 88.

<sup>199</sup> *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 336 [33] (Kiefel, Bell and Keane JJ) (*‘WZARH’*).

<sup>200</sup> *Ibid*; *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130, 141–2 [28] (Flick and Gleeson JJ).

<sup>201</sup> *Migration Act* s 473DA(1).

## VI CONCLUSIONS

In light of the above, we contend that the current legislative framework for the IAA operates to exacerbate circumstances of vulnerability or marginalisation of asylum seekers seeking to apply for refugee status. The exploration of procedural fairness set out in this article has indicated that the most effective way of determining the requirements of fairness is by applying these concepts in practice. The factors specific to refugee determination, such as the importance of credibility, the mind-set of the decision-maker and vulnerability of the applicant, suggest that a higher standard of fairness should be applied in the refugee decision-making context. Further, the seriousness of IAA decision outcomes, the inability to introduce new information to the IAA unless under exceptional circumstances, the potential for IAA decision-makers to discover inconsistencies not yet put to the applicant, and the unlikelihood that applicants will be aware that they do not have the right to an oral hearing at the IAA, are all strong arguments for why fairness might require such a hearing.

Whilst we recognise that the introduction of efficiency measures is an important way of avoiding delays in decision-making, and from that perspective is beneficial to administrative justice,<sup>202</sup> it increases the propensity of such measures to lead to serious legal errors (and thus also, possible breaches of the non-refoulement principle).<sup>203</sup> This was also recognised recently by the Australian Law Reform Commission ('ALRC'), discussing procedural fairness as part of the Freedoms Inquiry:

The ALRC considers that ... the fast track review process would benefit from further review to consider whether the exclusion of the duty to afford procedural fairness is *proportionate*, given the gravity of the consequences for those affected by the relevant decision.<sup>204</sup>

This article also demonstrates that fairness is especially compromised by the lack of an oral hearing when issues of applicant credibility are at stake. Credibility assessments involve the making of both objective and subjective judgments,<sup>205</sup> and fairness is likely to require that IAA reviewers make those subjective judgments comprehensively and in consideration of all available factors. Specifically, without

<sup>202</sup> For a discussion of this issue, see Peter Billings, 'Balancing Acts: Six Acts in Search of Equilibrium' (2006) 20 *Immigration, Asylum and Nationality Law* 197. See also John McMillan who argues that the hearing rule does not strike an appropriate balance between fairness and practical administrative considerations: John McMillan, 'Natural Justice: Too Much, Too Little or Just Right?' (2008) 58 *ALAL Forum* 33.

<sup>203</sup> See Maria O'Sullivan, 'Interdiction and Screening of Asylum Seekers at Sea', above n 80, 95. See also Erika Feller, 'Judicial or Administrative Protection – Legal Systems within the Asylum Processes' in *The Asylum Process and the Rule of Law* (International Association for Refugee Law Judges, 2006) 37, 40 who notes that '[e]xpeditious procedures have their place... However these should not be at the expense of key Convention notions...'

<sup>204</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) 402 [14.47] (emphasis added).

<sup>205</sup> United Nations High Commissioner for Refugees, 'Credibility Assessment', above n 153, [30].

observation of an applicant's body language and facial expressions, reviewers are restricted in their understanding of an applicant's demeanour.

In addition, the IAA's treatment of inconsistencies in an applicant's evidence appears to be subjective and arbitrary, which can be attributed in part to a lack of oral hearings. This suggests that an applicant should have the opportunity to comment and explain any inconsistencies. Further, gaining a personal impression of the applicant will have a significant impact on whether a reviewer finds their explanation of inconsistencies plausible. However, the requirements of fairness will differ according to the circumstances. For instance, fairness *might* be less demanding of an oral hearing when the IAA agrees with the Department's identification of inconsistencies and those inconsistencies were adequately put to the applicant during their oral hearing at the primary stage.<sup>206</sup> Further, with respect to those applicants who experience particular vulnerabilities, fairness is likely to be more demanding of an oral hearing. This is because observing those vulnerabilities in person is likely to give reviewers a more insightful appreciation of how they may affect an applicant's ability to give evidence.<sup>207</sup>

Moreover, considering that death or serious harm are the consequences of an improperly made decision in this context, it is clear that high standards of procedural fairness should be utilised within the refugee determination process.<sup>208</sup> Therefore, it is overall likely that fairness requires an oral hearing when the assessment of an applicant's credibility is contested (as is commonly the practice in other jurisdictions). We also argue that absence of an oral hearing diminishes the capacity of the applicant to participate in and understand the processes to which they are subject. For this reason, and those discussed earlier in Part IV, we contend that an oral hearing serves the dignitarian rationale of procedural fairness. Here we strongly argue that greater emphasis be given to dignitarian values in light of the recognised vulnerability of refugee applicants and so as to ensure asylum seekers are not further marginalised by the operation of the law.

In examining the interaction between vulnerability and the law, we posit that a central purpose of due process is to mitigate (rather than exacerbate) circumstances of vulnerability or marginalisation. We argue that the fast track process does not make room for consideration of applicants' vulnerability and that an oral hearing provides the best opportunity for decision-makers to recognise and consider an applicant's vulnerability. The risks to asylum seekers from the fast track procedure are heightened due to the fact that most asylum seekers are no longer entitled to Commonwealth-funded legal assistance to help them with their cases.<sup>209</sup>

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<sup>206</sup> United Nations High Commissioner for Refugees, *Beyond Proof*, above n 30, 123.

<sup>207</sup> See also Kirk, above n 67, 268.

<sup>208</sup> See discussion at above n 6.

<sup>209</sup> '[A] small number of people who are considered most vulnerable (such as unaccompanied minors) may be eligible for government-funded assistance under the Primary Application Information Service ('PAIS')': Andrew & Renata Kaldor Centre for International Refugee Law, 'Legal Assistance for People Seeking Asylum' (Factsheet, March 2017) <[www.kaldorcentre.unsw.edu.au/publication/legal-assistance-asylum-seekers](http://www.kaldorcentre.unsw.edu.au/publication/legal-assistance-asylum-seekers)>. Some legal assistance has also been provided by state governments and via pro bono programs: 'Victoria to Provide Legal Aid to Thousands of Asylum Seekers under New Initiative', *ABC*



Finally, we note that the above analysis and conclusions illustrate some important concerns for the future operation of the fast track system and suggest that reviewers should more flexibly and liberally interpret the procedural fairness codifications set out in the *Migration Act*. Further, whilst this study is important for the Australian context, it may also be of relevance to those jurisdictions who operate similar fast track processes, or who are proposing to do so in the future.<sup>210</sup>

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*News* (online), 17 April 2016 <[www.abc.net.au/news/2016-04-17/new-victorian-initiative-to-provide-legal-aid-to-asylum-seekers/7332884](http://www.abc.net.au/news/2016-04-17/new-victorian-initiative-to-provide-legal-aid-to-asylum-seekers/7332884)>.

<sup>210</sup> For instance, the current French government has proposed introduction of expedited RSD processes: see 'France Presents New Immigration Bill', *Deutsche Welle* (online), 21 February 2018 <[www.dw.com/en/france-presents-new-immigration-bill/a-42678578](http://www.dw.com/en/france-presents-new-immigration-bill/a-42678578)>.