FEDERAL COURT OF AUSTRALIA

AOI15 v Minister for Immigration and Border Protection [2016] FCA 1342

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| Appeal from: | *AOI15 v Minister for Immigration & Anor* [2016] FCCA 1517  |
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| File number: | NSD 955 of 2016 |
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| Judge: | **BARKER J** |
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| Date of judgment: | 11 November 2016 |
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| Catchwords: | **MIGRATION** – application for protection (class XA) visa – appeal from Federal Circuit Court of Australia – whether primary judge denied appellant procedural fairness by refusing adjournment to seek legal advice  |
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| Legislation: | *Migration Act**1958* (Cth) ss 36(2)(a), 36(2)(aa), 35(2A), 65, 91R(1)(c), 414, 422B, 424A, 476 |
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| Cases cited: | *AJW15 v Minister for Immigration and Border Protection* [2016] FCA 197*ARS15 v Minister for Immigration & Border Protection* [2015] FCCA 2135*Minister for Immigration and Border Protection v SZTJF* (2015) 149 ALD 552; [2015] FCA 1052*Plaintiff M61/2010E v The Commonwealth of Australia and Others* (2010) 243 CLR 319; [2010] HCA 41*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 |
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| Date of hearing: | 11 November 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 53 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the First Respondent: | Mr T Reilly |
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| Solicitor for the First Respondent: | DLA Piper |

ORDERS

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|  | NSD 955 of 2016 |
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| BETWEEN: | AOI15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | BARKER J |
| DATE OF ORDER: | 11 NOVEMBER 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

BARKER J:

1. The appellant is a male citizen of Sri Lanka of Tamil ethnicity who applied for a protection (class XA) visa under the *Migration* ***Act*** *1958* (Cth) on 5 December 2012, after arriving in Australia from Sri Lanka without a visa on 5 June 2012.
2. The appellant claimed that he grew up in Udappu in the north west of Sri Lanka before moving to Mullaitivu in the north east for work when he was around 20 years old. The appellant said that, at the time he moved there, Mullaitivu was under the control of the Liberation Tigers of Tamil Eelam (***LTTE***), who made him join the LTTE after attending forced training at an LTTE camp. The appellant said he managed to escape the LTTE due to the intervention of the family he was staying with at the time.
3. In 2007, the appellant said he started working as a delivery driver between Mullaitivu and Colombo, which required him to pass through checkpoints where he was regularly stopped and subjected to questioning. In 2008, he said, he was stopped at a checkpoint and, after being accused of transporting weapons, was forced out of his truck by army officers who then drove off with the vehicle. The appellant said he was then detained for three days, during which time he was questioned and subjected to physical abuse. He said he was then taken to the Arunchalan camp in Vavuniya that was occupied mostly by Tamils displaced by the conflict, where he was forced to remain for 15 months while people were being tortured in the camp.
4. The appellant claimed he was taken from the camp to an army base in Mallamadu, Mullaitivu where he remained for two years before he was released after bribing an army officer. During his time in the camp, the appellant said, he was forced to carry out work for the army and was subjected to physical abuse.
5. Once he was released from the army base, the appellant claimed, he returned to Udappu to work as a lorry driver, again travelling between Mullaitivu and Colombo. In 2012, he said he was stopped and questioned at a checkpoint by army officers and was asked to report back to Mallamadu camp. When the appellant returned to Udappu after failing to attend the camp, he claimed his father arranged for him to marry on 16 May 2012, believing this may protect him from further harassment.
6. The appellant claimed that five days after he was married he heard that army officers were asking about his location in Udappu, and so, fearing for his safety, he left to stay with a friend in a nearby Sinhalese village, where he stayed until he was able to arrange his departure from Sri Lanka by boat.
7. Before the Tribunal, the appellant also claimed to fear persecution in Sri Lanka on the grounds of his Tamil ethnicity; his actual and imputed political opinion, including of being a perceived sympathiser/supporter of the LTTE; and being a member of a particular social group, namely, a failed asylum seeker involuntarily returned to Sri Lanka.
8. The appellant’s application for a protection visa was refused by a delegateof the ***Minister*** for Immigration and Border Protection on 21 October 2013.
9. The appellant then applied to the former Refugee Review ***Tribunal*** for review of the delegate’s decision. However, on 19 March 2015, the Tribunal affirmed the delegate’s decision to refuse the appellant’s application for a protection visa.
10. On 2 June 2016, the Federal Circuit Court of Australia held the Tribunal’s decision was not affected by jurisdictional error. See *AOI15 v Minister for Immigration & Anor* [2016] FCCA 1517.
11. The appellant now appeals from the Federal Circuit Court’s decision by a notice of appeal filed 17 June 2016, alleging that the primary judge denied him procedural fairness in refusing to grant the appellant an adjournment in order to seek legal advice.

# tribunal’s decision

1. The appellant, together with his representative, attended a Tribunal hearing on 22 January 2015 to give evidence and present arguments. The appellant was assisted at the hearing by an interpreter in the Sinhala and English languages.
2. The Tribunal found that the appellant was not a reliable, credible or truthful witness, and that he had fabricated much of his claims in order to be granted a protection visa. The Tribunal did not consider the appellant to be a credible witness for two reasons: firstly, due to the large number of unexplained inconsistencies between the evidence in the appellant’s statement and his oral submissions at the hearing; and secondly, because he lodged a statement that he conceded contained evidence that he knew not to be true. At [21]-[33] of its reasons, the Tribunal detailed the inconsistences in the appellant’s accounts, which were put to appellant at the hearing. At the conclusion of the hearing, the Tribunal expressed its credibility concerns to the appellant, and gave him an opportunity to respond to these.
3. In the result, while the Tribunal considered some of the matters of concern may not singularly be determinative in and of themselves, cumulatively they left the Tribunal unable to be satisfied of the truth of significant and central aspects of the appellant’s claimed circumstances.
4. In the circumstances, the Tribunal accepted that the appellant was born in Udappu and was of Tamil ethnicity; moved to Mullaitivu, an LTTE controlled area, for work in 2007, where he transported fish and ice between Mullaitivu to Colombo; and was married on 6 May 2012.
5. However, the Tribunal did not accept that the LTTE required the appellant to undertake self‑defence training while he was in Mullaitivu; that he was stopped by army officers in 2008, taken away for questioning and subjected to physical abuse, and accused of being an LTTE fighter and of transporting weapons; that he was placed in Arunchalan camp; that he was transferred to Mallamadu camp; and that he bribed an army officer to be released from Mallamadu camp. The Tribunal also did not accept that the appellant was detained by army officers at a checkpoint in March 2012; that he was told by relatives shortly after getting married that army officers were looking for him; that he travelled by boat to Australia for that reason; that the Sri Lankan army was presently looking for him; and that the appellant was fearful he would be taken away.
6. After putting certain adverse country information contained in a country information report by the Department of Foreign Affairs and Trade (***DFAT***) dated 3 October 2014 to the appellant during the hearing, the Tribunal offered him an opportunity to respond, to ask for time to respond, and/or to ask that his representative respond for him in written submissions. The appellant said he wished for his agent to respond for him in later written submissions – a request that the Tribunal granted.
7. At [57] of its reasons, the Tribunal noted that the appellant relied on submissions respectively dated 6 August 2013, 23 July 2014 and 10 February 2015, and that only the latter submissions could and did in fact address the country information report dated 3 October 2014. Although those submissions obviously did not address country information contained in a DFAT report dated 16 February 2015 – information the Tribunal was obliged to take into account – the Tribunal noted that the relevant aspects of the country information were in nearly identical terms.
8. With regard to the appellant’s claim to fear persecution on the basis of his Tamil ethnicity, having considered the country information in the DFAT reports, the Tribunal held the appellant did not have a well-founded fear of persecution for reason simply of his Tamil ethnicity. It was not satisfied that the appellant, in his particular circumstances, had a well‑founded fear of persecution for this reason.
9. With regard to the appellant’s claim to fear persecution on the basis of his actual or implied political opinion in support of the LTTE, the Tribunal noted that the appellant did not, and did not claim to, fall into any of the categories of “at risk” persons returning to Sri Lanka identified in the UK Upper Tribunal’s decision in *GJ & Ors (post-civil war returnees) Sri Lanka* [2013] UKUT 00319 (IAC). For that reason, the Tribunal was not satisfied that the appellant, in his particular circumstances, had a well-founded fear of persecution on this basis.
10. With regard to the appellant’s claim to fear persecution on the basis of membership of the particular social group of failed asylum seekers, the Tribunal found that, on the basis of relevant country information, the appellant would be questioned at the airport, detained and investigated by Sri Lankan authorities for no more than a few days, and the most likely penalty he would receive would be a fine. It held that being charged under Sri Lankan departure laws and being detained would be the result of the non-discriminatory enforcement of a law of general application. Accordingly, the Tribunal found that the appellant had no fear of harm on this basis.
11. As to illegal departure, the Tribunal again did not accept that Sri Lankan departure laws disclosed a discriminatory intent, accepting that it was likely the appellant would be charged with breach of these laws and held on remand pending hearing if he returned to Sri Lanka. Accordingly, the Tribunal found that the appellant did not have a well-founded fear of harm by reason of being a member of a particular social group, namely, being an illegal Tamil departee from Sri Lanka.
12. The Tribunal was not satisfied that any problem the appellant may face as a result of being questioned, detained or charged was directed at him for a Convention reason, but were incidents that may be experienced by anyone returning to Sri Lanka. It was also not satisfied that being questioned, detained or charged amounted to systematic and discriminatory conduct as required by s 91R(1)(c) of the Act.
13. In the result, having considered the appellant’s claims both individually and cumulatively, the Tribunal did not consider the appellant had a real chance of persecution for any of the reasons claimed, arising on the evidence, or otherwise. Consequently, it was not satisfied that the appellant faced a well-founded fear of persecution for a Convention reason in Sri Lanka now or in the reasonably foreseeable future, nor that the appellant was a refugee under s 36(2)(a) of the Act.
14. The appellant therefore did not satisfy the criteria for a protection visa contained in s 36(2)(a) of the Act.
15. For the same reasons, the Tribunal was not satisfied that, as a necessary and foreseeable consequence of the appellant being removed from Australia to Sri Lanka, there was a real risk that he would suffer significant harm as exhaustively defined in s 36(2A) of the Act.
16. The appellant therefore also did not satisfy the criteria for a protection visa contained in s 36(2)(aa) of the Act.
17. Ultimately, the Tribunal affirmed the delegate’s decision not to grant the appellant a protection visa.
18. The appellant then sought judicial review of the Tribunal’s decision in the Federal Circuit Court.

# judicial review in the federal circuit court

1. In his amended application for review of the Tribunal’s decision filed 10 November 2015, the appellant raised the following grounds:
2. The Tribunal denied the Applicant Procedural Fairness by not putting to him material that was adverse to him and was used in making the decision.

**Particulars**

* The Applicant appeared before the Tribunal on 11 February 2015.
* At [61] and [68] the Tribunal uses the DFAT Country Report for Sri Lanka of 16 February 2015 to negate the submission made on behalf of the Applicant.
* The DFAT Report was not put to the Applicant for comment.
1. The Tribunal failed to comply with the ministerial direction number 56 in contravention of Section 499 (2A) of the Migration Act 1958.

**Particulars**

* The Tribunal failed to take into account the PAM3 protection visas complimentary (sic) protection guidelines when it made a finding on whether the treatment that the applicant would face on being detailed in Sri Lanka was degrading treatment or punishment or was cruel or inhuman treatment or punishment.
* At [69], the Tribunal found that 'I find that the applicant is unlikely to be detained for more than a few days while those investigations are carried out'.
* In *ARS15 v Minister For Immigration and ANOR* *[2015] FCCA 2135*, it was observed that the PAM3 guidelines must not be merely recited but actively engaged. In that case, it was quoted with approval, the decision of *Portorreal v Dominican Republic*, Comm No 188/1984, UN Doc CCPR/C/OP/2 (5 November 1987) where there was close analysis of the conditions to which the person was exposed for no more than 50 hours, but nonetheless there was a finding of a violation of Article 7 (Torture Convention).
1. The appellant appeared as a self-represented party at the hearing in the Court on 2 June 2016. The primary judge’s reasons do not disclose whether the appellant required an interpreter and, if so, whether one was present at the hearing. The primary judge’s reasons also do not disclose any request by the appellant for an adjournment or any other procedural issues that arose for the primary judge’s consideration. Nor is a transcript of the hearing in evidence before the Court.
2. With regard to ground 1, the primary judge noted that the ground was directed at the Tribunal’s use of the DFAT report dated 16 February 2015.
3. In this regard, the primary judge noted that the Tribunal, at [57] of its reasons, referred to the appellant’s representative’s submissions of 23 July 2014 and 10 February 2015, noting that, at the time of submitting the submissions, the representative was not able to address any country information assessment published by DFAT after these respective dates, such as the report of 16 February 2015. However, the Tribunal considered it was nonetheless obliged to take the report of 16 February 2015 into account pursuant to Ministerial Direction No 56, noting that the information in the DFAT report dated 16 February 2015 was relevantly identical to information in the appellant’s submissions in two respects, and that the only relevant differences related to the defeat of the Rajapaksa government in the recent election.
4. The primary judge accepted the Minister’s submissions that the Tribunal was not obliged to put this country information to the appellant.
5. Firstly, his Honour considered the Tribunal’s obligation to put adverse information to the appellant only arose under s 424A of the Act, and the country information in this case did not fall within that section. In any event, although the primary judge did not have the report before him nor all of the information referred to in the appellant’s submissions to the Tribunal, his Honour noted that the Tribunal considered the DFAT report of 16 February 2015 did not contain any relevant new information of which the appellant was not aware, and considered the appellant had not established that the Tribunal was incorrect in what it said at [57] of its reasons. For both of those reasons, the primary judge rejected the first ground of review.
6. Secondly, the primary judge held the Tribunal was not obliged, even by procedural fairness at common law, to put to the appellant country information that was not substantially new or different to that of which the appellant was already aware. His Honour noted that in *Plaintiff M61/2010E v The Commonwealth of Australia and Others* (2010) 243 CLR 319; [2010] HCA 41, the High Court referred to the obligation under s 424A, and said as follows at [91]:

But that obligation is subject to qualifications. In particular, it does not extend (s 424A(3)(a)) to information “that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member”. Hence country information is treated as a class of information which need not be drawn to the attention of applicants for review by the Refugee Review Tribunal.

1. The primary judge further considered that due to s 422B of the Act, s 424A was to be treated as exhaustive of the requirements of procedural fairness in relation to an appellant’s right to comment on adverse material which is known to the Tribunal and on which it relies. See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [41]-[42]; [2010] HCA 23, and *Minister for Immigration and Border Protection v SZTJF* (2015) 149 ALD 552 at [53]; [2015] FCA 1052.
2. For those reasons, the primary judge held the appellant was not denied procedural fairness by the Tribunal’s failure to provide him with any details of the information in the DFAT report of 16 February 2015.
3. The primary judge inferred that by his second ground of review, the appellant contended that the Tribunal failed to refer to the first of the guidelines referred to in Ministerial Direction No 56, namely, PAM3: Refugee and humanitarian – Complementary Protection Guidelines.
4. Proceeding on this inference, the primary judge noted that the Tribunal, at [9] of its reasons, stated that it was required to take account of policy guidelines and referred directly to each of the two guidelines in Direction No 56. Further, the Tribunal, at [57] and [60] of its reasons, referred to its obligation to comply with Direction No 56. In these circumstances, the primary judge considered it was difficult to infer that the Tribunal was not aware of the guideline and that it failed to take it into account.
5. His Honour noted that, while the appellant relied on the decision in *ARS15 v Minister for Immigration & Border Protection* [2015] FCCA 2135, where the inference was drawn that the Tribunal failed to comply with, or have regard to, Direction No 56, there were at least two decisions of the Federal Court in which opposite inferences were drawn. By way of example, the primary judge cited the following passage in *AJW15 v Minister for Immigration and Border Protection* [2016] FCA 197 at [46]:

The Court agrees that the Tribunal’s statement that it was required to take account of the guidelines should in itself, on a fair reading of the Tribunal’s reasons in accordance with *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others* (1996) 185 CLR 259 at 271–272; [1996] HCA 6, be sufficient to conclude the Tribunal has done so.

1. In reliance on this authority, the primary judge considered the Tribunal’s statement at [9] of its reasons was sufficient to conclude that the Tribunal had in fact complied with the direction; a conclusion that was only strengthened by the Tribunal’s statements at [57] and [60] of its reasons.
2. In circumstances where the appellant had not identified any particular aspect of the guidelines that was of such relevance that the Tribunal’s failure to refer to it gave rise to the inference that it failed to comply with Direction No 56, the primary judge held that the Tribunal did not fail to comply with the direction, and so rejected ground two.
3. The primary judge’s reasons suggest that, at the hearing, the appellant said there were still problems in his country and he could not return there. While the primary judge accepted that, if this was accepted as a fact, this might support the appellant’s claim to be a refugee, his Honour held that was a question to be decided by the Tribunal under s 65 and s 414 of the Act, and fell outside the scope of the Federal Circuit Court’s jurisdiction under s 476 of the Act. For that reason, his Honour held that this contention could not form the basis of any orders setting aside the Tribunal’s decision.
4. For those reasons, the primary judge held there was no jurisdictional error affecting the Tribunal’s decision, and so dismissed the application for review.
5. The appellant now appeals from the primary judge’s decision.

# appeal to this court

1. By notice of appeal filed 17 June 2016, the appellant essentially contends that the primary judge denied him procedural fairness in refusing to grant him an adjournment for the purposes of seeking legal advice. The specific grounds of appeal are as follows:
* The applicant was unrepresented in proceedings below and adjournment should have been was granted for me to seek legal advice.
* For this reasons the decision of the Federal Circuit Court Judge Smith is attended with sufficient error as to warrant the opportunity to postpone the hearing. The Federal Circuit Court Judge should have adjourned the hearing of the application for the applicant to obtain legal representation is a denial of procedural fairness by the Court below and is unsafe. Further, the true nature of the decision from which appeal is sought finally disposes of the matter being a matter of the utmost importance to the applicant.
* Judge Smith failed to have regard to the short nature of any adjournment that would be necessary given to the appellant that he had made arrangements to get a lawyers opinion and to represent him on the matter.
* Judge Smith erred by dismissing the proceedings where the appellant was not permitted legal representation by reason of the refusal to grant an adjournment. Had the applicant been legally represented, additional grounds could have been identified which would have clearly indicated that there was a reasonably arguable case of jurisdictional error.
1. The appellant did not file any written submissions but appeared as a self-represented party at the hearing with the assistance of an interpreter.
2. Counsel for the Minister filed written submissions and made oral submissions at the hearing.
3. In his written submissions, the Minister notes that the primary judge’s reasons do not record that any application for an adjournment was ever made by the appellant.
4. He further says the length of time between the appellant filing his original application for review on 22 April 2015 and the hearing on 2 June 2016, was ample time for the appellant to arrange legal representation if he wished.
5. Accordingly, the Minister submits that all grounds of appeal must fail, and the appeal should be dismissed with costs.

# Orders

1. The Court orders that:
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs of the appeal, to be taxed if not agreed.

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| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker. |

Associate:

Dated: 11 November 2016