

**MINISTER FOR IMMIGRATION AND BORDER
PROTECTION v WZARH & ANOR (S85/2015)**

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 137

Date of judgment: 20 October 2014

Special leave granted: 17 April 2015

WZARH is a Sri Lankan citizen of Tamil ethnicity who entered Australia by boat in November 2010. Having arrived without a visa, he was an “unauthorised maritime arrival” and as such was prevented by s 46A of the *Migration Act 1958* (Cth) (“the Act”) from making a valid application for a visa. After a Refugee Status Assessment found that he did not qualify for refugee status, WZARH sought an Independent Merits Review (“IMR”).

During the IMR process, in January 2012 WZARH was interviewed by a reviewer (“the First Reviewer”). The First Reviewer told WZARH that she would consider the information he had given, along with any further documents he wished to provide, before making a recommendation as to his refugee status to the Appellant (“the Minister”). WZARH later provided further documents that he wished to be taken into account. After the First Reviewer became unavailable, the IMR file was referred to another reviewer (“the Second Reviewer”), who completed the IMR with the aid of a recording and a transcript of the interview conducted by the First Reviewer. On 25 July 2012 the Second Reviewer found that WZARH did not meet any of the criteria for a protection visa set out in s 36(2) of the Act.

WZARH applied for judicial review of the IMR process, contending that he had been denied procedural fairness. This was primarily on the basis that he had not been interviewed by the Second Reviewer.

On 14 October 2013 Judge Raphael dismissed WZARH’s application. His Honour held that an adequate hearing had been given. Judge Raphael found that the Second Reviewer’s views as to WZARH’s credibility were based on inconsistencies in the evidence that had for the most part been raised with WZARH by the First Reviewer.

The Full Court of the Federal Court (Flick, Nicholas & Gleeson JJ) unanimously allowed WZARH’s subsequent appeal, finding that he had been denied procedural fairness. Flick and Gleeson JJ held that WZARH had a legitimate expectation either that the First Reviewer would ultimately make the IMR recommendation or that any such recommendation made by a different reviewer would occur only after that reviewer had conducted an oral hearing. That expectation was founded upon the fact that an oral hearing had been conducted, along with the First Reviewer’s statements as to her role in conducting the IMR and making a recommendation. Their Honours held that WZARH had suffered a practical injustice by a change in the process that had occurred without his knowledge. Justice Nicholas found, for similar reasons, a denial of procedural fairness by the Second Reviewer’s failure to inform

WZARH that there had been a change of reviewer. His Honour also found that the Second Reviewer's findings related to matters upon which WZARH's demeanour might have had some bearing.

The grounds of appeal include:

- The Full Court erred in holding that WZARH was denied procedural fairness because the Second Respondent did not:
 - (a) invite him to attend a face-to-face hearing; and/or
 - (b) inform him that the First Reviewer who conducted the hearing on 16 January 2012 had become unavailable after the interview to complete the review; and/or
 - (c) ask him how he wished for the review to proceed, given the change of reviewer.