FEDERAL COURT OF AUSTRALIA

MZZQY v Minister for Immigration and Border Protection [2015] FCA 883

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| Citation: | MZZQY v Minister for Immigration and Border Protection [2015] FCA 883 |
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| Appeal from: | MZZQY v Minister for Immigration & Anor [2015] FCCA 262 |
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| Parties: | **MZZQY v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL** |
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| File number: | VID 86 of 2015 |
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| Judge: | **BEACH J** |
|  |  |
| Date of judgment: | 18 August 2015 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court – protection visa – failure of Tribunal to consider various integers – appeal dismissed  |
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| Cases cited: | *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389*HTUN v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244*MZZUT v Minister for Immigration and Border Protection* [2015] FCA 141*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1*NAVK v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1695*SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 80  |
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| Date of hearing: | 17 August 2015 |
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| Place: | Melbourne |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 40 |
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| Counsel for the Appellant: | Mr D Nguyen |
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| Solicitors for the Appellant: | Ambi Associates |
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| Counsel for the First Respondent: | Ms C Symons |
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| Solicitors for the First Respondent: | Australian Government Solicitor |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 86 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | MZZQYAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

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| JUDGE: | BEACH J |
| DATE OF ORDER: | 18 AUGUST 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The appellant’s appeal be dismissed.
2. The appellant pay the Minister’s costs of and incidental to the appeal.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 86 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | MZZQYAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

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| JUDGE: | BEACH J |
| DATE: | 18 AUGUST 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

1. The appellant has appealed the judgment and orders of her Honour Judge Hartnett of the Federal Circuit Court of Australia given on 10 February 2015. Before her Honour was an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal). The Tribunal had affirmed a decision of a delegate of the first respondent (the Minister) not to grant the appellant a Protection (Class XA) Visa (the visa). Her Honour dismissed that application for judicial review.
2. By notice of appeal, the appellant has asserted the following grounds of appeal:

1. The primary Judge was in error at paragraphs 7, 21, 22, 23 and 29. The primary judge erred in finding that a claim or integer of a claim was not raised by the applicant to fear harm from politically connected people smugglers and their politician allies.

2. The primary Judge ought to have found that:

(a) Nothing in the Tribunal’s reasons indicate that the Tribunal considered the applicant’s answers to questions given at his first interview very soon after arrival in Australia.

(b) The Tribunal made a strong adverse credibility finding based in part upon a perceived lateness of a claim by the applicant to fear harm from politically connected people smugglers and their politician allies.

(c) This claim or an integer of it was raised by the applicant during his first interview upon arrival in Australia.

1. In my view and for the reasons that follow, the appellant’s appeal should be dismissed.

# Background

1. The relevant facts are not in dispute concerning the chronology of relevant events.
2. The appellant, a citizen of Sri Lanka, arrived in Australia on 10 June 2012.
3. On 12 September 2012 the appellant applied for a protection visa. The appellant made a declaration in support of his application.
4. In his declaration, the appellant claimed that he feared harm from unknown opponents of his uncle and the authorities of Sri Lanka, through the Criminal Investigation Department or the army, because he had witnessed his uncle being kidnapped and reported this to the police. The appellant feared that the authorities at the airport would arrest, detain and interrogate him if he was to return to Sri Lanka as a failed asylum seeker.
5. On 28 September 2012, the appellant’s migration agent submitted a letter in support of the appellant’s application. The appellant’s migration agent submitted that the appellant feared persecution due to his Tamil race, his membership of particular social groups comprising Sri Lankan Tamils and Tamils who had fled Sri Lanka illegally and had unsuccessfully made claims for asylum in Australia, and his real and imputed political opinion arising from his race and his former residence in a predominantly Tamil region.
6. The appellant’s application for a protection visa was refused by a delegate of the Minister on 22 February 2013. On 14 March 2013, the appellant applied to the Tribunal for a review of the delegate’s decision.
7. On 14 June 2013, a hearing took place before the Tribunal, at which the appellant was represented by his migration agent.
8. Following that hearing, on 28 June 2013, the appellant’s migration agent sent a letter to the Tribunal. In further submissions the appellant claimed that a politician named “Santha” had come to his family home and had told the appellant’s family that “He [the appellant] will come back and I will take care of him”. The appellant’s migration agent asked the Tribunal to take this matter into account as an additional claim. I will return to this issue later.
9. On 2 July 2013, the appellant’s migration agent forwarded to the Tribunal a letter from Kathirkamappilai Magalingam in which the writer claimed that kidnappers had come to his home to kidnap him and the appellant. The letter also claimed that the appellant faced a lot of difficulties with the Sri Lankan army, presumably if he was to return, a claim that the appellant had also made during the Tribunal hearing. During that hearing, the appellant had claimed that around 10 April 2012 an army person had come to the camp where his family was living and asked for the appellant to report to the army camp.
10. On 30 July 2013 the Tribunal affirmed the delegate’s decision to refuse to grant the appellant a protection visa.
11. The Tribunal did not regard the appellant to be a credible witness.
12. The Tribunal was prepared to accept that in 2008 the appellant’s uncle was taken at gunpoint and that the appellant had witnessed this and reported the abduction to the police. But the Tribunal considered that the abduction was “more likely to have been criminal activity” than there being a genuine political connection or motivation for what had occurred. The Tribunal did not accept that there was an ongoing risk to the appellant as a consequence of what had happened to his uncle in October 2008. Nor did the Tribunal accept that the appellant was at risk of harm from the Sri Lankan CID or other authorities of the government of Sri Lanka because of the incident involving his uncle in October 2008 or otherwise. The Tribunal rejected the appellant’s claim that he was at risk of harm from unknown people whom he witnessed kidnapping his uncle.
13. The Tribunal also found that the claim that there was a further kidnapping attempt made against the appellant and the uncle was not true. The Tribunal did not accept that someone from the Sri Lankan army had visited the appellant’s mother and said the appellant had to report to the army camp or that the appellant had faced difficulties from the Sri Lankan army.
14. Further, the Tribunal rejected the appellant’s apparently new claim that he was at risk of harm from a politician called Santha. The Tribunal considered that this was a “late claim” and opportunistically made. The Tribunal did not consider this to be a credible claim.
15. The Tribunal found that the appellant did not face a real risk of serious harm in Sri Lanka as a consequence of being a failed asylum seeker, a returnee, a person who had left Sri Lanka illegally or a returnee who might be charged with improperly departing Sri Lanka.
16. As I have said, the appellant filed an application for judicial review of the Tribunal’s decision with the Federal Circuit Court.
17. Given the nature of the asserted errors, it is convenient at this point to address the attack on how the Tribunal proceeded. If jurisdictional error is established, then necessarily the Federal Circuit Court would have erred in failing so to find.
18. Given how the submissions have proceeded before me, it is also appropriate to re-categorise the grounds of appeal in the manner that follows.

# Grounds of Appeal

## (a) Integer 1

1. The appellant asserts that the Tribunal did not properly deal with an integer of a claim, being what had been said by the appellant as recorded in the Entry Interview document dated 27 July 2012 and signed by the appellant. In that document, question 12 identified an answer given by him concerning the consequences that would occur if an agent who had arranged for him to travel to Australia was not paid. It was said by him:

“I will not suffering, but my home people will get suffering” [sic].

Further, he also said in respect of the agent:

“He has political connections, so it was a warning yet” [sic].

1. This integer was some unspecified threat by the agent, but not to the appellant; however, one may infer that if the appellant had returned to Sri Lanka he may have been subject to it.
2. It is said that the Tribunal did not consider this integer. But there are a number of difficulties.
3. First and foremost, the appellant’s counsel, Mr Daniel Nguyen, properly conceded that at the time of the Tribunal hearing, no submission had been put or evidence led on this integer by the appellant. As the agent’s letter dated 28 September 2012 to the Department made clear, the claims he was making and the relevant integers identified were set out in a written statement and oral evidence by reference to the request for protection on 12 September 2012, rather than the Entry Interview.
4. Second, as is apparent, the specific material put before the Tribunal for it to consider and the evidence led rather concerned the abduction of his uncle and his witnessing the same. See for example his Declaration dated 12 September 2012 and the letter from his migration agent dated 28 September 2012.
5. Third, the appellant was at all times during the Tribunal proceeding represented by a migration agent. One could have expected the migration agent to have raised this integer with the Tribunal at the hearing, but nothing was done. The fact that the appellant was represented has some significance to the way the Tribunal could have been expected to conduct the proceeding and the way it would have read and approached submissions (see *MZZUT v Minister for Immigration and Border Protection* [2015] FCA 141 at [18]).
6. Fourth, at the time of the Tribunal proceeding, the Tribunal was quite entitled to assume and proceed on the basis that such an integer was not being relied on. I accept that the Tribunal may for itself, even in the absence of an applicant raising it, identify and be bound to consider an integer where it is apparent on the face of the material. But this is not such a case. No such integer was identified and no evidence led by the appellant in support of it. Moreover, as I say, the appellant was represented before the Tribunal.
7. Fifth, cases such as *MZZUT* at [14] and [15], *HTUN v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at [42], *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [63], *SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 80 at [29] and generally *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 are only of modest assistance in the present context.
8. Those cases deal with the circumstance where the Tribunal has failed to address and deal with how the claim was put to it including the various integers. But here the Tribunal specifically addressed the claims and integers put to it. Moreover, as I say, in my view it cannot be said that this integer arose clearly from the material before the Tribunal. Indeed, the bare assertion was in a document that predated the visa application and had a different function and purpose. Moreover, the threat in terms of type was unspecified. Further, the threat did not identify the appellant as being subject to it, although I accept that he may have been if he had returned to Sri Lanka. Allsop J (as he then was) discussed the degree of “the apparentness of the unarticulated claim” required in *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1695 at [15]. But in my view, looking at the material before the Tribunal and how the appellant put his case at the Tribunal hearing, it does not seem to me that this integer or claim (if it could be so characterised) was something that the Tribunal ought to have considered.
9. Sixth, there is little doubt that the Tribunal had before it the Entry Interview document and considered it.
10. In summary, in my view the Tribunal made no error in failing to consider this integer or claim (if it could be so characterised). Further, the Federal Circuit Court made no error in finding that no such jurisdictional error had been made by the Tribunal.

## (b) Integer 2/New claim

1. After the Tribunal hearing, on 28 June 2013 the appellant’s agent sent a letter to the Tribunal as I have earlier described. That letter stated the following :

I have obtained further instructions from my client and he has asked me to present additional information to the Tribunal. I have informed him that it may become necessary for the Tribunal to interview him again. My client has informed me that on 24 June 2013 a politician by the name of “Santha” came to his family’s home and has been threatening them to pay a further four lac which is money that is owed for his journey to Australia. The politician told his family that (in reference to the client), “He will come back and I will take care of him.” My client had never met the politician before but is aware that politicians are often involved in people smuggling.

I ask that you take this issue in to account as an additional claim under Complementary Protection. My client fears that he will be killed by smugglers/politicians who support them if he is returned to Sri Lanka. He fears that the government of Sri Lanka will not protect him because the people who threaten him are connected to the government.

I would also like to request that a decision not be made in this matter before Wednesday next week, 3 July, as my client is trying to obtain documentation from Sri Lanka that may support his claims (letter from other individuals). If those letters are obtained and they are useful, I would like to ask that they be taken in to account when making your decision. We will only contact the Tribunal if we are able to obtain those letters, otherwise, we understand that the Tribunal may proceed to make a decision after Wednesday 3 July, 2013 on the information submitted to date.

1. This was a new claim. Indeed the author of the letter makes this plain. It also made no reference to the Entry Interview document. Further, it identified for the first time a politician, rather than the agent referred to in the Entry Interview document.
2. The Tribunal quite correctly treated the letter dated 28 June 2013 as a new claim and then assessed it as a new claim. The Tribunal concluded that it lacked credibility given its lateness and building upon its more general credibility findings on the other matters raised before the Tribunal. In my view it was entitled to so proceed.
3. The appellant asserts that the Tribunal was in error in treating this as a new and late claim. He has submitted that the Tribunal should have treated it and assessed it as “an element of a larger claim, raised at the first opportunity by the appellant” (i.e. the Entry Interview). In my view that contention lacks substance. First, such a “larger claim” was not raised before the Tribunal at its hearing. Second, the letter dated 28 June 2013 accepted that this was a new claim rather than part of and in elaboration of an earlier pre-existing claim. Indeed, the letter contradicts such an assertion by using the language of “an additional claim”. Further, the agent’s letter of 28 September 2012 to the Department advised at that time that:

“[The appellant] has provided a written statement and oral evidence *setting out his claims*”. (emphasis added)

That material did not identify the Entry Interview assertion.

1. In summary, the Tribunal was quite correct to assess this as a new claim. Moreover, it was quite entitled to find that it lacked credibility (see its reasons at [45] to [47]), particularly building upon the other credibility findings made by the Tribunal in its detailed reasons on other matters.

## (c) General

1. In my view, the appellant’s grounds of appeal are not made out. I should also say for completeness that the formulation of the appellant’s grounds of appeal (see [2] above) lacked precision and sought to collapse into one concept a claim by the appellant to “fear harm from politically connected people smugglers and their political allies”. As to the former aspect (identified above as “integer 1”), no such claim/integer was raised before the Tribunal at or prior to the Tribunal hearing. As to the latter aspect (identified above as “integer 2/new claim”), such a claim was made belatedly for the first time after the Tribunal hearing and treated as not being credible.
2. No error has been established in the reasons of the Federal Circuit Court which found that no jurisdictional error had been made by the Tribunal.
3. The appellant’s appeal will be dismissed.

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| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 19 August 2015