Federal Court of Australia

AFG20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 585

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **CHEESEMAN J** |
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| Date of judgment: | 20 May 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for leave to rely upon proposed amended ground of appeal as set out in the appellant’s outline of written submissions – where proposed amended ground of appeal opposed in part by the first respondent (**Minister**) – where proposed amended ground includes an argument not raised before the primary judge – where no explanation for failure to take the point in the Court below – where the Minister opposed leave being granted on the basis that the proposed amended ground raised matters not argued below and which if raised, could have caused the Minister to adduce evidence below – consideration of merits of proposed amended ground – Held: leave refused in part.  **MIGRATION** – appeal from the Federal **Circuit Court** of Australia (now the Federal Circuit and Family Court of Australia) – whether the Circuit Court erred in failing to find jurisdictional error in the second respondent’s (the Administrative Appeals **Tribunal**) decision – whether the Tribunal erred in its findings that the Appellant’s “personal and family profile were such that he did not face a real risk of serious or significant harm” – whether the Tribunal erred in failing to find the Appellant faced risk of harm by reason of having escaped Sri Lanka on a forged passport – whether the Tribunal erred by failing to take into account country information relating to the Sri Lankan state practice in respect of those who left the country using a forged identity – whether the Tribunal erred by finding, based on the Department of Foreign Affairs and Trade’s country information report, that illegal departure by boat was analogous to the crime of passport fraud or false passport – Held: no error – appeal dismissed.  |
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| Legislation: | *Migration Act 1958* (Cth), ss 36, 65*Sri Lanka: Immigrants and Emigrants Act, 1949* [Sri Lanka], s 45(1)(f)  |
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| Cases cited: | *AAM15 v Minister for Immigration and Border Protection & Anor* [2015] FCA 804; 231 FCR 452*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593*AWU15 v Minister for Immigration and Border Protection* [2019] FCA 2008*BDR18 v Minister for Home Affairs* [2020] FCA 212*Coulton v Holcombe* [1986] FCA 33; 162 CLR 1*CED15 v Minister for Immigration and Border Protection* [2018] FCA 451*CBN18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 2190; 272 FCR 513*CUF18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 144*CXS18 v Minister for Home Affairs* [2020] FCAFC 18*DFU16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 222*GLD18 v Minister for Home Affairs* [2020] FCAFC 2*MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; 242 FCR 585*MZAJC v Minister for Immigration and Border Protection* [2016] FCA 208*NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10*NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134; 147 FCR 51*NWQR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 30*O’Brien v Komesaroff* [1982] HCA 33; 150 CLR 310 *Water Board v Moustakas*; [1988] HCA 12;180 CLR 491*WGKS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 10  |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 70 |
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| Date of last submissions: | 18 July 2021 |
|  |  |
| Date of hearing: | 28 June 2021  |
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| Counsel for the Appellant:  | Daniel Taylor |
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| Solicitor for the Appellant:  | SWL Migration |
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| Counsel for the First Respondent:  | Christopher Tran |
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| Solicitor for the First Respondent: | Australian Government Solicitor  |
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| Counsel for the Second Respondent:  | The Second Respondent filed a submitting notice save as to costs |
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ORDERS

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|  | VID 443 of 2020 |
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| BETWEEN: | AFG20Appellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| order made by: | CHEESEMAN J |
| DATE OF ORDER: | 20 May 2022 |

THE COURT ORDERS THAT:

1. Leave is granted to the Appellant to rely on the proposed amended grounds of appeal recorded in the written submissions filed for the Appellant on 5 June 2021 save for:
	1. the whole of particular (ii);
	2. that part of particular (iii) which says “in conjunction with his own family having been targeted as an LTTE family post war through the brutal rape of his mother in their home while the applicant was present”; and
	3. that part of particular (iv) which says “circumstances where his family was a known LTTE family which had been targeted post‑war”,

in respect of which leave is not granted.

1. Within 14 days, the Appellant file and serve an amended notice of appeal to reflect the limited grant of leave in order 1.
2. The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

CHEESEMAN J:

# Introduction

1. The Appellant, a Sri Lankan national, appeals from a decision of what was then the Federal Circuit Court of Australia (**FCC**), now the Federal Circuit and Family Court of Australia, dismissing his application for judicial review of a decision of the Second Respondent, the Administrative Appeals Tribunal (**Tribunal**). The Tribunal affirmed a decision of a **delegate** of the First Respondent, the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs, to refuse the Appellant a protection visa under s 65 of the *Migration* ***Act*** *1958* (Cth).
2. The Appellant seeks leave to amend the notice of appeal. By the proposed amended ground and particulars thereof, the Appellant contends that the Tribunal erred in finding that the Appellant’s “personal and family profile were such that he did not face a real risk of serious or significant harm”. The particulars given in support of this amended ground are that: (1) the alleged risk to the Appellant arising from his departure from Sri Lanka on a forged passport; (2) the Tribunal failed to address the Appellant’s claim that the targeting and rape of his mother in her home, in his presence, also constituted direct harm to him; (3) the Tribunal allegedly failed to consider relevant country information including information relating to the Sri Lankan state practice with respect to those citizens who use forged identity documents to depart the country; and (4) the Tribunal allegedly took into account irrelevant information by using Department of Foreign Affairs and Trade (**DFAT**) country information concerning illegal departure by boat as being analogous to departure involving passport fraud or use of a false passport. The Minister opposes leave being granted in so far as the amendment seeks to add an argument that the rape of the Appellant’s mother involved “targeting” of his family.

# Conclusion in Summary Form

1. For the reasons which follow: (1) leave to amend is granted but only in respect of those parts of the amendments to which the Minister did not object; and (2) the appeal is dismissed with costs.

# Background

1. The Appellant is a Sri Lankan national of Tamil ethnicity and Roman Catholic faith. He applied for a protection visa on 18 July 2019. His mother arrived in Australia in 2012 as an irregular maritime arrival. The Appellant’s mother holds a Class XE subclass 790 visa.
2. The Appellant arrived in Australia on 16 June 2019 as an unauthorised air arrival. He arrived holding a passport in the identity of another person and was taken into immigration detention when this was discovered.
3. On 17 June 2019, the Appellant participated in a screening interview conducted at Sydney Airport by an Australian Border Force officer. During that interview the Appellant made a number of claims including that if he were to return to Sri Lanka he would be in trouble because he came to Australia illegally, and that in 2009 his father had been involved with the Liberation Tigers of Tamil Eelam (**LTTE**), a separatist group seeking to create an independent state in the north and east of Sri Lanka. Although the Appellant stated that “nothing had happened to him before however”.
4. The Appellant participated in a second screening interview at Villawood immigration detention centre on 18 June 2019. During that interview, the Appellant made new claims including that he had been taken in for questioning by the Sri Lankan government following the Easter bombings in Sri Lanka on 21 April 2019. That he was physically abused in various ways and then released after being detained for three days. The Appellant also claimed that sometime after 27 April 2019 he was abducted and assaulted by four individuals he suspected were involved in the Easter bombings. The Appellant later resiled from these claims and conceded before the Tribunal that his agent in Sri Lanka encouraged him to advance these claims.

# The Delegate’s decision

1. On 19 July 2019, the Appellant applied for a protection visa. The Appellant was represented before the delegate by his legal representative, Mr Taylor. In his application, the Appellant said that he left Sri Lanka because:

I suffered during the war and after the war as the Government committed atrocities against the Tamil people. I saw my father killed by the shelling. I lots of people killed by the shelling. Everything happened there. When we were running at the end of the saw general public (civilian) people getting shot by the army and falling down. By chance my mother and I survived. My father was killed by the shelling. Tortures and rapes happened in the in the camp

My father and uncles had been in the LTTE. My mother was tortured by the Sri Lankan authorities and had to flee. I did not want to live in Sri Lanka anymore and wanted to flee. I wanted to be with my mother.

(as written)

1. In a statement accompanying his application, the Appellant said that:
2. He feared harm from a people smuggling syndicate as well as the government if returned to Sri Lanka;
3. His father had been a member of the LTTE;
4. His father and his aunt were killed by the Sri Lankan army and he witnessed their deaths;
5. His mother was tortured by the authorities and fled as a refugee;
6. He was discriminated against in Sri Lanka, and wanted to be with his mother;
7. He was afraid that he would be detained, interrogated and punished for obtaining and using a false and altered Sri Lankan passport if returned, and that he would be tortured in custody during investigation and punishment;
8. He was afraid that he would be harmed in custody due to his family connection with the LTTE and as a young Tamil male from the north; and
9. He was afraid he would be subjected to inhumane and degrading treatment and punishment, and would be seriously and significantly harmed, while in custody and in detention in Sri Lanka.
10. The Appellant through his representative provided written submissions to the delegate on 21 July 2019. He submitted that he fell within a social group described as “those who fled their country illegally to unite with a refugee abroad” and relied on s 45(1)(f) of the *Sri Lanka Immigrants and Emigrants Act, 1949* [Sri Lanka] (**I&E Act (SL)**), which concerns the use of false passports. Section 45 of the I&E Act (SL) relevantly provides:
11. Any person who:

….

(f) without lawful authority uses or has in his possession any forged, altered or irregular passport, or any passport with any forged, altered or irregular visa or endorsement;

…

shall be guilty of an offence under this Act and shall on conviction be liable to a fine of not less than five thousand rupees and of not more that [sic] fifty thousand rupees or to imprisonment of either description for a term of not less than six months and of not more than five years, or to both such fine and imprisonment.

1. Any person who attempts to commit, or does any act preparatory to the commission of, or aids and abets the commission of, an offence under subsection (1) shall be guilty of an offence under this Act and shall on conviction be liable to the same punishment as if he had been guilty of an offence and been convicted under subsection (1).

…

1. The Appellant submitted that if he were to return to Sri Lanka he would be punished for using a fraudulent passport in contravention of this law.
2. The Appellant was requested to provide documentary evidence of his identity, nationality or citizenship on 23 July 2019. On 30 July 2019 he was asked to attend an interview scheduled for 12 August 2019. He provided some identity documents at that interview. After the interview, on 14 August 2019, the Appellant’s representative supplied country information relating to the use of false passports to leave Sri Lanka. The Appellant’s legal representative made further submissions between 18 to 21 August 2019 in relation to matters arising out of the interview and in respect of the I&E Act (SL).
3. On 28 August 2019, the delegate refused to grant the Appellant a protection visa under s 36 of the Act on the basis that the Appellant had no real chance of serious harm and no real risk of significant harm if he returned to Sri Lanka based on: being imputed with a Tamil separatist political opinion; his race; or as a failed asylum seeker.

# Tribunal’s Decision

1. On 6 September 2019, the Appellant applied to the Tribunal for review of the delegate’s decision. The Appellant was also represented before the Tribunal by Mr Taylor.
2. The Tribunal hearing was originally scheduled for 14 November 2019 but at the request of the Appellant’s representative was postponed to 3 December 2019. The hearing concluded after about 3.5 hours. After the conclusion of the hearing, the Appellant’s representative wrote to the Tribunal on 3, 16, 17, 18, 20, 22, 23, 24, 30 and 31 December 2019 to provide additional information and evidence in the form of government and media reports, photos of the Appellant and his family members and a redacted letter from a Sri Lankan lawyer concerning alleged state practices in Sri Lanka in respect of the criminal process for passport fraud (the **Attorney letter**).
3. The Tribunal found that the Appellant did not face a real risk of significant harm based on his ethnicity, imputed political and other accepted personal circumstances if he were to return to Sri Lanka should there be a foreseeable change of government in Sri Lanka: T[101]. In finding so the Tribunal had regard to a report prepared by DFAT entitled “DFAT country information Sri Lanka 4 November 2019” (**DFAT Report**) and earlier versions of the country information prepared by DFAT in respect of Sri Lanka: see T[75], [81] – [82], [85], [88], [97], [98]. The Tribunal made this finding notwithstanding that it accepted that the Appellant had in the past been imputed with LTTE sympathies. The Tribunal also accepted that the Appellant had immediate and extended family members who were members of the LTTE and that he had undertaken as much as two years of self-defence training with LTTE and had been subjected to LTTE indoctrination: T[76] – [78]. The Tribunal accepted the Appellant’s claim that his father was killed as a LTTE operative in early 2009: T[77]. The Tribunal found that the chance of the Appellant facing serious harm as a person of interest for being involved or associated with the LTTE was remote and insubstantial because the Appellant (1) did not claim that he had been arrested, detained, interrogated or otherwise harmed by members of the armed forces for his associations with the LTTE ; (2) had been able to depart and return to Sri Lanka in 2017 using his own passport without being arrested or detained; (3) had spent as much as ten years in Sri Lanka post the end of the civil war without being treated as a person of interest based on actual or imputed LTTE associations; and (4) had confirmed that his earlier statements to this effect were fabricated for the purpose of making a claim for protection: T[79], T[100]. The Tribunal concluded on the basis of the country information and the Appellant’s accepted personal circumstances that the Appellant did not face a real chance of serious harm: T[100].
4. The Appellant claimed that he faced a risk of harm if returned to Sri Lanka due to his Roman Catholic faith and because of his caste. The Tribunal did not accept that there was a real risk of significant harm to the Appellant on the basis of his faith (T[107] – [109]) or to his caste: T[113] – [114].
5. Prominent in the Appellant’s submissions before the Tribunal were his claims that he feared being detained, interrogated and punished for obtaining and using a fraudulent and altered Sri Lankan passport to leave the country. The Appellant specifically claimed fear of being imprisoned for up to five years for the offence of using a false passport under Sri Lankan immigration laws: I&E Act (SL), s 45 (extracted at [10] above). The Tribunal accepted that the Appellant left Sri Lanka on a false passport: T[117]. Accordingly, the Tribunal accepted that “the [Appellant] is possibly liable for passport fraud and other breaches of the I&E Act”: T[119]. But, the Tribunal was not satisfied of his claims for protection on the basis of prosecution for use of a false passport.
6. The Tribunal did not accept the Appellant’s submissions that the DFAT Report did not address the use of false passports as opposed to other illegality: T [121]. The Tribunal considered that the country information addressed breaches of s 45 generally, and did not consider that obtaining a false or fraudulent passport “would necessarily be treated as a separate or more serious offence”: T[121]. The Tribunal considered material provided by the Appellant in respect of sentencing of facilitators or organisers of people smuggling, namely the Attorney letter, but found it of little relevance to the Appellant’s circumstances: T[122] – [123].
7. The Tribunal considered that as a fare-paying passenger of a people smuggling venture, the Appellant would likely be granted bail in accordance with the practice described in the country information available to the Tribunal (T[123]). The Tribunal noted bail conditions are discretionary but may involve monthly reporting at the person’s own expense. The Tribunal further noted that the country information indicated that the authorities are generally opposed to protracted court proceedings in any event: T[123].
8. Finally, the Tribunal accepted that the Appellant would “come into contact with the authorities on arrival”, but that ultimately he would not be dealt with more harshly than “any other low-level breaches of the I&E Act, including passport fraud” (T[124]). What the Appellant would likely undergo was set out by the Tribunal and assessed (T[125] – [126]), including the possible penalties he might face (T[127]). Among other things, the Tribunal said that it “finds the chance of the [Appellant] facing a term of imprisonment, now or in the reasonably foreseeable future, remote”: T[127].
9. On 13 January 2020, the Tribunal affirmed the delegate’s decision to refuse to grant the Appellant a protection visa under s 65 of the Act: T[172].
10. The Tribunal was not satisfied that the Appellant was a person in respect of whom Australia owed protection obligations under s 36(2)(a): T[168]. Having found that the Appellant did not meet the refugee criterion in s 36(2)(a), the Tribunal considered the alternative criterion in s 36(2)(aa) and concluded that the Appellant was a person in respect of whom Australia has protection obligations under s 36(2)(aa) of the Act: T[169]. The Tribunal was not satisfied that the Appellant should be granted a protection visa on the basis of being a member of the same family unit as his mother, a person who satisfies s 36(2)(a) or (aa) and who holds a protection visa: T[170]. Accordingly, the Tribunal concluded that the Appellant did not satisfy the criteria in s 36(2) of the Act.

# Primary Judge’s Decision

1. The Appellant applied to the FCC for judicial review of the Tribunal’s decision. He was represented before the FCC by his solicitor, Mr Taylor. The Appellant initially raised four grounds of review but in his written submissions submitted that he did not press some of the grounds. The primary judge described the somewhat muddy way in which the grounds of review evolved at J[2] – [8]. For present purposes only the first ground of review in the Appellant’s amended application, which is extracted at J[38], is relevant:

The Tribunal’s findings that the [Appellant] did not face a real risk of detention and imprisonment over the offence of using a fraudulent passport was legally unreasonable, and otherwise failed to accord with the requirements of natural justice or procedural fairness under ss. 425 of the Act.

Particulars

i. The Delegate found that there was a real possibility that the applicant would be imprisoned over the offence of use a fraudulent passport.

ii. There was a requirement for the Tribunal to clearly indicate to the applicant that it was considering a finding that the applicant would not face any significant punishment over this offence.

iii. The Tribunal erred by considering without evidence that the punishment for passport fraud would be the same as punishment for illegal departure (on a boat).

iv. The Tribunal considered irrelevant information by applying the DFAT country of origin information concerning illegal departure by boat as analogous to the crime of passport fraud/use a false passport.

1. The primary judge observed that at “the heart of this ground was an objection to the conclusions reached by the tribunal about the possible consequences for the applicant if he were to return to Sri Lanka in light of the fact that he left using a fraudulent passport”: J[39].
2. The first and second particulars challenged the Tribunal’s finding that Appellant’s risk of imprisonment as a result of engaging in passport fraud was remote, as against the alternative finding by the delegate that had the Appellant left Sri Lanka using a false passport, then “in such a scenario he may be detained for this reason, and may even be potentially be jailed”. The primary judge addressed these related contentions together and rejected this part of the ground of review: J[43]-[56]. The primary judge found that an appeal could not be sustained on the basis that the Appellant was denied an opportunity to address the Tribunal. Rather the primary judge found that the Appellant was not only provided an opportunity to address the issue but did in fact provide significant material addressing it: J[55] – [56].
3. The third and fourth particulars challenged the Tribunal’s assessment of the risk the Appellant faced for having left Sri Lanka on a fraudulent passport. The primary judge also rejected this part of the ground of review: J[75] – [108].
4. The Appellant’s submission before the primary judge was that the Tribunal improperly concluded, without evidence, that leaving Sri Lanka on a fraudulent passport was not a serious offence. In his submissions before the primary judge, the Appellant relied upon ***AWU15*** *v Minister for Immigration and Border Protection* [2019] FCA 2008. In *AWU15*, Kerr J found that the Tribunal fell into jurisdictional error by failing to consider country information concerning the prison conditions in Pakistan in circumstances where the applicant in that case would be the subject of an arrest for a “non-bailable” offence for which he faced a minimum pre-trial imprisonment term if he were to be repatriated. The primary judge found that *AWU15* was distinguishable from the Appellant’s case as no arrest warrant was issued and given that the Tribunal did consider the claims made, it simply came to a conclusion contrary to that advocated by the Appellant: J[75].
5. The Appellant also submitted that the Tribunal’s treatment of the evidence before it was legally unreasonable. The Appellant referred specifically to two categories of evidence, the first being the Attorney letter and the second being two reports, one by the Home Office of the United Kingdom (**Home Office Report**) and another entitled ‘Danish Immigration Report’ (**Danish Report**). The primary judge concluded that in so far as the Appellant’s submission on this ground sought to take issue with the conclusions reached by the Tribunal in respect of the Attorney letter, the Appellant was inviting the Court to engage in impermissible merits review: J[84]. The primary judge also found that there was no proper basis on which to support the Appellant’s contention that the Tribunal overlooked either the Home Office Report or the Danish Report given that the Tribunal referenced the submissions made by the Appellant’s legal representative which attached the subject reports: J[103] – [104]. The primary judge concluded that it was evident from a fair reading of the Tribunal’s reasons that after considering the Appellant’s submissions, including by implication the extracts in the Home Office Report and the Danish Report, it preferred and relied on the information in the DFAT Report: J[104].
6. The primary judge held that none of the Appellant’s grounds revealed jurisdictional error and his application for review was dismissed.

# Ground of Appeal

1. On 7 July 2020, the Appellant filed a notice of appeal seeking review of the decision of the primary judge on the basis of a single ground of appeal being that “[t]he Judge failed to properly consider my case”. The Appellant, who had previously been represented by Mr Taylor, solicitor, in the FCC, before the Tribunal and in respect of his protection visa application, was unrepresented for a limited period at the time of filing that notice of appeal.
2. Subsequently, the Appellant once again secured Mr Taylor to act as his legal representative. On 11 May 2021, Mr Taylor wrote to the representative of the Minister and to the Court stating that “the Appellant would rely on the grounds raised in the [FCC]” and that he was preparing an amended notice of appeal. An amended notice of appeal was not forthcoming.
3. Instead, by his submissions in this Court, the Appellant seeks leave to rely on the following amended ground of appeal (as written):

The Circuit Court erred in failing to find jurisdictional error in the second respondent’s decision because:

1. The Tribunal’s findings that the applicant’s personal and family profile was such that he did not face a real risk of serious or significant harm, in the course of detention for questioning, remand, and/or imprisonment over the offence of using a forged identity and fraudulent passport was legally unreasonable, and otherwise failed to accord with the requirements of natural justice or procedural fairness under ss 425 of the Act.

Particulars

1. The Tribunal erred by considering without evidence that the punishment or harm to the applicant personally for passport fraud involving the use of a forged identity would be the same as if he were to receive punishment for illegal departure (on a boat)
2. In assessing the applicant as not having a profile which would put him at risk through the choke point of return, the Tribunal’s assessment that the applicant had not faced personal harm post war was unreasonable in that the Tribunal did not address the claim of the applicant that the targeting and rape of the applicant’s mother in her home in his presence was a harm directly upon the applicant personally for reason of his family.
3. The Applicant claimed to be at risk of harm because of his engagement in **identity fraud** specifically, in illegally departing with a false passport; in conjunction with his own family having been targeted as an LTTE family post war through the brutal rape of his mother in their home while the applicant was present [AB482-3 submissions to the Tribunal paragraphs 12, 16-17, 19, 32]
4. The Tribunal simply did not deal with the claim that the applicant was at a greater risk of harm due to having used a forged identity in departing Sri Lanka in circumstances where his family was a known LTTE family which had been targeted post-war.
5. The Tribunal ignored, or unreasonably rejected, relevant country information including the Court records [AB466-475], the lawyer’s letter [AB 463] as well as the Danish Report and the Home Office Report, which showed that the State practice of Sri Lanka was to treat differentially and more seriously in particular through remand, those who departed with fraudulent documents, as distinct from mere passengers on boats including the Court Documents, and that the state practice was long standing.
6. The Tribunal considered irrelevant information by applying the DFAT country of origin information concerning illegal departure by boat as analogous to the crime of passport fraud/use a false passport.

# Consideration

## Leave to adduce fresh evidence

1. During the hearing of the Appellant’s application for review, and in an attempt to make good his request for leave to introduce an amended ground of appeal to this Court, the Appellant sought leave to tender the transcript of the hearing before the primary judge. The Minister consented to such leave being granted. I granted the Appellant leave to file the transcript of the proceedings in the FCC and to make submissions in respect of that new evidence. I also granted the Minister leave to file responsive submissions.

## Leave to amend

1. The Appellant’s submissions in respect of the proposed amended ground of appeal (as contained in his written submissions) were initially made on the basis that Appellant required leave to amend. In submissions filed after the hearing, the Appellant submitted that “leave is not required to argue the ground as raised in the Federal Court because it is an organic development of the issues identified in the original application”. I reject that submission. The proposed amendments to the ground of appeal seek to introduce a new argument to the effect that the rape and targeting of the Appellant’s mother was because she was a member of her particular family and therefore constituted direct and targeted harm against the Appellant as a member of the same family, and that the Tribunal erred in failing to give consideration to this argument when assessing whether the Appellant faced a real and significant risk of harm if he were to return to Sri Lanka. In the alternative, the Appellant seeks leave to amend. To the extent that the proposed amended ground of appeal seeks to raise matters not argued before the FCC, the Appellant requires leave to proceed on those grounds in the appeal before this Court.
2. The Minister opposes leave being granted in respect of the following proposed particulars: (ii) — whole; part of (iii) — “in conjunction with his own family having been targeted as an LTTE family post war through the brutal rape of his mother in their home while the applicant was present”; and part of (iv) — “circumstances where his family was a known LTTE family which had been targeted post‑war”. The Minister contends those amendments seek to raise matters that were not advanced below and which if raised could have caused the Minister to adduce evidence below, relying on ***Coulton*** *v Holcombe* [1986] FCA 33; 162 CLR 1; *Water Board v Moustakas*; [1988] HCA 12;180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ).
3. In *WGKS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 10, the Full Court (Rares, Moshinsky and Stewart JJ) summarised the principles governing leave to amend in this Court’s appellate jurisdiction. The Court said (at [18] – [20]):

[18] The principle governing the Court’s appellate jurisdiction is that appeals proceed by way of rehearing. Other than in the most exceptional of cases, parties are bound by the conduct of their case at trial, as Gibbs CJ, Wilson, Brennan and Dawson JJ explained in *Coulton v Holcombe* (1986) 162 CLR 1 at 7 – 8. The new ground seeks to reduce the conduct of the proceeding before the Tribunal and primary judge to a preliminary skirmish. Ordinarily, the public interest in the finality of litigation would be undermined by allowing a new point to be argued on appeal that the party had not put below, and this is so even if it concerns only a question of law on uncontested facts that would not have changed the conduct of the trial. An appellate court will only permit such a new point to be raised if the interests of justice so require: *Coulton* 162 CLR at 8; *O’Brien v Komesaroff* (1982) 150 CLR 310 at 319 per Mason J with whom the rest of the Court agreed: see too *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ.

…

[20] Ordinarily, an explanation is required for the making of an amendment particularly, such as this, on an appeal: *Aon Risk Services Pty Ltd v Australian National University* (2009) 239 CLR 175 at 215 [103], 217 [111], [112] per Gummow, Hayne, Crennan, Kiefel and Bell JJ: *Tamaya Resources Ltd (in Liq) v Deloitte Touche Tohmatsu* (2016) 332 ALR 199 at 226 [153] – [159] per Gilmour, Perram and Beach JJ. The mere fact that new counsel has thought of a new point is insufficient. That is the only explanation here and, in our opinion, it is insufficient. Specifically in relation to migration cases, where an adverse decision may have various serious consequences for an appellant, the Court may grant leave to raise such a new point that was not taken below if the point clearly has merit and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. See, for example, *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 [48], *CGA15 v Minister for Home Affairs* (2019) 268 FCR 362 at 372 [36] and *Fualau v Minister for Home Affairs* [2020] FCAFC 11 at [13]-[14].

1. The role of this Court in its appellate function and the considerations the Court must have regard to in determining whether leave ought to be granted to permit new grounds on appeal was set out by Perram J in *AAM15 v Minister for Immigration and Border Protection & Anor* [2015] FCA 804; 231 FCR 452 in which his Honour said (455 at [14]):

One is confronted, then, with the situation that this Court is being called upon in the exercise of its appellate jurisdiction to decide the entirety of the matters which were for trial, including two new grounds, in circumstances where none of the issues to be decided in this Court were ever decided in the Court below. Section 476A of the Act explicitly removes this Court’s original jurisdiction in cases of this kind. Of course, the ability of this Court to hear fresh grounds of appeal or to entertain a notice of contention is not circumscribed by s 476A as they are both aspects of the Court’s appellate jurisdiction. But s 476A is, I think, relevant to whether I should, by leave, permit fresh grounds and a notice of contention when to do so will mean that this Court performs the trial court’s entire function. As a matter of substance, that is what s 476A appears aimed at preventing. There is this further matter, too: Pt 8 of the Act, which regulates judicial review of refugee determinations, ensures that there is one substantive trial in the Federal Circuit Court followed by one substantive appeal to this Court followed by a more cursory review by the High Court. If this Court, in substance, determines a case at first instance by entertaining fresh grounds and a notice of contention this structure is thwarted because no appeal lies to the High Court other than by special leave which is rarely granted and then only on the grounds set out in s 35A of the *Judiciary Act 1903* (Cth). If the matter is effectively tried in this Court then the appellant is denied a layer of appellate scrutiny.

1. The Appellant’s written submissions advanced the proposed amendment but did not address why leave to amend the grounds of appeal should be granted. In oral submissions, the Appellant’s legal representative conceded, contrary to the written submissions filed following the conclusion of the hearing, that the point was not raised in the review application to the FCC, and that as the application for review was conducted on a pro bono basis, the Court should have regard to this fact when considering that different issues were now being raised on appeal. These submissions were repeated by the Appellant’s legal representative in reply in response to the Minister’s oral submissions addressing his opposition to leave being granted based on the principles in *Coulton*. The Appellant’s explanation, such that it is, is insufficient. The Appellant’s legal representative in this appeal appeared on behalf of the Appellant both before the Tribunal and in the FCC, including as advocate. The lack of a satisfactory explanation for the late attempt to amend the grounds weighs against the grant of leave.
2. In considering whether leave ought to be granted the Court must consider whether it is expedient in the interests of justice to do so: *O’Brien v Komesaroff* [1982] HCA 33; 150 CLR 310 at 319 (Mason J (as his Honour then was) with whom Murphy, Aickin, Wilson and Brennan JJ agreed). The nature of migration cases, and in particular those concerning the refugee status of an applicant, mean that there is much personally at stake for visa applicants, and they are almost invariably at a disadvantage with regard to access to adequate legal representation, and they do not typically have an understanding of the Act. To that end, if a point clearly has merit and there is no other prejudice to the respondent in permitting it to be agitated, then the expediency and the interests of justice might justify leave being granted: *CBN18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 2190; (2019) 272 FCR 513, 520 at [48] (Stewart J). However, where there is no adequate explanation for the failure to take a point, and it seems to be of doubtful merit, leave should generally be refused: *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134; 147 FCR 51, 84 at [163] (Madgwick J, Conti J agreeing).
3. In evaluating whether leave ought to be granted to rely on a new ground of appeal, the Court has regard to the prospects of success of the proposed ground. This exercise is conducted at a reasonably impressionistic level and is focussed on whether the proposed ground of appeal is “sufficiently arguable” or has “reasonable prospects of success”: see *NWQR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 30 at [31] (Farrell J, Wigney J, Perry J); *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; 242 FCR 585, 597 - 598 at [62] – [63] (Mortimer J).
4. The argument the Appellant wishes to advance on appeal is that the Tribunal’s findings were legally unreasonable or otherwise failed to accord with the requirements of natural justice because, *inter alia*, his mother was raped in 2012 after the war ended, and this was evidence that his family was targeted by the Sri Lankan government. The Appellant contends that the denial of natural justice arose from the Tribunal’s failure to put to him that it would consider the rape of the Appellant’s mother as being harm directed to her personally and not as harm directed to him.
5. The Appellant submits that this claim was articulated before the Tribunal in written submissions lodged by his legal representative on 3 December 2019, following the conclusion of the hearing before the Tribunal. The Appellant relies on the opening extract which is as follows (with names redacted):

The applicant is a young Tamil man from Mullaitivu whose family have been strongly involved in anti-government LTTE activity, and been directly targeted by the authorities, for assassination of his grandfather, disappearance and presumed murder of his uncle [NAME REDACTED] and the brutal rape of his mother.

1. In oral submissions the Appellant also referred to a statutory declaration made by the Appellant’s mother on 17 August 2019 which stated (as written):

…That I was subjected to sexual assalut and rape by the Army and the C.I.D.

The Appellant similarly submits that it may be inferred from this statement that his mother’s rape was a targeted act against his family by members of the Army and the Criminal Investigation Department of the Sri Lankan Police.

1. The Appellant submits that these references, taken together, provide an inference from which the claim that his mother was raped because of her family’s LTTE associations can be drawn. The Appellant submits that he should not “be required to have spelled out the obvious to the Tribunal and also the Circuit Court, that the rape of his mother was not just because soldiers and CID wanted to, or just because they wanted to exploit power imbalance, or because she was a woman”.
2. For the following reasons, I am not satisfied that a substantial and clearly articulated claim was raised before the Tribunal to the effect that the Appellant’s mother’s rape was a targeted act due to her membership of an LTTE affiliated family. Further, I am not satisfied that it is sufficiently arguable that the Tribunal erred in failing to have regard to any consequential risk of harm faced by the Appellant by reason of his membership of his mother’s family.
3. The Appellant’s contention that the point was raised in the Tribunal depends on a selective reading of the material before the Tribunal. The balance of the opening paragraph of the post hearing submission is as follows (with names redacted):

He used a false passport to depart and is involuntary to return. If removed to Sri Lanka he would be a member of a particular social group of failed asylum seekers, being a Tamil from the North who reunited with members of the former LTTE diaspora, including his uncle [NAME REDACTED], who lives with his mother and uncle [NAME REDACTED] in Australia and is a recognized refugee.

1. The emphasis throughout the submission is that the Appellant is at risk due to him being a failed asylum seeker as a “member of a particular social group of failed asylum seekers, being a Tamil from the North who reunited with members of the former LTTE diaspora”. The rape of his mother is referred to by way of background where it is said “[h]is mother was raped as a young teenager” and “[i]n 2012 his mother was subject to a brutal rape by the army in her home and subsequently fled as a refugee. His mother had to leave him as a 16 year old boy with his grandmother rather than risk his life on a people smuggler’s boat to Australia”. It is then submitted:

[The Appellant] and his mother have a very strong bond. When his grandmother passed away they tried to bring him here legally but he was refused. He needed to be with his mother and so he sold the inherited land and organized with a smuggler to reunite with his mother and family in Australia.

1. The Appellant’s submissions before the Tribunal did not put the proposition in the way in which the Appellant contends in the present appeal. Rather, the Appellant submitted to the Tribunal that his mother was raped in 2012, a fact which the Tribunal accepted: T[62] and [146]. It was not put to the Tribunal that the Appellant’s mother’s rape was driven by any particular government interest in the Appellant’s family or the Appellant himself so as to warrant the Tribunal considering his claims on the basis of his family being “targeted” after the end of the war. Further, it warrants mention that not only was the Appellant represented before the Tribunal but he submitted a significant amount of material prior to, and following, the hearing of his application for review. It is not apparent from that material that the Appellant put an argument to the effect that he now seeks to propound on appeal. The statements to which the Appellant has drawn the Court’s attention, in an attempt to argue that a claim was made, do not go beyond the fact of the Appellant’s mother’s rape. It is not for the Tribunal to infer or enquire into claims that were not articulated on the material before it.
2. Next, the Appellant argues that “the new ground logically arises out of the ground argued in the Circuit Court, in all the circumstances”. While this submission is by no means clear, I understand the Appellant to contend that the proposed new ground, in so far as it raises an argument concerning his mother’s rape, arose below. The Appellant tendered the transcript of the hearing before the primary judge to make good his submission that this issue was raised before the primary judge. The transcript reveals that three references were made to the Appellant’s mother’s rape during the course of the hearing. Two of those references appear in the context of ground three below (being the Tribunal’s decision to decline to recommend that the Minister exercise his personal non-compellable power) which the Appellant has not challenged on appeal. There is one reference to the Appellant’s mother’s rape that is not made in that context, however that reference appears to be limited to explaining how the Appellant became separated from his mother and seeks to establish his desire to reunite with her. The submissions made before the primary judge fall well short of the matters the Appellant now seeks to agitate.
3. It is well established that a party should not be permitted to raise new arguments on appeal if those matters could have been met by evidence below: see authorities extracted at [37] and [38] above.
4. The hearing record of the Tribunal hearing indicates that the Appellant’s mother appeared as a witness. The transcript of the hearing before the Tribunal was not tendered in the Court below or on appeal. The Tribunal’s reasons at T[59] – [60] make reference to the Appellant’s mother’s protection visa application which included a statutory declaration signed by the Appellant’s mother. This was the subject of a non-disclosure certificate issued under s 438 of the Act, which the Tribunal was satisfied was validly issued: T[63]. The Tribunal examined the Appellant’s mother’s protection visa application, including her statutory declaration, and expressly concluded that there was “no relevant information in that application or attached statement that undermines the credibility of the [Appellant]’s claims for protection or would be the reason, or part of the reason, for affirming the decision under review”: T[61]. The Tribunal accepted that the Appellant’s mother’s claims for protection were credible. If it was the case that this issue was a substantial part of the Appellant’s claim, then the matter should have been the subject of evidence before the Tribunal. The Appellant points to the statement in his mother’s statutory declaration extracted at [44], but that does not demonstrate, or give rise to an inference, that the attack on his mother, which the Tribunal accepted had occurred, was a targeted political act against her family specifically.
5. In these circumstances, and in the absence of there being any material to which the Appellant can point that supports a claim being made before the Tribunal that his mother was raped by reason of her membership of a particular LTTE family, there is no reason for the Tribunal to have ventured off to consider whether the Appellant’s mother’s rape was an act by which her son was directly targeted such that would inform the assessment of risk of harm to him on his return. That argument was not put. During the course of his oral submissions, the Appellant’s representative submitted that notwithstanding that the transcript of the mother’s evidence was not before the FCC or this Court, the Tribunal did not question the Appellant’s mother’s evidence, speculating that this was to avoid “the risk of further traumatising her” and that in failing to do so, the Tribunal fell into error. Even if the transcript was in the material below and supported the contention that the Tribunal did not ask a question of the mother, that would readily be explained by the way in which the Appellant framed his case before the Tribunal. It is not the role of this Court to retrospectively piece together a possible claim that might have been made before the Tribunal: *DFU16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 222 at [20] (Middleton J); *MZAJC v Minister for Immigration and Border Protection* [2016] FCA 208 at [12] (Mortimer J). Further, a Court will be less willing to accept a submission that a claim has clearly and squarely arisen on the materials before the Tribunal if the party seeking to make the claim is represented and has had opportunities to advance that claim: *BDR18 v Minister for Home Affairs* [2020] FCA 212 at [39] (Lee J); see also *CED15 v Minister for Immigration and Border Protection* [2018] FCA 451 at [75] (Thawley J). In the circumstances of the procedural history in the present matter, and noting that the Appellant’s solicitor’s approach throughout has been to file what can fairly be described as waves of additional material, including submissions, post hearing, I am particularly reticent to accept that, on the basis of the scant references relied upon, that the claim now sought to be agitated was clearly and squarely put below. In fact, on the material before the Court I am satisfied that it was not.
6. The argument sought to be advanced in respect of the Appellant’s mother’s rape and the consequential risk of harm to the Appellant in returning to Sri Lanka as a result is lacking in merit. Further, the Appellant’s solicitor has not provided any explanation as to why this point was not raised before the FCC. The Minister submits, and I accept, that the issue of whether the mother was raped due to her membership of her family and whether that evidenced a targeting of her family that would, or could, flow through to the Appellant are matters about which the Minister could have adduced evidence below if those matters had been properly raised. The Minister could have sought to obtain the mother’s protection visa application or a transcript of the hearing before the Tribunal, where the mother was a witness. The matter was not raised and that material was not obtained. It was evidence that could have informed a proper consideration of the claims which were put before the Tribunal, or clearly and squarely raised on the material before the Tribunal. For these reasons, leave to rely upon this aspect of the amended ground of appeal is refused.
7. Leave is, however, granted to the Appellant to rely upon the balance of the particulars of the amended ground of appeal. Those particulars reflect part of the case before the primary judge and are matters to which the Minister takes no objection.
8. It is convenient to address the appeal by reference to the particulars provided to Ground 1 in the form for which leave to amend has been granted.

## Ground 1 – particulars (i) and (vi)

1. The first particular and the sixth particular challenge what the Appellant regards as a conflation by the Tribunal of the risk to him for having committed passport fraud as opposed to merely illegally departing Sri Lanka. The Appellant contends that the Tribunal considered irrelevant information, being the DFAT Report, in making a finding that the punishment or harm he would face would be the same as if he were to receive punishment for illegal departure on a boat.
2. Ultimately, the first particular challenges the Tribunal’s assessment of the country information before it. The Appellant argues that the Tribunal fell into error by relying on the DFAT Report in circumstances where there was other country information before the Tribunal which did show that there was a significant risk of harm to people found to have departed Sri Lanka in similar circumstances to those which applied to the Appellant’s departure.
3. The use of country information falls within the Tribunal’s jurisdiction: see *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [11] (Gyles, Tamberlin and Lander JJ); *CXS18 v Minister for Home Affairs* [2020] FCAFC 18 at [37] (McKerracher, White and Colvin JJ); *CUF18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 144 at [17] (McKerracher J)). Mere disagreement with the Tribunal’s reading of country information does not amount to jurisdictional error.
4. The Tribunal extracted the DFAT Report at T[54]. It was open to it to assess that report as pertaining to s 45 of the I&E Act (SL) as a whole. Moreover, it was open to the Tribunal to assess that there is no reason to think that using a false passport would be punished any more severely than any other infringing conduct. Accordingly, the Appellant’s contentions in particulars (i) and (vi) of ground 1 must fail.

## Ground 1 - particulars (iii) and (iv)

1. Given that leave has not been granted for the Appellant to rely on those parts of particulars (iii) and (iv) which relate to the Appellant’s mother’s rape, particulars (iii) and (iv) are limited to the Appellant’s contention that the Tribunal did not deal with his claim that he faced a greater risk of harm because he engaged in identity fraud, specifically in departing Sri Lanka with a false passport.
2. It is plain from the Tribunal’s reasons that it considered the risk of harm to the Appellant arising from his use of a fraudulent passport to depart Sri Lanka: T[125] – [127]. The Tribunal accepted that the Appellant will face questioning and will likely be investigated for departing Sri Lanka illegally and with a fraudulent passport: T[125]. However, the Tribunal was not satisfied that the Appellant would be a person of interest to the government solely based on the nature of his accepted illegal departure or because it involved use of a fraudulent passport: T[126].
3. As the primary judge indicated in her judgment below (at J[75]), unlike *AWU15* this is not a case in which the Tribunal failed to consider a claim made by an applicant by reference to country information. Rather, the Tribunal here did consider the claims made, but simply came to a conclusion contrary to that advanced by the Appellant. The submissions made by the Appellant’s legal representative in support of these particulars of appeal took issue with the conclusions reached by the Tribunal in respect of the DFAT Report. The significance to be attached to the Appellant’s use of a false or fraudulent passport was considered by the Tribunal and is the subject of an express conclusion: T[126]. The primary judge thoroughly reviewed the Tribunal’s finding in an analysis which demonstrates that the finding was supported by a rational process of reasoning and supported by the material before the Tribunal: J[83] – [84], [95] – [108]. The primary judge’s conclusions in respect of the way in which the Tribunal used the country information at J[85] – [108] are compelling. The Appellant’s submissions based on the Tribunal’s treatment of country information treatment amounts to an invitation to engage in a merits review.
4. For these reasons, the Appellant’s contentions based on particulars (iii) and (iv) of ground 1 must fail.

## Ground 1 – particular (v)

1. By the fifth particular to ground 1, the Appellant contends that the Tribunal “ignored or unreasonably rejected” relevant country information including, Court records, the Attorney letter, the Danish Report and the Home Office Report. The Appellant contends that these materials showed that the state practice of Sri Lanka was to treat differentially, and more seriously, those who departed with fraudulent documents, from those who departed as passengers on boats.
2. It is not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593, 604 at [46] (French, Sackville and Hely JJ). However, in this case, the Tribunal’s reasons reveal that it gave consideration to the information provided by the Appellant in support of his claim that the Sri Lankan authorities take passport fraud very seriously: T[122]. The Tribunal went on to set out its consideration of that information and ultimately found that the information provided by the Appellant, including the Attorney letter and the Court records, was of little relevance to his circumstances: T[120] – [123].
3. As to the Attorney letter, the Tribunal made express reference to the letter at T[122] of its reasons and proceeded at T[123] to find that the material was not relevant to the Appellant’s circumstances given he legally departed the country using a fraudulent passport, not as a facilitator or organiser of people smuggling. The primary judge was correct in finding that this conclusion was reasonably open to the Tribunal to make and does not give rise to jurisdictional error. For this Court to revisit the findings of Tribunal in respect of the Attorney letter would be to engage in impermissible merits review.
4. The fact that the Tribunal did not make specific reference to the Danish Report and the Home Office Report in its reasons does not establish jurisdictional error. The Danish Report is a document entitled “Security and human rights situation, entry and exit procedures and personal documentation: Report on fact-finding mission to Sri Lanka (1-12 October 2001)” published by the Danish Immigration Service on 1 May 2002. The Home Office Report is a document entitled “Report of the Home Office Fact Finding Mission Sri Lanka: Treatment of Tamils and People who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE) 2016”. The fact finding mission the subject of the Home Office Report was conducted on 11 to 23 July 2016. As at the time of the Tribunal’s decision, the Danish Report and the Home Office Report were not the most recent country information available to the Tribunal. The DFAT Report was more recent, the version before the Tribunal was dated 4 November 2019. In the circumstances, I do not consider that the most reasonable and probable inference to draw is that the Danish Report and Home Office Report were overlooked, rather the better explanation is that the Tribunal preferred more contemporaneous country information and therefore did not expressly refer to other country information because it was less relevant to, and not material to, its forward-looking analysis: *GLD18 v Minister for Home Affairs* [2020] FCAFC 2 at [71] – [80] (Allsop CJ and Mortimer J; Snaden J agreeing). That the Tribunal was aware of the other country information is plain on the basis of the primary judge’s analysis, culminating at J[104]. No error in reasoning or conclusion is demonstrated.
5. For these reasons, particular (v) of ground 1 must fail.

# Conclusion

1. For these reasons, the appeal must be dismissed with costs.

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| I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman. |

Associate:

Dated: 20 May 2022