FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

AWT22 v Minister for Immigration, Citizenship & Multicultural Affairs

[2022] FedCFamC2G 925

File number:	SYG327 of 2022
Judgment of:	**JUDGE RILEY**
Date of judgment:	9 November 2022
Catchwords:	**MIGRATION** – Immigration Assessment Authority – whether the Authority erred by failing to assess the risk of harm to the applicant in the reasonably foreseeable future.
Legislation:	*Migration Act 1958* s.65.
Cases cited:	*AIE15 v Minister for Immigration and Border Protection* [2018] FCA 610 *AKH16 v Minister for Immigration and Border Protection* (2019) 269 FCR 168; [2019] FCAFC 47 *BOT15 v Minister for Immigration and Border Protection* [2018] FCA 654 *CPE15 v Minister for Immigration and Border Protection* [2017] FCA 591 *EMX17 v Minister for Immigration and Border Protection* [2019] FCA 1337 *Minister for Immigration and Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559; (1997) 48 ALD 481; (1997) 144 ALR 567; (1997) 71 ALJR 743; [1997] 9 Leg Rep 2; [1997] HCA 22* *SZGHS v Minister for Immigration and Citizenship* [2007] FCA 1572.
Division:	Division 2 General Federal Law
Number of paragraphs:	49
Date of hearing:	14 September 2022
Place:	Melbourne
Counsel for the Applicant:	Richard Reynolds
Solicitor for the Applicant:	Lander & Rogers

Counsel for the First Respondent:	Jonathan Barrington
Solicitor for the First Respondent:	Mills Oakley
Counsel for the Second Respondent:	No appearance
Solicitor for the Second Respondent:	Mills Oakley

ORDERS

SYG327 of 2022

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**AWT22** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP & MULTICULTURAL AFFAIRS** First Respondent
	IMMIGRATION ASSESSMENT AUTHORITY Second Respondent
ORDER MADE BY:	**JUDGE RILEY**
DATE OF ORDER:	**9 NOVEMBER 2022**

THE COURT ORDERS THAT:

1. The decision of the Immigration Assessment Authority made on 14 February 2022 in matter number IAA21/10199 be set aside.

2. The matter be remitted to the Immigration Assessment Authority for determination according to law.

3. The first respondent pay the applicant's costs of the proceeding fixed in the sum of $7,853.

Note: The form of the order is subject to the entry in the court's records.

Note: This copy of the court's reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE RILEY:

INTRODUCTION

1 This is an application for review of a decision made by the Immigration Assessment Authority. In that decision, the Authority affirmed a decision of the Minister's delegate not to grant the applicant a Safe Haven Enterprise visa ("SHEV") pursuant to s.65 of the *Migration Act 1958* ("the Act").

BACKGROUND

2 In his written submissions filed on 24 August 2022, the applicant set out the background to this matter as follows:

> BACKGROUND
>
> Procedural history
>
> 3. The applicant … is a national of Sri Lanka: Decision, [18]. He arrived in Australia by boat [in 2012]: Decision, [1] and [28].
>
> 4. On 13 December 2012, a delegate of the Minister for Immigration and Citizenship (**Assessor**) was satisfied that the applicant was a person to whom Australia had protection obligations under s 36(2)(a) of the *Migration Act 1958* (Cth) (**2012 protection assessment**): SCB 1-13.
>
> 5. By decision of 5 February 2014, a delegate of the Minister for Immigration and Border Protection refused the applicant a Protection visa (Class XA, Subclass 866) on the basis that he did not satisfy clause 866.222 of the *Migration Regulations 1994* (Cth): CB 195-198.
>
> 6. By decision dated 29 July 2014, the Refugee Review Tribunal remitted the applicant's application for a Protection visa for reconsideration with the direction that he did satisfy clause 866.221(2) of the *Migration Regulations 1994* (Cth): CB 200-203.
>
> 7. On 14 January 2016, the applicant was granted a Temporary Protection visa (Class XD, Subclass 785) that expired on 14 January 2019: see CB 215-216.
>
> 8. On 6 November 2020, the applicant lodged a valid application for a SHEV: CB 217-226.
>
> 9. On 13 December 2021, the Delegate refused to grant the applicant a SHEV: CB 328-349.
>
> 10. On 14 February 2022, the Authority affirmed the Delegate's decision to refuse the applicant a SHEV: CB 715-745.
>
> 11. On 24 February 2022, the applicant filed an in-time application for judicial review.

3 In his written submissions filed on 5 September 2022, the Minister set out the background to this matter as follows:

> 2. The applicant is a male citizen of Sri Lanka who arrived in Australia [in 2012] as an unauthorised maritime arrival.
>
> 3. In September 2012, the applicant applied for a Protection (Class XA) (Subclass 866) visa (**CB 20-87**). A delegate of the Minister initially refused to grant that visa (**CB 198-199**), but on merits review, the (then) Refugee Review Tribunal remitted the matter for reconsideration with a direction that the applicant satisfied cl 866.221(2) of Schedule 2 to the *Migration Regulations 1994* (Cth) (**the Regulations**) (**CB 200-202**).
>
> 4. On 18 September 2015, the applicant was informed that as a result of legislative amendments to the Act and Regulations, his original application for a Protection (Class XA) (Subclass 866) visa was taken not to be, and never to have been, a valid application for that visa. Rather, it was taken to have been, and always have been, a valid application for a Temporary Protection (Class XD) visa (**CB 205-207**).
>
> 5. On 14 January 2016, a delegate of the Minister granted the applicant the Temporary Protection visa (**CB 215-216**).
>
> 6. On 14 January 2019, the Temporary Protection visa expired.
>
> 7. On 5 November 2020, the applicant lodged an application for the visa (**CB 217-227**). In that application, the applicant declared that there was no changes to his reasons for claiming protection (**CB 224**).
>
> 8. On 12 November 2020, the Department wrote to the applicant's representative and requested information, pursuant to s 56 of the Act (**CB 247-254**). Specifically, the Department referred to independent country information which suggested that: the overall security situation for Tamils in Sri Lanka had improved since the grant of the Temporary Protection visa; the Liberation Tigers of Tamil Eelam (**LTTE**) no longer existed as an organised force; and most returnees (including failed asylum seekers) were not monitored by the Sri Lankan authorities on an ongoing basis and did not experience treatment that endangered their safety or security.
>
> 9. On 19 November 2020, the applicant's representative responded to the request (**CB 256-272**).
>
> 10. On 20 November 2020, the Department obtained a copy of the applicant's national criminal history, which disclosed that the applicant was convicted of four offences between September 2018 and August 2019 (**CB 274-275**).
>
> 11. On 8 December 2020, the applicant attended an interview with the delegate, together with his representative. In the interview, he added new claims to fear harm (**CB 331**).
>
> 12. On 11 December 2020, the applicant's representative provided a post-interview submission (**CB 295-299**).
>
> 13. On 13 December 2021, the delegate refused to grant the applicant the

visa (**CB 328-349**). The matter was subsequently referred to the Authority for fast-track review under Part 7AA of the Act (**CB 351**).

14. On 9 and 11 January 2022, the applicant's representative provided various documents to the Authority, including:

    14.1. a statement from the applicant (**CB 380**);

    14.2. a submission addressing the consideration of new information (**CB 377-380**);

    14.3. a written submission (**CB 372-376**);

    14.4. country information referred to in the submission (**CB 388-712**);

    14.5. a psycho-social assessment completed by the Association for Services to Torture and Trauma Survivors (**CB 383-384**); and

    14.6. a letter from a former Member of Parliament (**CB 385**).

15. On 14 February 2022, the Authority affirmed the decision under review (**CB 716-743**) ...

MATERIAL RELIED UPON

4 At the hearing before this court, the applicant relied upon:

(a) the initiating application filed on 24 February 2022;

(b) the court book filed on 31 May 2022;

(c) the supplementary court book filed on 8 July 2022;

(d) the amended initiating application filed on 24 August 2022;

(e) his written submissions filed on 24 August 2022;

(f) his list of authorities filed on 25 August 2022; and

(g) the joint list of authorities filed on 12 September 2022.

5 At the hearing before this court, the Minister relied upon:

(a) his response filed on 4 April 2022;

(b) the court book filed on 31 May 2022;

(c) the supplementary court book filed on 8 July 2022;

(d) his written submissions filed on 5 September 2022; and

(e) the joint list of authorities filed on 12 September 2022.

GROUND OF APPLICATION

6 The single ground of review in the amended application filed on 24 August 2022 is:

The Authority erred in failing properly to assess the risk of a deterioration in the situation for the Tamil community in Sri Lanka in the reasonably foreseeable future.

Particulars

(a) On 13 December 2012, a delegate of the Minister for Immigration and Citizenship was satisfied that the applicant had a well-founded fear of persecution for Refugee Convention reasons. The delegate found that the applicant would be at risk of persecution if returned to Sri Lanka on the basis of his Tamil race and imputed political opinion as a perceived supporter of the Liberation Tigers of Tamil Eelam and the Tamil National Alliance (Supplementary Court Book 11-12).

(b) The Authority:

(i) Accepted that the applicant had experienced "*severe mistreatment*" prior to fleeing Sri Lanka in 2012: at [36].

(ii) Was not satisfied, "*[b]ased on the country information*", that if returned to Sri Lanka the applicant faced a real chance of serious harm: at [43].

(iii) Stated that the country information indicated that the conditions in Sri Lanka for Tamils had "*improved significantly*" after the end of the conflict and under the former Sirisena government from 2015 to 2019: at [39] and [42].

(iv) Noted that international observers were "*reportedly deeply concerned by worrying trends emerging under the Rajapaksa government*" and that there had been a "*direction of travel*" since the Rajapaksas' return to power: at [39].

(v) Despite noting these "*worrying trends*" and this "*direction of travel*", stated that it was "*too early to say whether there will be any material deterioration for the Tamil community in the foreseeable future*": at [42] (and [39]).

(c) In stating that it was "*too early to say*", the Authority failed properly to assess the risk of a deterioration in the situation for the Tamil community in the reasonably foreseeable future. The Authority failed to speculate or prognosticate about the risk of a deterioration in the reasonably foreseeable future.

RELEVANT EXTRACTS FROM THE AUTHORITY'S REASONS FOR DECISION

7 The relevant passages from the Authority's reasons for decision are as follows:

[37] The country information before me reports of considerable change in Sri Lanka since the applicant left in May 2012. **In 2015 President Maithripala Sirisena was elected on a platform of democratic renewal, post-war reconciliation, accountability for war crimes, anti-corruption, and economic reform.** In October 2015, that government adopted the UN Human Rights Council Resolution 30/1 in committing to implement a range of truth, justice, and reconciliation measures. In line with these commitments the government subsequently established various bodies to investigate disappearances and trace missing persons, compensate those affected by conflict and took some steps to investigate human rights violations during the conflict by members of

the security forces, among other things. In April 2019 there were a series of coordinated terrorist bomb attacks, later claimed by Islamic extremists. The perpetrators have since reportedly been captured or killed. This led to heightened security in Sri Lanka for some time. Despite improvements issues remained under the former government who was criticised for its slow and uneven progress toward promised reform. **In November 2019, Gotabaya Rajapaksa won the presidential election.** He has since appointed other family members to Cabinet, including Mahinda Rajapaksa (who served as President during the conflict) as Prime Minister. **The Rajapaksas have been called "authoritarian" and are alleged to have been involved in past human rights abuses in Sri Lanka, including against Tamils.**

…

[39] The sources report, among other things, that the security situation in Sri Lanka (particularly in the north and east) has improved significantly since the end of the conflict and Sirisena's presidential election in 2015; the incidence of homicide has fallen sharply in recent years; checkpoints on major roads were removed in 2015; travel to the north and east is no longer restricted; military involvement in civilian life has deceased since the conflict; and white van abductions are no longer common. While historically violent and there have been some more recent reports of voter intimidation, there were no significant security issues reported at the 2020 and 2021 elections. While its parliamentary presence has been diminished the TNA remain active. **International observers are reportedly deeply concerned by worrying trends emerging under the Rajapaksa government.** For example, the government has amended the *Constitution* dismantling constitutional reform undertaken by the former Sirisena government to improve transparency and accountability. It has withdrawn from the UN Human Rights Council Resolution 30/1 entered into by the previous government. There has also been a greater centralisation of power in the executive and increased militarisation of civilian government functions. Some measures taken by the former government to address reconciliation and past human rights abuses and accountability have been frustrated or undermined. For example, since the Rajapaksa's return to power, high profile parliamentarian and ally Pillayan has had a murder case against him discontinued, he has been elected to Parliament, he has been freed from custody and was even able to be released from remand prison for a period before his case was discontinued so that he could make a speech in the first sitting of the new Parliament in August 2020. The government has sought to silence its critics through various measures, and journalists, investigators, activists, and former police officers critical of the government or who probe historical abuses reportedly face a high risk of official harassment and a moderate risk of violence. The *Prevention of Terrorism Act*, disproportionately used to detain Tamils in the past, sometimes arbitrarily, remains in force. The government has more recently moved to broaden its operation (a legal challenge to these new powers is on foot). The government has also proscribed additional Tamil groups, and unlike the former Sirisena government, declined to include the national anthem in the Tamil language on national occasions. DFAT reports that the Sri Lankan government, ostensibly in its efforts to combat COVID-19 and drug trafficking, has also introduced a number of measures. These include a number of roadblocks in the north and east and the use of strict quarantine measures which some argue effectively limit legitimate freedom of expression and association such as in relation to Tamil commemorative events in the north. **Based on the sources the "direction of travel" since the Rajapaksa's return to power points to no improvements**

for the Tamils community in the foreseeable future, although on the evidence it is too early to say whether there will be a material deterioration in the human rights situation for the Tamil community in the foreseeable future. DFAT assesses that ordinarily, Tamils living in the north and east are at low risk of official harassment and that they face a low risk of societal or official discrimination based on ethnicity of caste. 'Low risk' means that that (sic) while there are incidents, they are insufficient to suggest a pattern of treatment. Consistent with this the UK Home Office notes that while Tamils may sometimes be subjected to discrimination, they are unlikely to face persecution based on their ethnicity alone.

…

[42] The country information above indicates that conditions significantly improved for Tamils after the end of the conflict and under the former Sirisena government from 2015 until 2019. **International observers are concerned about worrying trends emerging under the Rajapaksa government although it is too early to say whether there will be any material deterioration for the Tamil community in the foreseeable future, and unlike in the past Tamils are now unlikely to be persecuted based on their ethnicity alone.** The government remains sensitive to the potential re-emergence of the LTTE and maintains an interest in those perceived as playing a significant role in Tamil separatism who pose a threat to the integrity [of the] Sri Lankan state by reason of their committed activism in the furtherance of the establishment of Tamil Eelam. Factors such as the nature, extent, and duration of any active involvement in Tamil diaspora organisations, a person's history in Sri Lanka and their family connections are determinative in establishing whether they hold such a profile. The government maintains sophisticated intelligence on those of interest including a 'stop' list (including the names of those with an extant court order, arrest warrant or order to impound their passport) and 'watch' list (which includes the names of those they consider to be of interest such as because of suspected separatist or criminal activities). Returnees on a 'stop' list are likely to be detained at the airport on return. Returnees on a 'watch' list are likely to be able to return home from the airport. Those on a 'watch' list perceived to be playing a significant role in Tamil separatism may be detained on their return home or monitored. **If detained, and it is only then that scars may become relevant and raise further suspicions, there is a real chance of serious harm.** Monitoring will reportedly generally not in itself amount to persecution. The government monitors public gatherings and protests and practises targeted surveillance of certain individuals and groups in the north and east, particularly those associated with politically sensitive issues. Consistent with this, the sources indicate it is those who are perceived as being actively critical of the government, involved in politically sensitive issues or criminal or separatist activities who may attract the adverse attention of authorities. The TNA remain active and elections appear to be less violent than in the past. More recently roadblocks have been introduced in the north and east and strict quarantine measures have been implemented, ostensibly to combat COVID-19 and drug trafficking.

[43] **I accept that as Tamils in the Eastern Province at a time of increased violence during the conflict and in its aftermath that the applicant and his family experienced various incidents of harassment and severe mistreatment at the hands of the authorities and those working for them, however, I do not accept that the applicant was of ongoing interest in this regard, whether on account of LTTE links or otherwise, when he left Sri**

Lanka in 2012. I also note that these events were now some time ago when conditions were different in Sri Lanka and his sister (the only one in his family with any sort of link to the LTTE) passed away some 18 years ago now. In the SHEV interview the applicant said he had never taken part in any protests with the TNA in Sri Lanka, expressed any views critical of the Sri Lankan government publicly and he confirmed he had no criminal record or outstanding warrant for his arrest in Sri Lanka which is consistent with his other evidence and I accept this. The applicant's active involvement with the TNA and political work has been limited to putting up posters and the like in 2010 in Sri Lanka. While he has supported the TNA since he could vote he has said his motivation for doing the volunteer work was to secure future employment. He did not engage in any other similar activity or protests or other public activities that could be perceived as being against or critical of the Sri Lankan government or supportive of Tamil separatism, and nor has he done so in the last nine of so years since being in Australia, and it is because of this, and his motivation for his limited past activity (rather than because of a fear of harm) that I do not accept he would actively engage in such activities now or in the reasonably foreseeable. He does not have an extant court order, arrest warrant or order to impound his passport. I do not accept that the authorities or those working for them have looked for him or harassed his family in connection with him since being in Australia. Based on the country information above and the evidence before me I am not satisfied the applicant is on a 'stop' or 'watch' list or otherwise has a profile of adverse interest with the authorities or those working with them. The country information before me does not indicate that Tamils of slight stature or build or who have a cooperative demeanour are targeted on account of this. Based on the country information above while he may be questioned when passing through roadblocks and subject to other COVID-19 quarantine measures, like others in the area, I am not satisfied he faces a real chance of being otherwise harassed or detained in this regard or that this amounts to serious harm. I am not satisfied the applicant faces a real chance of serious harm on account of being a cooperative Tamil male of slight stature, with scars, from the Eastern Province, his and his family's past experiences in Sri Lanka, his experiences in Australia or his private support for the TNA, even when taking into account his mental health issues.

…

[45] I accept the applicant may be identifiable as someone who sought asylum in Australia, was granted protection in the past, that his visa has since expired and that he appears to be part of the earlier cohorts being reassessed in this regard. DFAT reports that returning failed asylum seekers, especially those returning to the north and east, may be subject to monitoring by authorities, but that most, including failed asylum seekers, were not actively monitored on an ongoing or long-term basis. Returnees may also face a number of practical reintegration issues on their return such as difficulties finding suitable employment (compounded by limited job availability in the north and east) and reliable housing, delays in obtaining necessarily identity documents in turn delaying access to social welfare schemes, bank accounts and so forth. It does not state that this is because of official discrimination. Societal discrimination was not reported to be a major concern for returnees, including failed asylum seekers. The UK Home office reports that Tamils returning from abroad are generally monitored in the community, the period of monitoring by local police can vary, however there is no evidence to suggest all returning Tamils are at risk of being perceived to have LTTE links. The report also indicates

that even those with an LTTE connection but no significant role in the group and/or in Tamil separatism may be questioned on return at the airport and monitored on return to their community but do not suffer ill-treatment. DFAT notes that some Tamils reported discrimination in employment, particularly in relation to government jobs, although it assessed that this underrepresentation was driven by language constraints and disrupted education as a result of the war, rather than official discrimination on the basis of ethnicity. DFAT reports that the COVID-19 pandemic has also adversely impacted the Sri Lankan economy and compounded existing inequalities and livelihoods, particularly in vulnerable communities in the east. Prices for basic foodstuffs have reportedly soared. In response the government has reportedly expanded its existing social protection schemes including additional ad hoc payments to certain groups and increases to its various pensions and allowances.

(footnotes omitted) (emphasis added)

THE APPLICANT'S WRITTEN SUBMISSIONS

8 In his written submissions filed on 24 August 2022, the applicant said that:

33. In the present case, the Authority at [39] and [42] purported to consider the situation for the Tamil community in Sri Lanka in the reasonably foreseeable future. However, it failed properly to assess the risk of a deterioration for that community in the reasonably foreseeable future.

34. The Authority noted that "*[i]nternational observers are reportedly deeply concerned by worrying trends emerging under the Rajapaksa government*" (at [39] (and [42])). The Authority set out examples of measures taken by the Rajapaksa government to wind back reforms made by the former Sirisena government (at [39]). These examples included measures specifically affecting the Tamil community. The Authority also noted that there had been a "*direction of travel*" since the Rajapaksas' return to power (at [39]). Yet despite noting the "*worrying trends*" and the "*direction of travel*" since the Rajapaksas' return to power, the Authority twice stated, at [39] and [42], that "*it is too early to say whether there will be any material deterioration for the Tamil community in the foreseeable future*".

35. To use the language of Markovic J in *BOT15* at [58], the "*vice*" in the Authority's Decision is that it failed to speculate about the reasonably foreseeable future. In the language of the majority in *QAAH* (FCAFC) at [108], the Authority failed to "*prognosticate the situation into the reasonably foreseeable future*". By stating that it was "*too early to say*", the Authority failed to speculate or prognosticate about the risk of a deterioration in the reasonably foreseeable future.

36. The present case is analogous to that of *AIE15*, where Perry J held at [34] that "*having found that the frequency of attacks appeared to be increasing, the Tribunal failed to consider whether the risk of attacks may continue to escalate in the foreseeable future, that is, was this a continuing trend, and how might that impact on the risk of persecution or significant harm to the appellant*?" Likewise, in the present case, the Authority failed to consider whether the "*worrying trends*" and the "*direction of travel*" it had identified were continuing trends and a continuing direction, and, if so, how they might impact on the risk of persecution to the applicant.

37. The fact that the Authority identified the need to have regard to the

"*foreseeable future*" and applied the real chance test (at, for example, [39] and [42]) does not immunise its reasons from scrutiny or the conclusion that it nonetheless failed to apply the correct approach (*SZGHS* at [2], *BOT15* at [59] and *AIE15* at [33]).

38. Finally, in stating at [39] and [42] that it was "*too early to say whether there will be any material deterioration*" (underlining added), the Authority demonstrated a misunderstanding of the real chance test. This point was made by Allsop J (as he then was) in *SZGHS* where twice the Refugee Review Tribunal had stated that it was not satisfied that the applicant "*would*" be subjected to persecution (see *SZGHS* at [20]-[21] and [25] and [27]). Allsop J noted that the Tribunal appeared to be erroneously focussed on probabilities rather than possibilities.

THE MINISTER'S WRITTEN SUBMISSIONS

9 In his written submissions filed on 5 September 2022, the Minister said that:

21. There is no real dispute as to the relevant legal principles. In applying the "real chance" test, a decision-maker must assess the risk of harm into the reasonably foreseeable future.[1] As Mortimer J explained, "the use of reasonable foreseeability as the benchmark concept indicates that the assessment is intended to be one which can be made on the basis of probative material, without extending into guesswork" (emphasis added).[2]

22. In the present case, the Authority did not fail to conduct the predictive exercise required of it.

23. ***First***, the Authority recognised that it was required to assess the risk of harm into the foreseeable future. It referred to the foreseeable future repeatedly in its written statement of reasons.[3]

24. Moreover, the Authority's use of phrases like "worrying trends" and "direction of travel" demonstrate that the Authority was undertaking a predictive exercise. That language is only consistent with a decision-maker engaging in a forward-looking assessment.

25. ***Second,*** the Authority's assessment of the sources as indicating a "direction of travel" since Rajapaksa's return to power was that it pointed to "no improvements for the Tamil community in the foreseeable future" (emphasis added). Put differently, after considering the country information, the Authority did not consider that the Rajapaksa government was *improving* the situation for Tamils.

26. But on the other hand, the Authority found that it was "too early to say" whether there will be a material *deterioration* for the Tamil community in the foreseeable future. That is, it would be premature (and therefore speculative) to assume that things will change for the worse for Tamils.[4]

27. These findings involve an appropriate application of the real chance test. The Authority looked to the future and noted that whilst the situation was not improving for Tamils, it was too early to say that it was getting worse. Those findings also accorded with the country information referred to at [39] of the Authority's reasons. The Authority then had regard to information that suggested that, on that basis, the applicant would not face a real risk of harm in the foreseeable future as a Tamil.

28. ***Third***, contrary to **AS [38]**, the Authority's use of the word "will" at [39] and [42] does not reveal any misunderstanding or misapplication of the "real chance" test. The Authority was not, at that point of its reasons, requiring the applicant to show that the situation *will* deteriorate (and in doing so, adopting some higher standard). Rather, at that point of its reasons, the Authority was saying that the chance of the situation materially deteriorating was speculative. That involves a correct application of the "real chance" test.

29. A similar argument was advanced by the appellant and rejected by Jackson J in *EMX17*.[5] The relevant finding by the Authority in *EMX17* was:[6]

> [w]hile it is possible … that sectarian groups may target Shias in Islamabad in future, I consider it speculative to suggest that this *will* occur and that violence against Shias in Islamabad *will* increase in future ….

30. The appellant argued that this passage "demonstrates that the Authority had required the appellant to show not that there was a real chance of persecution, but instead that there 'will' be persecution".[7]

31. Jackson J said that it was "immediately apparent that this argument is based on fundamental misreading of the passage". His Honour said that "[t]he Authority is neither saying nor assuming that the appellant must demonstrate that targeting of Shias in Islamabad will occur, or that violence against Shias in Islamabad will increase. It is saying that those are speculative suggestions. So the finding is that the chance that either of those things will occur is speculative" (emphasis added).[8]

FN 1: *AHK16 v Minister for Immigration and Border Protection* (2019) 269 FCR 168, at [48] (Middleton and Mortimer JJ). See also, *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, at [48] (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

FN 2: *CPE15 v Minister for Immigration and Border Protection* [2017] FCA 591, at [60] (Mortimer J).

FN 3: At [39] (twice); [42]; [43]; [44].

FN 4: *AHK16 v Minister for Immigration and Border Protection* (2019) 269 FCR 168, at [60] (Middleton and Mortimer JJ)

FN 5: *EMX17 v Minister for Immigration and Border Protection* [2019] FCA 1337.

FN 6: *EMX17 v Minister for Immigration and Border Protection* [2019] FCA 1337, at [4].

FN 7: *EMX17 v Minister for Immigration and Border Protection* [2019] FCA 1337, at [5].

FN 8: *EMX17 v Minister for Immigration and Border Protection* [2019] FCA 1337, at [6].

THE APPLICANT'S ORAL SUBMISSIONS

10 The applicant's oral submissions were basically to the same effect, save that the applicant also addressed in detail a number of cases.

11 Firstly, the applicant referred to *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559; (1997) 48 ALD 481; (1997) 144 ALR 567; (1997) 71 ALJR 743; [1997] 9 Leg Rep 2; [1997] HCA 22, where the High Court said at 572 to 575 that:

> In the present case, for example, Einfeld J thought that the "real chance" test invited speculation and that the Tribunal had erred because it "has shunned speculation". If, by speculation, his Honour meant making a finding as to whether or not an event might or might not occur, no criticism could be made of his use of the term. But it seems likely, having regard to the context and his Honour's conclusions concerning the Tribunal's reasoning process, that he was using the term in its primary dictionary meaning of conjecture or surmise. If he was, he fell into error. Conjecture or surmise has no part to play in determining whether a fear is well-founded. [p.572]
>
> …
>
> The course of the future is not predictable, but the degree of probability that an event will occur is often perhaps usually assessable. [p.574]
>
> …
>
> But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future. [p.575]
>
> (footnotes omitted)

12 The applicant argued that, in the present case, the Authority had failed to determine the likelihood of a material deterioration in the circumstances prevailing in Sri Lanka, and thus, on the High Court's analysis, did not have a rational basis for determining that the applicant did not face a real chance of serious harm.

13 The applicant then referred to *CPE15 v Minister for Immigration and Border Protection* [2017] FCA 591, where Mortimer J said that:

> [59] In my opinion, the prospects of success of the proposed new ground of appeal depend in part on the understanding of what is meant by the now well-established and orthodox approach to the determination of risk of harm to a person occurring in the future: that is, is there a real chance a person may suffer serious harm on return to her or his country and nationality: see generally *Chan Yee Kin v Minister for Immigration* (1989) 169 CLR 379 at 389 (Mason CJ), 398 (Dawson J), 407 (Toohey J), 429 (McHugh J). To make that assessment, there must be speculation about the future, and the period of time throughout which that speculative task must be carried out has been expressed to include so much of the future as is "foreseeable" or "reasonably foreseeable": see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 279 (Brennan CJ, Toohey, McHugh and Gummow JJ); *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [13]; *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at [27] (Heerey, Moore, Goldberg JJ); *SZQXE v Minister for Immigration and Citizenship* [2012] FCA 1292 at [7] (Flick J).
>
> [60] The "reasonably foreseeable future" is something of an ambulatory period of

> time, but the use of reasonable foreseeability as the benchmark concept indicates that the assessment is intended to be one which can be made on the basis of probative material, without extending into guesswork. It is also intended to preclude predictions of the future that are so far removed in point of time from the life of the person concerned at the time the person is returned to her or his country of nationality as to bear insufficient connection to the reality of what that person may experience. The purpose of the "well-founded" aspect of the Art 1A test is, after all, to be an objective but realistic and accurate assessment of what risks a person may face in the practical "on the ground" circumstances she or he will be living in. Using "reasonably foreseeable" also carries with it a rejection of an assessment which becomes too remote from a person's expected life circumstances. These are not matters which can be expressed sensibly with any more precision.

14 The applicant argued that, in *CPE15*, the court used the word "speculation" in a different way to the way it had been used in *Guo*. The applicant argued that *CPE15* showed that the assessment of the reasonably foreseeable future required speculation based on probative material, not guesswork.

15 The applicant then referred to *AKH16 v Minister for Immigration and Border Protection* (2019) 269 FCR 168; [2019] FCAFC 47, where the Full Court said that:

> [25] … the Tribunal sought to deal with the evidence of the 13 December 2015 incident as follows:
>
> > [79] The Tribunal accepts that on 13 December 2015 at least 25 people were killed and over 70 injured in a bomb explosion in the Eid Gah clothes market in Parachinar. The Tribunal has considered whether this most recent attack was indicative of the increasing tensions in Parachinar and whether this incident would lead to further sectarian violence. The Tribunal considers, however, that the weight of the evidence indicates that there has been a sustained improvement in the security situation in the Kurram Agency since 2013. Despite this recent terrorist attack there is nothing in the independent evidence to indicate that the 2013 truce is not holding and all indications are that the security situation has been relatively stable with the exception of incidents like those referred to in the reports by the FATA Research Centre. The Tribunal considers that in this context it is the terrorist attack in Parachinar on 13 December 2015 which must be viewed as anomalous, **it would be premature** to conclude that this attack – the first such attack in Parachinar for almost two and a half years – marks a definite change in the security situation. …. (emphasis added)
> >
> > [80] The Tribunal does not accept that the applicant faces a real chance of serious harm or a real risk of significant harm in his home region for these attributes. The Tribunal considers that the country information provided in detail demonstrates that the situation in Parachinar, and in Kurram more generally, has witnessed a significant decline in the violence for what is now an extended period of time. The Tribunal accepts that there have been incidents of violence in the area, as detailed in the reports mentioned above. However these incidents are isolated and limited in the region for Parachinar Shias, Bangash Tribe

members, Pashtuns, those attributed with anti-Taliban political opinions or pro-Western opinions, or people belonging to particular social groups that the applicant claims to be a member of. The Tribunal considers at present, the prospect of the applicant being harmed for these reasons is remote and mere speculation, and not one that constitutes a real chance or a real risk of occurring.

[26] Then, at [83]-[85] the Tribunal stated as follows:

> [83] Since the military action, there has not been any increase in the violence in the region. Indeed, as reported above, there is a notable decline in violence, apart from isolated incidents, such as December 2015. As discussed, the Tribunal considers this incident anomalous in the improving situation of this region in Pakistan.
>
> [84] Given that this improvement in the security situation in the applicant's home region has been ongoing for an extended period, the Tribunal considers that there are grounds to determine that the prospect that the situation in the applicant's home region will remain peaceful, now and in the reasonably foreseeable future, is quite high.
>
> [85] The Tribunal considers on the country information it has read, including that submitted by the applicant's agent, and the country information included above, that the situation in the Parachinar region has improved to the extent that the chance or risk of the applicant being harmed can only be considered to be remote or speculative. The Tribunal does not accept that that applicant will be harmed on return to Parachinar for these reasons.

16 The Full Court later noted in *AKH16* that:

> [46] Reaching too readily for the label "remote" as a descriptor of risk may lead to error. Whilst we conclude on this appeal that the Tribunal's findings were open to it in this particular case, it would not be correct to use "remoteness" as suggesting that to be well-founded, the harm feared by a person must be of an immediate or direct nature. Nor should a decision-maker go straight to the question of whether there is only a "remote chance" that the harm feared by an applicant will eventuate. **That may lead a decision-maker inadvertently into a reasoning process relying on probabilities**. It may subvert the Convention's focus on the positive question as to whether there is a sufficient basis in the evidence to describe a person's fear of persecution as "well-founded'. (emphasis added)
>
> …
>
> [48] However, the assessment of whether a person fears persecution on return to her or his country of nationality, **must involve speculation** about the future, and an assessment of the period of time to look into the future. … (emphasis added)

17 At [49], the Full Court adopted Mortimer J's statement in *CPE15* at [60], which is set out above. Then, at [63], the Full Court said:

> [63] … However, in considering an assessment of the future, **there must be some degree of speculation (as distinct from guesswork)** based upon present and past information… The task for each decision-maker is, relevantly, to

> determine what she or he is satisfied the reasonably foreseeable future holds for the individual applicant on return to her or his country of nationality, in terms of her or his articulated fear of persecution. (emphasis added)
>
> …
>
> [65] … On this matter, the Tribunal found the prospect of the situation remaining peaceful was "quite high", having found (at [79]) that the 2013 truce was holding. This was a finding open to it, and was a finding of fact as to the likelihood of a future event. It was not a finding as to the ultimate issue of whether the fear of the appellant was well-founded.
>
> [66] On this factual foundation, that the security situation being peaceful would remain, which related to the remoteness of the appellant suffering harm from any sectarian violence, the Tribunal found that there was not a real chance of the appellant suffering that harm. The Tribunal could then (as it did) conclude that the fear was not "well-founded" in accordance with the established principles it referred to in the beginning of its reasons at [12] and which we have referred to above.

18 The applicant argued that in *AKH16*, the Tribunal had assessed a terrorist attack as anomalous, and said that it would be premature to conclude that the terrorist attack marked a definite change in the security situation in Pakistan. The applicant argued that, in *AKH16*, the Tribunal went on to conclude that the prospect that the applicant's home region would remain peaceful in the reasonably foreseeable future was quite high. The applicant argued that the present case was different, because the Authority did not make a finding as to the prospect of material deterioration in circumstances.

19 The applicant also argued that the Authority had fallen into the error identified in paragraph 46 of *AKH16*, by following a process of reasoning that relied on probabilities. The applicant noted that in *AKH16* at [48] and [63], the Full Court said that the decision-maker must engage in some form of speculation. The applicant also argued that, in the present case, the Authority did not determine what the reasonably foreseeable future held for the applicant, contrary to paragraph 63 of *AKH16*.

20 The applicant responded to the Minister's reliance on *EMX17 v Minister for Immigration and Border Protection* [2019] FCA 1337. In that case, Jackson J said that:

> [4] The appellant has filed no written submissions in the appeal. It is nevertheless possible to discern from the written submissions filed on his behalf in the Federal Circuit Court that the ground of review and the ground of appeal focus on the following passage from paragraph 49 of the Authority's reasons (emphasis added in the submissions):
>
> > [w]hile it is possible … that sectarian groups may target Shias in Islamabad in future, I consider it speculative to suggest that this will occur and that violence against Shias in Islamabad will increase in

future …

[5] … The written submissions say that the passage demonstrates that the Authority had required the appellant to show not that there was a real chance of persecution, but instead that there 'will' be persecution.

[6] It is immediately apparent that this argument is based on a fundamental misreading of the passage. The Authority is neither saying nor assuming that the appellant must demonstrate that targeting of Shias in Islamabad will occur, or that violence against Shias in Islamabad will increase. It is saying that those are speculative suggestions. So the finding is that the chance that either of those things will occur is speculative.

…

[20] Then, the Authority expressed its conclusions as to what that evidence says about the chance of future harm to the appellant (para 49). This paragraph contains the passage picked out by the appellant's submissions to the Federal Circuit Court, which I dealt with at the outset of these reasons. The paragraph in full is:

> The applicant's representative suggests that the recent absence of attacks on Shia Muslims in Islamabad should not be taken as a reliable indicator of the future chance of harm to the applicant given that [sic] the fluid nature of the security situation in Pakistan. However, there is very limited evidence of past attacks on Shias of any ethnicity in Islamabad over an extended period of time, and no credible evidence before me to suggest that the situation in Islamabad will change in the foreseeable future. The evidence indicates that although there are some troubling and inconsistent aspects to the Pakistani Government's approach, the initiatives taken by the government reflect a sustained commitment to reducing terrorist and sectarian violence in Pakistan. While it is possible that the government's commitment to reducing sectarian and other violence may change, and that sectarian groups may target Shias in Islamabad in future, I consider it speculative to suggest that this will occur, and that violence against Shias in Islamabad will increase in future for this or another reason. I am not satisfied that there is a real chance of harm to the applicant as a result of sectarian attacks on the basis of his Shia Hazara identity, or the security situation, in Islamabad.

[21] So the crux of the Authority's reasons was that there was limited evidence of past attacks in Islamabad and no credible evidence that the situation would change. The passage at the end of the paragraph on which the appellant's submissions focussed merely reinforces the latter point, by saying that any suggestion that the situation will change is mere speculation, in the sense of conjecture or surmise.

21 The applicant argued that *EMX17* was very different to the present case because, in *EMX17*, the authority said certain suggestions were speculative, whereas, in the present case, the Authority itself erected a test that of whether there would be a material deterioration in the circumstances.

22 The applicant then relied on *SZGHS v Minister for Immigration and Citizenship* [2007] FCA 1572, where Allsop J, as the Chief Justice then was, said that:

> [3] The Tribunal may be taken to have directed itself in respect of these matters uncontroversially in its template introduction. That does not, however, immunise its reasons from scrutiny or from a conclusion that, notwithstanding assertions in its reasons, its approach demonstrates a failure to employ the correct approach (which it has otherwise correctly stated to bind it).
>
> …
>
> [20] The approach of the Tribunal was as follows. In an important paragraph, the Tribunal discounted the significance of the three incidents, saying:
>
> > I accept that he was assaulted seriously on three occasions, and that these assaults were at least in part motivated by the applicant's perceived sympathy for Indo-Fijians, and his perceived political opinion. I consider that the assaults were unrelated to each other, and I am satisfied that they occurred in the specific circumstances of the time, that is, in the lead up to the 1999 elections. Even if I were satisfied that these events constituted past persecution of the applicant, I am not satisfied that there is a real chance that the applicant would be subjected to similar or more serious incidents in the future, amounting to persecution. In view of the changed circumstances — there are no elections looming, a pro-Fijian government is in power — there is no evidence to suggest that there is a real chance that serious and systematic violence amounting to persecution would resume, although the possibility of random, isolated racially based incidents occurring cannot be ruled out.
>
> [21] Whilst it is important to examine the whole of the Tribunal's reasons and recognising that fact finding is generally for the Tribunal, unless it reveals some vitiating legal error, some things need to be said about the paragraph. One of the three incidents, the serious beating consequent upon his campaigning for the FLP, could not rationally be explained by the identified so-called "changed circumstances". That there was no election looming is irrelevant and reflects a focus of attention on the near future. The existence of a pro-Fijian government in power was also irrelevant. This was the case when he suffered the first two beatings. One might have thought that a willingness to campaign (as a part Fijian) for the FLP against an encumbent pro-Fijian government may have been behind the beating. Also, the state of the existing government again reflects a focus of attention limited to the near future. These are very limited bases for concluding that persecution would not resume. The use by the Tribunal of the word "would" also reflects a possible attention to probability not possibility.
>
> …
>
> [25] The Tribunal continued…
>
> > *… While there is evidence of some ongoing racial tension as a legacy of the coup. I am not satisfied that this would lead to serious or significant harm or harassment of the applicant, or any other mistreatment amounting to persecution for reason of his race or his political opinion.*
>
> …

> [27] Further the Tribunal once again drew conclusions based on probabilities, rather than examining the matter in the manner described in *Minister for Immigration and Multicultural Affairs v Rajalingham* (1999) 93 FCR 220 at 231-41.
>
> [28] Critically, however, looking at all of the reasons of the Tribunal, there was a failure to address the reasonably foreseeable future in the context of the claims made. The dealing with the three incidents was based on immediate facts – no elections looming and the character of the present government. This reflected a focus on immediacy which was no real assessment of whether in the future, with elections looming, with the first appellant campaigning for the FLP, he would not face a similar beating for the same reasons, or threats from elements of the Taukei Movement who had already targeted him. The Tribunal's paragraph dealing with the three incidents was not just a body of introductory remarks; they were the encapsulated rejection of one body of the appellants' claims. The Tribunal failed, it seems to me, to deal with the fears of the first appellant based on the beating in April/May 1999 by reference to the reasonably foreseeable future and on the assumption that the first appellant will continue to support the FLP.

23 The applicant noted that the error in *SZGHS* was that the Tribunal only looked to the immediate future, and not to the reasonably foreseeable future. That was an error even though the Tribunal had set out the correct test in its reasons for decision.

24 The applicant also relied on *BOT15 v Minister for Immigration and Border Protection* [2018] FCA 654, where Markovic J said that:

> [45] The Tribunal concluded at [95] that:
>
> > The Tribunal considers that there is a violent situation in Afghanistan, and the withdrawal of troops has led to an increase in violence. However the Tribunal does not accept that the withdrawal has led to the deterioration of security to such an extent that the government has lost control of significant locations in Afghanistan, and most relevantly for the applicant, locations such as Kabul.
>
> …
>
> [58] … I accept the Minister's submission that it is permissible for the Tribunal to speculate about the future based on past events and present circumstances. But the vice in the Tribunal's decision is that it did not, in my opinion, undertake any such speculation. Its findings at [95] were limited only to the present. They cannot be construed as addressing the future. …
>
> [59] That conclusory statement does no more than set out the test. It is a bare assertion that is insufficiently explained and lacks logical connection to the material and analysis that precedes it. There is no consideration by the Tribunal of what may happen after the completion of the withdrawal of foreign troops and of how the country information demonstrates that the appellant does not face a real chance of serious harm or a real risk of significant harm in the reasonably foreseeable future. Its focus on the near completion of the withdrawal of foreign troops looks to the past and present and, possibly, to the near future, and not to the reasonably foreseeable future.

25 The applicant argued that this was another case that showed that it was not sufficient for the decision-maker to set out the correct test. It is necessary for the decision-maker to correctly apply the correct test. In *BOT15*, the Tribunal failed to do that, because it did not speculate as to the reasonably foreseeable future.

26 Finally, the applicant also relied on *AIE15 v Minister for Immigration and Border Protection* [2018] FCA 610. In that case, Perry J identified the Tribunal's error as follows at [34]:

> … having found that the frequency of attacks appeared to be increasing, the Tribunal failed to consider whether the risk of attacks may continue to escalate in the foreseeable future, that is, was this a continuing trend, and how might that impact on the risk of persecution or significant harm to the appellant?

27 The applicant argued that the Authority fell into the same error in the present case, by identifying that worrying trends were emerging, and that there was a certain "direction of travel", but by failing to consider how they might impact on the risk of harm to the applicant. The applicant argued that the Authority found that "worrying trends [were] emerging" and there was one "direction of travel", but that the Authority failed to make findings about the implications of that.

28 The applicant argued that the Authority could not simply throw its hands in the air and say, "It's too early to say." The applicant argued that the Authority was obliged to, but failed to, speculate about the reasonably foreseeable future and make appropriate findings.

THE MINISTER'S ORAL SUBMISSIONS

29 The Minister said that there was no dispute as to the law to be applied, and that the Authority was obliged to make a predictive assessment as to the reasonably foreseeable future. However, the Minister said that the Authority did make such an assessment.

30 The Minister said firstly that the Authority was plainly aware of its task, because it set out a number of times in its reasons what its task was. However, the Minister conceded that more was required to show that the Authority had correctly applied the correct test.

31 The Minister argued that it was apparent that the Authority had correctly undertaken a predictive assessment by using the words "direction of travel" and "material deterioration" in paragraph 39 of the Authority's reasons for decision as follows:

> Based on the sources the "direction of travel" since the Rajapaksa's return to power points to no improvements for the Tamils community in the foreseeable future, although on the evidence it is **too early to say** whether there will be a material deterioration in the human rights situation for the Tamil community in the foreseeable

future. (emphasis added)

32 The Minister argued that the Authority did not actually make a finding in [39] that there were "worrying trends emerging", but merely noted that country information indicated that international observers were concerned that "worrying trends were emerging".

33 The Minister argued that the Authority did undertake a predictive assessment of the human rights situation by saying it was "too early to say".

34 The Minister argued that the Authority, correctly, undertook that assessment "on the evidence".

35 The Minister argued that the words "too early to say" were analogous to the word "premature" in *AKH16*, which the Full Court of the Federal Court found to be acceptable.

36 The Minister noted the applicant's point about the Authority's use of the words, "it is too early to say whether there **will** be a material deterioration" (emphasis added), observing that the point seemed to be that the Authority was incorrectly focussing on probabilities rather than correctly focussing on possibilities. The Minister relied on *EMX17* to reject that submission.

CONSIDERATION

37 I accept the Minister's submission that the Authority did not actually accept that there were "worrying trends emerging". The Authority in that part of [39] was simply noting that country information showed that international observers were concerned about "worrying trends emerging". The Authority's summary of the country information in [39] was that:

> Based on the sources the "direction of travel" since the Rajapaksa's return to power points to no improvements for the Tamils community in the foreseeable future, although on the evidence it is too early to say whether there will be a material deterioration in the human rights situation for the Tamil community in the foreseeable future.

38 A "direction of travel" is a trend. The trend identified by the Authority was "no improvements for the Tamils community in the foreseeable future".

39 The critical point, however, is the next part of the sentence, which dealt with "whether there will be a material deterioration in the human rights situation". In relation to that, the Authority said that it was "too early to say". In doing so, arguably, the Authority failed to make an assessment of what the reasonably foreseeable future held.

40 Nevertheless, the Minister argued that this case was relevantly identical to *AKH16* where the Tribunal said:

> **it would be premature** to conclude that this attack – the first such attack in Parachinar for almost two and a half years – marks a definite change in the security situation. (emphasis added)

41 The Minister's point was that the Tribunal saying in *AKH16* that "it would be premature to conclude that this attack … marks a definite change in the security situation" was basically the same as the Authority saying in the present case that "it is too early to say whether there will be a material deterioration in the human rights situation".

42 In *AKH16*, the Full Court rejected the challenge to the Tribunal's decision. The Full Court's reasoning was as follows:

> [58] Returning then to the reasons of the Tribunal in the appeal before us, the Tribunal correctly set out the definition of the term "refugee" and explained correctly (at [12]) in terms of the High Court authority referred to above:
>
> > … an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have a genuine fear founded upon a "real chance" of being persecuted for a Convention stipulated reason. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
>
> [59] Then, it is clear that as a matter of fact, the Tribunal did not accept that the appellant would face a real chance of serious or significant harm as a consequence of sectarian and generalised violence in the Kurram Agency. As is apparent from reading [49]-[86] of the Tribunal's reasons in their entirety, there were many aspects of the evidence which led the Tribunal to this factual conclusion. The Tribunal identified, having regard to country information about the situation in Pakistan, a number of important factors leading to its ultimate view:
>
> > (1) the Kurram Agency had "been a violent region of Pakistan, in particular between April 2007 and February 2012" ([50]);
> >
> > (2) the level of violence in Parachinar and the surrounding area had, since July 2013, been "limited" ([52]);
> >
> > (3) there were some reported incidents of sectarian and generalised violence in the Kurram Agency in 2014 and 2015, the last and most significant of which was a bombing in a market in Parachinar on 13 December 2015 ([53]-[62]);
> >
> > (4) there had, however, been no incident in Parachinar leading to "significant civilian casualties" between July 2013 and December 2015 ([60]);
> >
> > (5) overall, and even having regard to the incident in December 2015, there had been "a sustained improvement in the security situation in the Kurram Agency since 2013" ([79]) and the area had witnessed "a significant decline in the violence" for

an extended period of time ([80]);

(6) more recent incidents of violence in the Kurram Agency, including the incident in December 2015, were "isolated and limited" and "anomalous" ([79]-[80]); and

(7) people displaced by violence in the Kurram Agency had begun returning to their former places of residence in 2014 ([63]-[68]).

[60] Therefore, in our view, even faced with conflicting evidence, the Tribunal had a repetition of events which led it to conclude that there was a significant reduction in levels of sectarian violence, even after considering the one event in December 2015, which was assessed by the Tribunal as "anomalous". As such the Tribunal considered that it would be premature or "mere speculation" to conclude that this attack — the first such attack in Parachinar for almost two and a half years — marked a definite change in the security situation. The phrase "mere speculation" in this context only meant to emphasise the guesswork that the Tribunal thought was necessary to assume a change for the worse in the security situation, which it was not prepared to undertake.

[61] The Tribunal then considered that given that this improvement in the security situation in the appellant's home region had been ongoing for an extended period, there were grounds to determine that the prospect that the situation in the appellant's home region would remain peaceful, now and in the reasonably foreseeable future, was quite high ([84]).

43 In the present case, the Authority did not include in its reasons for decision an equivalent of the passage set out in [58] of *AKH16*, regarding real chances. Rather, the Authority said:

[34] Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a wellfounded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

[35] Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective

protection measures are available to the person, and

- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

44 Also, in the present case, the Authority did not proffer the sorts of reasons given by the Tribunal in *AKH16* for its eventual conclusion that the applicant did not face "a real chance of serious harm": [43]. Rather, the Authority:

(a) noted that there had been considerable change in Sri Lanka since the applicant left in 2012;

(b) noted that Gotabaya Rajapaksa became president in 2019;

(c) noted that "International observers are reportedly deeply concerned by worrying trends emerging under the Rajapaksa government";

(d) noted that, "the government has amended the *Constitution* dismantling constitutional reform undertaken by the former Sirisena government to improve transparency and accountability";

(e) noted that the government "has withdrawn from the UN Human Rights Council Resolution 30/1 entered into by the previous government";

(f) noted that, "There has also been a greater centralisation of power in the executive and increased militarisation of civilian government functions";

(g) noted that, "Some measures taken by the former government to address reconciliation and past human rights abuses and accountability have been frustrated or undermined";

(h) noted that, "since the Rajapaksa's return to power, high profile parliamentarian and ally Pillayan has had a murder case against him discontinued, he has been elected to Parliament, he has been freed from custody and was even able to be released from remand prison for a period before his case was discontinued so that he could make a speech in the first sitting of the new Parliament in August 2020";

(i) noted that, "The government has sought to silence its critics through various measures, and journalists, investigators, activists, and former police officers critical of the government or who probe historical abuses reportedly face a high risk of official harassment and a moderate risk of violence";

(j) noted that, "The *Prevention of Terrorism Act*, disproportionately used to detain Tamils in the past, sometimes arbitrarily, remains in force. The government has more recently moved to broaden its operation (a legal challenge to these new powers is on foot)";

(k) noted that, "The government has also proscribed additional Tamil groups, and unlike the former Sirisena government, declined to include the national anthem in the Tamil language on national occasions"; and

(l) noted that, "DFAT reports that the Sri Lankan government, ostensibly in its efforts to combat COVID-19 and drug trafficking, has also introduced a number of measures. These include a number of roadblocks in the north and east and the use of strict quarantine measures which some argue effectively limit legitimate freedom of expression and association such as in relation to Tamil commemorative events in the north."

45 There is more in a similar vein. Reading the Authority's reasons as a whole, the Authority seems to have taken the view that the big changes in the Tamils' lives brought about by the Sirisena government had become the norm, and it was too early to say whether the fairly new Gotabaya Rajapaksa government was going to persecute Tamils. It is not for this court to take issue with that view on its merits.

46 However, it seems to me that, in the present case, the Authority did not support its eventual conclusion that the applicant did not face a real chance of serious harm with the sort of findings that the Full Court found in *AKH16* were sufficient to support the conclusion in that case that the applicant did not face a well-founded fear of persecution.

47 Reading the Authority's reasons as a whole, I consider that the Authority saying that it was "too early to say whether there will be a material deterioration in the human rights situation" was reflective of the Authority not undertaking its task of deciding what the reasonably foreseeable future held for the applicant. The Authority thereby fell into jurisdictional error.

48 I also consider that the Authority erred by saying "whether there **will** be a material deterioration" (emphasis added) rather than "whether there **might** be a material deterioration". The former focusses on probabilities and the latter on possibilities. The latter is the correct test. *EMX17* does not assist the Minister. *EMX17* dealt with, and rejected, an argument that the Authority had required the appellant to show not that there was a real chance of persecution, but instead that there "will" be persecution. There was no such argument in the present case.

CONCLUSION

49 As the applicant's ground of review has been made out, the decision of the Authority will be set aside and the matter will be remitted for determination according to law. The Minister will be required to pay the applicant's costs.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Riley.

Associate:

Dated: 9 November 2022