FEDERAL COURT OF AUSTRALIA

ASU15 v Minister for Immigration and Border Protection

[2017] FCA 1167

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| Appeal from: | *ASU15 v Minister for Immigration and Anor* [2016] FCCA 715 |
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| File number: | SAD 119 of 2016 |
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| Judge: | **CHARLESWORTH J** |
|  |  |
| Date of judgment: | 29 September 2017 |
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| Catchwords: | **MIGRATION** – protection visa –self-represented appellant – one ground for judicial review raised on originating application in proceedings below – additional grounds of review raised in the course of submissions and determined by primary judge – no leave required to rely upon grounds of appeal going to issues in fact considered and determined by primary judge – leave required to raise yet further grounds – proposed new grounds not supported by submissions, impermissibly broad or otherwise lacking in merit – leave to introduce new grounds refused – appeal otherwise dismissed. |
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| Legislation: | *Migration Act 1958* (Cth)  *Migration Regulations 1994* (Cth) |
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| Cases cited: | *ABA15 v Minister for Immigration and Border Protection* [2016] FCA 1419  *ASU15 v Minister for Immigration* [2016] FCCA 715  *BGZ15 v Minister for Immigration and Border Protection* [2017] FCA 1095  *Gomez v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 543; [2002] FCA 480  *Metwally v University of Wollongong* (1985) 60 ALR 68; [1985] HCA 28  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 259 ALR 429  *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34  *VUAX v Minister for Immigration and Multicultural Affairs* (2004) 238 FCR 588 |
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| Date of hearing: | 2 August 2016 |
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| Registry: | South Australia |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 55 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondents: | Mr K Tredrea |
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| Solicitor for the Respondents: | Sparke Helmore |

ORDERS

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|  | | SAD 119 of 2016 |
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| BETWEEN: | ASU15  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | CHARLESWORTH J |
| DATE OF ORDER: | 29 SEPTEMBER 2017 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.

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

REASONS FOR JUDGMENT

CHARLESWORTH J:

1. The appellant is a citizen of Sri Lanka. He is of Sinhalese ethnicity and of the Roman Catholic faith. He arrived in Australia in August 2012 as an unauthorised maritime arrival.
2. In December 2012, the appellant applied for a Protection (Class XA) Visa under the *Migration* ***Act*** *1958* (Cth). The application was refused by a delegate of the Minister for Immigration and Border Protection and the delegate’s decision was affirmed by the then-named Refugee Review **Tribunal**. An application to the Federal Circuit Court of Australia for judicial review of the Tribunal’s decision was dismissed: *ASU15 v Minister for Immigration* [2016] FCCA 715. This is an appeal from that judgment.
3. For the reasons that follow, the appeal should be dismissed.

# THE VISA CRITERIA

1. A visa may only be granted if the Minister is satisfied that the prescribed criteria are met: s 65 of the Act. At the time of the appellant’s application for a protection visa, the appellant had to satisfy either the criterion in s 36(2)(a) of the Act (**Refugee Criterion**) or s 36(2)(aa) of the Act (**Complementary Protection Criterion**). See also s 31(3) of the Act and cl 866 of Sch 2 to the *Migration Regulations 1994* (Cth).
2. Section 36(2)(a) relevantly provides:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol;

1. The references to the Refugees **Convention** and the Refugees Protocol in s 36(2)(a) of the Act are references to the Convention relating to the Status of Refugees (1951) and the Protocol relating to the State of Refugees (1967) respectively.
2. Pursuant to Article 1A(2) of the Convention, Australia has protection obligations to a person who:

… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

1. Section 91R of the Act in force at the time that the appellant applied for a visa, imposed some qualifications on the application of Article 1A(2) of the Convention. It relevantly provided:

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:

(a) a threat to the person’s life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill‑treatment of the person;

(d) significant economic hardship that threatens the person’s capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.

…

1. Section 36(2)(aa), (2A) and (2B) of the Act relevantly provide:

(2) A criterion for a protection visa is that the applicant for the visa is:

…

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a))in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

…

(2A) A non-citizen will suffer ***significant harm*** if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

1. Section 5 of the Act provides an exhaustive definition of the phrase “cruel or inhuman treatment or punishment” as an act or omission by which:

(a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or

(b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

(c) that is not inconsistent with Article 7 of the Covenant; or

(d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

1. The expression “real risk that the non-citizen will suffer significant harm” in s 36(2)(aa) of the Act is to be understood as referring to a reasonable possibility, or a real chance, as opposed to a remote chance, that such harm will occur: see *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 (Lander and Gordon JJ (at [242] — [247]).

# THE APPELLANT’S CLAIMS

1. For the purposes of the Refugee Criterion the appellant claimed to have a well-founded fear of persecution by virtue of his ethnicity (Sinhalese) and religion (Catholic) and by reason of his membership of a particular social group, namely, “returned failed asylum seeker”. He claimed that he would not be afforded protection by the Sri Lankan police from such persecution because he was a supporter of the United National Party (**UNP**).
2. In a statutory declaration made in support of his protection visa application, the appellant said that he was an active member of a Catholic church in his town and that there were growing tensions in the town between the Catholic community and the Buddhist community. The appellant claimed that he had supported the church in his capacity as a stonemason and that he had encouraged new members to come to the church to learn about Christianity. He claimed that in July 2007, the church tried to erect a statue of the Virgin Mary in the centre of the town. He continued:

I was one of the leaders of the group of parishioners who are trying to erect the statue. We were transporting the statue to the plot of land on the back of a utility vehicle when we were attacked by the Buddhist crowd. The Buddhist crowd attacked us with sticks, clubs and stones. There were at least 500 people in the angry mob that attacked our group and there were only around 50 people in our group.

I was injured in my leg. My leg was cut open and I needed stitches in my leg to help it heal. I still carry the scar on my leg. I was taken to hospital and remained there for two days.

1. The appellant further claimed that in the years and months following the 2007 incident he received anonymous death threats on his mobile phone. He said that he lived in constant fear that the people responsible for making the threats would locate him and carry out their threats against him. The appellant claimed that the police in Sri Lanka would not assist him for two reasons. First, he claimed that the police would side with the Buddhist worshippers in his town. Second, in the appellant’s words:

As well, my family have long been supporters of the United National Party (UNP) who are in opposition to the government. My family used to assist the UNP during the 2010 and 2011 elections by distributing leaflets for the campaign. Due to my family’s political affiliation with the UNP, I am sure that the police will not protect me against the threats made against me.

1. These claims were elaborated upon in comprehensive written submissions and oral submissions before the Tribunal. The opening paragraph of the written submissions contains a statement to the effect that the appellant had a well-founded fear of being persecuted “for reasons of his religion, membership of a particular social group, and political opinion”. In the body of the submissions, however, the appellant’s political affiliations were relied upon as the reason he had not reported the threats to the police. The submissions were otherwise consistent with the claims made in the appellant’s statutory declaration, to the effect that he feared persecution by reason of his Catholic faith and his active support for his local church. His political opinion was relied upon in support of his assertions that the Sri Lankan police would not protect him from the feared persecution.
2. The Tribunal’s reasons for rejecting the appellant’s claims, insofar as they bear on this appeal, will be considered in due course.

# PROCEEDINGS BEFORE THE PRIMARY JUDGE

1. To succeed in the proceedings before the primary judge it was necessary for the appellant to establish jurisdictional error on the part of the Tribunal: ss 474, 476 of the Act; see also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [83] (per Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 259 ALR 429 at 433 (per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
2. There was a single ground of judicial review relied upon before the primary judge. It was expressed in his originating application as follows:

The [Tribunal] erred in not giving consideration to the evidence provided to the effect that the Applicant will be harmed upon his return and the authorities of the Applicant’s home country will arrest and detain the Applicant and torture and/or imprison him being a failed asylum seeker. The tribunal has not given consideration to the evidence provided. Accordingly the tribunal erred as a matter of law.

1. The primary judge interpreted the ground of review as contending that the Tribunal had committed jurisdictional error by failing to have regard to the appellant’s status as a failed asylum seeker and the possibility that, as such, he might be subjected to serious or significant harm if he were to be returned to Sri Lanka. For reasons I will summarise shortly, that ground of review was rejected.
2. The reasons of the primary Judge indicate that the appellant made oral submissions to the effect that the Tribunal had erred in other respects, in addition to the single ground for judicial review articulated in his originating application. Those submissions were entertained, considered and determined, notwithstanding that they bore no relation to the single ground for judicial review specified in the originating application.

# GROUNDS OF APPEAL

1. The appellant appeared self-represented on the appeal. It may fairly be inferred that the notice of appeal (**NOA**) was drafted by a person other than the appellant. It contains the following grounds:
2. The learned Judge failed to take into consideration that the decision of the Administrative Appeal Tribunal was rendered invalid by a jurisdictional error made by the Tribunal by and/or identified a wrong issue, asked a wrong question, relied on irrelevant material or ignored relevant material.
3. The learned Judge erred in not providing procedural fairness to present arguments and not finding that the interest of the Appellant is affected by the decision given by the Second Respondent on 17 April 2015.

Particulars

(a) The Respondents in particular the second Respondent failed to properly consider and apply the definition of Article 1A(2) Of the Convention relating to the status of Refugees made at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees made at New York on 31 January 1967. The Respondents failed to consider that the Applicants claims in coincide with the Complementary protection criteria.

(b) The learned Judge did not provide an opportunity to the Appellant to present his arguments by allowing an adjournment to obtain legal representation.

1. That the Second Respondent ignored/failed to consider Section 424A(1) of the Migration Act 1958.

Particulars

(a) The Second Respondent made an adverse decision against the claims made by the Appellant affirming the decision made by DIBP without giving any notice under section 424A(1) as required by legislation to address ‘credibility’, ‘delay in leaving the country’ and/or the reason for forgetfulness providing detailed injuries suffered at the Entry Interview.

1. The Second Respondent acted without or in excess of jurisdiction and/or identified wrong issues, asked wrong questions, relied on irrelevant material or ignored relevant material

Particulars

(a) The Second Respondent failed to consider the Appellants express claim that he was at risk of persecution because of his religion together with his political opinion (rather separately) and his particular social group – failed asylum seeker.

(b) The Second Respondent rejected the Appellant claims in relation to failed asylum seeker taking into account the external report of DFAT than the legislation. By failing to apply the legislation the Second Respondent made a jurisdictional error by not considering the significant harm that would give rise to the Complementary protection Criteria.

1. The applicants were denied natural justice.

Particulars

(a) The Respondents in particular the Second Respondent questioned the Appellant in a fashion that implying in regularly that he was not a credible witness and therefore preventing the Appellant in putting forward his case.

(b) The Second Respondent has given undue weight in finding the time of country information in general rather than subjectivity to the Appellant.

1. The Second Respondent failed to review and consider the Application for protection as per the Migration Act.

Particulars

(a) The appellant refer to and repeat the particulars set out in Paragraph 3-5.

(Original grammar retained)

1. With some exceptions, the grounds of appeal seek to identify jurisdictional errors affecting the Tribunal’s decision, apart from the single jurisdictional error articulated in the originating application before the primary judge and otherwise in addition to the arguments previously raised in the judicial review proceedings. Moreover, the grounds are in some respects so broadly stated that, if taken literally, they constitute an invitation to this Court to analyse the reasons of the Tribunal so as to identify, and decide, grounds of review that might be available to the appellant, whether or not the arguments were previously advanced before the primary judge.
2. In ***BGZ15*** *v Minister for Immigration and Border Protection* [2017] FCA 1095, Flick J discussed the approach to be pursued by this Court in the exercise of its appellate jurisdiction in circumstances such as the present. That case, as here, involved a self-represented litigant relying on broadly cast grounds of appeal that failed to identify any appealable error said to have been committed by the primary judge. His Honour said at [8]:

To unquestionably endorse such an approach would be to impermissibly reduce the proceeding before the Federal Circuit Court to a “*preliminary skirmish*”: *Coulton v Holcombe* (1986) 162 CLR 1 at 7 per Gibbs CJ, Wilson, Brennan and Dawson JJ. Such an approach is to be firmly rejected: *SZVBT v Minister for Immigration and Border Protection* [2017] FCA 355 at [10] per Flick J. Such an approach also denies to this Court on appeal any real assistance as to why the primary Judge may have erred in her own resolution of the grounds of review advanced below.

1. His Honour continued: (at [10] – [12]):

It should not be left to this Court on appeal to itself review the reasons for decision of the primary Judge and attempt to identify appellable error. Nor should it be left to this Court to itself try to identify a ground of review that may have been available to the Applicant, irrespective of whether it was previously advanced for consideration.

In such circumstances, it is considered that the preferable approach that should be pursued is for this Court to review the reasons for decision of the Federal Circuit Court Judge and to determine whether there is any self-evident error as to the manner in which that Court resolved the grounds of review previously advanced for consideration and which it would appear are sought to be re-agitated on appeal. A course which construes *Grounds of Appeal* which impermissibly seek to repeat arguments directed to the question of whether the Tribunal erred as though they were expressed as an argument that the Federal Circuit Court erred in not accepting like arguments previously advanced is a course which:

· is commonly pursued in this Court;

· recognises difficulties confronting unrepresented appellants; and

· recognises that the Court’s duty is not solely to the unrepresented litigant but “*entails ensuring that the trial is conducted fairly and in accordance with law*” and a duty to strike a “*balance between providing assistance to an unrepresented litigant and ensuring a fair trial for all parties*” (cf. *Hamod v New South Wales* [2011] NSWCA 375 at [309] to [315] per Beazley JA, Giles and Whealy JJA agreeing; *AMF15 v Minister for Immigration and Border Protection* [2016] FCAFC 68 at [39], (2016) 241 FCR 30 at 44 to 46 per Flick, Griffiths and Perry JJ).

In striking that balance, it is necessary to balance compliance with the requirement imposed by r 36.01(2)(c) of the *Federal Court Rules* *2011* (Cth) to state “*briefly but specifically, the grounds relied on in support of the appeal*” and the need to ensure that an unrepresented appellant “*suffers no meaningful disadvantage in the conduct of her or his case because she or he does not have the skills or knowledge of a lawyer*” (*MZAGE v Minister for Immigration and Border Protection* [2016] FCA 630 at [32] per Mortimer J).

In the absence of any appellable error having been specifically identified in the purported *Grounds of Appeal*, or in the absence of an ability to construe a *Ground* as meaning that the primary Judge erred in not accepting much the same argument as previously advanced, this Court has no general function to resolve an unspecified and unidentified error. A consideration as to whether there is any self-evident error, it is recognised, may well fall far short of a Judge of this Court independently parsing and analysing a Tribunal decision with a view to identifying a potential argument as to jurisdictional error and thereafter proceeding to resolve that newly formulated argument. In the absence of a self-evident error, this Court has no general duty or function to itself articulate a question of law.

1. I respectfully agree with the approach preferred by Flick J, subject to two considerations arising in this matter that do not appear to have arisen before his Honour. First, notwithstanding the narrow basis upon which the single ground of review specified in the originating application was framed, the primary judge heard argument advanced by the appellant to the effect that the Tribunal’s decision was affected by errors in addition to that raised in his ground of review. The primary judge proceeded to consider and determine the merits of those arguments, including by having regard to counter-arguments advanced on behalf of the Minister in respect of the same issues. The issues included, at least, the question of whether it was open to the Tribunal to make the factual findings that it did, including adverse findings concerning the appellant’s credibility. The primary judge concluded (at [21]) that “[t]he findings as to both credit and the inherent implausibilities of some aspects of the applicant’s claim were clearly open to it”. Later in his reasons, the primary Judge said (at [25]):

In this case, the Tribunal made adverse credibility findings based on the applicant’s delay in leaving Sri Lanka, inconsistency surrounding his account of the [2007] incident, and exaggerations as to the extent of his involvement with the church and politics. These findings were all open on the evidence before the Tribunal. There was nothing unreasonable in the legal sense, irrational or illogical in either the approach taken by the Tribunal in considering this evidence, or the findings that it made. It is not for this Court to substitute its own view of the facts or credit worthiness of the applicant for that of the Tribunal. The applicant’s complaint to this Court amounts to a complaint about the outcome of the hearing and it is clearly an invitation to undertake a merits review which is not permissible.

1. It is plain from the face of the reasons that Counsel for the Minister did not object to the primary judge reviewing the Tribunal’s decision for jurisdictional error in the nature of legal unreasonableness in the sense described by the High Court in *Minister for Immigration and Citizenship v* ***Li***(2013) 249 CLR 332. Indeed, review of the decision on that basis was the subject of positive submissions by the Minister inviting the primary judge to find that no jurisdictional error of that kind had been made.
2. In applying the approach identified by Flick J in *BGZ15* it is appropriate to have regard to the scope of judicial review in fact undertaken, by reference to the arguments advanced before the primary judge and the consideration given to those arguments in the reasons for the judgment appealed against. It is not to be assumed that the matters falling for determination in the proceedings before the primary judge are necessarily confined to the grounds articulated in writing in the originating application.
3. Second, appropriate regard is to be had to the position adopted by the respondent in the proceedings before the primary judge and on the appeal. In the present case, leave to introduce grounds of appeal not previously argued is opposed by the Minister on the basis that the grounds have no reasonable prospect of success.
4. In light of these principles, the issues raised, or sought to be raised, on the appeal may be summarised as follows:
5. Paragraph 1 will be determined as a contention that the learned primary judge erred in rejecting the ground of review articulated in the originating application.
6. Paragraph 2 will be considered in three parts:
   1. [2(a)] of the NOA will be determined as an argument that the primary judge erred by rejecting the argument that the Tribunal committed jurisdictional error in determining that the appellant did not satisfy the complementary protection criteria by reason of his status as a failed asylum seeker;
   2. insofar as [2(a)] of the NOA contains an allegation that the Tribunal committed jurisdictional error by failing to find that the appellant satisfied the refugee criterion, it will be determined as an application to introduce a broad and vague ground of judicial review not advanced before the primary judge; and
   3. [2(b)] of the NOA will be determined as a contention that the primary judge denied the appellant procedural fairness by refusing to adjourn the hearing of the judicial review application so as to enable the appellant to obtain legal representation.
7. Paragraph 3 of the NOA will be determined as an application to introduce on the appeal a ground for judicial review not previously advanced, namely that the Tribunal failed to comply with s 424A of the Act in respect of three matters.
8. Paragraph 4 of the NOA will be considered in two parts:
   1. [4(a)] will be determined as an application to introduce on the appeal a ground of judicial review not advanced in the proceedings below, namely that the Tribunal failed to determine the review on the basis that the appellant claimed to fear persecution by reason of both his religion and his political opinion together.
   2. [4(b)] raises the same issue as [2(a)] and will be determined accordingly.
9. Paragraph 5 of the NOA will be considered in three parts:
   1. [5(a)] will be determined as an application to introduce on the appeal grounds for judicial review not previously advanced, namely that the Tribunal denied the appellant natural justice by conducting its hearing in a fashion that did not afford the appellant a fair opportunity to present his evidence and arguments and so committed jurisdictional error;
   2. [5(b)] will be considered as a particular allegation made in support of [1] and [2(a)]; and
   3. in addition, [5(b)] will be considered as a complaint that the primary Judge erred in determining that the Tribunal’s decision was not affected by legal unreasonableness in the sense described in *Li*,because the Tribunal afforded impermissibly excessive weight to country information in respect of critical matters bearing on the visa criteria more generally.
10. Paragraph 6 of the NOA is repetitive. It adds nothing of substance to the issues already identified.

# THE APPPLICATION FOR LEAVE TO INTRODUCE NEW ARGUMENTS

1. Except in “the most exceptional circumstances”, a party is bound by the prior conduct of their case and may not raise a new argument on appeal which they failed to put when they had the opportunity to do so below: *Metwally v University of Wollongong* (1985) 60 ALR 68; [1985] HCA 28 (per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ at ALR 71). However, there remains a discretion to allow the introduction of new grounds if it be expedient in the interests of justice: see *Gomez v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 543; [2002] FCA 480at [18] (Hill, O’Loughlin and Tamberlin JJ); *VUAX v Minister for Immigration and Multicultural Affairs* (2004) 238 FCR 588 at [46] (Kiefel, Weinberg and Stone JJ).
2. Leave to introduce the new arguments should be refused, primarily because the appellant made no submissions that could fairly support them. For the most part, the new proposed grounds are too broadly stated and it is not self-evident that the Tribunal committed jurisdictional error in the manner alleged in any event. The following more specific observations may be made in relation to each proposed new ground.
3. As to the new grounds identified in [3] and [5(a)] of the NOA, the complaints that the Tribunal denied the appellant natural justice are complaints that cannot be established without reference to the transcript of the proceedings before the Tribunal or other evidence capable of demonstrating that the Tribunal failed to observe the express and implied limits on its powers in the manner complained of. The complaint that the Tribunal failed to comply with s 424A of the Act should not be introduced on the appeal for the additional reason that it does not have reasonable prospects of success.
4. The appellant’s ground of review in [3] of the NOA asserts that the Tribunal should have given him notice under s 424A(1) of the Act to address “‘credibility’, ‘delay in leaving the country’ and/or the reason for forgetfulness providing detailed injuries suffered at the Entry Interview”. These matters went to the Tribunal’s reasons for disbelieving that the appellant had a well-founded fear of persecution. The obligation in s 424A(1) applies only to “any *information* that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review” (my emphasis). What constitutes “information” for the purposes of this provision was considered by the High Court in ***SZBYR*** *v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190. The majority (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) said at [18]:

…if the reason why the Tribunal affirmed the decision under review was the Tribunal’s disbelief of the appellants’ evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting “information” within the meaning of para (a) of s 424A(1). Again, if the Tribunal affirmed the decision because even the best view of the appellants’ evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute “information”. Finn and Stone JJ correctly observed in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* that the word “information”.

does not encompass the tribunal’s subjective appraisals, thought processes or determinations … nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc.

If the contrary were true, s 424A would in effect oblige the Tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process. However broadly “information” be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence…

1. The matters identified by the appellant do not constitute “information” for the purposes of s 424A of the Act as they relate to doubts held by the Tribunal and inconsistencies in the appellant’s evidence. Those were matters which went to the Tribunal’s reasons for disbelieving the appellant’s claims. They are not related to evidentiary material or documentation. If the contrary were true, as the majority commented in *SZBYR*, that would have obliged the Tribunal to give advanced notice of its reasons and its prospective reasoning process, which is not what is required by s 424A.
2. In any event, the Tribunal is not obliged to give notice under s 424A(1) of the Act if the applicant is appearing before the Tribunal because of an invitation under s 425 of the Act and the Tribunal orally gives clear particulars of the relevant information and invites the applicant to comment on or respond to that information: ss 424AA and 424A(2A) of the Act. The appellant was invited to appear before the Tribunal for a hearing. A fair reading of the Tribunal’s reasons indicates (in the absence of evidence to the contrary) that it put to the appellant the concerns it had about inconsistencies in the appellant’s claims (including the matters now raised by the appellant in [3] of his ground of appeal) and invited his comment. The appellant has not sought to submit that the Tribunal’s account of the hearing is inaccurate. Moreover, the matters identified in this proposed ground of appeal were dealt with in the appellant’s written submissions, and provided to the Tribunal prior to hearing.
3. The new ground identified in [2(a)] of the NOA, as interpreted in [29(2)(b)] above, is impermissibly broad. In the absence of a self-evident error, leave to introduce it should be refused for that reason alone.
4. The new ground identified in [4(a)] of the NOA is not reasonably arguable in that it does not accord with the appellant’s claims as they were advanced at all times in support of his application for the protection visa. The claim was to the effect that the involvement of the appellant and his family with the UNP was the reason the appellant had not reported the threats he had received to the Sri Lankan police. The feared acts of persecution were at all times those threatened by the Buddhists in the appellant’s town, not by reason of his political opinion but by reason of his support for the Catholic church there. The appellant claimed he could not access the protection of the Sri Lankan authorities from that feared persecution because of his political opinion. The claims, as advanced by the appellant, were expressly dealt with and rejected by the Tribunal (at [113]) in terms that evidence no misunderstanding on the Tribunal’s part as to the factual claims the appellant has made.

# THE REMAINING GROUNDS

## Adjournment

1. The reasons of the primary judge indicate that the applicant made a “comment” in the course of the hearing of his judicial review application that he “expected” to appear in those proceedings represented by a lawyer. The primary judge (at [35]) said that the appellant:

… did not make an application for an adjournment. He did not provide the Court with any information as to efforts he had made to obtain legal representation, or any plans he had presently on foot to do so. A period of many months has elapsed since his application to this Court and the making of orders by the Registrar in July 2015. I take the view that [he] has had sufficient opportunity to attempt to obtain legal representation. I understood his comment in this regard to be an expression of frustration with the legal process in which he has become involved, rather than a request for an adjournment based on a considered plan to obtain legal advice.

1. It has not been shown that this characterisation of the appellant’s “comment” was erroneous. There is no evidence before this Court that an application for an adjournment of the hearing of the judicial review application was in fact made, nor is there evidence before the Court to support a finding that the primary judge otherwise committed an appealable error by not adjourning the hearing of the judicial review application.
2. The contention in [2(b)] of the NOA is rejected.

## Failed asylum seeker

1. It is convenient to consider and determine [1], [2(a)] and [4(b)] and [5(b)] of the NOA together.
2. The appellant’s anticipated status as a failed asylum seeker was relied upon in support of his claim to fulfil both the Refugee Criterion and the Complementary Protection Criterion.
3. The Tribunal referred extensively to country information concerning the treatment of persons returning to Sri Lanka who had left the country illegally and then made a failed claim for asylum in another country. On the basis of that information, the Tribunal concluded:

115. I accept that the applicant would be returning to Sri Lanka as a failed asylum seeker. As I put to him, the information available from, among others, the Australian Department of Foreign Affairs and Trade indicates that non-voluntary returnees are interviewed at the airport by various government departments and that a representative of the Australian Government is present at the airport for the arrival of non-voluntary returnees. The Department of Foreign Affairs and Trade has said that failed asylum seekers are not treated differently from other returnees and that allegations of mistreatment of returnees have not been substantiated.

116. I also accept that the applicant would be charged with offences under the Immigration and Emigration Act of Sri Lanka relating to his illegal departure from Sri Lanka. The information available to me indicates that the most likely penalty is a fine unless a person is considered to be an organiser of irregular migration of people from Sri Lanka. The information available to me suggests that the applicant will be remanded in custody when he returns to Sri Lanka and that he may spend up to a fortnight in jail on remand.

(Footnotes omitted)

1. The Tribunal did not accept that there was a real chance that the appellant would be mistreated because he would be returning to Sri Lanka as a failed asylum seeker who had left the country illegally. Accordingly, the Tribunal found that he did not satisfy the Refugee Criterion by virtue of that status.
2. As to the Complementary Protection Criterion, the Tribunal relied upon the same factual findings it had made in the course of considering the appellant’s claim to be a refugee. It said that the appellant would face checks and that he would appear before a magistrate charged with having departed the country illegally in breach of a law of general application. The process may, the Tribunal held, involve the appellant being held in detention for up to two weeks on remand. The situation in the Sri Lankan prisons would be less sanitary, be more crowded and have less services than would be available in Australia. The Tribunal continued:

127. I find that the purpose of the detention is solely for the purpose of administering a law of general application, without intent to harm and without any disproportionate penalty.

128. The applicant is an able bodied male with no physical handicaps. While it is possible that he could be held on remand for up to two weeks, having considered the evidence before me I am satisfied that the harm he faces as a consequence is not of such gravitas as to constitute significant harm.

1. The primary judge properly rejected the appellant’s contention that the Tribunal had failed to consider the evidence provided by the appellant to the effect that he would be persecuted or otherwise face significant harm on his return. The evidence to which the appellant referred was in the form of country information dated 2010 and summarised in the written submissions prepared by the appellant’s migration agent. The submissions were to the effect that, as a person of Sinhalese ethnicity, he would be considered a “traitor”.
2. The agent’s submissions are expressly referred to by the Tribunal in its reasons (at [26] – [36]). The Tribunal also referred to submissions made by the agent to the effect that country information contrary to that relied upon by the appellant should be given little weight (at [68]). As I have said, the Tribunal referred extensively to country information, which included a report issued by the Department for Foreign Affairs and Trade confirming that returnees were “treated along standard procedures applying to all Sri Lankans, regardless of their ethnicity and religion” (at [84]). The DFAT information further supported the Tribunal’s finding that the appellant would be detained under laws of general application for up to two weeks before being released upon the granting of a surety. The delegate had made a similar finding, concluding that the appellant would be granted bail and released “after a short time”. Both the delegate and the Tribunal made an implicit finding that a family member of the appellant would in fact be able to provide surety so as to secure his release. In *ABA15 v Minister for Immigration and Border Protection* [2016] FCA 1419, an appeal was allowed on the ground that a finding to a similar effect was not open on the material before the Tribunal. However, no such ground was articulated in this case (whether on the appeal or before the primary judge) and nor did the appellant make any submissions or refer to any evidence bearing on the topic so as to invite the Court’s consideration of it.
3. As to the Tribunal’s finding that any harm that might be suffered by the appellant would not be as a result of “intent”, it should be noted that the delivery of judgment in this matter was deferred pending a decision of the High Court in ***SZTAL*** *v Minister for Immigration and Border Protection* [2017] HCA 34 which concerns the construction of the definition of significant harm in s 36(2)(aa) of the Act. That decision was delivered on 6 September 2017. The majority (Kiefel CJ, Nettle and Gordon JJ) said (at [26]-[27]), in respect of the definition of “cruel or inhumane treatment of punishment” in s 5 of the Act (which is part of the definition of significant harm):

The reference in the Act to "intentionally inflicting" and "intentionally causing" is to the natural and ordinary meaning of the word "intends" and therefore to actual, subjective, intent. As *Zaburoni* confirms, a person intends a result when they have the result in question as their purpose.

An intention of a person as to a result concerns that person's actual, subjective, state of mind. For that reason, as the plurality in *Zaburoni* were at pains to point out, knowledge or foresight of a result is not to be equated with intent. Evidence that a person is aware that his or her conduct will certainly produce a particular result may permit an inference of intent to be drawn, but foresight of a result is of evidential significance only. It is not a substitute for the test of whether a person intended the result, which requires that the person meant to produce that particular result and that that was the person's purpose in doing the act.

1. See also Edelman J at [114].
2. The approach of the Tribunal is not inconsistent with that construction.
3. The contention in [4(b)] of the NOA that the Tribunal failed to apply the Complementary Protection Criteria should also be rejected. The relevant statutory provisions are extracted in the Tribunal’s reasons, and there is nothing in the body of the reasons to suggest that any part of the statutory test has been misunderstood or ignored.
4. The primary judge did not err in rejecting the contention that the Tribunal committed jurisdictional error in determining this aspect of the appellant’s claims. The contentions in [1], [2(a)] and [4(b)] and [5(b)] of the NOA are rejected.

## Weight

1. It remains to determine [5(b)] of the NOA insofar as it involves a more general contention that the Tribunal’s decision was affected by legal unreasonableness in the sense described in *Li* by reason of the Tribunal affording excessive weight to the country information before it.
2. This contention, too, should be rejected. It was not supported by written or oral submissions and it is not self-evident that the Tribunal erred in the manner alleged. The primary judge correctly held that the Tribunal’s findings and ultimate conclusions were open to it on the country information before it. No appealable error is shown.
3. The appeal should, accordingly, be dismissed.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth. |

Associate:

Dated: 29 September 2017