FEDERAL COURT OF AUSTRALIA

SZNBX v Minister for Immigration and Border Protection [2018] FCA 1172

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| Appeal from: | *SZNBX v Minister for Immigration and Border Protection* [2018] FCCA 445 |
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| File number: | NSD 416 of 2018 |
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| Judge: | **GRIFFITHS J** |
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| Date of judgment: | 29 August 2018 |
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| Catchwords: | **MIGRATION** – appeal from a judgment of the Federal Circuit Court of Australia – whether the primary judge erred in not finding that the Administrative Appeals Tribunal (**AAT**) failed to consider relevant facts and material in concluding that the appellants had a right to enter and reside in other European Union countries for the purposes of s 36(3) of the *Migration Act 1958* (Cth) – whether the primary judge erred in not finding that the AAT had considered irrelevant material or material which did not exist – whether the primary judge erred finding that the AAT was correct to determine that the appellants had not taken all possible steps to avail themselves of third country protection under s 36(3) – **Held:** appeal dismissed, with costs |
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| Legislation: | *Migration Act 1958* (Cth), ss 36(2)(a), 36(2)(aa), 36(3), 417 |
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| Cases cited: | *Minister for Immigration and Multicultural Affairs v Applicant C* [2001] FCA 1332  *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12  *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* [2013] FCAFC 91; 215 FCR 35  *Suntharajah v Minister for Immigration & Multicultural Affairs* [2001] FCA 1391  *V856/00A v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 408 |
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| Date of hearing: | 17 August 2018 |
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| Registry: | New South Wales |
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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 |
|  |  |
| Number of paragraphs: | 52 |
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| Counsel for the Appellants: | The first appellant appeared on behalf of the appellants, with the assistance of an interpreter and a McKenzie friend |
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| Counsel for the First Respondent: | Mr C Lenehan |
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| Solicitor for the First Respondent: | DLA Piper Australia |

ORDERS

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|  | | NSD 416 of 2018 |
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| BETWEEN: | SZNBX  First Appellant  SZNBY  Second Appellant  BAZ16  Third Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 29 AUGUST 2018 |

THE COURT ORDERS THAT:

1. The first appellant be appointed the litigation representative of the third appellant.
2. The appeal be dismissed.
3. The appellants pay the first respondent’s costs, as agreed or assessed.

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

REASONS FOR JUDGMENT

# GRIFFITHS J:

1. This appeal is from a judgment and orders of the Federal Circuit Court of Australia (**FCCA**) which were published on 8 March 2018 (see *SZNBX v Minister for Immigration and Border Protection* [2018] FCCA 445). The FCCA dismissed the appellants’ judicial review application concerning a decision dated 7 April 2016 of the Administrative Appeals Tribunal (**AAT**), which dismissed the appellants’ application to review the delegate’s decision made on 18 September 2014 to refuse the appellants a protection visa. The second and third appellants are the de facto partner and son respectively of the first appellant. At the outset of the hearing, and with the consent of the first appellant, he was appointed the litigation representative of the third appellant.

## Background matters summarised

1. The proceedings have a long history dating back to 5 April 2008 when the first and second appellants first entered Australia holding tourist visas. The first appellant is a citizen of Latvia. In May 2008 he applied for a protection visa claiming that he feared harm from Latvian authorities in Latvia. His de facto partner was included in that application. The application was refused by the Minister’s delegate, the then Refugee Review Tribunal, the then Federal Magistrates Court, the Full Court of this Court and the High Court refused special leave to appeal on 26 May 2010.
2. The Minister decided on two occasions not to intervene under s 417 of the *Migration Act 1958* (the ***Act***) (on 21 October 2010 and 19 July 2012 respectively).
3. The third appellant was born in Australia on 29 December 2012. On 17 April 2014, the first appellant lodged a further protection visa application which named the second appellant and his son as members of his family unit. That application was refused by the delegate on 18 September 2014. The decision was affirmed by the AAT on 7 April 2016. As noted above the FCCA dismissed the appellants’ judicial review application on 8 March 2018.
4. The primary judge summarised the first appellant’s case in support of his protection visa application at [41] which, for convenience, is now set out (without alteration):

41. The Applicant provided a statement in support of his Protection visa application in which he stated:

a) He may suffer persecution upon his return to Latvia because he wished to draw attention to police corruption in Latvia.

b) He would be personally targeted because in 2002 he was arrested on fabricated criminal drug charges and coerced into a confession through physical torture and police threats against his brother.

c) Upon his release in 2007, he instigated litigation in order to attract public attention to corrupt police practices and to also seek compensation for unlawful imprisonment.

d) He received numerous threatening phone calls and threatening notes demanding he withdraw the litigation and depart Latvia.

e) His apartment was searched by police on two occasions and he was physically assaulted by three unknown assailants prior to his departure.

f) He was threatened with a return to prison should he return to Latvia.

g) The second applicant would suffer mental harm should she return to Latvia because she had been diagnosed in Australia with post-Traumatic Stress Disorder and Major Depression. She had received medical treatment on two occasions as an in-patient of Sutherland Hospital psychiatric unit. The first, in October in 2009 after the applicant bought her to the hospital concerned for her safety. The second in November 2010, when she was bought to the emergency department of Sutherland Hospital by Police who found her threatening suicide. The Applicant claimed that this instance coincided with the receipt of a negative outcome to a request to the Minister.

1. Her Honour summarised the delegate’s decision at [42] to [47], including the delegate’s finding that the first appellant might have had a legally enforceable right to enter and continue to reside in a number of European Union (**EU**) countries within the meaning of s 36(3) of the *Act* and that the appellant did not take all possible steps in this respect.
2. Her Honour summarised the AAT’s reasons at [48] to [91]. Having regard to the grounds of appeal, it is sufficient to focus on the AAT’s findings concerning the first and second appellants having entered and resided in Germany.
3. The AAT found that, based on evidence provided by the first appellant in his original protection visa application of his previous travel, including to Germany, the appellants could take steps to enter and reside in other EU countries (see at [55] of the primary judgment). Her Honour’s summary of this aspect of the AAT’s decision is correct. The AAT noted at [16]-[17] of its reasons for decision that, in his original protection visa application, the first appellant submitted evidence of his having travelled in Germany and that he had also submitted evidence of his wife having travelled on many occasions to *inter alia* Germany.
4. The primary judge noted that the first appellant did not provide any information to the AAT that would suggest that he or his family lacked a legally enforceable right to enter and reside in other EU countries or that he would face persecution for a Convention reason in those countries (see at [69] of the primary judgment). This summary accurately reflects the AAT’s findings at [47] to [51] of the AAT’s reasons for decision.
5. The primary judge noted that the AAT had found that each of the appellants had a legally enforceable right to enter and reside in other EU member states and that it had given weight to the first appellant’s indication that he and his partner had such a right (at [76] of the primary judgment). This is an accurate summary of what appears in [47] of the AAT’s reasons for decision. The primary judge then stated at [77] and [78] of her Honour’s reasons for judgment:

77. The Tribunal gave some weight to both applicants having entered freely for unspecified periods and resided in Germany. The Tribunal gave no weight to the Applicant’s reservations about the accommodation situation Germany (sic) or to his claim about landlords being reluctant to let to people from other countries that (sic) may be liable to deportation.

78. The Tribunal found that the applicants had not taken all possible steps to avail themselves of the right to enter and reside in other EU states. The Tribunal was not satisfied on the evidence before it that the authorities or non-state parties in EU countries mistreat people with mental health issues.

1. There is another aspect of the AAT’s reasons for decision which should be noted. Notwithstanding the AAT’s finding that the appellants have effective protection in a third country for the purposes of s 36(3) of the *Act*, the AAT proceeded at [52] ff of its reasons for decision to consider the appellants’ claims on their factual merits, i.e. whether or not they were entitled to protection under either ss 36(2)(a) or (aa). The AAT disbelieved the first appellant’s claims that he was convicted for a crime which he did not commit, nor that he was threatened and pressured to leave Latvia. It found at [54] that these claims were Convention related. The AAT’s adverse findings on credibility then grounded its rejection of the claim for complementary protection. The AAT specifically found at [65] that it was not satisfied that the second appellant’s mental health condition placed her and the other two appellants at risk of significant harm.

## The proceedings in the FCCA

1. The appellants were represented below by the first appellant, who had the assistance of an interpreter. The grounds of judicial review in the FCCA proceeding are set out in an amended application filed on 2 August 2016. It is desirable to set out those grounds in their entirety and without alteration:

**Ground l. Effective state protection.**

1. The tribunal said, “on the evidence before me, the applicants all have legally enforceable right to enter and reside in other EU member states”. The tribunal also said that we “had not taken all possible steps to avail themselves of the right to enter and reside in other EU states” (Germany in particular).

2. The evidence the tribunal referred to are as follows:

2.1. Page 8 (paragraph 16). “In the original application, [the Applicant] submitted evidence of his having travelled to Germany, an EU state, and Russia in or prior to 200 l. He has not suggested that any subsequent circumstances have diminished his legally enforceable right as an EU citizen to enter Germany or another EU state”

2.2. Page 18 (paragraph 48). “I give weight in this case to their both having freely entered and resided in Germany.”

2.3. Given the aforementioned “evidence” the Tribunal concluded: “I find on the evidence before me that the applicants have not taken all possible steps to avail themselves of the right to enter and reside in other EU states. For example, one possible step that [the Applicant] and [the second applicant] could both have taken would have been to enter and reside in Germany, a fellow EU state near Latvia where they have both resided temporary in the past” (page 18, paragraphs 48).

3. The tribunal fabricated its “evidence.”

3.1. Neither me nor my partner resided temporary in Germany (I travelled to and stayed in Germany for a couple of days as a tourist in 2001).

3.2. In 2001 Germany (as well as other EU states) was not “a fellow EU state.” Latvia joined EU in 2004.

3.3. In 2001 I had no right to enter and reside in other EU states as I had to apply for a visa to enter and stay in these states.

3.4. After Latvia joined EU I had no “legally enforceable right” to enter and reside in other EU states as I had a criminal conviction.

3.5. The tribunal accepted that I had a criminal conviction. Therefore it should have accepted that I could have been denied entry to or expelled from a “fellow EU state.” According to EU's Directive, which governs the free movement of EU citizens between Member States, free movement can be denied on grounds of “public policy, public security or public health.” This applies to entry, exit and stay in a country. Even though the law states that a criminal conviction cannot automatically justify blocking free movement rights, there is a proportionality test to be applied on a case-by-case basis. Given that crimes related to “drugs” are the most serious crimes and that my conviction was quite recent (in 2008), there was obviously an extremely strong case that I could have been refused entry.

4. In relation to my wife the tribunal said “there was no evidence that authorities in EU countries mistreat people with mental health issues; on the contrary, countries like Germany and the UK are highly related in relation to treatment of people with mental health issues”.

5. The “evidence” the tribunal referrers to do not relate to citizens of “other EU states” but to citizens of “host member state”. As I have already mentioned, according to the above-mentioned EU's Directive, should a person or persons become a burden on the social services of the host Member State they could be expelled from an EU member state on grounds of public health.

6. The tribunal accepted that my wife had been suffering from severe mental illness. Therefore it should have accepted that we could have been expelled from a EU member states on grounds of public health.

7. The Tribunal ignored relevant facts and material and relied on material which did not exist. Accordingly the tribunal erred in its conclusion that we had effective state protection in & third country under s 36(3) of the Act.

**Ground 2. Credibility.**

8. “On the evidence before it” the tribunal found that our claims about threats in Latvia failed on credibility grounds and are no more able to succeed under s.36(2)(aa). The Tribunal did not believe my claims about drugs being planted, me being convicted for a crime I did not commit, instigation of court proceedings, etc.

9. On a number of occasions the tribunal referred to “evidence”, which, do not exist. For example the tribunal said “I consider it badly speculative and quire far-fetch that he would ever pursue such a course of action (i.e. to apply to a court) in any jurisdiction. Given the fact the tribunal did not give any details as to why it is speculative and “quite far-fetch” can such “consideration” be regarded as “evidence”?

10. Before applying to the tribunal I had pursued similar actions in Australia (applied to Federal Magistrates, Federal and High courts). According to the tribunal, such a course of action (not to mention current proceedings) are also “badly speculative and quire far-fetch”.

11. If the tribunal did have adverse evidence “before it” it should have given me an opportunity to comment upon and respond to these matters.

12. It is well settled that where procedural fairness requirements apply decision-maker must provide an affected person with “an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made”

13. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.

1. The first ground of the amended application challenged the AAT’s finding that the first appellant had a legally enforceable right to enter and reside in other EU countries. The appellants alleged that, in making that finding, the AAT fabricated evidence and ignored relevant facts and circumstances. It was submitted that because the first appellant had a criminal conviction for drug related offences this meant that he did not have a right to enter and reside in other EU countries. The first appellant complained that the AAT’s finding was based on his evidence that he and his partner had freely entered and resided in both Germany and Russia following his drug related convictions and after he had obtained a passport in Latvia.
2. The first appellant submitted in the FCCA that an EU Directive, which was before the AAT, had the effect that a criminal conviction may result in the refusal of entry and that the AAT should have explored the possibility that the first appellant would be denied entry to EU countries because of his criminal conviction in Latvia. Moreover, in relation to the second appellant, it was submitted that the EU Directive indicated that a person could be expelled from an EU country on the grounds of public health and that this was relevant to the second appellant because of her mental health condition.
3. Further, in relation to the AAT’s finding that the first and second appellants could have taken steps to enter and reside in Germany in circumstances where the AAT had found that they had both resided there temporarily in the past, it was submitted that in fact this had never occurred. The first appellant said that he had merely visited Germany as a tourist in 2001.
4. With reference to the terms of s 36(3) of the *Act* and the phrase “all possible steps”, it was submitted that before the AAT could determine whether “all possible steps” had been taken to enter and reside in Germany, it was necessary to determine whether the right to enter and reside in that country was a presently existing right available at the time of decision and that the AAT failed to address that matter.
5. The primary judge found at [127] that it was open to the AAT on the evidence and material before it to find that the appellants had not taken all possible steps to enter and reside in other EU member countries. Her Honour also found at [128] that there was no general obligation on the AAT to investigate an applicant’s claim and, in particular, whether the appellants could enter and reside in another EU country, applying, *inter alia, Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12 (***SGLB***) at [43]. Her Honour added at [130] that the first appellant “did not give any evidence of any degree of cogency that would have prompted an obligation on the part of the Tribunal to investigate his claims further”. Although her Honour noted the first appellant’s evidence before the AAT that he was making inquiries of EU embassies concerning the effect of his criminal conviction on his right to enter and reside in a EU country, there was no evidence before the FCCA as to whether these inquiries were pursued or had produced any result (at [130]).
6. At [132], the primary judge identified the following findings of the AAT as being open to it on the evidence and material before it and for the reasons it gave (without alteration):

132. As stated above, the following were all matters properly considered by the Tribunal and in respect of which the Tribunal made findings that were open to it on the evidence and material before for it for the following reasons that it gave:

i) the absence of the Applicant raising the effect of his conviction on any right of entry and residence to an EU state squarely before the Tribunal;

ii) the absence of any evidence whatsoever that prevented his entry into an EU state with a conviction;

iii) the opportunity given to the Applicant to present evidence and present arguments;

iv) the absence of any attempt by the applicants to enter an EU state (consistent with the Applicant’s own evidence);

v) the Tribunal’s consideration of the second applicant’s health issues in entering or being able to enter and reside an EU state;

vi) the Tribunal’s consideration of both the risk to the second applicant of refoulement to Latvia;

vii) the Tribunal’s consideration of the risk of persecution of the second applicant in Latvia because of her mental health condition;

viii) the consideration of any risk to the Applicant of refoulement to Latvia;

ix) the Tribunal’s consideration of the risk of persecution of the Applicant in Latvia;

x) the rejection by the Tribunal of the applicants claims.

1. The primary judge also rejected the second ground of the judicial review application, which related to adverse credibility findings made by the AAT concerning various aspects of the first appellant’s evidence. It is unnecessary to summarise this aspect of the FCCA proceeding because it is not challenged on appeal. This is a matter of some significance in circumstances where, as noted above, the AAT’s decision had an alternative basis to its findings concerning s 36(3), namely the rejection on credibility grounds of the appellants’ claims for protection by reference to both the Refugees Convention and complementary protection.

## The grounds of appeal

1. The notice of appeal contained the following five grounds of appeal (without alteration):

1. The Tribunal said that we both entered and resided in Germany. The Tribunal found no evidence that we "took all possible steps to avail ourselves of the right to enter and reside in other EU states". The Tribunal said that one possible step we could take would be to enter and reside in Germany, a fellow EU state near Latvia where we had allegedly resided temporary in the past. The Tribunal said that "the applicants all had legally enforceable right to enter and reside in other EU member states". The Tribunal concluded that we had effective state protection in a third country under s 36(3) of the Act.

2. The Tribunal ignored the following facts:

(i) Neither me nor my partner resided temporary in Germany (I traveled to and stayed in Germany for a couple of days as a tourist in 2001).

(ii) In 2001 Germany (as well as other EU states) was not "a fellow EU state" as Latvia joined EU in 2004.

(iii) As a person who had a criminal conviction I would be denied entry to or expelled from a 'fellow EU state' in accordance with the EU's Directive, which governs the free movement of EU citizens between Member States. According to the Directive free movement can be denied on grounds of public security.

(iv) As a person who had severe depression (and history of suicide attempts) my partner would be denied entry to or expelled from a 'fellow EU state' in accordance with the EU's Directive on grounds of public health.

3. The primary judge should have concluded the Tribunal ignored relevant facts and material and relied on irrelevant material or material which did not exist.

4. The primary judge should have concluded the Tribunal erred in its conclusion that we had effective state protection in a third country under s 36(3) of the Act.

5. The primary judge should have concluded that section 36(3) of the Migration Act did not apply to us because given our exceptional circumstances, such as my criminal conviction (which the Tribunal accepted) and my partner's mental state (which the Tribunal also accepted) we had neither the "right to enter", "the right to reside" in Germany or in any other EU states nor the right to obtain effective protection in these countries.

## The appellants’ submissions summarised

1. Directions were made on 24 April 2018 which required the appellants to file and serve an outline of written submissions no later than 10 business days before the hearing date. The Registry emailed the appellants on 30 July 2018 and drew attention to the fact that they had not filed an outline of written submissions by 25 July 2018 as required. The first appellant responded on 1 August 2018 stating that he had not received any correspondence from either the Court or the respondents that an outline of written submissions had to be filed by 25 July 2018. The Registry records include an email dated 24 April 2018 which was sent at 3:56 pm to the email address which appears at the bottom of the appellants’ notice of appeal, to which was attached a copy of the orders made on that day. The Registry emailed and wrote to the first appellant on 1 August 2018 drawing his attention to these matters and stating that, if he wished to file and serve a written outline of submissions, he should do so by close of business 6 August 2018 and seek leave from the Court to rely on that document at the commencement of the hearing on 8 August 2018.
2. On 1 August 2018, the appellants filed an outline of written submissions dated 31 July 2018. They contended that the “right” referred to in s 36(3) refers to a presently existing right and not a past or lapsed right or a potential right or an expectancy, citing *Suntharajah v Minister for Immigration & Multicultural Affairs* [2001] FCA 1391 (***Suntharajah***). They submitted that the issue to be determined in their case is whether they had legally enforceable right to enter and reside in EU countries. They repeated their submission that the AAT had erred in relying upon evidence that both the first and second appellants had visited Germany and also to the fact that Latvia did not join the European Union until 2004. Moreover, it was submitted that the primary judge erred in not upholding the appellants’ contention that the AAT should have found that there was a possibility that the appellants would be denied entry to an EU country on the grounds of public security, given the first appellant’s criminal conviction. It was also submitted that the primary judge erred in not finding that the AAT had fallen into error in not addressing the relevant issue concerning the second appellant, namely whether a person with mental health issues would be allowed to enter and reside in EU countries.
3. In brief, the appellants submitted that the primary judge should have accepted their contention that the AAT had ignored the following relevant facts:
4. neither the first nor second appellant resided temporarily in Germany;
5. Latvia did not join the EU until 2004;
6. as a person with a criminal conviction, the first appellant would be denied entry to or expelled from another EU state in accordance with the EU’s Directive;
7. given the second appellant’s mental health condition, she would be denied entry to or expelled from another EU state in accordance with the EU’s Directive and the ground of public health.
8. When the matter was called for hearing on 8 August 2018, through a friend of the first appellant, a request was made for the appeal to be adjourned because of a medical condition of the first appellant. A brief medical certificate was handed to the Court, which stated that the first appellant had a medical condition which rendered him unable to attend the Court for the period 7-9 August 2018. The hearing was adjourned to 10:15 am on 17 August 2018. At the outset of the resumed hearing, the Court granted leave to the same friend of the first appellant to participate as a McKenzie Friend. The first appellant was also assisted by an interpreter.
9. On 16 August 2018, the appellants attempted to file an amended outline of submissions which elaborated upon their earlier outline. At the outset of the hearing, and after hearing from the Minister, leave was granted for the appellants to rely upon the amended outline. The Court ruled that certain parts of the amended outline, which purported to be fresh or further evidence, would only be regarded as submissions, noting that the Minister opposed the material being adduced as evidence when it was not before either the AAT or the FCCA.
10. In the amended outline, the appellants identified various alleged errors of law in the AAT’s decision concerning irrelevant or unreliable material and ignoring relevant facts. In [11] of the amended outline, it was contended that, because of the first appellant’s poor English, he did not understand the AAT’s question at [38] of its reasons for decision. In [12] of the amended outline, it was contended that the AAT in [44] of its reasons for decision “put the own opinion (sic) and made the decision on that statement”. The first appellant confirmed in oral address and in response to a question from the Court that [11] and [12] of the amended outline related to ground 1 of the notice of appeal. Finally, the appellants contended in [15] of the amended outline that the AAT erred in not taking into consideration the best interests of the third appellant, as a minor child.

## The Minister’s submissions summarised

1. As noted above, there were five grounds of appeal. The Minister’s outline of written submissions dealt with grounds 1 and 2 together and grounds 4 and 5 together. In relation to what he described as ground 1 (namely grounds 1 and 2), the Minister relied upon case law which indicated that the word “right” in s 36(3) of the *Act* is not restricted to a legally enforceable right but can also refer to something less, including a “liberty, permission or privilege lawfully given” and “capable of withdrawal” (citing, *inter alia*, *V856/00A v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 408 per Allsop J and *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* [2013] FCAFC 91; 215 FCR 35 (***SZRHU***)).
2. The Minister contended that it was open to the AAT to find that s 36(3) applied to the appellants in circumstances where the AAT:
3. had regard to the delegate’s observation that there was an EU Directive of the European Parliament and of the Council of 29 April 2004 (2004/38/EC) which provided for the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States;
4. the first appellant did not provide the AAT with any information that would suggest that he or his family lacked a legally enforceable right to enter and reside in other EU countries; and
5. there was no evidence before the AAT that any discretion to exclude citizens of other EU states would be applied to the appellants and, in any event, would only be applied at the time that entry and residence was sought.
6. The Minister contended that material on the EU website which was referred to by the AAT concerning the right of EU citizens to live in another EU country, together with the first appellant’s acknowledgement that he and his wife had a right to enter and reside in other EU states, provided a sufficient basis for the AAT’s conclusion that they had a right to enter and reside in another EU state.
7. The Minister submitted that whether or not the AAT correctly concluded that the first and second appellants resided in Germany at some earlier time was not capable of establishing jurisdictional error. Nor did any such error arise from the AAT’s finding that the first appellant had travelled to Germany at a time prior to Latvia during the EU because this did not derogate from the AAT’s finding that the appellants had a right, in a broad sense, to enter and reside in another EU state. At the time of the AAT’s decision Latvia was member of the EU.
8. The Minister also defended the primary judge’s finding that there was no evidence before the AAT that the appellants had taken any steps at all to seek protection in another EU state, which underpinned the AAT’s conclusion that they had not taken “all possible steps” to avail themselves of protection in other country for the purpose of s 36(3) of the *Act*. The primary judge observed that while the first appellant had told the then Refugee Review Tribunal in the earlier proceedings that he had made inquiries of certain embassies as to whether he had a right to reside in their countries, there was no evidence in the Court below that he had pursued those inquiries or that they had produced any results.
9. As to what the Minister described as the second ground of appeal (i.e. ground 3), he contended that neither the primary judgment nor the AAT’s reasons for decision disclosed any material to support the appellants’ claim that the AAT took into account irrelevant considerations.
10. As to what the Minister described as the third ground of appeal (i.e. grounds 4 and 5), he contended that there was no general obligation on the AAT to carry out an investigation for itself as to whether the appellants had a right to enter and reside in an EU state, citing *SGLB* at [43].
11. Finally, the Minister drew attention to the fact that, apart from the AAT’s conclusions regarding s 36(3), the AAT also rejected the appellants’ claims under ss 36(2)(a) and (aa) of the *Act* and no appeal has been brought in relation to those findings. Accordingly, it was submitted that the AAT’s findings would stand even if, contrary to the above, there was a jurisdictional error established in respect of the AAT’s conclusions concerning s 36(3).

## Consideration and determination

1. As the Minister pointed out in his outline of written submissions, even if one or more of the appellants’ grounds of appeal was established, the appellants did not challenge the primary judge’s reasons for dismissing their claims in respect of the AAT’s rejection of their cases under both ss 36(2)(a) and (aa) of the *Act*. The appellants did not seek leave to amend their original notice of appeal and they did not suggest that their amended outline of submissions was intended to go beyond that notice of appeal. The Court went to some lengths to have the appellants identify which particular grounds of their notice of appeal were relevant to the amended outline. In circumstances where none of those grounds of appeal challenges the primary judge’s rejection of their claims that the AAT fell into jurisdictional error in rejecting their claims for protection either as refugees or under complementary protection, any appealable error in relation to s 36(3) is immaterial. For that reason alone, the appeal must be dismissed.
2. For completeness, however, I would dismiss each of the five grounds of appeal, substantially for the reasons set out in the Minister’s submissions. The appellants have established no appealable error in the primary judge’s reasoning or orders.
3. As to grounds 1 and 2, no error has been established in relation to her Honour’s conclusion at [132] that it was open to the AAT to make the findings that it did in respect of its conclusion that the appellants had a right to enter and reside in other EU countries (see [18] above). I accept the Minister’s submission that, even if there was an erroneous finding of fact made by the AAT in respect of the issue whether either the first or second appellants had resided in Germany or that the first appellant’s visit there occurred before Latvia joined the EU, at the time of the AAT’s decision Latvia was a member of EU and there was material before the AAT (as identified by the primary judge at [114] and [115] of her Honour’s reasons for judgment) to ground the AAT’s finding that the appellants had a right to enter and reside in other EU countries.
4. I reject the appellants’ submission that the issue to be determined is whether they had a “legally enforceable right” to enter and reside in EU countries. That submission is inconsistent with *SZRHU*, which makes plain that s 36(3) is not confined to a legally enforceable right, but also encompasses a liberty, permission or privilege lawfully given.
5. Nor has any appealable error been established in respect of the primary judge’s finding at [122] that there was no evidence before the AAT to support the claim that the first and/or second appellants may be excluded from such countries because of the first appellant’s criminal conviction or the second appellant’s mental health issues. In particular, there was no evidence before the AAT to suggest that any discretion to exclude citizens of EU countries on account of public security or public health grounds would be applied unfavourably to either of them. As the primary judge observed at [123] of her Honour’s reasons for judgment, it could only be at the time of seeking entry and residence in an EU country that any discretion to exclude on public security or public health grounds would be exercised. Notwithstanding that the appellants contended that the discretion would be exercised unfavourably to them, they provided no evidence below to support that contention, even though they were given the opportunity to do so in the FCCA (see [121] of the primary judge’s reasons for judgment). In this Court the appellants sought to put into evidence a document dated 2016 from the European Parliament which contained a table setting out statistics concerning the refusal to grant residence in various EU member countries during the period 2011-2015 (MFI 1). The Minister opposed this course. The Court ruled the material to be inadmissible in circumstances where it was not before either the AAT or the FCCA and no explanation was provided as to why the appellants did not take the opportunity to put the material before the FCCA. Moreover, there was nothing in the material to suggest that it had any relevance to the individual circumstances of the appellants.
6. The appellants have been on notice from the terms of the first Refugee Review Tribunal decision dated 25 November 2008 that it was considered that, as citizens of a EU member country, they could enter and reside in any EU country. There is also a reference in the reasons for decision of the AAT to the delegates who assessed the appellants’ first and second protection visa applications having made a similar finding. These matters were referred to by the primary judge at [57]-[58] of her Honour’s reasons for judgment.
7. The appellants must have appreciated the relevance of a EU Directive on the question of the right to enter and reside in another EU country. Ground 3.5 of their amended application for judicial review in the FCCA referred to an EU Directive and to the freedom of movement of EU citizens being denied on grounds of “public policy, public security or public health”. The primary judge noted at [114] of her Honour’s reasons for judgment that the FCCA was informed by the first appellant that he had given the AAT a copy of the relevant EU Directive and that there was also a specific reference by the second delegate to Directive 2004/38/EC. Her Honour noted at [116] that the first appellant was unsure whether the Directive he provided to the Tribunal was that particular Directive or material on a Europa internet site to which the first Refugee Review Tribunal made reference (see [115] and [116] of the primary reasons for judgment). In any event, it appears that a copy of the Directive was not in evidence before the FCCA nor included in the material in this appeal.
8. To the extent that the appellants’ complaint is that the AAT itself should have made inquiries to resolve the issue whether or not the appellants might be refused entry or expelled from EU countries on public security or public health grounds, I respectfully agree with the primary judge’s reasoning at [128] to [130] that there is no general obligation on the AAT to make such inquiries. Nor does the appellants’ case fall within any of the narrow exceptions to that general principle.
9. As to ground 3, the appellants have not established that the primary judge erred in rejecting their claim that the AAT ignored relevant facts and material or relied on irrelevant or non-existent material.
10. With respect to the four matters raised in the appellants’ outline of written submissions filed on 1 August 2018 (see [23] above):
11. any error of fact by the AAT concerning the first or second appellants’ travels to Germany is not material given that there was other material before the AAT which indicated that the appellants had a right to enter and reside in other EU countries;
12. the same may be said in respect of the appellants’ contentions relying upon the fact that Latvia only joined the EU in 2004; and

(c)-(d) there was no evidence before the AAT to suggest that the discretion to exclude citizens of EU countries on public security or public health grounds would be exercised unfavourably to the first or second appellant.

1. As to grounds 4 and 5, the appellants have not established any error by the primary judge in rejecting their challenge to the AAT’s findings in respect of s 36(3) of the *Act*. I accept the Minister’s submissions which are summarised at [33] above.
2. I do not consider that *Suntharajah* assists the appellants. That decision of Gray J applied the view of the Full Court in *Minister for Immigration and Multicultural Affairs v Applicant C* [2001] FCA 1332 (***Applicant C***), that the “right” referred to in s 36(3) is a legally enforceable right. That view was subsequently rejected in *SZRHU* at [75] per Buchanan J, with whom Tracey, Robertson and Griffiths JJ agreed. In any event, *Suntharajah* turned very much on its own facts. The applicant there contended that he did not have a right to enter and reside within the UK notwithstanding that he possessed a UK student visa. He said that his visa would be cancelled if he returned to the UK because he had ceased studying there and left the country. Importantly, Gray J noted at [18] that the Tribunal seemed to have assumed that this argument had some strength. His Honour held that the Tribunal was bound to resolve the issue as to whether, in these circumstances, the applicant’s student visa was likely to be cancelled.
3. That is to be contrasted with the position here where the appellants failed to adduce any evidentiary material in support of their contention that they did not have a right of entry and residence in an EU country because of the discretion to exclude EU citizens on public security or public health grounds. Having themselves raised these matters as qualifying the freedom of movement of EU citizens, they needed to provide sufficient material to establish that they fell within the qualifications and were likely to be refused entry or expelled.
4. As to the other alleged errors committed by the AAT as raised in the appellants’ amended outline of submissions (and putting to one side whether all these matters were run below):
5. It is difficult to see how the material relating to mental health care in Latvia which the AAT referred to in [20] of its reasons for decision was irrelevant in circumstances where the appellants had raised the issue of the second appellant’s mental health condition.
6. The claim that the material referred to by the AAT at [25] was “unreliable” goes to the merits of the matter.
7. As to the contention that the AAT had applied the “wrong law” in [21] and [24] of its reasons for decision, the appellants failed to identify how the Tribunal erred in concluding that the evidence before it did not suggest that Latvia discriminates against people with mental health conditions.
8. The appellants contended that it was wrong to equate the right to a long-term stay in a country with citizenship or residency, referring to [27] of the AAT’s reasons for decision, however, that paragraph relates to what the delegate found, not the AAT.
9. The appellants repeated their submissions concerning the nature of their visits to Germany, the timing of Latvia’s membership of the EU, the fact of the first appellant’s criminal conviction and the second appellant’s mental health condition, matters which have been addressed above.
10. There are three other matters. The first relates to the issue raised in the amended outline of submissions concerning the first appellant’s poor English and the answer he gave to the AAT as recorded in [38] of its reasons for decision. No evidence has been provided to support the appellants’ claim that the first appellant “clearly indicated that [he] did not understand what the question was about”. The appellants were given the opportunity in the FCCA to put a copy of the AAT transcript into evidence but they declined to do so (see [121] of the primary judge’s reasons for judgement).
11. Secondly, the appellants claim that [44] of the AAT’s reasons for decision reveal that the AAT substituted its “own opinion”, upon which it made its decision. The AAT explained in that paragraph why it was not satisfied that the second appellant was at risk for any Convention-related reason by reference to both her mental health, her husband’s claims or her Russian ethnicity. These matters are findings by the AAT and form part of the basis for its rejection of the appellants’ claims for protection, matters which are then expanded upon in [53]-[67] of the AAT’s reasons for decision. As noted above, there is no ground in the notice of appeal which is directed to the appellants’ claims for protection and the correctness of the primary judge’s rejection of their judicial review grounds relating to those claims.
12. Thirdly, the same may be said in respect of the appellants’ contentions concerning the best interests of the third appellant as a minor child. In any event, it is plain on the face of the AAT’s reasons for decision that consideration was given to the position of the third appellant (see, for example, [45], [56] and [68]).

## Conclusion

1. The appeal should be dismissed and the appellants ordered to pay the first respondent’s costs as agreed or assessed.

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| I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 29 August 2018