Federal Court of Australia

CYH16 v Minister for Immigration and Border Protection [2023] FCA 453

|  |  |
| --- | --- |
| Appeal from: | *CYH16 v Minister for Immigration & Anor* [2020] FCCA 1596 |
|  |  |
| File number(s): | VID 500 of 2020 |
|  |  |
| Judgment of: | **ROFE J** |
|  |  |
| Date of judgment: | 11 May 2023 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia – application for extension of time in which to appeal from decision of Federal Circuit Court – application for extension of time allowed– where appellant sought to rely on two new grounds that were not relied upon in the Federal Circuit Court – whether leave should be granted to the appellant to rely on the new grounds – appeal dismissed  |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) ss 36, 65. 91R *Migration Regulations 1994* (Cth) Sch 2*Federal Court Rules 2011* (Cth) rr 36.03, 36.05*Immigrants and Emigrants Act 1949* (Sri Lanka)  |
|  |  |
| Cases cited: | *A101/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 556; (2004) 82 ALD 787*BLX16 v Minister for Immigration and Border Protection* [2019] FCAFC 176*CYH16 v Minister for Immigration and Ano*r [2020] FCCA 1596 *DKT16 v Minister for Immigration and Border Protection* [2019] FCAFC 208*GOK18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 169*Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26*O'Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310*SZTIB v Minister for Immigration and Border Protection* [2015] FCAFC 40*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588*Zheng v Cai* (2009) 239 CLR 446; [2009] HCA 52 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 62 |
|  |  |
| Date of hearing: | 4 April 2023  |
|  |  |
| Counsel for the Applicant: | Mr S Sharify |
|  |  |
| Solicitor for the Applicant: | Carina Ford Immigration Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr T Goodwin |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |
|  |  |
| Solicitor for the Respondents: | Mills Oakley  |

ORDERS

|  |  |
| --- | --- |
|  | VID 500 of 2020 |
|   |
| BETWEEN: | CYH16Applicant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| order made by: | ROFE J |
| DATE OF ORDER: | 11 May 2023 |

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to Minister for Immigration, Citizenship and Multicultural Affairs.
2. The appeal be dismissed.
3. The Applicant 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

ROFE J:

1. This is an appeal from a decision of the Federal Circuit Court (**FCC**) in *CYH16 v Minister for Immigration & Ano*r [2020] FCCA 1596.
2. The primary judge dismissed the applicant’s application for judicial review of the second respondent’s (the **Tribunal**) decision made on 26 September 2016 affirming the decision of the delegate of the first respondent (the **Minister**) not to grant a protection visa pursuant to s 65 of the *Migration Act 1958* (Cth) (the **Act**).
3. The applicant now seeks to appeal the orders made on 18 June 2020 dismissing the application for judicial review, and requires an extension of time to do so. If an extension of time is granted, he seeks leave to amend the proposed notice of appeal to advance the following two new grounds of appeal, not raised before the FCC:
4. The Tribunal fell into error by failing to consider an integer of the Applicant’s claim that: a) he had a well-founded fear of persecution because of the possibility of being charged and imprisoned for leaving Sri Lanka illegally and returning as a failed, Tamil Asylum Seeker; and b) the Applicant faced a real risk of significant harm as a necessary consequence of being removed from Australia.
5. The Tribunal fell into error by misunderstanding the meaning of a) whether a person who fears persecution for reasons of race or religion; and b) “systematic and discriminatory conduct” in s 91R(1)(c) of the Act, or in the alternative, failed to take into account that the Applicant had left Sri Lanka because he feared persecution as a Tamil.
6. For the reasons set out below, I grant leave to extend the time in which to file an appeal, but I do not grant leave to amend the notice of appeal, and I dismiss the appeal.

# Background

1. The applicant is a Tamil citizen of Sri Lanka who arrived in Australia as an irregular maritime arrival in June 2012, and applied for a Protection (Class XA) visa on 6 November 2012. The applicant primarily claimed to fear harm on the basis of his father’s alleged membership of or links with the Liberation Tigers of Tamil Eelam (**LTTE**).
2. On 10 April 2014, a delegate of the Minister did not accept the applicant’s claims and refused to grant the applicant a visa.
3. Following the FCC quashing, by consent, a previous decision of the Tribunal affirming the delegate’s decision, the Tribunal (differently constituted) affirmed the decision of the delegate on 26 September 2016.
4. The Tribunal considered the protection criteria set out in s 36 of the Actand in Schedule 2 to the *Migration Regulations 1994* (Cth). That is, whether the applicant is either a person in respect of whom Australia owes protection obligations under the “refugee” criterion, or on other “complementary protection” grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
5. The Tribunal considered the applicant’s claims but had significant concerns about the applicant’s credibility and did not consider him to be a credible witness. I adopt the Minister’s summary of the Tribunal’s factual findings:

A critical basis for the Tribunal’s decision to reject the Applicant’s claims to fear harm associated with imputed political opinion (regarding his or his father’s links to the LTTE) was an adverse credibility finding against the Applicant. The Tribunal did not consider that the Applicant was a credible witness for six primary reasons, some of which involved inconsistencies in the evidence before the Tribunal.

…

Further, the Tribunal determined not to provide weight to a Human Rights Commission complaint [the applicant’s mother’s February 2014 complaint that her husband had gone missing] because it did not accept the Applicant’s explanation for why the document was provided late to the Tribunal. Finally, due to the credibility concerns the Tribunal had, it determined to also give the May 2012 police report [relating to the applicant’s father’s abduction] no weight.

On the basis of the above findings, the Tribunal rejected that:

a. the Applicant’s father was abducted by an unknown militant group, the Sri Lankan Army, or at all;

b. in 2011, Greasemen came to his village or that the Applicant protested against them;

c. following the protest, the Applicant was arrested, detained and physically assaulted due to there being adverse interest in his association with his father; and

d. the Applicant was put on reporting and restricted movement requirements by the Sri Lankan authorities or that, just prior to him leaving Australia and after, officials had visited his home.

1. The Tribunal then went on to consider the applicant’s claims to fear harm associated with the Greasemen or “Grease Yakas”, his Tamil ethnicity, as a Tamil failed asylum seeker, due to his illegal departure and due to his claims of threats of extortion. These were considered against the backdrop of the country information reports.
2. The Tribunal ultimately found that the applicant does not face a real chance of persecution in the reasonably foreseeable future for any reason and that his fear of persecution was not well-founded. The Tribunal also found that there was not a real risk that he would suffer significant harm if removed from Australia to Sri Lanka.
3. Before the FCC, the applicant relied on the following two grounds of review:
4. the Tribunal’s findings as to the applicant’s credibility, and rejection of the applicant’s claims based on those findings, were illogical; and
5. the Tribunal failed to consider the applicant’s claims to fear harm by reason of his protest against the Greasemen.
6. In relation to the first ground, the Court below found that none of the Tribunal’s reasoning was illogical or outside the bounds of legal reasonableness. The Court found that, reading the Tribunal’s reasons as a whole, it was open to the Tribunal to place weight on the difference in the applicant’s evidence and that of the police report in relation to the time at which the applicant said his father was abducted (being mid-morning contrasted with an allegation the abduction occurred in the evening).
7. The Court also rejected the second ground. The Court identified that the Tribunal considered the matter and unfortunately the country information provided no support for any ongoing concern about “Grease Men”.

## The appeal

1. The FCC delivered its reasons on 18 June 2020. By reason of r 36.03 of the *Federal Court* ***Rules*** *2011* (Cth), the applicant was required to file a notice of appeal by 16 July 2020.
2. The applicant filed a draft notice of appeal on 27 July 2020. The applicant was 11 days out of time in doing so.
3. The applicant explained the delay as being caused by language barriers and his then legal representative’s failure to respond. The applicant also explained he could not seek help to understand the documents due to the restrictions on movement caused during the COVID-19 pandemic.
4. The applicant’s counsel acknowledged the Minister’s interest in finalising visa applications but submitted the relative prejudice suffered by the applicant weighs strongly in his favour.
5. The applicant’s draft notice of notice of appeal filed on 27 July 2020 sets out two grounds of appeal similar in substance to the grounds of appeal raised in the court below.
6. On 29 March 2023, the applicant filed an amended draft notice of appeal setting out and particularising two new grounds of appeal, not raised before the primary judge. The applicant seeks leave to raise the two new grounds in this appeal. The Minister opposes the application to raise fresh grounds of appeal.

# Principles

1. The principles associated with an application for an extension of time under r 36.05 of the Rules are well settled.
2. In determining whether to exercise its discretion to allow an extension of time, the Court will consider the explanation for the delay, the merits of the proposed grounds of appeal and the relative prejudice the parties might suffer if the application is allowed or disallowed: *GOK18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 169 at [23] (per Collier, Rangiah and Derrington JJ).
3. The principles regarding raising new grounds to those raised below in an appeal are also well settled. Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interest of justice to do so: *O’Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310 at 319 per Mason J (as his Honour then was).
4. In ***Khalil*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 (Katzmann, Banks-Smith and Rofe JJ), the Full Court stated at [34]:

The Court’s power to grant leave must be exercised in the way that best promotes the overarching purpose of the civil practice and procedure provisions of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and Rules: FCA Act, s 37M. That purpose is the facilitation of “the just resolution of disputes… according to law” and “as quickly, inexpensively and efficiently as possible”. It includes objectives such as the just determination of all proceedings before the Court; the efficient use of the Court’s judicial resources; the efficient disposal of the Court’s overall caseload; and the timeous disposal of all proceedings. Dealing with a point for the first time on appeal does not serve those objectives.

1. Relevant considerations on such an application include:
2. whether there is an adequate explanation for the failure to raise the ground below: ***VUAX*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588; [2004] FCAFC 158 at [48]; *Khalil* at [37];
3. the merits of the proposed ground: *VUAX* at [48];
4. the “potential vindication of a just outcome” and the gravity of the consequences of the decision not to permit the ground to be advanced: *Khalil* at [36];
5. any prejudice to the respondent if the new ground is allowed to be advanced: *VUAX* at [48]; *Khalil* at [36]; and
6. whether the new ground raises a matter that could have been met by evidence: *Zheng v Cai* (2009) 239 CLR 446; [2009] HCA 52 at [16].
7. Without more, the fact that there has been a change of counsel is insufficient to justify a grant of leave: see, for example, *BLX16 v Minister for Immigration and Border Protection* [2019] FCAFC 176 at [31] (Moshinsky, Steward and Wheelahan JJ); *DKT16 v Minister for Immigration and Border Protection* [2019] FCAFC 208 at [31] (Davies, Moshinsky and Snaden JJ).
8. The Full Court observed in *Khalil* at [36]:

Requiring an appellant to show that it is expedient and in the interests of justice for an appellate court to grant leave “endeavours to strike an appropriate balance between securing the role of the court at first instance, protecting the integrity of the appellate process, and meeting the needs of justice as understood within the judicial process”: *CVRZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 205 at [19] (Kenny, Davies and Banks-Smith JJ). The interests of justice include “the potential vindication of a just outcome” and the gravity of the consequences of the decision is a relevant consideration: *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affair*s [2021] FCAFC 11 at [2] (Allsop CJ). It is true that appeals are not intended to provide an opportunity to conduct a second trial on a different basis than the first (see the discussion in *Han v Minister for Home Affairs* [2019] FCA 331 at [10]–[18] per Bromwich J and the authorities referred to there). Nevertheless, the predominant consideration must be the interests of justice. In the absence of prejudice to the respondent, the more meritorious the point, the more likely it is that leave will be granted notwithstanding the other considerations which favour its refusal.

# Statutory Framework

1. The applicant observed that the eligibility criteria for protection visas (at the time of the Tribunal’s Decision) is conveniently described by the Full Court in *SZTIB v Minister for Immigration and Border Protection* [2015] FCAFC 40.

11 Section 91R took the following form:

**91R Persecution**

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

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

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

(c) the persecution involves systematic and discriminatory conduct.

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

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

(b) significant physical harassment of the person;

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

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

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

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

(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person’s claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

12 At the time of the tribunal’s decision, s 36(2)(a) of the Migration Act provided:

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

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

…

13 Article 1A(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 (the Convention) relevantly defined a “refugee” as a person who:

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

# Extension of time and amended notice of appeal

1. The extension of time that is sought is relatively short, being 11 days. The delay in filing has been explained by the applicant and I do not consider the relative prejudice suffered by the Minister if the extension is granted to be substantial.
2. In those circumstances, I am minded to grant the extension of time.
3. However, the applicant does not seek to rely on the notice of appeal filed with the extension of time application but seeks to rely on the two new grounds set out above.
4. Before the court below, the applicant, represented by a solicitor and counsel team different to this proceeding, relied on the two grounds of review set out at [12] above. No explanation was proffered by the applicant for the raising of the two new grounds, other than the change of counsel.
5. The Minister submits the applicant has failed to provide an adequate explanation for the raising the new grounds.
6. The applicant accepts that there would be some prejudice to the Minister, and the public interest in finalising visa applications, but submits that the proposed grounds are meritorious and any prejudice to the applicant outweighs the prejudice to the Minister, such that the proposed new grounds should be allowed.
7. I am not persuaded that the interests of justice require the grant of leave to rely on the amended grounds of appeal. I accept the Minister’s submissions that there was no sufficient explanation for the applicant’s failure to raise the point in the court below. Indeed, as the authorities have identified, the mere fact that new counsel has thought of a new point is insufficient. For the reasons below, I consider that the proposed new grounds also lack sufficient merit. Accordingly, I refuse leave to the applicant to raise two new grounds of appeal.

## Proposed ground 1

1. Ground 1 asserts that the Tribunal erred in failing to consider two integers of the applicant’s claim to fear harm from Sri Lankan authorities upon return to the country. The applicant provided the following particulars of the proposed ground:
2. The Tribunal found at [47]–[49] that the applicant had illegally departed Sri Lanka by sea and would likely be charged under the *Immigrants and Emigrants Act 1949* (**I&E Act**);
3. The Tribunal found at [49] that the applicant would be “fined and then be free to go”; and
4. The Tribunal failed to consider a clearly articulated representation by the applicant that as a non-Sinhala speaking defendant who could not afford legal representation, the applicant would likely face a harsher penalty.
5. In oral submissions, the applicant’s counsel Mr Sharify submitted that on his return to Sri Lanka, the applicant would be charged under the I&E Act, and by reason of the applicant’s inability to speak English or Sinhala and his lack of legal representation he would (or could) face a harsher penalty. The applicant submits that this submission was an essential component of the applicant’s claim to serious harm which required explicit consideration by the Tribunal, and which the Tribunal failed to address.
6. In support of his submission before the Tribunal the applicant relied on country information being an ABC Radio Australia Report and UK Border Agency Guidance which observed:

A shortage of court-appointed interpreters restricts the ability of Tamil-speaking defendants [who are facing charges such as leaving the country illegally and in some cases people smuggling] to receive a fair hearing in many locations.

1. At [39], the Tribunal referred to the country information relied on by the applicant, but, as it was entitled to do, it chose to give greater weight to the report of the Department of Foreign Affairs and Trade (**DFAT**) on the basis that it was “recent, authoritative and [DFAT] has been specifically charged with giving advice to the Australian Government”. The Tribunal’s preference of country information in turn provided the basis for the finding that only those Tamils who had an actual or perceived association with the LTTE might face harm upon return. The Tribunal did not accept that if he were to return to Sri Lanka that the authorities or anyone else would regard the applicant as a supporter of the LTTE or someone with links to the LTTE.
2. At [42] the Tribunal found that the applicant did not face a real chance of persecution “now or in the reasonably foreseeable future” if he were to return to Sri Lanka as a failed asylum seeker. The Tribunal continued at [43]:

Based on his individual circumstances and the individual country information, I do not accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of the Applicant being removed from Australia to Sri Lanka that there is a real risk he will suffer significant harm on this basis.

1. The Tribunal extracted sections from the DFAT country information as to the return of asylum seekers to Sri Lanka from Australia at [44], including:

5.33 DFAT was informed in July 2015 by Sri Lanka’s Attorney-General’s Department, which is responsible for the conduct of prosecutions, that no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. However, fines had been issued to act as a deterrent towards joining boat ventures in the future. Fine amounts vary on a case-by-case basis and can be paid by instalment. If a person pleads guilty, they will be fined and are then free to go. …

DFAT assesses that ordinary passengers are generally viewed as victims and penalties are more likely to be pursued against those suspected of being facilitators or organisers of people smuggling ventures.

1. After setting out the extracts from the DFAT country information at [44], the Tribunal considered and rejected the submission that the applicant had a well-founded fear of persecution for a convention reason at [46] to [49] of its reasons, concluding that it was not satisfied that questioning, arrest, detention and the poor conditions in remand amount to systematic and discriminatory conduct as required by s 91R(1)(c).
2. The Tribunal further found at [50] that short term detention, questioning or imposition of a fine following the applicant’s return to Sri Lanka did not amount to significant harm under s 36(2A) of the Act.
3. The Minister submits that the Tribunal’s rejection that the applicant had a well-founded fear of persecution cannot be ignored in the consideration of the Tribunal’s assessment of serious harm. The Minister submits that it can safely be inferred from [44] to [49] of the Tribunal’s reasons that the Tribunal had regard to any linguistic or legal representation difficulties the applicant might have in considering whether the applicant would likely face a higher penalty on return when charged under the I&E Act.
4. The Tribunal was aware of the applicant’s linguistic challenges, noting at [4] that the hearing was conducted with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages.
5. At [47], the Tribunal found that the country information indicates that returnees who have left Sri Lanka by irregular means are dealt with equally regardless of ethnicity. The Tribunal found there “is no suggestion of discriminatory enforcement or punishment of a particular group of returnees in the country information”.
6. The Tribunal specifically considered the applicant’s circumstances, noting at [48]:

There is no independent country information before me that shows that persons in the applicant’s circumstances are being imprisoned under the I&E Act. The DFAT information is that persons who have illegally departed are not given a custodial sentence, but are only fined as a deterrent. The information from DFAT is strong evidence that offenders in the applicant’s circumstances do not face both a fine and imprisonment.

1. It was the applicant’s evidence before the Tribunal that he would plead guilty and at [49], the Tribunal found that on the applicant's return to Sri Lanka, he would be fined and then be free to go, and that he had a mother and three adult siblings who could act as guarantor. The Tribunal then found that any short-term detention or fine does not amount to persecution for a convention reason, because it is the enforcement of a generally applicable law and is not discriminatory. At the end of that paragraph the Tribunal stated that it did not accept that the applicant being detained for a short period in the prison conditions and fined constituted serious harm.
2. The Tribunal considered the applicant’s individual circumstances including his linguistic and legal representation difficulties. The Tribunal made express reference to the applicant’s circumstances or “individual circumstances” in its considerations at [48], [49], [52], [54], [55], [56] and [57], including to the applicant’s financial circumstances at [49]. Proposed appeal ground 1 has no merit.

## Proposed ground 2

1. The applicant submits that proposed ground 2 is directed to the Tribunal’s consideration of the convention criteria, in particular the Tribunal’s finding that the I&E Act is a law of general application.
2. The applicant provided the following particulars of proposed ground of appeal 2:
3. The Tribunal found at [47] that the provisions of the I&E Act which punish illegal departure were not discriminatory as they were laws of general application which applied to all Sri Lankans regardless of their ethnicity.
4. The Tribunal failed to appreciate that the I&E Act discriminated against failed Tamil asylum seekers because it had the effect of punishing failed Tamil asylum seekers for escaping what they perceived as persecution.
5. In the alternative, the Tribunal failed to genuinely consider that the applicant had left Sri Lanka fearing persecution as a Tamil and therefore, the I&E Act was discriminatory in its impact against him despite being a law of general application.
6. Proposed ground 2 is directed to the following passage at [49] of the Tribunal’s reasons:

I find that any short term detention or fine does not amount to persecution for a Convention reason because it is the enforcement of a generally applicable law and is not discriminatory. I accept that prison conditions in Sri Lanka are poor but I do not accept that he faces a real chance of persecution during any short term period of being detained. I am not satisfied that any problems the applicant may face as a result of questioning, charges, cramped and uncomfortable and unsanitary conditions in remand are aimed at the applicant for any Convention reason, but are factors which apply to the general population and not specifically to Tamils. I am not satisfied therefore, that questioning, arrest, detention, and the poor conditions in remand amount to systematic and discriminatory conduct as required by s.91R(1)(c).

1. The applicant’s counsel in oral submissions explained that the relevant question was whether in the personal circumstances of the applicant which render him likely to be charged under the I&E Act*,* being charged amounts to persecution or to systematic and discriminatory conduct. The applicant’s counsel submitted:

What is very clear again from the reasons for decision is that there’s no consideration given to the fact that this man claims to have left Sri Lanka illegally because he feared persecution, and so the fact that he will be charged under that Act is a direct consequence of his actions which were motivated by fear, and he is being returned as a failed Tamil asylum seeker. He will be charged again. It is inextricably linked with that aspect of his personality and his motivations.

1. The applicant submits that an application of a general law can be said to be persecutory for a convention-related reason. The applicant relied *A101/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 556; (2004) 82 ALD 787, which involved a Pakistani man who was charged under general criminal laws for attending a protest. Justice Finn found at [28] that in holding “this is a law of general application. It’s not discriminatory”, the Tribunal “misapprehended the nature both of the claim being made by the applicant and of the inquiry it entailed”. Justice Finn continued at [30]:

The tribunal did not address the anterior questions (i) whether the manner in which the machinery of the State was allegedly being brought to bear against him was discriminatory …

1. The applicant submits that the Tribunal failed to consider whether the general law, the I&E Act, was applied differently to different people. The applicant submits that he fled Sri Lanka because he feared persecution and that the Tribunal failed to consider the application of the I&E Act in the particular context of the applicant’s personal circumstances. The applicant submits that the Tribunal failed to consider that the applicant fled Sri Lanka illegally *because* he was Tamil.
2. The Minister submits that proposed ground 2 is no more than an attempt to have the Court engage in impermissible merits review. The Tribunal relied on country information (that it preferred to the country information provided by the applicant) to find that the I&E Act did not operate discriminatorily against any group, including Tamils.
3. At [36], the Tribunal found the applicant did not face a real chance of persecution on account of his Tamil race or his actual or imputed political opinions, or his membership of a particular social croup consisting of “Young Male Tamils from the North or East” or his family. On the applicant’s individual circumstances and on the country information, the Tribunal at [37] considered there was likely not a real risk that the applicant would suffer significant harm as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka.
4. From [38], the Tribunal then considered the applicant’s claims to fear harm associated with being a Tamil failed asylum seeker or based on illegal departure: the applicant might have left by reason of his claimed fear of persecution.
5. When the Tribunal came to consider the applicant’s claims to fear harm associated with being a failed asylum seeker or based on illegal departure, the Tribunal understood the context, the applicant’s departure was by reason of his claimed fear of persecution, but, nonetheless, the Tribunal had already rejected that that such a fear was well-founded or for a convention reason.
6. The Tribunal found, after the paragraphs of its reasons traversed above, and particularly at [49], that the I&E Act the applicant would be subject to on return did not operate discriminatorily, including against Tamils.
7. I agree with the Minister’s submission that proposed ground 2 seeks to have the Court engage in impermissible merits review. As such, it has no merit.
8. The appeal is dismissed.

|  |
| --- |
| I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rofe. |

Associate:

Dated: 11 May 2023