FEDERAL COURT OF AUSTRALIA

ALP15 v Minister for Immigration and Border Protection [2019] FCA 1123

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| Appeal from: | *ALP15 v Minister for Immigration and Border Protection* [2017] FCCA 1418 |
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| File number(s): | NSD 1225 of 2017 |
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| Judge(s): | **FARRELL J** |
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| Date of judgment: | 23 July 2019 |
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| Catchwords: | **MIGRATION** –appeal from the Federal Circuit Court of Australia – where primary judge dismissed an application for judicial review of a decision of the Administrative Appeals Tribunal to affirm a decision of a delegate of the Minister for Immigration and Border Protection refusing to grant ALP15 a Protection (Class XA) visa – application to extend time to appeal granted by consent – whether Tribunal lawfully considered whether the cumulative effect over time of “low level harassment” amounts to serious harm within the meaning of s 5J(4)(b) of the *Migration Act 1958* (Cth) – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) s 5J |
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| Cases cited: | *ALP15 v Minister for Immigration and Border Protection* [2017] FCCA 1418  *BZAFM v Minister for Immigration and Border Protection* [2015] FCAFC 41;321 ALR 117  *SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 80; 76 ALD 625  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 |
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| Date of hearing: | 19 July 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 |
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| Number of paragraphs: | 31 |
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| Counsel for the Appellant: | Mr L Karp |
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| Solicitor for the Appellant: | Rasan T. Selliah & Associates |
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| Counsel for the First Respondent: | Mr T Reilly |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent submitted to any order of the Court, save as to costs |

ORDERS

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|  | | NSD 1225 of 2017 |
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| BETWEEN: | ALP15  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | FARRELL J |
| DATE OF ORDER: | 23 July 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant must pay the first respondent’s costs as agreed or taxed.

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

REASONS FOR JUDGMENT

FARRELL J:

# Introduction

1. The appellant (who will also be referred to as **ALP15**) arrived in Australia in July 2012 as an undocumented unauthorised maritime arrival.
2. ALP15 applied for a Protection (Class XA) **visa** on 6 December 2012 but a **delegate** of the **Minister** for Immigration and Border Protection refused to grant the visa on 23 September 2013. The Refugee Review Tribunal (**RRT**) affirmed the delegate’s decision on 18 March 2015. The RRT’s decision was quashed on 5 April 2016: see *ALP15 v Minister for Immigration and Border Protection* [2016] FCCA 1151 and the application was remitted for decision according to law. Following a further review of the delegate’s decision by the Administrative Appeals **Tribunal**, it affirmed the delegate’s decision on 28 September 2016.
3. ALP15 applied to the Federal Circuit Court of Australia (**FCCA**) for judicial review of the Tribunal’s decision. The FCCA Judge dismissed the application: *ALP15 v Minister for Immigration and Border Protection* [2017] FCCA 1418.
4. By consent, orders were made extending time to appeal the FCCA’s decision and the draft notice of appeal attached to the affidavit of Rasan Selliah, dated 21 July 2017 was treated as being filed. Although the draft notice of appeal contained two grounds, having regard to the High Court’s decision in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 only one ground of appeal was pressed.

# Ground of appeal

1. The sole ground of appeal can be summarised as that the FCCA erred in finding (at J[29]-[33]) that the Tribunal lawfully considered whether the cumulative effect over time of what it called “low level harassment” amounts to serious harm within the meaning of s 5J(4)(b) of the *Migration Act 1958* (Cth).
2. Relevantly to the ground of appeal, s 5J(1) of the *Migration Act* defines when a person has a well-founded fear of persecution. Under s 5J(4)(b), if a person fears persecution for one of the reasons specified in s 5J(1), the persecution must involve “serious harm”. Section 5J(5)(f) states that, for the purposes of s 5J(4)(b), “serious harm” means “denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist”.

# Claims to fear harm and Tribunal findings

## Claims

1. In written submissions filed by ALP15’s counsel, ALP15’s claims for protection were summarised as follows:

i He is a young Tamil from Trincomalee in the Eastern Province of Sri Lanka.

ii In 1996 his grandfather was shot and killed by the Sri Lankan Navy.

iii In 2006 the Sri Lankan military went on a rampage after a bomb exploded in Trincomalee town five minutes after the applicant and his sister passed the spot. They created havoc. The deterioration in security caused the family to flee to India for months.

iv After their return, in February 2008, he was interrogated by the Karuna Group (a Tamil paramilitary group allied to the government). In May 2008 his cousin disappeared after being taken in for questioning.

v. During 2009, the applicant, his father and uncle suffered continual harassment, and beatings at the hands of the Sri Lankan navy whilst trying to work as fisherman.

vi. Around January 2011, whilst the applicant was fishing with his father, some unknown men who spoke Tamil came to the applicant’s home and told his mother he was wanted for questioning. Based on his previous experiences and what had happened to his cousin, he left the country. After some months in Singapore and Malaysia, in which he faced many difficulties, he decided to return to Sri Lanka, hoping that the situation had improved.

vii. In 2012, he was taken in a white van, interrogated about his knowledge of an LTTE fund raiser known as “Nagulan”, and tortured. He was held for two to three days before being released. He decided to flee the country after that.

1. The submissions go on to note:

7. A further claim raised at the first tribunal hearing was that Sri Lankan intelligence officers had questioned his parents in mid 2014. He claimed that they had said that there was a request from the Australian Government as to whether the applicant had a terrorist background or had been involved in criminal activities (AB 313 [34]).

8. The ability of a Tamil fisherman to pursue their occupation was specifically raised in submissions to the Department at AB 123-125 and 181-185, in a submission following the first Tribunal hearing at AB 283-284, although the information in the latter submission pertained mainly to Indian Tamil fishermen from the state of Tamil Nadu. The specific submissions were that Tamil fisherman were being excluded from traditional fishing areas by Singhalese with the connivance of officials and the military, that Singhalese fisherman and the military continue to mistreat Tamil fisherman by destroying their nets and taking fish from them and in physically attacking them. It was submitted that this threatened the livelihoods of Tamil fishermen.

9. The applicant’s solicitor and migration agent lodged another submission after the hearing held by the second Tribunal (AB 351-358). As relevant to the proposed appeal, that submission canvassed relevant provisions of the Migration Act, aspects of the of his credit including his contacts with “Nagulan”, the particular social groups to which he was said to belong.

## Tribunal findings

1. In its decision record (or **DR**) the Tribunal found as follows:
2. It accepted that ALP15, his father and uncle experienced harm during their fishing work, including in 2009: DR[78].
3. It did not accept that ALP15 was abducted in 2012 or that his parents were visited by men asking for him in 2014: DR[87]-[88].
4. It did not accept that ALP15 had a profile of the kind that required particularly careful attention within the UNHCR’s 2012 Eligibility Guidelines: DR[91].
5. As ALP15 had gained work experience in Australia in an industry other than fishing, he has some training in computing and English and he has a brother who was then studying electronics, the Tribunal expressed “some doubt” that he would return to fishing. It nonetheless accepted that the only form of work in which ALP15 had engaged in Sri Lanka was fishing and that his father remains employed as a fisherman, the Tribunal considered ALP15’s position should that transpire: DR[95].
6. The Tribunal was not satisfied that ALP15 was questioned and beaten by the Sri Lankan Navy after 2009. It noted that he continued to work as a fisherman until he left Sri Lanka in 2012 and he gave evidence that the problems he had experienced eased off after the end of the conflict. His evidence as to more recent difficulties was vague and lacked detail: DR[96].
7. It noted that ALP15 had complained of the impact of fuel costs, nets being stolen and Sinhala fishermen encroaching on what had been Tamil fishing areas, and the “authorities” siding with the Sinhala fishermen when there was a dispute. In considering the evidence, the Tribunal noted that ALP15’s father had continued in “this line of work” and appears to have been able to support his family despite these difficulties and had experienced no further attacks but sometimes his catch was taken by Sinhala fishermen and there was nothing he could do: DR[97].
8. At DR[98]:

The Tribunal is not satisfied on the evidence that there is a real chance or risk of the applicant being seriously or significantly harmed by either the Sri Lankan Navy or Sinhala fisherman should he return to Sri Lanka now or in the reasonably foreseeable future. In particular, the Tribunal does not accept that there is now a real chance or risk of the applicant experiencing harm of the kind he suffered in 2009 prior to the cessation of hostilities. The Tribunal accepts that there is a real chance or risk that the applicant may experience some low level harassment or interference with his work and that he may have limited means of recourse to the authorities should he experience such treatment or become involved in a dispute with a fellow fisherman. The Tribunal is not satisfied, however, that such treatment or any failure to protect the applicant in these circumstances involves serious harm amounting to persecution or significant harm, as that term is defined, such as pain or suffering that is severe, cruel of inhuman, or treatment that is intended to cause extreme humiliation.

# FCCA proceedings

1. The ground of appeal relates to ground 2 in the FCCA proceedings. That ground was expressed as follows:

2. The Second Respondent committed jurisdictional error by failing to consider a claim or an integer of claim that arose either expressly or clearly on the information and evidence before it.

(a) The second respondent (the Tribunal) failed to consider whether the “low level harassment” that it accepted (at CB 400 [98]) may be continually inflicted on the applicant and his father while fishing for their living and whether the cumulative effect of such “low level harassment” may amount to serious harm within the meaning of s.5J(4)(b) of the Migration Act.

1. The FCCA Judge noted (at J[8]) the contention made by ALP15’s counsel that the Tribunal had failed to deal with ALP15’s claim that he may be continually inflicted with conduct that the Tribunal found to be “low-level harassment” in circumstances where it did not consider the cumulative effect of that conduct.
2. The FCCA Judge noted the evidence on which ALP15 relied in support of his claims. It may be summarised as follows:
3. ALP15’s statement in support of his protection visa application (at J[8]):

We have problems with the Sinhalese fishermen, they cut our nets and cause problems because we are Tamils.

1. ALP15’s account of the incidents in 2009 where he and his father were prevented from fishing at sea and beaten by the Sri Lankan Navy. On a second occasion, they were ordered to jump into the water (at J[9]). He stated:

Such problems continue to this day, as the Sri Lankan Navy and other Sinhala fishermen harass Tamil fishermen and prevent us from fishing peacefully at sea. They often damage our fishing nets and other fishing gear.

1. Submissions made on ALP15’s behalf which cited excerpts from country information, including country information that stated:

The entire coast is now a monopoly of Sinhala fishermen who have come with hundreds of boats while the resettled Tamil fishermen of the land cannot get into the waters, and that the Tamil fishermen have lost their boats in the war and the resettled among them now try for their subsistence with hand nets.

That submission also referred to recent government actions that had begun to affect Tamil fisherman of Indian heritage whose livelihoods were being threatened to the point where it may not be possible for them to subsist in the foreseeable future: J[10]-[11].

1. A submission made by ALP15’s migration agent recounting country information and a further statement by ALP15 in which he stated that he believed that the situation in his area for Tamil fisherman was evolving and he would remain at a real chance of encountering similar or worse harm by Sri Lankan authorities or Sinhala fishermen while working on his job in the reasonably foreseeable future. ALP15 stated his belief that the interests of Sinhala fishermen are to the detriment of local fishermen and this has been identified as posing a threat to the livelihoods of Tamil fisherman in these areas. The statement also referred to country information which stated that the military is protecting Sinhala fishermen’s monopoly by attacking fishing boats of their competitors from neighbouring Tamil Nadu: J[12]-[13].
2. At J[14]-[20] the FCCA Judge discussed how the Tribunal dealt with these matters. This discussion accurately reflects DR[42]-[48], and in particular DR[48].
3. At J[21]-[28], the FCCA Judge summarised the Tribunal’s findings (at DR[95]-[98]) which are briefly summarised at [9] above.
4. At J[28], the FCCA Judge recorded Mr Karp’s submission that the Tribunal had failed to consider the cumulative effect of APL15’s expressed concerns over the impact of fuel costs, nets being stolen, Sinhala fishermen being allowed into the area and authorities taking their side in disputes. At J[29]-[33], her Honour considered that submission and the submission that ALP15 had claimed before the Tribunal that the conduct would continue and evolve. At J[34], her Honour found that ground 2 had not been made out.
5. For convenience, J[29]-[33] are set out below:

29 The Tribunal stated that following its consideration of the evidence and its findings that it had considered the applicant’s claims individually and cumulatively, it was not satisfied that the applicant has a well-founded fear of being persecuted in Sri Lanka. In my view, that statement accurately reflects the manner in which the Tribunal considered the applicant’s claims. The Tribunal expressly referred to the totality of the applicant’s concerns and that despite those concerns, the applicant’s father had continued in the same line of work and had been able to support his family.

30 Mr Karp submitted that the applicant’s claims before the Tribunal were that the conduct would continue and was evolving on the evidence before the Tribunal. However, in my view, the Tribunal was entitled to have regard to the particular evidence of the applicant before it in finding that there was not a real chance of the applicant being seriously or significantly harmed by either the Sri Lankan Navy or Sinhala fishermen should he return to Sri Lanka as a fisherman now or in the reasonably foreseeable future; and that any such harm that he may suffer did not amount to more than low-level harassment or interference with his work.

31 The Tribunal specifically accepted that the applicant may have limited means of recourse to the authorities should he experience such treatment or become involved in a dispute with a fellow fisherman. It is clear from the Tribunal’s reasons that its conclusions resulted from the applicant’s vague details of more recent difficulties or problems since the easing of hostilities in 2009; that the applicant had continued to work as a fisherman after those instance; and, that his father continued to work as a fisherman and support his family financially. The country information, to which I have referred above, referred to instances where fishermen no longer had boats and were forced to continue fishing with nets. As stated above, this was not the position of the applicant’s father.

32 The Tribunal’s findings and conclusions were open to it on the evidence and material for it and for the reasons it gave.

33 In the circumstances, the Tribunal’s finding that the harm the applicant may suffer in the future, being low-level harassment or interference with his work, was based on a cumulative consideration by the Tribunal of the applicant’s claims and his concerns in relation to the impact of fuel cost, his nets being stolen, Sinhala fishermen being allowed into the area and the authorities taking the side of the Sinhala fishermen in the event of disputes.

# ALP15’s Submissions

1. Counsel who appeared for ALP15 in the FCCA proceedings also appeared for him on the appeal. He raised essentially the same arguments and referred to documents discussed in the FCCA Judge’s reasons in seeking to demonstrate jurisdictional error by the Tribunal.
2. Counsel for ALP15 submitted that the Tribunal implicitly accepted ALP15’s concerns that Tamil fishermen experienced their nets being damaged and their catches being stolen without effective recourse to assistance from authorities and that Sinhala encroachment on traditionally Tamil fishing grounds was being supported by the Sri Lankan Navy because the Tribunal characterised the matters as “low level harassment”. He says that the Tribunal failed to take into account that this was continuing conduct which was detrimental to the livelihood of Tamil fisherman, like the appellant, because it affected their tools of trade and impacted their income through stolen catches. He submitted that the Tribunal did not, as a matter of substance rather than form, consider whether this conduct, continuing into the future, cumulatively would amount to persecution.
3. Counsel submitted that the Tribunal did not take into account that the situation was evolving. He said that it failed to take account of the submission made by the ALP15’s migration agent in the context of the country information to the effect that fishing areas traditionally used by Tamils are being progressively taken over by Sinhala fishermen with the connivance of government officials. He relied on that part of the migration agent’s submissions which appeared at AB124-125 which referred to the resettlement of Tamil fishermen in another area who were not able to enter the water because they faced attacks by Sinhala and Muslim intruders and the submissions that Tamil fishermen were being “… denied the capacity to earn a livelihood to the point where they are unable to subsist” and “the situation could only get worse in the foreseeable future”.
4. Counsel accepted that single or isolated events may constitute “low level harassment”, but said that the cumulative effect of such events over time may damage a person’s livelihood to the point where “serious harm” amounting to persecution is caused within the definition in s 5J of the *Migration Act*. He submitted that whether the culmination of low level harassment or discrimination, can over a period of time, amount to “serious harm” depends on the nature of the harm and its duration and frequency.
5. Counsel referred to the Full Court’s decision in *BZAFM v Minister for Immigration and Border Protection* [2015] FCAFC 41; 321 ALR 117 (***BZAFM***) at [56]-[66] for the proposition that the inclusion of s 91R of the *Migration Act*, being the statutory predecessor of s 5J, did not affect (by which the Court understands him to mean “narrow”) the meaning of “persecution” in the Refugees Convention.
6. In *BZAFM* at [56], the Full Court set out paragraphs [19], [22] and [25] of the explanatory memorandum in relation to s 91R of the *Migration Act*, the statutory predecessor of s 5J of the *Migration Act*. Having set out the proposed content of s 91R of the *Migration Act* at [22], the explanatory memorandum stated as follows at [25] (words relied on by counsel are in bold):

25. … Persecution must constitute serious harm. The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, **serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual**.

1. Counsel also relied on the Full Court’s decision in *SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 80; 76 ALD 625 (***SCAT***)at [19]-[23] (per Madgwick and Conti JJ, Gyles J dissenting). In *SCAT* at [23], Madgwick and Conti JJ noted the claim had been raised that the appellant in that case (from a minority religion in Iran) and his family were likely to suffer considerable discrimination, including in highly personally offensive terms, the cumulative effect of this was likely to entail severe psychological harm. In *SCAT* at [25], Madgwick and Conti JJ found that the Tribunal member had a legal duty to consider this matter.
2. In summary, it was counsel’s contention that in this case the Tribunal failed to recognise that repeated events of the kind which concerned the appellant could, cumulatively, meet the definition of serious harm in s 5J(5)(f) of the *Migration Act* by removing his capacity to earn a living to such an extent that his capacity to subsist would be threatened.

# Consideration

1. The Court accepts the Minister’s submission that the FCCA Judge dealt comprehensively and correctly with the complaint raised in ground 2 of the application for review and that ALP15 has not established any error in her Honour’s conclusion that ground 2 was not made out.
2. The FCCA Judge correctly identified the nub of the complaint raised by ground 2 at J[8] and recorded the submissions made by counsel for ALP15 (at J[28]) that the Tribunal had failed to consider the cumulative effect of APL15’s expressed concern over the impact of fuel costs, nets being stolen, Sinhala fishermen being allowed into the area and authorities taking their side in disputes and (at J[30]) that the appellant’s claims before the Tribunal were that the conduct would continue and was evolving on the evidence before the Tribunal. Both of those submissions were repeated on the appeal.
3. The FCCA Judge noted the evidence which had been before the Tribunal to which counsel for the appellant took the court, including the country information to which counsel referred in the submission on appeal at J[8]-[13].
4. The FCCA Judge accurately summarised the course of the Tribunal’s consideration of the appellant’s claims. Having regard to ss 5J(4)(b) and 5J(5)(f), the issue of which the Tribunal had to be satisfied was whether or not, having regard to the totality of the appellant’s claims, he would be able to subsist as a fisherman if he returned to Sri Lanka “now and in the foreseeable future”. The Tribunal questioned the appellant about this, and it recorded the questioning at DR[42]-[48]. It is appropriate to set out DR[48] in full:

The applicant told the Tribunal that he would probably resume work as a fisherman if forced to return to Sri Lanka as he didn’t know anything else. The Tribunal asked the applicant whether he had any fears about returning to Sri Lanka and resuming work as a fisherman. The applicant expressed concern about the impact of fuel expenses, lots of Sinhala fisherman being allowed into the area, his nets being stolen and getting into disputes with Sinhala fishermen in which the authorities may take the Sinhala fishermen’s side. The Tribunal noted that the applicant’s father continued to earn a living as a fisherman and the problems the applicant had described appeared more in the nature of frustrations, annoyances or obstacles to the applicant earning the kind of living he hoped for as a fisherman rather than persecution or significant harm as defined. The applicant responded that fishermen were still being humiliated and harmed by the Navy of Sinhalese fishermen and distracted from their fishing. The Tribunal asked the applicant whether his father had experienced any particular difficulties with Sinhalese fishermen. The applicant said that there had been no attacks on his father but he had told the applicant that sometimes they would take their catch and if they refused to return it there was nothing they could do.

1. In forming her conclusions at J[30] and [33], the FCCA Judge did not err in her findings that:
2. The Tribunal took into account the totality of the appellant’s concerns but balanced them against his father’s actual experience of being able to support his family from working as fisherman in the same area to which he would return.
3. In addressing the submission that the conduct of the Sinhala fishermen and the Sri Lankan Navy would continue and was evolving on the evidence before the Tribunal, the Tribunal was entitled to have regard to the appellant’s particular situation. That evidence included the appellant’s vague evidence about difficulties encountered since the easing of hostilities in 2009, that the appellant had continued to work as a fisherman up until 2012 and that his father continued to work as a fisherman in the same area and support his family, in contrast to some of the country information where fisherman no longer had boats and were forced to fish with nets.
4. The Tribunal’s finding that the harm the appellant may suffer in the future was low-level harassment or interference with his work was based on a cumulative consideration of his claims and concerns in relation to the impact of fuel costs, nets being stolen, Sinhala fisherman being allowed into the area and the authorities taking their side if a dispute occurred.
5. This case is clearly distinguishable from *SCAT*, where the cumulative effect of harassment was found to be likely to result in serious psychological harm. In this case the FCCA Judge did not err in finding that it was open to the Tribunal on the evidence before it and for the reasons that it gave to find that the appellant had not established that, if he returned to the same area of Sri Lanka in which his father continued to operate as a fisherman, there was a real chance that the appellant would be deprived of a capacity to earn a livelihood or threatened with being unable to subsist in the reasonably foreseeable future, as required to meet the test in s 5J(5)(f) of the *Migration Act*.

# Conclusion

1. The appeal should be dismissed with costs.

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| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate:

Dated: 23 July 2019