FEDERAL COURT OF AUSTRALIA

AAE15 v Minister for Immigration and Border Protection [2017] FCA 1093

|  |  |
| --- | --- |
| Appeal from: | *AAE15 v Minister for Immigration & Anor* [2016] FCCA 1825 |
|  |  |
| File number: | VID 910 of 2016 |
|  |  |
| Judge: | **MOSHINSKY J** |
|  |  |
| Date of judgment: | 20 September 2017 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court of Australia – application for Protection (Class XA) visa – whether jurisdictional error by Refugee Review Tribunal – where primary judge dismissed application for judicial review – appeal dismissed |
|  |  |
| Legislation: | *Migration Act 1958* (Cth), ss 36, 46A, 424A |
|  |  |
| Cases cited: | *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152*SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556*SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 |
|  |  |
| Date of hearing: | 10 November 2016 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 36 |
|  |  |
| Counsel for the Appellant: | The appellant appeared in person with the assistance of an interpreter |
|  |  |
| Solicitor for the First Respondent: | Mr L Leerdam, DLA Piper Australia |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |

ORDERS

|  |  |
| --- | --- |
|  | VID 910 of 2016 |
|   |
| BETWEEN: | AAE15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | MOSHINSKY J |
| DATE OF ORDER: | 20 SEPTEMBER 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

## Introduction

1. The appellant is a citizen of Sri Lanka and a Tamil of Hindu faith. Before coming to Australia, he was a fisherman. He left Sri Lanka by boat and arrived at Christmas Island in August 2012.
2. On 10 October 2012, the appellant was interviewed by an officer of the Department of Immigration and Citizenship (as it then was). On the same day, a delegate of the first respondent (the **Minister**) gave the appellant notice of a decision of the Minister to exercise his power under s 46A(2) of the *Migration Act 1958* (Cth), allowing the appellant to apply for a Protection (Class XA) visa (a **protection visa**). The appellant was provided with representation from a migration agent from BMA Lawyers pursuant to the Immigration Advice and Application Assistance Scheme.
3. On 10 December 2012, the appellant lodged an application for a protection visa.
4. On 23 September 2013, a delegate of the Minister decided to refuse to grant the appellant a protection visa. Notification of that refusal was given to the appellant’s authorised recipient by correspondence dated 9 October 2013.
5. The appellant applied to the Refugee Review Tribunal (the **Tribunal**) (now the Administrative Appeals Tribunal) for review of the delegate’s decision.
6. On 27 March 2014, the appellant’s authorised representative provided written submissions to the Tribunal.
7. On 2 February 2015, a hearing took place before a member of the Tribunal. The appellant appeared at the hearing and gave evidence with the assistance of an interpreter in the Tamil and English languages. The appellant was represented by BMA Lawyers in connection with the review application. I note for completeness that, at the commencement of the hearing, the appellant’s lawyer had not arrived. The Tribunal dealt with some preliminary matters and then said it would wait. A lawyer then arrived (although not the lawyer who was due to appear) and the hearing proceeded (AB 327).
8. On the same day, the Tribunal decided to affirm the delegate’s decision to refuse the application for a protection visa. The decision was notified to the appellant’s representative on 3 February 2015.
9. The appellant applied to the Federal Circuit Court of Australia for judicial review of the Tribunal’s decision.
10. On 14 April 2016, a hearing took place before the primary judge. Both the appellant and the Minister were represented by counsel at the hearing. The material before the primary judge comprised a Court Book and a Supplementary Court Book, the latter containing the transcript of the hearing before the Tribunal.
11. On 22 July 2016, the primary judge published reasons for judgment and made orders that: the application be dismissed; and the appellant pay the Minister’s costs in the sum of $6,825.
12. The appellant has appealed to this Court from the judgment of the Federal Circuit Court. The appeal was heard on 10 November 2016. While judgment was reserved, in December 2016 the solicitors for the Minister wrote to my chambers to advise that the appeal may be affected by the determination of an appeal to the High Court of Australia, namely the appeal from the decision of the Full Court of this Court in *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556. In these circumstances, I deferred handing down a decision in this matter. The High Court has now given judgment in the appeal: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34. The High Court, by a majority, dismissed the appeal. It follows from this result that there does not appear to be any additional point, of the kind argued in *SZTAL*, that could be raised in the present case.
13. For the reasons that follow, in my view the appeal should be dismissed. In summary, each of the grounds raised by the appellant before the Federal Circuit Court was properly considered by the primary judge, and no error is shown in the primary judge’s reasons.

## The Tribunal’s decision

1. The Tribunal summarised the appellant’s claims at [21]-[24] of its statement of decision and reasons (the **Tribunal’s reasons**). As noted in [21], the appellant is a Tamil born in Supparmadam, Point Pedro, Sri Lanka; he has never married and has no children. The appellant claimed that: his sister joined the Liberation Tigers of Tamil Eelam (**LTTE**) movement and was killed by a landmine in 1995; in 1996-97 and 2004-09, his family was displaced into camps in Mullaitivu; the appellant was placed into the Kaithady displaced persons camp in Jaffna from March to October 2009; and he was interrogated there by the Criminal Investigation Department (**CID**) of the Sri Lankan Police and accused of being an LTTE member. In [22], the Tribunal noted that the appellant claimed that: ever since he was young, he had been harassed by the authorities, particularly the CID; in around May 2009, he was stopped three times by the CID; he had been interrogated, slapped, and had his neck squeezed severely; he was also handcuffed and punched in the stomach causing excruciating pain such that he could not walk; the CID had accused him of being an LTTE member because of his sister; every month since 2009, he has been forced to register at the army camp at Point Pedro; he feared that, if he did not register, he would be caught and bashed; the CID had killed so many Tamils that he complied; and in 2011, the CID called him to the base and hit him with a baton on his shoulders and legs. At [23], the Tribunal set out the appellant’s claims that: the harassment continued until the time he left Sri Lanka; the authorities would question him and ask him to identify LTTE people in his area; they would beat him up when he refused; and the last such incident occurred a month before he left Sri Lanka. Other claims were set out at [24] of the Tribunal’s reasons.
2. The Tribunal set out, at [25]-[31], certain independent country information concerning the conditions in Sri Lanka. This included information about: Tamils; fishermen; and failed asylum seekers and illegal departure.
3. At [32], the Tribunal found that the appellant was a national of Sri Lanka.
4. The Tribunal’s assessment of the appellant’s claims was set out at [33]-[64] of its reasons. The Tribunal dealt first with the appellant’s credibility. While the Tribunal accepted some aspects of the appellant’s evidence (see [33] of the Tribunal’s reasons), the Tribunal did not accept as credible significant aspects of the appellant’s claims (see [34]-[36]). The Tribunal provided detailed reasons for forming this view. Having set out its reasons for doubting the credibility of the appellant’s claims, the Tribunal stated at [35]:

Given these highly significant credibility concerns, I do not accept that the applicant was of any adverse interest to the authorities when he was released from the camp in October 2009. I do not accept that he was required to report or that he was detained, interrogated and physically mistreated on any occasion or that he was forced to identify LTTE members. I do not accept that since he left Sri Lanka, the authorities have visited his home on any occasion to look for him or that they have ever detained, questioned or mistreated his brother or forced him to report. I do not accept that the applicant is of any continuing interest to the authorities or anyone else.

1. The Tribunal dealt with the claims concerning the appellant’s brother at [37]-[39] of the Tribunal’s reasons. The Tribunal accepted that a particular incident involving his brother had occurred, but found that it had no adverse consequences for the appellant.
2. The Tribunal dealt with matters relating to the appellant’s occupation as a fisherman at [40]-[43]. The Tribunal (at [41]) did not accept that the appellant had been mistreated by the Sri Lankan Navy, other than on one particular occasion in 1997.
3. The Tribunal considered the appellant’s claims based on his Tamil race and perceived links with the LTTE at [44]-[48]. After referring in some detail to country information, the Tribunal found (at [45]) that the chance or risk that the appellant would be persecuted or significantly harmed on account of being a young Tamil male, or because he lived in the north of Sri Lanka, was remote. The Tribunal then stated at [46]-[48]:

46. I accept that Tamils suspected of certain links to the LTTE (including persons with family links) are at risk upon return to Sri Lanka. However, the applicant has not claimed that his father was subject to any adverse attention and I have rejected that his brother has been because of the applicant. The applicant’s only link has been via his sister who was killed in the mid 90s when he was just 11 years old. This is a very long time ago and I do not accept that there is a real chance or real risk that the applicant will be suspected of being linked to the LTTE now or in the reasonably foreseeable future. I find that the applicant is not of adverse interest to the authorities or anyone else.

47. Based on his individual circumstances and the overall weight of the country information, I find that the applicant does not face a real chance of persecution on account of his Tamil race, membership of particular social groups (including “young male Tamils” or his family) or his actual or imputed political opinion or any other Convention reason, now or in the reasonably foreseeable future from the authorities, paramilitary groups or anyone else.

48. Based on his individual circumstances and the overall weight of the country information, I find that there are not substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka that there is a real risk that he will suffer significant harm on these bases.

1. Next, the Tribunal considered the appellant’s position as a failed asylum seeker if returned to Sri Lanka (Tribunal’s reasons, [49]-[56]). The Tribunal also considered matters concerning illegal departure at [57]-[62] of its reasons. Under the heading “cumulative assessment”, the Tribunal stated at [63]-[64]:

63. Considering the applicant’s individual circumstances and the independent country information cumulatively, I find that he does not face a real chance of persecution in the reasonably foreseeable future for any reason (Convention or non-Convention related). His fear of persecution is not well-founded.

64. Considering the applicant’s individual circumstances and the independent country information cumulatively, I find that there are not substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka that there is a real risk that he will suffer significant harm.

1. Ultimately, the Tribunal concluded that it was not satisfied that the appellant was “a person in respect of whom Australia has protection obligations under the Refugees Convention”, and therefore the appellant did not satisfy the criterion set out in s 36(2)(a) of the *Migration Act*. The Tribunal also considered the alternative criterion in s 36(2)(aa), concluding that it was not satisfied that the appellant was “a person in respect of whom Australia has protection obligations” under that provision. There being no suggestion that the appellant satisfied s 36(2) on the basis of being a member of the same family unit as a person who satisfies s 36(2)(a) or (aa) and who holds a protection visa, the Tribunal concluded that the appellant did not satisfy any of the criteria for a protection visa in s 36(2).

## The Federal Circuit Court decision

1. The appellant’s amended application in the Federal Circuit Court contained the following six grounds:

1. The Tribunal erred jurisdictionally by not assessing the applicant’s integer claim of imputed supporter of or links to the LTTE even though it accepted that his sister was a member of the LTTE (CB 142)

2. The Tribunal acted unreasonably which resulted in the breach of section 414 of the Migration Act.

3. The Tribunal breached section 424A of the Migration Act.

4. The Tribunal was obliged to put the applicant on notice of its concerns but it acted in haste by rejecting his application on the day of the hearing thereby breached procedural fairness. (CB 213 & CB 234)

5. The Tribunal applied the wrong test when it assessed part of the applicant’s claim and thereby fell into jurisdictional error.

6. The Tribunal has not assessed the applicant’s claim cumulatively of being a young Tamil fisherman from the north of Sri Lanka of Hindu faith with perceived links with LTTE and belong to a group where a member of his family was known LTTE cadre.

1. It appears from [3] of the reasons for judgment of the primary judge (the **Reasons**) that ground five was not pressed at the hearing.
2. The primary judge dealt first with grounds two and three. After setting out the text of s 424A of the *Migration Act*, the primary judge stated, at [18], that the appellant had failed to particularise the alleged breach of s 424A. The primary judge noted that no information had been relied upon by the Tribunal that enlivened its obligations under s 424A of the Act.
3. The primary judge stated, at [19], that no particulars had been provided by the appellant as to the allegation that the Tribunal had acted unreasonably. The primary judge considered that the Tribunal “did not do so in the processes it adopted nor in the logic applied to its reasoning as gleaned from a fair reading of the Tribunal’s decision” (at [19]). Accordingly, the primary judge concluded that grounds two and three were not made out.
4. The primary judge next dealt with grounds one and four, stating at [21]-[22]:

21. There is also no merit in these grounds. The Tribunal carefully considered the claims as put by the Applicant as to his being an imputed supporter of the LTTE and/or having links to the LTTE in particular by virtue of his sister’s accepted association with the LTTE. Ultimately the Tribunal rejected the Applicant’s claims for the reasons given in the Decision Record. Those reasons included an express finding that the Applicant’s relationship to his sister did not lead to a real chance or a real risk that the Applicant would be suspected of being linked to the LTTE. The findings made by the Tribunal were open on the evidence before it and no illogicality or unreasonableness attends the Tribunal decision. The Tribunal did not, as claimed, fail to consider country information, including that contained in the UNHCR Eligibility Guidelines dated 21 December 2012 which listed risk profiles of potential individuals who may be in need of international protection which included:-

“*…*

*(6) Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles*” (being profiles connected with the LTTE).

The Tribunal expressly, in paragraph 46 of the Decision Record, stated “*I accept that Tamils suspected of certain links to the LTTE (including persons with family links) are at risk upon return to Sri Lanka.*” However the Tribunal found nonetheless that it was satisfied that the Applicant was now and in the reasonably foreseeable future of no “*adverse interest to the authorities or anyone else*” and that the Applicant was not at risk of harm due to his family link with his sister.

22. There was no breach of s.425 of the Act and the Applicant does not particularise any such breach. The making by the Tribunal of its decision on the day of the hearing does not, without more, go to the establishment of jurisdictional error by the Tribunal. It is not apparent that the Tribunal “acted in haste” in making its decision. The Applicant points to no matters which he contends needed to be raised with him at the hearing which were not. The Court has before it in evidence the transcript of the hearing. That transcript shows, as submitted by Counsel for the First Respondent, that the Tribunal traversed with the Applicant, at the hearing, all of the dispositive issues in the review.

(Footnotes omitted.)

In a footnote to the second paragraph quoted above, the primary judge referred to *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.

1. Lastly, the primary judge dealt with ground six. The primary judge reasoned as follows, at [23]-[24]:

23. The Tribunal considered cumulatively those matters which were applicable to the Applicant. That is that he was a Tamil; a fisherman; a Tamil who had a family member who had been involved in the LTTE; a Tamil failed asylum seeker and one who left Sri Lanka illegally.

24. The Tribunal did not accept that the Applicant had perceived links to the LTTE and that therefore was not a claim required to be considered cumulatively with his other claims. Although the Applicant claimed to be of Hindu faith he did not claim that caused him to be at risk of harm, either of itself or coupled with any of his other claims. As submitted by Counsel for the First Respondent, it is not open to the Applicant to now point to all of his personal attributes and allege that they need to be considered cumulatively by the Tribunal.

1. Accordingly, the primary judge concluded that there was no jurisdictional error in the Tribunal’s decision.

## The appeal to this Court

1. The appellant’s notice of appeal contains the following four grounds of appeal:

1. The learned judge erred by holding that Tribunal did assess the appellant’s integer claim of imputed supporter of or links to the LTTE even though the Tribunal accepted that the appellant sister was a member of the LTTE and died in action. The Tribunal clearly not assessed this integer claim and fell into jurisdictional error.

2. The Tribunal erred jurisdictionally by acting in haste and delivered its decision on the day of the hearing. The learned judge erred by finding that, such action by the Tribunal does not, without more, go to the establishment of jurisdictional error. (paragraph 22 of the reasons for judgment)

3. The learned judge erred by holding with the Tribunal that the appellant’s claim was cumulatively assessed but it was not.

4. The Tribunal erred jurisdictionally by breaching section 424A of the Act. It has not given to the appellant clear particulars pursuant to subsection (1) and acted in haste and refused the application on the same day. The learned judge erred and misconstrued the obligation imposed on the Tribunal under the Migration Act.

1. At the hearing of the appeal, the appellant (who was representing himself) made some brief oral submissions.
2. I will deal with each of the four grounds in turn. The first ground is essentially the same as the first ground before the Federal Circuit Court. The appellant contends that the Tribunal erred in failing to assess an integer of his claims, namely imputed support for or links with the LTTE. This error is said to have occurred notwithstanding that the Tribunal accepted that the appellant’s sister had been a member of the LTTE. In my view, the primary judge was correct to reject this ground for the reasons given at [21] of the Reasons, quoted above. The Tribunal did consider the appellant’s claims relating to imputed support for or links with the LTTE. These were considered at [44]-[48] of the Tribunal’s reasons. The Tribunal had regard to the appellant’s sister’s link with the LTTE, but considered that as she had been killed in the mid-1990s this did not provide a basis to conclude that the appellant was of adverse interest to the authorities or anyone else (see [46] of the Tribunal’s reasons, quoted above).
3. The second ground of appeal concerns the Tribunal acting “in haste” by making its decision on the same day as the hearing. This is similar to ground four before the Federal Circuit Court. In my view, the primary judge was correct to conclude, at [22] of the Reasons, that it was not apparent that the Tribunal acted “in haste” in making its decision. I note that the Tribunal hearing concluded at 11.18 am (AB 350) and the decision was made at 4.43 pm on the same day (AB 304). The short period of time between these two events does not demonstrate that the Tribunal failed to give due consideration to the matter. Further, the primary judge was correct to observe, at [22] of the Reasons, that the making by the Tribunal of its decision on the day of the hearing did not, without more, go to the establishment of jurisdictional error. I note for completeness that there is no suggestion that the Tribunal conveyed to the appellant that he would have the opportunity to file further submissions after the conclusion of the hearing and before a decision was made.
4. The third ground of appeal is similar to the sixth ground before the Federal Circuit Court. In my view, the primary judge was correct to hold that the Tribunal had considered the appellant’s claims cumulatively. This is evident from [63]-[64] of the Tribunal’s reasons, quoted above.
5. The fourth ground of appeal is similar to ground three below, and concerns an alleged breach of s 424A of the *Migration Act*. In my view, in the absence of particulars of the alleged breach of s 424A, the primary judge was correct to conclude that no breach of the provision had been established. Insofar as the fourth ground of appeal traverses matters also raised by the second ground, I refer to my reasons, above, in relation to that ground.
6. It follows from the above that the appeal is to be dismissed. There is no apparent reason why costs should not follow the event. Accordingly, there will also be an order that the appellant pay the Minister’s costs of the appeal.

|  |
| --- |
| I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky. |

Associate:

Dated: 20 September 2017