FEDERAL COURT OF AUSTRALIA

ACL15 v Minister for Immigration and Border Protection [2016] FCA 1318

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| Appeal from: | *ACL15 v Minister for Immigration & Anor* [2016] FCCA 1301  |
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| File number: |  |
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| Judge: | **BARKER J** |
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| Date of judgment: | 8 November 2016 |
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| Catchwords: | **MIGRATION** – application for protection (class XA) visa – appeal from Federal Circuit Court of Australia – whether primary judge committed jurisdictional error – whether Tribunal erred by failing to comply with requirements in s 424A and s 425 of the Act – whether Tribunal erred by failing to consider whether circumstances of appellant’s likely detention upon return to his country of nationality might involve harm “intentionally inflicted”  |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2)(a), 36(2)(aa), 36(2A), 91R(1), 91R(1)(a), 91R(1)(b), 91R(1)(c), 91R(2), 424(1), 424(3)(a), 424AA, 424A, 425*Immigrants and Emigrants Act 1949* (Sri Lanka)*Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137*International Covenant on Civil and Political Rights. Opened for signature 19 December 1996.* 999 UNTS 171. 6 ILM 386 (entered into force 23 March 1976) (ICCPR)  |
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| Cases cited: | *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146*SZQDR v Minister for Immigration and Border Protection* [2016] FCA 543*SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC 69*SZUMS v Minister for Immigration and Border Protection* [2016] FCA 542 |
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| Date of hearing: | 8 November 2016 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 71 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the First Respondent: | Mr K Eskerie  |
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| Solicitor for the First Respondent: | Sparke Helmore |

ORDERS

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|  | NSD 932 of 2016 |
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| BETWEEN: | ACL15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | BARKER J |
| DATE OF ORDER: | 8 NOVEMBER 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the first respondent 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, a male citizen of Sri Lanka of Tamil ethnicity, appeals from a decision of the Federal Circuit Court of Australia dismissing his application for judicial review of a decision of the former Refugee Review ***Tribunal*** refusing to grant a protection (class XA) visa under the *Migration* ***Act*** *1958* (Cth).
2. The appellant arrived in Australia at Christmas Island on 13 August 2012 without a visa. The appellant, assisted by his representative at the time, applied for a protection visa on 27 September 2013.
3. The appellant claimed he would be imprisoned, tortured and harmed in some way by the Sri Lankan Army (***SLA***)or the Sri Lankan Criminal Investigation Department (***CID***) if he were to return to Sri Lanka because he was a Tamil person who would be imputed to have pro-Liberation Tigers of Tamil Eelam (***LTTE***) beliefs. He said his circumstances were exacerbated by the fact that his uncle was killed by the SLA because he was suspected of involvement with the LTTE; that the CID suspected the appellant was sending money to the LTTE after some people observed him depositing his wages into a bank in 1998; and that the appellant was wrongfully implicated in a bomb explosion outside his jewellery shop that destroyed an army tank on 21 August 2011. He further claimed that cruel or inhumane treatment or punishment would be intentionally inflicted on him upon his return to Sri Lanka because he would be held in prison on remand for being a failed asylum seeker and having departed Sri Lanka illegally.
4. His application was refused by a ***delegate*** of the ***Minister*** for Immigration and Border Protection on 6 February 2014. About a month later, the appellant made an application to the Tribunal for review of the delegate’s decision. On 19 February 2015, the Tribunal affirmed the delegate’s decision to refuse the appellant’s application for a protection visa.
5. The appellant then applied to the Federal Circuit Court for judicial review of the Tribunal’s decision. However, on 3 June 2016, the Court dismissed the review because it considered the Tribunal’s decision was not affected by jurisdictional error. See *ACL15 v Minister for Immigration & Anor* [2016] FCCA 1301.
6. The appellant now appeals from the Federal Circuit Court’s decision by a notice of appeal filed 14 June 2016, alleging the primary judge erred in failing to find that the Tribunal “erred in law” in failing to comply with the requirements of s 424A of the Act, and in not considering whether the unpleasant prison conditions the appellant may be exposed to if held in remand upon his return to Sri Lanka would be “intentionally inflicted” in circumstances where the Sri Lankan authorities are aware of these unpleasant conditions.

# Delegate’s decision

1. The delegate was not satisfied that the appellant was a truthful witness and believed that the appellant was prepared to embellish, if not entirely fabricate, most of his material claims.
2. As the delegate did not accept the appellant’s claim regarding an army truck exploding out the front of his business in 2011, the delegate did not consider whether there was a nexus between this claim and a ground in the ***Convention*** *relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954). The delegate nonetheless found that the ground of political opinion (imputed or otherwise) was the essential and significant reason for the harm feared for the purposes of s 91R(1)(a) of the Act.
3. The delegate was further satisfied that the harm feared, namely, being imprisoned, tortured and otherwise harmed by the SLA or CID, was serious harm and systematic and discriminatory conduct within the meaning of s 91R(1)(b) and (c) of the Act.
4. However, the delegate was not satisfied that the appellant had a real chance of being persecuted for a Convention reason, and therefore found that the appellant’s fear of persecution was not well-founded. As a result, the delegate was not satisfied that Australia owed protection obligations to the appellant under the Convention, and so the appellant did not meet the criteria for the grant of a protection visa under s 36(2)(a) of the Act.
5. With regard to whether Australia owed the appellant protection obligations under s 36(2)(aa) of the Act, the delegate was satisfied that the harm feared amounted to “significant harm” for the purposes of s 36(2A) of the Act. The delegate was not, however, satisfied there were substantial grounds for believing that, as a necessary and foreseeable consequence of the appellant being removed from Australia to Sri Lanka, there was a real risk the appellant would be subject to significant harm.
6. In the result, the delegate was also not satisfied that Australia had protection obligations to the appellant under s 36(2)(aa) of the Act. The appellant therefore did not satisfy the criteria for the grant of a protection visa under that section.
7. The appellant then applied to the Tribunal for merits review of the delegate’s decision.

# Tribunal’s decision

1. On 10 February 2015, the appellant and his representative attended a Tribunal hearing that was conducted with the assistance of an interpreter in the Tamil and English languages. At the hearing, the appellant responded to apparent inconsistencies in his claims raised by the Tribunal and the Tribunal gave him opportunities to produce further evidence in support of his claims.
2. On 17 February 2015, a week after the hearing, the Tribunal received further written submissions from the appellant’s representative.
3. On the evidence before it, the Tribunal accepted that the appellant was a Tamil from Chilaw, where he lived and worked as a labourer, delivery man, painter and jewellery shop proprietor.
4. The Tribunal further accepted, and afforded some weight to the fact, that the appellant was granted a passport in 2004 and travelled to Dubai for work before voluntarily returning to Sri Lanka. The Tribunal gave considerable weight to the fact that this occurred during the civil war between the Sri Lankan government and the LTTE, and considered these events to be inconsistent with the appellant’s claims about trouble he claimed to be in up to that time, including his uncle being killed in 1998 and the appellant being suspected of sending money to the LTTE.
5. The Tribunal also did not accept that the CID approached and threatened the appellant in 2005 as this was a “new claim” that was inconsistent with the claim made in his visa application that his next contact with the CID after Dubai was in 2008.
6. In the result, the Tribunal did not accept that the appellant had ever lived in hiding from Sri Lankan authorities.
7. The Tribunal also did not believe that the bombing in 2011 ever occurred, and notified the appellant that this might be the case at the Tribunal hearing. It considered this claim to be highly incongruous with the apparent absence of any independent evidence of the bombing, despite the fact that such an occurrence would have been big news.
8. In the result, the Tribunal dismissed all of the appellant’s claims about imputed links to the LTTE in their entirety.
9. The Tribunal accepted the appellant may be charged under Sri Lankan departure laws for having illegally departed Sri Lanka and, as a result, may be held in prison on remand for up to three or four days. However, in reliance on country information provided by the Department of Foreign Affairs and Trade (***DFAT***), it found that the process of interviewing, detaining and prosecuting Sri Lankans in the same position as the appellant was implemented under laws of general application. Therefore, in the event that the appellant were detained for having illegally departed Sri Lanka, the Tribunal held that this would not amount to “persecution” under s 91R(1) as it would not involve “discriminatory conduct”.
10. The Tribunal further held that although the appellant may be exposed to poor conditions while in prison on remand, it was not satisfied, having regard to the evidence overall, including the brevity of any period of remand, that these conditions would constitute serious harm within the meaning of s 91R(2).
11. Finally, the Tribunal was also not satisfied on the country information before it that the appellant faced a real chance of serious harm in Sri Lanka by reason of being a Tamil, a Tamil male, or a young adult Tamil male.
12. In the result, the Tribunal was not satisfied that the appellant faced a real chance of persecution in Sri Lanka in the reasonably foreseeable future for a Convention reason.
13. For the same reasons, the Tribunal was not satisfied that it had substantial grounds for believing 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.
14. Consequently, the Tribunal held that the appellant did not satisfy the criteria for a protection visa under s 36(2)(a) or s 36(2)(aa), and the Tribunal affirmed the delegate’s decision.
15. The appellant then sought judicial review of the Tribunal’s decision in the Federal Circuit Court of Australia on the grounds of jurisdictional error.

# Judicial review in the federal circuit court

1. In his amended application for judicial review of the Tribunal’s decision dated 18 May 2015, the appellant raised the following three grounds:

1. I will provide further details of these grounds and any other ground after I have received and listened my RRT hearing CDs and after a lawyer has been given by this court.

2. When deciding that cruel or inhumane treatment or punishment would not be intentionally inflicted upon me if I was placed in prison on remand for several days on my return to my home country, because the RRT has accepted that the prison is subject to overcrowding, poor conditions and unpleasant conditions. The RRT has not considered whether the fact of possible placement of me in the overcrowded jail which has unpleasant conditions by the Sri Lankan authorities would be intentionally inflicted in circumstances where the Sri Lankan authorities have known of the existence of the overcrowded and unpleasant jails.

3. The RRT did not comply with the section 424AA and it has breached its statutory duty imposed by section 424A of the Act as well as the RRT has failed to put the concern and adverse information to me during the RRT hearing and in writing the concerns and adverse information which arose in my review (reasons for refusing my review) and it has failed to invite me for my comments, after the hearing, before it made its decision.

1. At the time of the hearing of the judicial review application on 30 September 2015, the Full Court of this Court had reserved its decision on an appeal considering the meaning of the phrase “significant harm” in s 36(2)(aa) of the Act. As the appellant’s application for judicial review raised this issue, the primary judge reserved his decision until after the Full Court delivered its judgment on that appeal on 20 May 2016 in ***SZTAL*** *v Minister for Immigration and Border Protection* [2016] FCAFC 69.
2. With regard to ground 1, the primary judge held that nothing in that ground constituted any basis upon which constitutional writs might issue in respect of the Tribunal’s decision.
3. With regard to ground 2, the ground that raised the same issues that were considered in *SZTAL*, the primary judge held that the point raised by the appellant did not arise on the Tribunal’s findings and so the ground must be rejected. In this regard, his Honour considered that the Tribunal did not confine itself to determining whether or not the appellant might suffer significant harm upon return to Sri Lanka only by reference to whether or not such harm might be intentionally inflicted, noting that, at [49] and [51] of its reasons, the Tribunal rejected the possibility of significant harm because:
	1. any treatment of the appellant in connection with his illegal departure would arise only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Convention; and
	2. any such treatment did not amount to severe physical or mental pain and suffering, or pain and suffering cruel or inhumane in nature, and did not amount to extreme humiliation.
4. His Honour further held that, even if the point did arise on the Tribunal’s reasons, the decision of the Full Court in *SZTAL*, which held that the “natural and ordinary meaning of intentional infliction is actual subjective intention by the actor to bring about the victims’ pain and suffering by the actor’s conduct”,would mean that it must be rejected.
5. With regard to ground 3, the primary judge made the following remarks regarding the requirements imposed on the Tribunal by s 424A of the Act:

In essence, the Tribunal is required to give an applicant particulars of ‘information’ that it considers would be the reason or part of a reason for an adverse decision and to invite him or her to comment on or respond to that information. Importantly, ‘information’ does not include the thought processes of the Tribunal, information given by the applicant for the purposes of the review and information that does not specifically relate to the applicant. Further, the Tribunal has an option to fulfil any obligation to give those particulars orally at a hearing in accordance with the provisions of s.424AA.

1. The primary judge noted that the appellant did not specify what “information” the Tribunal was obliged to give him particulars of. His Honour could discern no information within the meaning of s 424(1) which the Tribunal considered would be the reason or part of the reason for its decision. Firstly, although the Tribunal referred to evidence given by the appellant at an interview with the delegate, one might have thought that evidence would have been a relevant step toward rejecting, not affirming, the decision under review. Secondly, while the Tribunal also referred to certain information concerning the circumstances in Sri Lanka, this information was not specific to the appellant and so, by operation of s 424(3)(a), did not fall within the meaning of s 424(1).
2. Consequently, the primary judge also rejected ground 3.
3. In the result, the primary judge concluded that none of the appellant’s grounds for judicial review were made out, and that the Tribunal decision did not involve jurisdictional error.
4. The appellant now appeals from the primary judge’s decision.

# Appeal to this court

1. In his notice of appeal filed 14 June 2016, the appellant raises two grounds of appeal that largely replicate the grounds of review in the Federal Circuit Court:

The Federal Circuit Court Judge erred in the judgment as the Judge failed to find that the Tribunal erred in law when the Tribunal had reviewed my review application.

1. The Federal Circuit Court Judge failed to accept in the judgment on that he AAT declined its power under sections 424A and 425 to me when it reviewed my protection visa application. The AAT did not comply with the section 424AA and it has breached its statutory duty imposed by section 424A of the Act as well as the RRT has failed to put the concern and adverse information to me during the AAT hearing and in writing the concerns and adverse information which arose in my review (reasons for refusing my review) and it has failed to invite me for my comments, after the hearing, before it made its decision.

2. When the AAT deciding that cruel or inhumane treatment or punishment would not be intentionally inflicted upon me if I was placed in prison on remand for several days on my return to my home country, because the AAT has accepted that the prison is subject to overcrowding, poor conditions and unpleasant conditions. The AAT has not considered whether the fact of possible placement of me in the overcrowded jail which has unpleasant conditions by the Sri Lankan authorities would be intentionally inflicted in circumstances where the Sri Lankan authorities have known of the existence of the overcrowded and unpleasant jails.

1. The appellant did not file any written submissions prior to the hearing, but appeared, as a self-represented party, at the hearing and made oral submissions.
2. Counsel on behalf of the Minister made submissions both in writing and orally at the hearing.
3. Ground 1 raises the issue of the Tribunal’s compliance with ss 424A, 424AA and 425.
4. In this regard, s 424A(1) provides as follows:

(1) Subject to subsections (2A) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

1. Section 424A(2A) and (3), to which subs (1) is subject, provide as follows:

(2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.

 (3) This section does not apply to information:

(a) 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; or

(b) that the applicant gave for the purpose of the application for review; or

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

(c) that is non‑disclosable information.

1. Section 424AA separately provides:

**424AA Information and invitation given orally by Tribunal while applicant appearing**

(1) If an applicant is appearing before the Tribunal because of an invitation under section 425:

(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) if the Tribunal does so—the Tribunal must:

(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and

(ii) orally invite the applicant to comment on or respond to the information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

(2) A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 426A(1F).

1. Section 425, to which both s 424AA and this first ground of the appeal refer, provides as follows:

**425 Tribunal must invite applicant to appear**

(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.

1. As the primary judge found, there is no “information” that is readily discernible on the material before his Honour that separately enlivened the obligation to give clear particulars of that information to the appellant as a result of the hearing in the Tribunal.
2. All matters relevant to the hearing in the Tribunal were canvassed by the Tribunal member with the appellant at the Tribunal hearing.
3. Before that, a number of questions and concerns had become evident as a result of the decision of the delegate.
4. The Tribunal ultimately rejected the appellant’s claims on the basis of comprehensive adverse credibility findings.
5. There was no separate obligation arising, in the circumstances, on the Tribunal, in effect, to provide the appellant with a further opportunity to answer the concerns that the Tribunal had obviously raised, in the course of the hearing, with the appellant. There is, for example, no obligation for the Tribunal to issue what would amount to a draft set of findings in order to provide an applicant for review with an additional opportunity to satisfy the Tribunal member that their account of events, which have plainly been put in contention, should be accepted by the Tribunal.
6. In all the circumstances, it is plain that the appellant was afforded a sufficient opportunity to give evidence and make submissions about all relevant matters in issue and no further obligation to provide any “information” was raised under s 424A, or that the Tribunal failed in meeting its obligations under s 424AA.
7. As has been pointed out in a number of decisions, the Tribunal, in circumstances such as these, does not labour under an obligation to invite submissions or comment on the “thought processes” of the Tribunal and “information” does not constitute thought processes, or information given by an applicant for the purposes of the review and information that does not specifically relate to an applicant. See *SZUMS v Minister for Immigration and Border Protection* [2016] FCA 542 at [20]‑[24] and *SZQDR v Minister for Immigration and Border Protection* [2016] FCA 543 at [29]-]36].
8. The primary judge’s rejection of this particular ground, to be found at [37]-[39] of his Honour’s judgment, does not disclose any legal error.
9. Consequently, ground 1 of the appeal fails.
10. The second ground of the appeal more or less repeats the second ground of the judicial review application before the primary judge, which is set out as ground 2 at [29] above.
11. The question about the relevance of information before the Tribunal concerning the circumstances of the appellant, should he be returned to Sri Lanka, and placed in prison on remand, was dealt with in two ways by the Tribunal.
12. First, in considering whether the appellant was a person in respect of whom Australia has protection obligations under the Convention, for the purposes of s 36(2)(a) of the Act, the Tribunal considered whether the conditions and circumstances in which the appellant might be held in custody on return to Sri Lanka were relevant. Having regard to the evidence overall, including the information regarding the shortness of any remand or detention that the appellant might suffer, the Tribunal was not satisfied that the conditions would constitute “serious harm” within the nature of s 91R(2) of the Act.
13. At [35] of its reasons, the Tribunal expressly accepted information to the effect that the appellant would likely come to the attention of Sri Lankan authorities on return as a former illegal immigrant from Sri Lanka as soon as he reached the airport or would be questioned by police and possibly charged, and may be transported to the Magistrates Court in Negombo and remain in police custody at the airport for up to 24 hours, or for three or four days if there was an intervening weekend, and then bailed. The Tribunal also accepted that many, if not most, of the people with whom the appellant could be remanded may be Tamils. But also that he would be granted bail on his own recognisance, but would not be suspected of association with people smugglers or with the Liberation Tigers of Tamil Eelam.
14. The Tribunal then considered the appellant’s complementary protection claims for the purposes of s 36(2)(aa) of the Act, and expressly found at [49] of its reasons, that on the evidence before the Tribunal, the process of investigating the appellant’s illegal departure or other aspects of his background on his return to Sri Lanka, or the period he may face in custody for questioning on remand, or the fine he might have to pay for illegal departure, or any ensuing sanctions, would involve or amount to significant harm, as an act or omission, would not constitute torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, as they constituted “lawful sanctions” under Sri Lankan departure laws and were not inconsistent with the *International* ***Covenant*** *on Civil and Political Rights*. Opened for signature 19 December 1996. 999 UNTS 171. 6 ILM 386 (entered into force 23 March 1976) (ICCPR.
15. In essence, the Tribunal considered that the acts or omissions would arise from, inherent in or incidental, to lawful sanctions not inconsistent with the Covenant.
16. Further, at [50], the Tribunal found there would not be any real risk that the appellant would suffer significant harm as a result of the sanctions involved, including his possible detention, because they fell within the exceptions set out s 36(2B)(c) of the Act in that, as law to which everyone is subject, the risk was one faced by the population of a country generally and not by the appellant personally.
17. At [51], the Tribunal expressly found:

I find on the before me that [the appellant] will not be arbitrarily deprived of his life of subject to the death penalty being carried out. In light of my finding above on the conditions in which [the appellant] might find himself I remanded I find that those conditions do not constitute torture or cruel or inhuman treatment or punishment because the independent information before [me] does not indicate that it is severe physical or mental pain and suffering or pain and suffering cruel or degrading in nature. Nor is it degrading treatment or punishment as it does not involve extreme humiliation.

1. Of these findings, the primary judge noted, at [34] of his reasons for judgment, that the Tribunal was not concerned with whether or not this harm might be “intentionally inflicted”, for the purposes of the definition of “cruel or inhuman treatment or punishment”, being the expression used in the definition of “significant harm”, for the purposes of s 36(2)(aa) (as set out in s 36(2A) of the Act) but rather found that the harm did not otherwise meet that level. In passing, the primary judge also noted that while the Tribunal at one point, at [51] of his reasons for judgment, referred to “cruel or *degrading* in nature” that was only a slip and was intended to state, as in the definition, “cruel or *inhuman* in nature”. I consider the primary judge was correct in so observing.
2. The primary judge also concluded that, in any event, the decision of the Full Court of this Court in *SZTAL* meant that the appellant’s arguments could not succeed.
3. In *SZTAL*, the joint judgment of Kenny and Nicholas JJ held that the relevant intention in respect of the harm complained of must be an actual subjective intention by the actor to bring about the victim’s pain and suffering by the actor’s conduct.
4. The Minister notes that the Full Court’s decision in *SZTAL* is the subject of a special leave to appeal application to the High Court of Australia to be held in just over a week from now, on 16 November 2016.
5. In the circumstances of this case, having regard to the particular findings of the Tribunal concerning the nature of the custody, questioning, remand, fine and the like that might imposed on the appellant if he were to return to Sri Lanka, the question of intention (whether subjective or objective) does not arise and I agree with the primary judge’s final conclusion, in that regard, at [36], that the point raised by the appellant does not arise on the Tribunal’s findings and that ground must be rejected.
6. As a consequence, ground 2 of the appeal fails.
7. For these reasons, the appeal should be dismissed.

# Order

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

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| I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker. |

Associate:

Dated: 8 November 2016