Federal Court of Australia

EEE16 v Minister for Immigration, Citizenship, Migrant Services, Multicultural Affairs [2022] FCA 629

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| Appeal from: | *EEE16 v Minister for Immigration and Anor* [2019] FCCA 3710 |
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| File number(s): | NSD 9 of 2020 |
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| Judgment of: | **RARES J** |
|  |  |
| Date of judgment: | 17 May 2022 |
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| Catchwords: | **MIGRATION** – application for constitutional writ relief – whether Immigration Assessment Authority failed to consider claim that visa applicant was political activist when claim not before it or delegate – whether Authority erred in making adverse credibility finding – whether Authority should have sought new information under ss 473DC and 473DD of *Migration Act 1958* (Cth) – where Authority not asked to accept new information – where no exceptional circumstances existed – *Held:* appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 5J, 5H, 36, 473DC, 473DD |
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| Cases cited: | *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135   1. *EEE16 v Minister for Immigration and Anor* [2019] FCCA 3710   *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* *(No 2)* (2004) 144 FCR 1  *Waterford v The Commonwealth* (1987) 163 CLR 54 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 52 |
|  |  |
| Date of hearing: | 17 May 2022 |
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| Counsel for the Appellant: | Mr G Foster |
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| Solicitor for the Appellant: | Sentil Solicitor |
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| Solicitor for the First Respondent: | Minter Ellison |

ORDERS

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|  | | NSD 9 of 2020 |
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| BETWEEN: | EEE16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| order made by: | RARES J |
| DATE OF ORDER: | 17 MAY 2022 |

THE COURT ORDERS THAT:

1. The appellant be granted leave to file the amended notice of appeal filed on 14 April 2022 on or before 20 May 2022.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs.

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

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

RARES J:

1. This is an appeal from the decision of the Federal Circuit Court of Australia refusing the appellant’s claim for constitutional writ relief, in respect of the decision of the Immigration Assessment **Authority** made on 23 December 2016 to affirm the decision of the Minister’s **delegate** not to grant the appellant a safe haven entry **visa**: *EEE16 v Minister for Immigration and Anor* [2019] FCCA 3710.

## Background

1. The appellant is a citizen of Sri Lanka who arrived in Australia as an unauthorised maritime arrival in September 2012. He lodged his application for the visa on 11 December 2015, supported by a statutory declaration that he had made on 10 September 2013. In the statutory declaration, the appellant claimed that:

* in May 2011 he decided to stand as a candidate for the United National Party (**UNP**) in a local government **election** to be held in July 2011;
* prior to his decision to stand as a UNP candidate he had never been involved in politics;
* after the UNP office in Jaffna approved his application, he contested the election, campaigning by arranging meetings, distributing flyers and putting up posters;
* prior to the election, unknown armed persons came to his house where his family lived, several times, mostly at night (although he modified that claim at a later stage in the visa application process to assert that the persons came to his home after the election);
* the persons from whom he feared harm were, he believed, members of the Tamil paramilitary group, the Eelam People’s Democratic Party (**EPDP**) who worked closely with the government and soldiers in the Sri Lankan **army**;
* when he heard these people approaching his home, he escaped through the back door and hid until the men left the house;
* the armed men would ask his parents about him and then would leave;
* he had not been harmed by those persons, because he had always managed to leave before they entered the house;
* many UNP candidates, including himself, lost at the election, and the ruling party supporters sought revenge and caused trouble for those candidates and their supporters;
* several innocent Tamils, including those who contested the election as UNP candidates, were targeted and some were killed by unknown persons related to the Sri Lankan government;
* the province in which he lived remained a dangerous place for Tamils and was highly militarised, even after the defeat of the Liberation Tigers of Tamil Eelam (**LTTE**);
* he was in constant fear of being targeted and fled Sri Lanka in September 2012;
* he feared being seriously harmed or killed by members of the EPDP, the army and security forces, because he had previously contested the election as a UNP candidate;
* he was a Tamil from the north that fled Sri Lanka illegally and claimed asylum here; and
* the Sri Lankan government considered that all Tamil asylum seekers were LTTE supporters.

## The process before the delegate

1. On 27 May 2016, the appellant attended an **interview** with the delegate, a recording of which was before the Authority. A **transcript** of the interview produced for the purposes of the proceeding below was in evidence before the trial judge.
2. The delegate recorded that the appellant also claimed that:

* he had publicly criticised the EPDP and brought attention to atrocities that government forces had committed against Tamils;
* as his migration agent asserted at the interview, he should be assessed as a human rights advocate and treated as a refugee based on country information recorded by the United Nations High Commissioner for Refugees (**UNHCR**); and
* he could not relocate to another area in Sri Lanka because would need to register at the local police station and would always attract adverse attention since he did not speak Sinhala and did not have any family outside the northern province.

1. The delegate accepted that the appellant was a UNP candidate and had contested the election but was not satisfied, among other matters, that:

* he was knowledgeable about, or committed to exposing, either atrocities of others or the policies of the UNP itself, that he claimed to have propagated in the campaign;
* the appellant had been harmed by anyone the subject of his claims;
* any unknown armed persons were interested in him, had ever come to his house in the past or would come to his home were he to return to Sri Lanka;
* anyone had any adverse interest in the appellant;
* the appellant had a profile of a political activist as described by the UNHCR or that he would be imputed on return with a political opinion on that basis; and
* the appellant was a political or human rights activist

1. The delegate found that the appellant did not have a well-founded fear of persecution were he to return to Sri Lanka because there was no real chance of the harm he claimed to fear occurring and for the same reasons he was not entitled to complementary protection under s 36(2)(aa) of the *Migration Act 1958* (Cth).

## The Authority’s decision

1. The Authority assessed all the appellant’s numerous claims. It is only necessary to focus on a small part of those claims since the issues on this appeal have been refined because the appellant was represented by counsel before the trial judge and on appeal.
2. Relevantly, the Authority considered the appellant’s claims to fear harm:

* as a UNP candidate who stood for the local government election in July 2011; and
* as a person who had criticised publicly the EPDP and government forces for human rights abuses against Tamils and as therefore being a human rights advocate.

1. The appellant did not himself claim to be a human rights advocate himself but, as noted above, at the interview with the delegate his migration agent advanced that claim directly for him.
2. The Authority set out the UNHCR categories of persons at risk of harm in Sri Lanka in par 44 of its reasons, namely:

The UNHCR identifies the following cohorts of people regarded as being at risk of harm in Sri Lanka. (i) persons suspected of certain links with the Liberation Tigers of Tamil Eelam (LTTE); (ii) **certain opposition politicians and political activists**; (iii) certain journalists and other media professionals; (iv) certain human rights activists; (v) certain witnesses of human rights violations and victims of human rights violations seeking justice; (vi) women in certain circumstances; (vii) children in certain circumstances; and (viii) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals in certain circumstances [UNHCR “Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 1 December 2012].

(emphasis added)

1. The Authority summarised the evidence that the appellant gave to the delegate, including that he had claimed to have made speeches in each village in the electoral area, repeating the same speech many times and that he had always spoken about kidnappings, killings and rapes that had occurred there. It noted that the appellant had not made any claim in his statutory declaration that he made speeches criticising the EPDP or Sri Lankan government or referring to kidnappings, rapes and killings perpetrated by those groups against Tamils in Jaffna.
2. It found that the appellant said that he had wanted to draw attention to those matters and to convince people that, if he were elected, he could do something about them. It found that he clarified to the delegate that none of the crimes had affected himself or anyone in his family directly but he was very concerned about those matters.
3. The Authority said that there were some aspects of the appellant’s evidence that led it to doubt his central claim that he was a candidate for the UNP in the election and that, at his interview with the delegate, he had provided very generalised information about the UNP’s policies, saying that they tried to solve day to day problems, such as the curfew restricting people from going out at night and that people in the area were restricted like slaves, which his party wished to help.
4. The Authority noted the appellant’s claims that he had referred to paramilitary groups working with the government and that the UNP would try to get rid of them. The Authority found that the appellant appeared to have very limited knowledge of the UNP’s policies and that he had not provided any detailed information regarding the content of posters that he affixed, such that his answers did not appear to be consistent with the level of detail that could be expected from a candidate or person who claimed to have pasted up numerous such posters. The Authority noted that, at the interview with the delegate, he was asked who had won the election and had responded that the EPDP had won, which was aligned with Sri Lankan Freedom Party, known as the **SLFP**. The delegate had put to the appellant that the official results showed that in his area, the Tamil National Alliance, or **TNA**, had won, and that the United People’s Freedom Alliance, or **UPFA**, came next, with the UNP coming last. The delegate and Authority confirmed that this information was correct. The Authority found that the appellant had told the delegate that he meant the UPFA and not the SLFP, and that the SLFP was related to the EPDP through an alliance, which fact was confirmed by country information. The Authority regarded as being of concern, that the appellant had not stated to the delegate that the TNA had won the local government election in the district in which he claimed to have stood as a candidate, but, because he had consistently made such a claim, it accepted that he had stood as a candidate in the election, despite not having any previous political background or experience.
5. The Authority then turned to the appellant’s claim to fear that he would be seriously harmed or killed by members of the EPDP, the army and or the security forces because of his involvement in the election. It noted that, in his arrival interview held in January 2013, he had made reference to not being able to move freely about in Sri Lanka, being stopped and questioned by Tamil speaking people in army uniforms who supported the army. The Authority found that in his statutory declaration, he had said that prior to the election, unknown armed persons had come to his house, but that, during the interview with the delegate he had stated that the first time armed men had come to his home was two or three days after the election results had come out, and that, subsequently, they came many times, every couple of days, sometimes in the day and sometimes at night and that on each occasion, he would escape before they entered the house.
6. The Authority found that, during the interview, the delegate had explored the inconsistency of the appellant’s accounts as to the timing of the armed men’s coming to the house, namely whether they had come before or after the election. The Authority found the inconsistency in the appellant’s accounts of this matter undermined his claim that armed men came looking for him, because it considered that it was reasonable to expect that he would have remembered when something as significant and frightening as armed men searching for him in his home first occurred. It did not accept the appellant’s explanation for this inconsistency.
7. The Authority noted that the appellant had claimed, during the interview with the delegate, that he was the only “gutsy person” who spoke a lot about the atrocities in public during the election campaign, and that he was not sure if other UNP candidates had been harmed or threatened by the armed men. The Authority noted that, however, in his statutory declaration, the appellant had said that several innocent Tamils who had contested the election had been targeted and some were killed. It found the inconsistency between whether or not UNP candidates had been harmed or killed undermined the appellant’s credibility as a truthful witness.
8. The Authority found that, during the interview with the delegate, the appellant had clarified that the armed men had not caught or harmed him and that he had not been involved with the UNP after the July 2011 election.
9. It found that the appellant claimed to have continued to live at his home after the election until he left for Australia over a year later in September 2012, while managing to leave and hide every time the armed men came and that the primary reason that he feared harm was because he had spoken about the atrocities when he was campaigning for the UNP during the election campaign. The Authority found that, at the beginning of the interview with the delegate, the appellant had said that he spoke with his family regularly and that they were “alright”.
10. It found that, after assessing all of the evidence, the appellant had stood as the UNP candidate in the election, that the TNA had won it, with the UPFA coming second and the UNP last. It found that the appellant was not able to state correctly who had won the election in the area where he stood as candidate, and that prior to the election, he had had no involvement in politics and neither had any member of his family. It found that, after the election, he had discontinued his involvement with the UNP and remained living at the family home for more than a year, until 31 August 2012, when he left Jaffna and departed Sri Lanka for Australia shortly afterwards. It found that the appellant had not been threatened directly or harmed during that time, his family still continued to live in their home in Jaffna, and there was no claim or evidence to indicate that the family had been threatened or harmed any time or that armed men continued to look for the appellant.
11. It then found:

29. In assessing the credibility of the applicant’s claim that he spoke out about kidnappings, rapes and killings of Tamils in Jaffna and blamed the EPDP who work closely with the government and the SLA I note the following. The applicant stated several times that this was the topic of his campaign speeches in the villages that form part of the Nallur local government area. However **he provided no detail about the content of his speech**. He continually repeated that he spoke out about “kidnappings, rapes and killing” of Tamils in the area. Other than to claim that he blamed the EPDP for these atrocities **he provided no detail of when, or who, or how, or why, or what he saw as the solution, or what he wanted to happen in response to the atrocities. On listening to the interview I am satisfied that the applicant was provided with ample opportunity to provide details of the issues he claims to have raised in his speech however he did not do so**. **I find the applicant’s evidence regarding the content of his speeches is generalised, vague and without any detail**. After assessing the evidence I accept that the applicant made speeches as the UNP candidate in the local government election; however **I do not accept that the main content of his speeches were accusations against the EPDP and the UPFA of perpetrating crimes against Tamils.**

(emphasis added)

1. The Authority found that the appellant’s claims of unknown armed men coming to his home looking for him because of the speeches he had made was generalised, vague and inconsistent about when these persons first came looking for him. It found that the appellant had provided very little detail about how he had managed to escape and where he had hidden each time those persons approached the house. It found that it was reasonable to assume that, if he had continued to live at his home for 13 months (from the election until he left Jaffna), the armed men would have been able to find and approach him directly at least once during that time period. It concluded that it was implausible that unknown armed men would not be able to confront him directly if they had been looking for him on numerous occasions over that time period, particularly when he continued to live at his home address.
2. It also found that in spite of his claim to fear for his safety and life, he remained living in his family home in Sri Lanka for 13 months after both the election and the claimed threats of harm from the EPDP. It found that those actions on his own part undermined his claim of fearing harm and that it was reasonable to assume that a person in fear of their safety and life would make arrangements to leave the area in which they feared such harm as soon as possible. The Authority found that, after assessing all of the evidence, it did not accept that unknown masked armed or armed men from the EPDP or aligned with Sri Lankan government, were searching for him or intended to harm him.
3. It found that the appellant’s chance of suffering harm now or in the future because of his candidacy for the UNP in the July 2011 elections was remote. It found that he did not intend to become involved in politics were he to return to Sri Lanka and concluded that there was not a real chance of him suffering serious harm from the EPDP, the army or other Sri Lankan government authorities because he had stood in the election.
4. The Authority accepted the appellant’s submission, by his migration agent, that “human rights defenders and others who seek justice for atrocities committed during the war are at risk of harm in Sri Lanka”. It referred to the UNHCR criteria that it set out in par 44 (see [10] above), but it did not accept that the appellant was, or would be perceived as, a human rights advocate or defender. It found that he did not face a real chance of being targeted for harm in that regard on return to Sri Lanka.
5. After assessing all of the evidence, it found that he did not face a real chance of serious harm because he was a UNP candidate in the July 2011 elections in Jaffna or because he was or would be perceived to be a human rights advocate who had spoken about atrocities perpetrated against Tamils.
6. The Authority also considered the appellant’s claims to be at risk of persecution or significant harm because he was a Tamil from Jaffna or would be imputed to be a supporter of the LTTE. It found that if persons, such as those in the UNHCR criteria, were to be suspected of links with the LTTE, they would have to have held senior positions or be perceived to be persons involved in military or other activities. It found that were he to return to Sri Lanka, the appellant would not be perceived to be a human rights activist and that his claims and past experiences did not place him in a cohort of persons assessed by either UNHCR or the United Kingdom Home Office as being at risk of harm or as a Tamil from Jaffna or associated with, or a supporter of, the LTTE.
7. It also examined the appellant’s other claims and did not accept them. It concluded that, having considered his claims individually and cumulatively, it was not satisfied there was a real chance that the appellant would face serious harm within the meaning of s 36(2)(a) of the *Migration Act* or significant harm within the meaning of s 36(2)(aa), were he to return to Sri Lanka then or in the reasonably foreseeable future. It found that he did not have any well founded fears of persecution or basis to claim complementary protection from Australia.

## The proceeding before the trial judge

1. The appellant claimed before the trial judge that the Authority had committed a jurisdictional error because it has engaged in an illogical reasoning process, had misunderstood the evidence by coming to the following three findings, namely, that he did not meet the requirements of (a) the definition of a refugee in s 5H(1) of the Act, (b) the criteria in s 36(2)(a) to engage Australia’s protection obligations in respect of him because he was a refugee and (c) the criteria in s 36(2)(aa) that engaged Australia’s protection obligations because the Minister, or decision-maker, had substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia to Sri Lanka, there was a real risk that he would suffer significant harm. I note that the appellant relied on the same three matters in the appeal. The particulars of those grounds were extensive.
2. Relevantly, the primary judge dealt with six substantive arguments put in support of the sole ground on which the appellant sought constitutional writ relief. His Honour dealt with numerous of those arguments by setting out passages in the transcript of the hearing before the delegate and the alleged failures of the Authority properly to understand or deal with what that interview revealed as to the appellant’s situation. His Honour observed that, even after hearing submissions from the appellant’s counsel, the structure of the particulars and their lack of clear numbering made it difficult to link the particulars to the pleaded ground. That had required him to deal in detail with each particular. He said that, in the mire of detail, the appellant had failed in submissions satisfactorily to explain the ground with reference to authorities that identified how the Authority could have been said to have fallen into jurisdictional error.
3. It is notable that the particulars before his Honour and on appeal commenced by asserting that the appellant “did not refer to himself as a human rights advocate even though his agent made a similar submission”, but the Authority had not accepted the claim that he was a human rights advocate or defender. The particulars then alleged that it failed to consider whether he was capable of being at risk of harm because he fell within the UNHCR criterion of “certain opposition politicians and political activists”.
4. His Honour recorded the appellant’s counsel’s submission that, although the expression “political activist” was not used during the interview with the delegate, it was he argued, a claim that emerged clearly from the material before the delegate and was therefore before the Authority. He contended that this unmade claim ought to have been considered in addition to the Authority’s discussion of the appellant’s claims to fear harm because of his activities as a politician and his expressions of political opinion during the election campaign being the only activity he claimed to have been engaged in a political nature.
5. The trial judge held, in respect of the particular that the Authority had failed to consider whether the appellant was a “political activist” within the UNHCR guidelines, that it only needed to deal with the appellant’s clearly expressed, and different, claim by his migration agent, namely that he was a human rights advocate.
6. His Honour found the appellant’s principal claim before the delegate was that his open opposition to, and exposure of, the atrocities of the EDPD and government forces amounted to denouncing criminal and human rights abuses against Tamils. His Honour found that, during the interview the migration agent made clear that the main reason for the appellant’s fear of harm were he to return to Sri Lanka was his human rights activism and exposure of abuses. The trial judge found that the delegate had understood the appellant’s evidence and submissions by his migration agent in the same way. He found that the delegate had concluded that the UNHCR had categorised those at risk of being persons with a Tamil profile after the defeat of the LTTE, including as a human rights activist, and the delegate had considered and rejected the claim as made. His Honour found that the Authority considered the claim as made by the appellant, including through his agent. He found the Authority dealt with the appellant’s clearly articulated claim to be a human rights advocate as well as his claim to fear harm from his activities as a candidate during the course of the election.
7. The trial judge found that the appellant’s argument that the Authority had made a jurisdictional error by not also considering the unarticulated claim that he was a political activist, involved approaching the Authority’s reasoning in the manner deprecated by Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 where they said:

The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.

1. The appellant’s grounds of review before the trial judge contended that the Authority had considered that he was either an “opposition politician” or “political activist” at the time that he was making his statements when campaigning and that that was a jurisdictional error. The trial judge found that there was no explanation in the particulars of this issue or in submissions beyond the above assertion and that, accordingly, it should be rejected. His Honour found that the Authority had not accepted the appellant’s claim to fear harm as a result of his conduct during the election campaign, as a critic of the EPDP and government forces for human rights abuses against Tamils, on the basis of the claim that he was a human rights advocate as made and came to a conclusion that was reasonably open to it in the circumstances. He found that its reasons for doing so were logically probative.
2. His Honour dealt with the six particulars relevant to the issues argued on this appeal. Those six particulars concerned how the Authority dealt with the inconsistencies in the appellant’s evidence in par 29 of its reasons. He noted that the appellant had argued that the Authority had misunderstood his evidence when it did not accept that the main content of his speeches had comprised accusations that the EPDP and UPFA had perpetrated crimes against Tamils and the Authority erred in finding that he had provided no details about the content of his speeches and what he wanted to happen in response to the atrocities, when, in fact, he had provided such detail. His Honour found that there was nothing in the Authority’s decision record that revealed that it had ignored, misunderstood or misrepresented what the appellant had said during the interview with the delegate.
3. The trial judge identified the appellant’s real complaint in respect of the Authority’s finding was that he had provided “no detail”. His Honour found that this finding was explained in par 29 logically on the basis of the evidence before the Authority and that its reasons were cogent. His Honour found that the Authority had assessed the appellant’s evidence to the delegate as being generalised, vague and without any detail. He held that that finding was reasonably open to it and that the appellant’s complaint was no more than a disagreement with the Authority’s reasoning and findings.
4. His Honour noted that the appellant complained that the Authority had not sought to clarify these issues with him by seeking to exercise its power under s 473DC to get new information. The trial judge found that this contention ignored the context of Pt 7AA of the Act. He rejected the argument that the Authority ought to have invited the appellant to a hearing or an interview as without merit, having regard, in particular, to the absence of any exceptional circumstances so as to enliven the Authority’s capacity to consider any new information under s 473DD. His Honour also noted that the appellant had not given any reasoning process to warrant why the Authority should have done so.
5. Accordingly, the trial judge dismissed the application with costs.

# This appeal

## The appellant’s submissions

1. The appellant repeated today similar arguments to those put to and rejected by his Honour. He argued that the Authority must have been taken to have disregarded his claim that he was a political activist, which it ought to have garnered from all of the material before it, albeit that he accepted in the course of argument that no such claim was made specifically. He contended that the claim was within the categories that the Authority cited in par 44 of its reasons from the UNHCR report which identified persons who may be at risk of persecution. The appellant submitted that the Authority had not engaged in an active intellectual process in considering whether the appellant was a “political activist” or if he could have fallen within that category in dealing with his claims for protection.
2. The appellant referred again to various aspects of his evidence in the transcript of the interview with the delegate. He argued that the Authority erred in its finding in par 29 that he had “provided no detail of when, who, how, why or what he saw as a solution or what he wanted to happen in response to the atrocities” in his evidence to the delegate. He asserted that the Authority had misunderstood the material before it on those topics that answered those questions, and that therefore it had made a jurisdictional error in coming to its findings in par 29. He also argued that the Authority should have considered that, if it was going to make the criticisms it did in par 29, the appellant ought to have been invited to provide new information under s 473DC and 473DD about those topics before criticising him in, what he contended, was an unwarranted and unjustified way.

## Consideration

1. In my opinion, the Authority was not obliged to consider any claim beyond what it did consider in relation to the appellant’s political activity as an election candidate who spoke out against the atrocities as he claimed and as it summarised in par 29 of its reasons. I reject the argument that the Authority made a jurisdictional error because, somehow, it failed to identify and consider an unarticulated claim that the appellant was a political activist. The argument was, in my opinion, fanciful. As Black CJ, French and Selway JJ said in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* *(No 2)* (2004) 144 FCR 1 at 22 [68]:

Although such a claim might have been seen as arising on the material before the Tribunal it did not represent, in any way, ‘a substantial clearly articulated argument relying upon established facts’ in the sense in which that term was used in *Dranichnikov.* [*v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALJR 1088]. **A judgment that the Tribunal has failed to consider a claim not expressly advanced is, as already indicated in these reasons, not lightly to be made. The claim must emerge clearly from the materials before the Tribunal.**

(emphasis added)

1. In my opinion, no claim that the appellant was a political activist arose on the material before the Authority beyond the issues that it did consider and determine in its reasons relating to the appellant’s activities in the election campaign. The only clearly articulated claim which related to the UNHCR’s categories was that the appellant was a “human rights advocate”. However, the Authority went further to consider whether he was a human rights defender. The only matters which the appellant raised as to his activities related to what he had said in his election speeches about the atrocities of which he complained that he wished to have brought out to the community, together with his other campaign activities.
2. The Authority identified those matters and considered whether, in the context of the appellant claiming to fear harm from being persecuted for reasons of political opinion, within the meaning of s 5J(1)(a) of the Act, he had established that he had a well-founded fear that he would suffer serious harm were he return to Sri Lanka. The Authority did not make a jurisdictional error in failing to deal with a claim that had not been advanced to it, which did not arise clearly on the material and that took matters beyond what it needed to consider. The appellant’s claim to protection based on his political activity during the election campaign and how that might be perceived was not improved by the attribution of a different label, not further explained by the appellant, taken from the UNHRC category of “**certain** opposition politicians and political activists”. The appellant did not explain how the use of this label could have made any difference to the outcome.
3. The appellant’s complaint as to the Authority’s assessment of his credibility in par 29 of its reasons, is no more than a complaint about it making a wrong finding of fact. In *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 154 [44], Gleeson CJ, Gummow, Kirby and Hayne JJ referred to what Mason J had said in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 40, namely:

The limited role of the court [in] reviewing the exercise of an administrative discretion must constantly be borne in mind.

1. Their Honours approved what Brennan J had pointed out in *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77, namely that:

There is no error of law in simply making a wrong finding of fact.

1. In *Wu Shan Liang* 185 CLR at 272, Brennan CJ, Toohey, McHugh and Gummow JJ said that the reality is:

…that the reasons of an administrative decision-maker are meant to inform and must not be scrutinised on over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed (See *McAuliffe v Secretary, Department of Social Security* (1992) 28 ALD 609 at 616). In the present context, **any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision.** This has been made clear many times in this Court. For example, it was said by Brennan J in *Attorney-General (NSW) v Quin* ((1990) 170 CLR I at 35-36):

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but **the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."**

(emphasis added)

1. I reject the appellant’s argument that the trial judge erred in rejecting his contention that par 29 of the Authority’s reasons revealed some form of jurisdictional error in its finding that it did not accept the appellant’s evidence because it lacked detail on aspects of his claims, was generalised and vague, including that the main content of his speeches comprised accusations that the EPDP and UPFA had perpetrated crimes against Tamils. That argument was no more than an invitation for the Court to engage in merits review. It was for the Authority to be satisfied as to the appellant’s credibility. It gave reasons for not being so satisfied, which were adequate unto the day.
2. Finally, the Authority was not obliged to find, and the appellant did not ask it to consider, whether there were exceptional circumstances warranting it getting new information under ss 473DC and 473DD of the Act. The appellant’s complaint is simply that, on looking at his own evidence to the delegate, he left many questions unanswered about which, had the Authority wished, it could have sought new information. That argument overlooked the limited role the Authority had in being able to seek new information. It was for the appellant to make out his claim to the delegate on the information that he wished to put before the delegate as decision-maker. The adequacy or inadequacy of that material was the subject of the Authority’s review, in accordance with the constraints in Pt 7AA of the Act.

## Conclusion

1. There is no basis to conclude that the Authority made any jurisdictional error in its consideration of the appellant’s claims or evidence. As I have noted, the Authority had set out the substance of that evidence before it came to its conclusions in par 29 in assessing his overall credibility in relation to what he had said and done in the election campaign. The Authority’s summary of what it perceived to be the deficiencies in his evidence was no more than an articulation of its evaluation process in arriving at a credibility finding in relation to the claim. There was no jurisdictional error in that process.
2. For these reasons, I am not satisfied that there is any basis that could support the sole ground of appeal. The appeal should be dismissed with costs.

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

Associate:

Dated: 1 June 2022