STRUCTURE OF PRESENTATION

- Background and overview
- The conduct of a review by the Immigration Assessment Authority (IAA)
- Key issues
- Other procedural aspects (including practical aspects, judicial review)
- An assessment
- Some unresolved questions
BACKGROUND

- *Migration and Maritime Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth):*
  - Established Fast Track Assessment Process:
    - Limited, efficient and quick processing of protection visa applications made by around 30,000 UMA’s who arrived in Australia between 13 August 2012 – 1 January 2014
  - Established IAA
    - Structure and organisation described in Division 8, Part 7AA, *Migration Act 1958* (Cth)
APPLICANTS

• Delegate makes a "fast track reviewable decision" in respect of a "fast track review applicant" who is not an "excluded fast track review applicant" (s 5(1) definitions)

• "fast track decision": a decision to refuse to grant a protection visa to a fast track applicant, other than certain other decisions
  * Nb s 473BC (certain decisions also to be reviewable as specified by legislative instrument)

• "fast track review applicant": a fast track applicant who is not an "excluded fast track review applicant".

• "fast track applicant": UMA who entered Australia between 13 August 2012 - 1 January 2014 and not taken to a regional processing country, for whom the bar under s 46A(1) has been lifted, and who made a valid protection visa application, OR as legislatively specified
EXCLUDED APPLICANTS

“Excluded fast track review applicant” is a fast track applicant:

• covered by ss 91C (safe third country) or 91N (dual national)

• previously made a protection claim in Australia which was refused or withdrawn, or in another country that was refused, or was refused by the United Nations High Commissioner for Refugees in that country

• gives a bogus document with their application without reasonable explanation

• makes a manifestly unfounded claim (eg lacks credibility; claims made in relation to a country cannot be substantiated by evidence; sole purpose is to delay removal), or

• is legislatively specified
PROCESS – PART 7AA

• Automatic referral of decision to IAA “as soon as reasonably practicable” (s 473CA)
  * Nb s 473BD (conclusive certificates that review contrary to national interest)

• Accompanied by “review material”:
  * Delegate’s statement of facts and reasons
  * Material provided by applicant to delegate
  * Other material in Department’s possession/control and considered relevant to review at time of referral
  * Applicant’s contact details
PROCESS – PART 7AA

- IAA conducts review:
  - Must review referred decisions
  - In carrying out its functions under the Migration Act, the IAA is to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (s 473FA)
  - IAA’s power of review unaffected by jurisdictional error in delegate’s decision (eg DDK16)
- IAA is not bound by technicalities, legal forms or rules of evidence.
FINALISING A REVIEW

• IAA can only:
  • affirm delegate’s decision, or
  • remit decision for reconsideration in accordance with permissible directions/recommendations

• IAA to issue a decision statement which sets out reasons for its decision (s 473EA)

• IAA has no power to vary or revoke a decision after written statement is made (see also CLV16)

• IAA returns material to Department together with any other evidence

• Validity of decision unaffected by any procedural irregularities in the above

• IAA to notify applicant of decision within 14 days (s 473EB)

• Decisions of particular interest to be published without any identifying details (s 473EC)
THE CONDUCT OF A REVIEW BY THE IAA
SOME KEY DEFINITIONS (S 473BB)

- "fast track reviewable decision" and related terms: see s 5(1)
- “new information”: see s 473DC(1)
- “referred applicant”: an applicant for a protection visa in respect of whom a fast track reviewable decision is referred under s 473CA (s 473BB)
- “review material”: see s 473CB
ORTHODOX DECISION-MAKING ASPECTS

- IAA makes factual findings and gives reasons assessing an applicant’s claims against refugee and complementary protection criteria (ss 5, 5H, 5J & 36)
  - If unaddressed in reasons then may not have been relevant to decision
- Claims made before a delegate must be considered
- IAA need not refer to every piece of evidence or contention in its decision
- It is a matter for the IAA to:
  - Assess country information
  - Weigh evidence
NATURE OF IAA'S REVIEW

- A de novo review as per the AAT (BMB16)
- IAA can make factual findings which can differ from the delegate (CLL16)
  - Need not forewarn applicant (DGZ16)
- A “limited” review – procedural powers: considers “review material” and confined capacity to get “new information”
- IAA to make “correct or preferable decision”? Cf BMB16 & AMA16:
  - IAA does not have same powers as delegate
  - Limited to affirming or remitting delegate’s decision
NO HEARING - BUT MAYBE AN INTERVIEW

- IAA reviews decisions on the papers (s 473DB)
- IAA considers the review material provided to it:
  - without accepting or requesting new information, and
  - without interviewing a referred applicant
- IAA may make a decision at any time after referral
- Applicant has to establish material exists which was not provided (AFK16)
- IAA can consider review material even without actual document before it (CRJ16)
- Any error by Secretary in providing review material may not be a jurisdictional error by the IAA (SZTYD)
GETTING "NEW INFORMATION"

* "New information" (s 473DC):
  * Was not before the Minister when the s 65 decision was made, and
  * the IAA considers may be relevant.

* Information about substantive merits and not procedures or jurisdiction (AMA16)

* "Information": rejection, denial or undermining of claims
  * not IAA's reasoning, evidentiary gaps or country information

* "Information" v "claims"

* "Document" = evidence in writing (ABJ17)

* IAA does not have a duty to get, request or accept, any new information whether requested by a referred applicant, any other person, or in any other circumstances.

* IAA may invite a person to give new information in writing or at interview – a discretion
CONSIDERING "NEW INFORMATION"

• IAA must not consider any new information unless
  • there are exceptional circumstances to justify considering it; and

• referred applicant satisfies IAA that the new information:
  • was not, and could not have been, provided to the Minister before s 65 decision was made
  • is credible personal information which was not previously known and, had it been known, may have affected consideration of the referred applicant's claims (s 473DD).
CONSIDERING “NEW INFORMATION”

- Definition of “new information” in s 473DC applies to 473DD (s 473BB)
- Requirements of s 473DD(a) and (b) are cumulative and overlap
- IAA’s failure to refer to applicant’s circumstances, material or s 473DD considerations does not necessarily occasion jurisdictional error

- “Exceptional circumstances”:
  - Exceptional = out of the ordinary course, unusual
  - Circumstances not specified - question of fact for IAA (BNN16)
  - Must justify consideration of new information
  - May include a variety of matters:
    - Eg relevance to claims (BMQ16)
    - Not limited to applicant’s explanation for late provision (BVZ16)
  - Information previously “unknown” to whom? Not limited to applicant (BVZ16)
GIVING “NEW INFORMATION” TO APPLICANTS
(S 473DE)

• IAA must:
  • give to a referred applicant particulars of any new information if that new information:
    * has been, or is to be, considered by the IAA under s 473DD
    * would be the reason, or a part of the reason, for affirming the decision
  • explain why the new information is relevant, and
  • invite the referred applicant to give comments in writing or at interview

• Particulars to be given in a way thought appropriate in the circumstances

• Does not apply to country, non-disclosable or prescribed information
PROCEDURAL FAIRNESS

• IAA: Division 3, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA (s 473DA)
  • Excludes common law natural justice/fair hearing rule (FCCA eg AFK16)

• Cf AAT: Division 4 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with (s 422B(1))
PROCEDURAL FAIRNESS

- Nothing in Part 7AA requires the IAA to give to a referred applicant any material that was before the Minister when the s 65 decision was made (s 473DA(2))

- Under its statutory procedural code, the IAA need not:
  - Give prior notice of prospective findings (even if different from that of the delegate)
  - Accept or request new information from an applicant or other person
  - Interview an applicant (even if credibility will be rejected) (DBA16)
  - Identify dispositive issues (DBE16) (cf s 425)
LIMITS ON THE IAA’S POWERS

• Disclosing new issues is “good administration” (DBE16)

• Powers to be exercised reasonably:
  * IAA may invite a person, orally or in writing, to give new information in writing or at interview (s 473DC(3))
  * Applicant to be heard on dispositive issue (eg relocation) (DZU16, CRY16)
  * Applicant to have a reasonable opportunity to respond (re timeframe for and form of response) (DZU16)
  * Unreasonable for IAA to proceed under incorrect statutory provision (DZU16)
APPREHENDED BIAS

- Secretary identifies relevant review material
- IAA must consider it “free of bias”
- Apprehended bias established in AMA 16
- Remedy - disclose material to applicant?
"This is a common procedure. So to keep things interesting, I'm going to attempt it blindfolded."
IMPORTANT PROCEDURAL PROVISIONS

- Giving and receiving documents (see ss 473HA – 473HG)
  - Specifies methods, time of deemed receipt and authorised recipients

- Information disclosure (see ss 473GA - 473GD)
  - Any public interest immunity claim over a document has not necessarily been waived (AMA16)
  - MZAFZ principle (re invalid non-disclosure certificates) does not apply to IAA

- Invitations to give new information or comments in writing or at interview (s 473DF): prescribed periods; IAA determines interview arrangements; IAA can act if an applicant fails to respond

- IAA guidance decisions (s 473FC)

- Prescribed provisions addressed in Part 4, Division 4.4, Migration Regulations 1994 (Cth):
  - New information not required to be given to referred applicants (r 4.41)
  - Periods for giving information or comments (r 4.42)
  - Permissible directions on remittal (r 4.43)
IAA PRACTICE DIRECTIONS

• Addresses IAA operations and the conduct of reviews (s 473FB)
• Non-compliance by IAA does not invalidate its decision
• Directions must be consistent with Act and Regulations
• No 1 (2017): Practice Direction for Applicants, Representatives and Authorised Recipients
  * Submissions longer than 5 pages may be returned – not ultra vires because Direction does not limit amount of information provided (DGZ16)
• No 2 (2016): The giving of information to the IAA by the Secretary
IAA FORMS

• F2 - Appointment of Representative/Appointment of Authorised Recipient
• F3 - Change of Applicant Contact Details
• F4 - Change of Authorised Recipient Contact Details
• F5 - Withdrawal of Authorised Recipient/Withdrawal of Representative
• F6 - FOI request
JUDICIAL REVIEW

• The FCCA has jurisdiction to review IAA decisions as “migration decisions” (ss 5, 477)

• Judicial review application to be made within 35 days of date of decision
  • Time extended in the interests of justice

• FCCA assesses IAA decision for jurisdictional error and not merits
Some unresolved questions include:

- Section 473DA(1):
  - Is it a valid Commonwealth enactment?
  - To what extent does s 473DA(1) oust the natural justice hearing rule?

- Is a delegate’s decision to decline referral to the IAA a “decision” subject to IAA and/or judicial review?

- Can the IAA conduct a review without any input from an applicant?
AN ASSESSMENT

GREAT
GOOD
FAIR
POOR
PRESENTATION FINISHED

...ANY QUESTIONS?