IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P50 of 2016

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

AAR15
Appellant

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

and

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S AMENDED SUBMISSIONS

Part I: Certification for publication

1. It is certified that the submission is in a suitable form for publication on the Internet.

Part II: Issues the Appeal presents

2. Whether the Appeal Judge based his decision upon speculation as to the reason for the Refugee Review Tribunal rejecting the 2011 Minority Rights Group International report and preferring the 2006 International Crisis Group report and erred in concluding that it was not unreasonable for them to do so when the Appeal Judge concluded that the Tribunal gave no reason for doing so.

Part III: Certification regarding section 78B of the *Judiciary Act 1903*

3. The Appellant has considered whether notice should be given in compliance with s 78B of the *Judiciary Act* and concluded that it should not.

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Part IV: Reports of primary and intermediate court

4. *AAR15 v Minister for Immigration & Anor* [2015] FCCA 2570.

5. *AAR15 v Minister for Immigration and Border Protection* [2016] FCA 150.

Factual background

6. The Applicant is a national of the Democratic Republic of the Congo (DRC) and a member of the Kasai-Luba ethnic group from the province of Katanga who has applied for a protection visa.

7. The Refugee Review Tribunal accepted that the Applicant is of the Kasi-Luba ethnic group;[1] having noted that most people of Kasai origin in the Katanga Province belong to the Luba tribe.[2]

8. The Tribunal acknowledged that 'trouble and violence erupts in DRC due to ethnic tensions'.[3]

9. The Tribunal noted that -

> Limited recent information was located explicitly discussing ethnically – motivated conflict between Kasian immigrants and other Katangese residents.[4]
> That said, sources do report a long history of conflict, and violence, between the Kasaian Luba and the Katangese Lunda.[5]

10. The Tribunal referred to the 2006 International Crisis Group report[6] that "[o]ver the past few years, tensions have decreased and many Kasians have returned to Lumbumbashi and Likasi, though not to Kolwezi where most of the killings took place".[7]

11. However, the Tribunal also noted that:

    (a) In 2008, the UK Home Office reported that some 750,000 Kasians who fled Katanga during the war had not returned to the province.[8]

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[1] Refugee Review Tribunal ("RRT") at [67]; Federal Circuit Court ("FCC") at [12].
[2] RRT at [46].
[3] RRT at [79]; FCC at [4].
[4] RRT at [47].
[5] RRT at [48].
[6] International Crisis Group 2006, *Katanga, the Congo's Forgotten Crisis*, Africa Report No 103, 9 January, p 4 RRT fn 5.
[7] RRT at [49] and fn 6; FCC at [6].
[8] RRT at [49], fn 7; FCC at [6].

(b) Some sources refer to recent Luba-Lunda 'conflict' or 'tensions', however few of these sources sufficiently elaborate on how this conflict manifests. In 2005, a United Nations High Commissioner for Refugees (UNHCR) report noted that ethnic conflict was "apparent" between the Kasian Luba and Katangese Lunda.[9]

(c) In 2006, the Luba-Lunda conflict reignited in the lead up to presidential elections... At the time, ICG reported that Katanga province was divided by "tensions between southerners and northeners, between outsiders and natives, ...;[10]

(d) In 2011, Minority Rights Group International (MRG) listed the Luba as a minority group under threat in the DRC, meaning that they are considered to be at future risk of "genocide, mass killings or other systematic violent repression";[11]

(e) As reported in 2014, violence is particularly prevalent in the Eastern regions of the DRC[12]...[N]o sources were found identifying areas where violence does not occur, or is low, in the DRC;[13]

(f) Sources consulted indicate that violence is particularly high in the eastern provinces.....[I]n 2014 Medicins Sans Frontieres(MSF) provided the following overview of the conflict ...:
After a period of relative calm in 2010 and 2011, active fighting resumed in Katanga province, causing widespread panic and leading to massive displacement. The situation worsened in early 2013 as the Congolese army prepared for offensive operations against the Mai Mai militias, and tens of thousands were displaced...;[14]

(g) In its September 2014 report on the human rights situation in the DRC, the UN Human Rights Council reported that 'numerous armed groups as well as members of the Congolese defence and security forces regularly commit serious human rights violations, particularly in the eastern provinces affected by the conflict' including ....Katanga.[15]

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[9] RRT at [50]; UK Home Office 2009, *Country of Origin Information Report – Democratic Republic of Congo*, 27 January, p 91 at fn 10.
[10] RRT at [51]; International Crisis Group 2006, *Katanga, the Congo's Forgotten Crisis*, Africa Report No 103, 9 January, p 5, fn 1.
[11] RRT at [52] and fn 13; FCC at [6].
[12] RRT at [53], fn 14; FCC at [7].
[13] RRT at [53] and fn 17; FCC at [7].
[14] RRT at [54]; Medecins Sans Frontieres 2014, *Everyday Emergency: Silent Suffering in Democratic Republic of Congo*, p 12 at fn 20; FCC at [8] and [9].
[15] RRT at [55]; fn 21.

(h) In March 2014 the UN Security Council reported that 'during the period under review, the security situation in eastern 'DRC 'remained volatile...[16]

(i) The UNHCR reported that there was 'ongoing instability in the east of the country'; [17]

(j) In its 2014 annual Report, Human Rights Watch stated that armed militia groups 'continue to carry out brutal attacks on civilians across eastern Congo';[18]

(k) In April 2014 the UK Foreign and Commonwealth Office (FCO) reported that ongoing fighting in the eastern provinces of the DCR has caused large numbers of displaced people.[19]

12. It was argued for the Appellant before the primary Judge that, relying on a 2006 report, which referred to the few years previous to that, does not reasonably or logically provide a basis for a conclusion as to the risk of persecution of the Applicant at the time of the Tribunal's decision in 2015, in the context of the findings and observations of the Tribunal, referred to above, as to the situation in 2011, 2013 and 2014. The Tribunal could not reasonably conclude, as it did at [79], that the 'country information before the Tribunal' (and then citing only the 2006 ICG Report) led to the conclusion that 'the applicant does not face a real chance of serious harm for reasons of his ethnicity now or in the reasonably forseeable future if he returns to Likasi', a township in the eastern province of Karanga.

13. The primary Judge rejected that argument[20], saying that:

> It is a matter for the Tribunal to determine which country information it accepts. It is clear in this case that the Tribunal did have regard to the most up-to-date country information available but accepted in its findings the position identified in the 2006 report in its findings in para. 79.

14. The Federal Court Appeal Judge noted that:

> The primary judge did not explain why it was that he came to the conclusion that this process was not unreasonable. His Honour did not examine whether the Tribunal's reasons revealed why it took the approach of accepting the 2006 ICG report when deciding the case in 2015.[21]

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[16] RRT at [55]; fn 23.
[17] RRT at [55]; fn 24.
[18] RRT at [55]; fn 25.
[19] RRT at [55]; fn 26.
[20] FCC at [20].
[21] *AAR15 v Minister for Immigration and Border Protection* [2016] FCA 150 at [20].

15. The Appeal Judge then went on to comment that:

> "24. It would have been desirable, looking at the matter in retrospect, if the Tribunal had explained why it preferred the earlier evidence from 2006 to this evidence in light of the very serious allegations made in the later 2011 report. One can only glean from the brief reference, perhaps, the reasons for the Tribunal's approach.
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> 25. Mr French, who appeared as counsel on behalf of the Minister, drew attention to the first sentence in [52], where the Tribunal noted that there was limited information available about this particular ethnic group in the particular area in issue in this case. It may have been that that limitation points to a reason why the Tribunal placed no emphasis on the 2011 report."

16. On that basis the Appeal Judge in the Federal Court concluded that:

> The Tribunal was entitled to assess the evidence contained in the country information referred to in [46] to [52], and come to the view that the picture presented from the flow of history up to 2006 was a better guide than the report in 2011. It was not unreasonable to adopt that approach and consequently the critical evidence on which the appellant relies does not support his contention that the Tribunal acted unreasonably.[22]

Part III: Appellant's argument

17. The Appeal Judge correctly acknowledged that the Tribunal gave no explanation for why it preferred the earlier evidence from 2006 in, light of what he found to be "very serious allegations made in the later 2011 report". In other words, he found that there were no reasons given for preferring the 2006 report over the 2011 report and that the allegations made in the 2011 report were such that an explanation was called for, if a reasonable decision was to be arrived at.

18. As Justice Kirby said in *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*[23]:

> Some decisions cry out for a clear explanation[24]. Especially is this so where the legislature has recognised the need and imposed a duty to give reasons and where the decision is very important for the person affected…

19. As Justice Kirby suggests in *Palme*[25], the failure to give reasons "indicates that the decision was an arbitrary one made outside the decision-maker's jurisdiction".

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[22] At [25].
[23] [2003] HCA 56, at [64].
[24] cf *R v Director of Public Prosecutions; Ex parte Manning* [2000] EWHC 562; [2001] QB 330.

20. The fact that the Tribunal said that it "had regard to the information before the Tribunal"[26] does not comprise a statement of a reason for the choice it made to accept the 2006 report over the 2011 report. As Kirby J said in the *Palme* case[27]:

> To state "I have considered all relevant matters" is an all-embracing and self-serving statement of conclusion not of the reasons for that conclusion. ... It does not reveal the reasons why the [decision-maker] opted for one rather than any of the ...other possibilities ....

21. It is not an answer to say, as Judge Street did[28] that:

> It is a matter for the Tribunal to determine which country information the Tribunal accepts.

22. It can be readily accepted that the Tribunal has a discretion to determine which country information it accepts.[29] However, the discretionary authority to choose country information does not absolve the decision-maker from making a choice which has "an evident and intelligible justification"[30].

23. As the Full Court of the Federal Court said in *Minister for Immigration and Border Protection v Singh*[31]:

> where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look in order to understand why the power was exercised as it was. The "intelligible justification" must lie within the reasons the decision-maker gave for the exercise of the power — at least, when a discretionary power is involved....it is the explanation given by the decision-maker for why the choice was made as it was which should inform review by a supervising court.

24. It is readily apparent from the language used by the Appeal Judge that he could do no better than speculate as to a reason for the Tribunal preferring the evidence from 2006 to the evidence in the 2011 report. The appeal judge spoke of 'gleaning' what was 'perhaps' the reasoning of the Tribunal, and what "may have been ... why the Tribunal placed no emphasis on the 2011 report."

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[25] At [66].
[26] RRT at [79].
[27] At [111].
[28] *AAR15 v Minister for Immigration & Anor* [2015] FCCA 2570, at [20].
[29] See *VQAB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 104 at [26]; *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10.
[30] *Minister for Immigration & Citizenship* [2013] HCA 18 at [76] per Hayne, Kiefel and Bell JJ.
[31] [2014] FCAFC 1 at [47] (Allsop CJ, Robertson and Mortimer JJ).

25. It is axiomatic that an appellate court has a duty to intervene in relation to a conclusion dependent upon speculation: see Callinan J in *Anikin v Sierra*[32]. In *Neterczuk v Mortimer*[33] Kitto J said:

> The tribunal may of course reason from the material before it, drawing all logical inferences while refraining from speculation.[34]

26. Gummow ACJ in *Tabet v Gett*,[35] noted that it is "uncontroversial" that determinations of fact must be based upon evidence "rather than speculation based upon insufficient evidence"[36].

27. Mason J in *Air Express Ltd. v. Ansett Transport Industries (Operations) Pty. Ltd.*[37] draws the distinction between "speculation" and "legitimate inference".

28. The Appeal Judge in the Federal Court, in basing his conclusion, that the Tribunal did not act unreasonably, on speculation as to the process of reasoning of the Tribunal, has failed to arrive at a decision by an exercise of judicial power which is reasonable.

29. The Appeal Judge did not go outside the decision-maker's reasons to discover another justification for the exercise of power of the decision-maker.[38] Rather, he sought to attribute reasons to the Tribunal by speculating as to what they were or might have been, when there was, in fact, no "explanation given by the decision-maker for why the choice was made"[39].

30. The conclusion which the Appeal Judge reached,[40] that the Tribunal decision was reasonable, was itself unreasonable.

31. The Appeal Judge identified that the Tribunal dealt with two categories of information separately, relating to two separate claims:

    (a) An ethnicity-based claim[41]; and

    (b) A Mia Mai violence claim.[42]

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[32] [2004] HCA 64; 79 ALJR 452; 211 ALR 621 at [87]; see also Kirby J in *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56, at [116].
[33] [1965] HCA 60; (1965) 115 CLR 140, at 149-150.
[34] [1965] HCA 60; (1965) 115 CLR 140 at 149-150.
[35] [2010] HCA 12, at [23].
[36] Referring to *Matsuyama v Birnbaum* 890 NE 2d 819 at 833-834 (2008) per Marshall CJ.
[37] [1981] HCA 75; (1981) 146 CLR 249 at [45].
[38] See *Minister for Immigration &Border Protection v Singh & Anor* [2014] FCAFC 1 at [46]-47]; (2014) 231 FCR 437.
[39] *Singh* at [47].
[40] At [25].
[41] RRT at [49]-[52]; Appeal Judge at [16], [21]-[30].
[42] RRT at [53]-[55]; Appeal Judge at [17] and [21]-[22].

32. It is not disputed that the Appeal Judge was entitled to conclude that the Appellant's arguments before the primary judge and the Appeal Judge which sought to use post-2006 information concerning Mai Mai violence in support of the ethnicity-based claim did not provide a basis for concluding that the Tribunal acted unreasonably by not having regard to the Mai Mai violence information in respect to the ethnicity claim.[43] ~~However, there was a sufficient and compelling basis for reaching a conclusion in favour of the Appellant's argument based upon the 2011 Minority Groups Report alone, the content of which was recited without adverse comment by the Tribunal at [52] of its Reasons, when dealing with the ethnicity-based claim~~.

33. However, there was a sufficient and compelling basis for reaching a conclusion in favour of the Appellant's argument based upon the 2011 Minority Groups Report alone, the content of which was recited without adverse comment by the Tribunal at [52] of its Reasons, when dealing with the ethnicity-based claim. In addition, the risk to the Luba minority group was supported by reports that the violence in the eastern provinces was causing widespread panic and massive or significant population displacement of civilians, moving to avoid violence, as militia groups carry out 'brutal attacks on civilians'.[44]

~~33~~. 34. The Appeal Judge did not arrive at a reasonable conclusion when he concluded that the "Tribunal was entitled to assess the evidence contained in the country information referred to in [46] to [52], and come to the view that the picture presented from the flow of history up to 2006 was a better guide than the report in 2011" [45], because the Tribunal did not provide sufficient reasons for its decision for the Appeal Judge to be satisfied on any reasonable basis that the Tribunal had assessed the evidence in the manner he speculated that they did.

~~34~~. 35. Further, there was no 'evident and intelligible' justification for the Appeal Judge to conclude that the Tribunal did not act unreasonably[46] in circumstances where he had concluded that:

> On the face of it, the information from the 2011 Minority Rights Group International report referred to in [52] was important information about the state of affairs in the DRC after 2006 to which the earlier evidence had been directed. The evidence was that the Kasian Luba were considered to be at future risk of 'genocide, mass killings or systematic violent repression'.

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[43] Appeal Judge at [22].

[44] RRT at [54]-[55]; Medecins San Frontieres 2014, *Everday Emergency; Silent Suffering in Democratic Republic of Congo*, p. 12; Human Rights Watch 2014, World Report 2014: Democratic Republic of the Congo; UK Foreign and Commonwealth Office, *Democratic Republic of the Congo (DRC) - Copuntry of Concern: Latest Update, 31 March 2014* <https://www.gov.uk/govrnment/publications/democratic-republic-of-the-congo-drc-country-of-concern/democratic-republic-of-the-congo-drc-country-of-concern-latest-update-31-march-2014>

~~44~~[45] At [25].

~~45~~[46] At [25].

~~35~~. 36. The Appeal Judge (and Judge Street before him) did not point to any rejection of the information in the 2011 report, or any basis for rejection of it, because there was none. Rather, the Appeal Judge confirmed that the Tribunal had not "explained why it preferred the earlier evidence from 2006 to this evidence in light of the very serious allegations made in the later 2011 report."[47]

~~36~~. 37. The best the Appeal Judge was able to identify as a possible basis for the Tribunal's approach was that the Tribunal noted that there was limited information available about the particular ethnic group in the particular area in issue.[48] That was not sufficient for the Appeal Judge to rationally conclude that there was a rational basis for the Tribunal's decision, in the light of the 2011 report and the findings he made concerning it.

~~37~~. 38. The challenge to the lack of an evident and intelligible justification for the Tribunal's decision in this case goes a significant distance beyond approaching the decision with a "keen eye for error" [49].

Part VII: Statutory provisions

~~38. The applicable statutory provisions at the relevant time and still in force are Section 36 of the *Migration Act 1958* (Cth) and Schedule 2 to the *Migration Regulations*, which are listed in the Appellant's List of Authorities.~~

39. There are no statutory provisions necessary to consider in order to resolve the matters in issue in this appeal.

Part VIII: Orders sought

~~39~~. 40. The orders sought are:

(a) Appeal be allowed.

(b) The decision of the Honourable Justice North, His Honour Judge Street and the Refugee Review Tribunal be set aside.

(c) The matter be remitted to the Administrative Appeals Tribunal to be determined in accordance with law.

(d) The First Respondent pay the Appellant's costs of this appeal, and the appeal to the Federal Court of Australia and application to the Federal Circuit Court.

~~46~~47 At [24].

~~47~~48 Appeal Judge, at [25], referring to RRT at [52].

~~48~~49 *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at [30]

Part IX: Oral argument

~~40~~. 41. The appellant's oral argument is estimated to take less than one hour.

Dated: October 2016

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