Federal Court of Australia

CUP17 v Minister for Immigration and Multicultural Affairs [2025] FCA 183

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| Appeal from: |  |
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| File number(s): |  |
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| Judgment of: | **BROMWICH J** |
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| Date of judgment: | 12 March 2025 |
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| Catchwords: | **MIGRATION** – application for leave to file amended notice of appeal – whether amended notice of appeal has merits – whether the Immigration Assessment Authority committed jurisdictional error in concluding that the appellant’s scarring would not bring him to the adverse attention of the Sri Lankan government – HELD: leave granted except as to one ground of appeal; appeal dismissed with costs  |
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| Legislation: | *Migration Act 1958* (Cth) ss 473DC, 473DD*Federal Court Rules 2011* (Cth) r 36.10 |
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| Cases cited: | *CUP17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3119 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: |  |
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| Number of paragraphs: | 22 |
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| Date of hearing: | 12 March 2025  |
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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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| Counsel for the Respondents: | Mr T Reilly |
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| Solicitor for the Respondents: | Mills Oakley |

ORDERS

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|  | NSD 1334 of 2020 |
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| BETWEEN: | CUP17Appellant |
| AND: | MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRSFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| order made by: | BROMWICH J |
| DATE OF ORDER: | 12 March 2025 |

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to Minister for Immigration and Multicultural Affairs.
2. Leave be granted to the appellant nunc pro tunc to file the amended notice of appeal dated 23 January 2024, lodged for filing out of time on 4 March 2024.
3. Leave be refused to rely upon proposed ground 3 in the amended notice of appeal.
4. The amended notice of appeal otherwise be dismissed.
5. The appellant pay the first respondent’s costs as taxed or agreed.

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

REASONS FOR JUDGMENT

BROMWICH J:

1. This is an appeal from the orders and judgment of the Federal Circuit Court, now the Federal Circuit and Family Court of Australia (Division 2): *CUP17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCCA 3119. On 6 May 2020, the primary judge dismissed the appellant’s application for judicial review of a decision of the Immigration Assessment **Authority** dated 30 May 2017. The Authority had affirmed a decision of a delegate of the **Minister** for Immigration and Multicultural Affairs to refuse the appellant’s application for a Safe Haven Enterprise Visa.

## Before the primary judge

1. It is convenient to reproduce aspects of the primary judge’s reasons as to the Authority’s decision, the case advanced in support of the judicial review application and his Honour’s rejection of that case. The primary judge succinctly summarised the relevant portions of the Authority’s detailed reasons as follows:

[5] After the Authority identified the information before it, including what (with one exception) the Authority accepted as new information in relation to which it found there were exceptional circumstances justifying its consideration of it, the Authority identified and considered the applicant’s claims for protection. The Authority:

(a) accepted the applicant is a Tamil male from a particular village in the Jaffna district;

(b) accepted the applicant grew up in a LTTE controlled area until it was captured by the SLA;

(c) accepted that several army camps remain today, and that military and security forces maintain a significant presence in the Northern Province;

(d) accepted the applicant was attacked with a knife in 2007, and three other drivers were attacked and killed on the same day;

(e) although it was not satisfied the identity of the attackers responsible for the 2007 attack is known, relying on country information the Authority found it plausible attacks on the applicant and the three other drivers were carried out by persons affiliated with the SLA government for reasons of Tamil ethnicity; and

(f) accepted the applicant received medical treatment for three days following the 2007 attack.

[6] The Authority, however, found unconvincing the applicant’s evidence in relation to the events that occurred after the 2007, and, therefore, the Authority did not accept: the applicant was a person of adverse interest to the CID after the 2007 attack; or that the applicant was required to report to the CID between 2007 and 2012; or that the CID came to the applicant’s home during that period; or that the applicant has an adverse profile because of his truck driving activities, or due to an actual or imputed involvement with the LTTE; or that the CID had gone to the applicant’s home and enquired about him after he left Sri Lanka. The Authority relied on the applicant’s having given inconsistent evidence about: where he lived and worked; when the CID began targeting him; whether he had been previously arrested by the CID and the duration of any such detention; whether he had transported weapons for the LTTE or worked for Mr U; whether he attended the CID camp for questioning or was questioned by the CID at home; and about the way in which the CID contacted the applicant in 2012 and asked him to report to the CID office.

[7] The Authority accepted there was country information that confirmed scarring has been a risk factor in the past for returnees. The Authority, however, noted two things. First, the “*scars could be easily covered by sleaves of a shirt*”. Second, the Authority found country information does not indicate that body scars “*are now likely to attract the attention of the authorities*”. The Authority referred to a decision of the UK Tribunal that the issue of scarring was only relevant in circumstances where the person was being detained and stripped. The Authority was not satisfied the applicant is at risk of being detained and stripped on his return to Sri Lanka; and it was not satisfied the applicant is at risk of coming to the adverse attention of the authorities on his return because of his scars on his left and right arms.

[8] The Authority was also not satisfied the applicant faces a real chance of serious harm because of his Tamil ethnicity or because of any actual or imputed connections with the LTTE, or because of the place at which he lived, or because of his age, or for any other reason. The Authority relied on findings it had already made, and country information which the Authority was satisfied indicated that: (a) the overall situation of Tamils in Sri Lanka had improved considerably since the end of the civil war in 2009; (b) there are no official laws or policies that discriminate on the basis of race, language, or social status; and (c) there is no longer a presumption of a requirement for protection because a person is a Tamil from a former LTTE controlled area.

[9] The Authority accepted that, if he returned to Sri Lanka, the applicant would be identifiable to the authorities as a failed asylum seeker who departed Sri Lanka illegally. The Authority assessed this risk by reference to two matters. The first was the applicant’s being a failed asylum seeker with scars. The Authority was not satisfied the applicant faces a real chance of serious harm because he is a failed asylum seeker from Australia, or because of his scarring, now or in the reasonably foreseeable future. The Authority relied on its not being satisfied that, on the basis of country information that was before it, the applicant would be harmed by the Sri Lankan authorities because he is a Tamil asylum seeker, and there being no information before the Authority to indicate the applicant is at risk of coming to the attention of the authorities “*on account of bodily scarring*”.

[10] The second matter by reference to which the Authority assessed risk of harm to the applicant is its finding that on his return to Sri Lanka the applicant will be exposed to penalties for having breached the Sri Lankan *Immigrants and Emigrants Act*. The Authority referred to a DFAT report that states “*most returnees will be fingerprinted and photographed, transported to the nearest Magistrates Court at the first available opportunity*” after which “*custody and responsibility for the individual shifts to the courts or prison services*.” Relying on country information, the Authority found that on his arrival the applicant will be charged and fined, and potentially detained for a brief period of time; and, if the applicant pleads not guilty, he will either be granted bail on personal surety or have a family member act as guarantor. The Authority further found: there is no real chance the applicant will face imprisonment; the imposition of a fine, surety or guarantee would not amount to serious harm; and, while the applicant may be briefly detained in poor prison conditions, that would not amount to serious harm.

[11] Relying on these findings, the Authority was not satisfied the applicant was a “*refugee”* because it was not satisfied the applicant faces a real chance of suffering significant harm upon return to Sri Lanka, and was not satisfied the applicant met the complementary protection criterion provided for by s.36(2)(aa) of the Act.

1. The primary judge reproduced the sole ground of review pressed at the hearing before his Honour, which asserted jurisdictional error on the part of the Authority by failing to provide adequate reasons, and the particulars to that ground. His Honour then briefly but thoroughly summarised the submissions advanced in support of that ground of review and explained why they were not successful as follows:

[13] In his written submissions the applicant submits that the Authority “assumes/conjects that during the initial processing at the airport, subsequent transfer to the court and or prison system, the applicant would not be searched”, but “no reasons are advanced as to how that conclusion is reached”, and “no evidence is cited to support it”. Mr Hodges, who appeared for the applicant, repeated the substance of this submission. He submitted there was no evidence to support the Authority’s assumption that the applicant would not be detained and searched before the Authority.

[14] There are two difficulties with the applicant’s submissions. First, it assumes that the Authority’s accepting that the applicant would be charged and detained necessarily entailed a real risk the applicant would be searched, and thus would be exposed to the risk of his scars being revealed. But the applicant does not identify any material that was before the Authority that could render this assumption reasonable. Second, the applicant ignores the findings and country information on which the Authority relied. The Authority relied on its finding that the applicant did not have a profile that would expose him to adverse interest by the authorities, and on country information the Authority accepted showed that the risk of mistreatment for the majority of returning asylum seekers was low; and which showed that most returnees who had departed Sri Lanka illegally will be fingerprinted and photographed, and transported to the nearest magistrates court at the first available opportunity once investigations are complete, after which the custody and responsibility for such returnees would shift to the courts and prison authorities. The Authority also referred to country information about poor prison conditions in Sri Lanka. The applicant has not identified country information that was before the Authority that refe[r]s to persons being stripped and searched, or of the circumstances in which persons may be stripped and searched.

[15] The Authority did not rely on an assumption that the applicant would not be stripped and searched while in detention. The Authority made findings about the risk profile of the applicant, and consulted country information about what occurs to returnees who share the risk profile the Authority found the applicant had who had left Sri Lanka illegally. There was nothing in that material that could reasonably have suggested to the Authority that such persons would be processed on his or her return in a manner other than that revealed by the country information to which the Authority referred, none of which suggested that such persons face a real chance of being stripped and searched. The ground on which the applicant relies, therefore, fails.

1. Additionally, the Authority’s reasons at [36] warrant reproduction as follows (footnote omitted):

I have also accepted that the applicant has scarring on his arms as a result of the June 2007 attack. Given the location of the scars, I consider the scars could be easily covered by sleaves of a shirt. Country information in the referred materials confirms that scarring has been a risk factor in the past for returnees. However, country information does not indicate that body scars alone are now likely to attract the attention of the authorities. The UK Tribunal opined that the issue of scarring was only relevant in circumstances where the person was being detained and stripped.While I accept the applicant has scarring as claimed, in his circumstances, I am not satisfied he will be at risk of being detained and stripped upon his return to Sri Lanka. Nor am I satisfied that the applicant is at risk of coming to the adverse attention of the authorities on his return due to scars on his left and right arm.

## The grounds of appeal

1. On 14 December 2020, the appellant filed a notice of appeal containing a single ground of appeal, which replicates the ground of review pressed before the primary judge:

The IAA it committed jurisdictional error by failing to provide adequate reasons for its decisions.

1. On 4 March 2024, the appellant filed an amended notice of appeal which substantially amended the initial notice of appeal. The grounds of appeal, with the particulars removed, are (verbatim):

Ground 1 The Federal Circuit Court erred when failed to actively engage in intellectual process, when it ignored relevant material, when it failed to find that the IAA committed jurisdictional error, and when the Federal Circuit Court unreasonably dismissed the Applicant’s Review Application.

Ground 2 The Lower Court erred when it found the sole Ground on which the Applicant relied failed and proceeded to dismiss the Application.

Proposed The Authority was in error when the Authority did not consider getting

Ground 3 more information pursuant to s 473DC concerning the likelihood of the Applicant being examined prior to being brought before the magistrate.

1. As the amended notice of appeal was filed more than 28 days after the initial notice of appeal, the appellant requires leave from the Court to rely upon it: *Federal Court Rules 2011* (Cth) r 36.10. This is reflected in order 4 of the orders sought by the appellant. The reference to ground 3 as “proposed” reflects an acknowledgement that it was a ground that was not advanced before the primary judge.

## Leave to rely upon the late amended notice of appeal

1. I consider that the appellant should be granted leave to rely upon the amended notice of appeal filed out of time, to enable the real issues in dispute to be addressed, rather than reverting to the original notice of appeal. This does not entail the grant of leave to rely upon ground 3 as proposed in the amended notice of appeal as that requires another level of leave to rely upon a point not raised below, for which sufficient merit needs to be established.

## Ground 1

1. This ground asserts that the primary judge failed to actively engage in intellectual process, ignored relevant material, and unreasonably dismissed the appellant’s review application by failing to find that the Authority had committed jurisdictional error. The particulars in the amended notice of appeal trawl through the information that was before the Authority and the reasons in addressing that material, suggesting that different conclusions could have been reached, or assessments made. The appellant’s submissions go further down this path by quoting from material that is footnoted by the Authority, and not contained in the appeal book, suggesting that different conclusions should have been reached by the Authority from the material that was before it. There is no suggestion that anything of this kind was raised before the primary judge. Had they been raised, they likely would have been given short shrift as constituting nothing more than impermissible merits review.
2. The reference to the primary judge having failed to engage in an active intellectual process, an obligation sometimes applied to executive decision-makers to identify jurisdictional error, and the reference to ignoring relevant material, as though his Honour had some obligation to go beyond the arguments and materials that were raised in the course of judicial review of the Authority’s decision, in order to assert that this led to a failure to find jurisdictional error, is misconceived, inappropriate and in any event a doomed enterprise. There is no discernible error on the part of his Honour and no failure to find jurisdictional error on the part of the Authority, not least because none in substance was in fact alleged, much less proven.
3. This ground of appeal must fail.

## Ground 2

1. Ground 2 asserts that the primary judge erred in dismissing the review application after finding that the appellant had not succeeded in establishing the sole ground advanced. This ground is not advanced by a single reference to the primary judge’s reasons. Instead, it is sought to be advanced by running a version of the arguments apparently advanced before the primary judge, but significantly embellishing them by reference to parts of the contents of country information that was before the Authority, suggesting that it was jurisdictional error on the part of the Authority to refer to parts of that material, but not the parts that are quoted and relied upon. This too is flagrant merits review.
2. In any event, I am satisfied, that there was no failure on the part of the primary judge to detect any jurisdictional error on the part of the Authority in relation to the appellant’s asserted fears arising from his scars.
3. This ground of appeal must also fail.

## Ground 3

1. The appellant contends that the Authority erred by not getting more information pursuant to s 473DC of the *Migration Act 1958* (Cth) (**Act**), in relation to the likelihood of the appellant being examined prior to being brought before the magistrate. This complaint has two aspects: the use that was made of information that was received, and upon consideration that it is said should have taken place revealing an inconsistency with the material that was considered, failing to obtain further information of a vague and general kind.
2. Section 473DC confers a discretionary power on the Authority to get new documents or information that were not before the Minister. However, s 473DC(2) is clear in stating that the Authority does not have a duty to get or accept any new information, even if the Authority is requested to do so by an applicant. Further, new information must not be considered unless it meets the criteria in both sub-ss 473DD(a) and (b). Importantly, the Authority exercised that power in the appellant’s favour by allowing certain information relied upon to be considered, namely an undated report by the United Nations Committee Against Torture (**CAT**) titled “Concluding observations on the fifth periodic report of Sri Lanka”. That was because the Authority was satisfied that there were exceptional circumstances to justify the consideration of this new information as it contained up to date information regarding torture in Sri Lanka. However, the Authority expressly found that the report was not credible personal information that would have affected consideration of the appellant’s claims: IAA[6]. Understandably, no attempt is made to establish error on the part of the Authority in giving the CAT report that characterisation, because it is plainly correct.
3. The appellant’s real complaint is twofold. The first complaint is not that the Authority did not receive the information relied upon, but rather that this information, once received, was not considered in the particular way that the appellant contends that it should have been, namely by considering the part of the CAT report that addressed medical examinations for the purposes of showing evidence of mistreatment in detention. The CAT report was not directed to the issue of such examinations being the means by which pre-detention injury or abuse in the form of scarring might be seen and somehow interpreted by a detaining official, as a sign of previously having come to the attention of authorities. Rather, the CAT report discussed medical examinations by doctors with reference to people already in detention and as evidence for showing ill-treatment in detention, apparently from the point of arrest onwards. It is not concerned with historic events, such as those which may have given rise to scarring, but rather mistreatment, perhaps rising to the level of torture, from the time of arrest or other detention then occurring. The complaint about that is therefore wholly misconceived, beyond the obvious vice of engaging in impermissible merits review.
4. The second complaint is that the Authority did not obtain further information about what would happen to the appellant if his case was to fail and he was to be returned to Sri Lanka as a failed asylum-seeker. There are a number of problems with this complaint:
5. there was no obligation to seek such information;
6. no such information was asked to be obtained (other information having been furnished by the appellant);
7. the complaint depends upon, per the appellant’s written submissions, the CAT report constituting a direct challenge to the Authorities assumptions and findings on the issue of strip searches, which is plainly incorrect. As already noted, the CAT report is relevantly about medical examinations to detect current mistreatment of persons since they have been detained, which may rise to the level of torture. The issue raised by the appellant is the detection upon his return as a failed asylum-seeker, and being stripped searched and exposing scarring reflecting historic injuries (in 2007), causing him to be identified as someone who had come to the attention of the authorities in the past.
8. In my view, reliance on the CAT report in the way suggested by the appellant is fanciful. It was not raised below and there is no compelling reason to allow it to be raised now.
9. No error, let alone jurisdictional error, has been established on the part of the Authority in the use and assessment of the CAT report.
10. As this was not a ground of review that was raised before the primary judge, and as it is devoid of merit, leave to rely upon it for the first time on appeal must be refused. Even if leave had been granted, the ground would have been dismissed in any event.

## Conclusion

1. The appeal must be dismissed with costs.

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| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 12 March 2025