FEDERAL COURT OF AUSTRALIA

AYJ15 v Minister for Immigration and Border Protection [2016] FCA 863

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| Appeal from: | *AYJ15 v Minister for Immigration & Anor* [2016] FCCA 252  |
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| File number: |  |
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| Judge: | **REEVES J** |
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| Date of judgment: | 2 August 2016 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court dismissing an application for judicial review of a Refugee Review Tribunal decision – where appellant raised new grounds of appeal that were not before the Federal Circuit Court – where no clear merit in the proposed new grounds of appeal – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth)*Migration Litigation Reform Act 2005* (Cth) |
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| Cases cited: | *AYJ15 v Minister for Immigration & Anor* [2016] FCCA 252 (*AYJ15*)*Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194*Coulton v Holcombe* (1986) 162 CLR 1*Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244; [2001] FCA 1802*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16*MZYPO v Minister for Immigration and Citizenship* [2013] FCAFC 1*VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158 |
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| Date of hearing: | 3 May 2016 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 27 |
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| Solicitor for the Appellant: | Mr S Hodges of Hodges Legal  |
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| Solicitor for the First Respondent: | Ms E Tattersall of Sparke Helmore Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | QUD 75 of 2016 |
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| BETWEEN: | AYJ15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | REEVES J |
| DATE OF ORDER: | 2 August 2016 |

THE COURT ORDERS THAT:

1. Leave to amend the notice of appeal is refused.
2. The appeal is dismissed.
3. The appellant is to pay the first respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

REEVES J:

# Introduction

1. The appellant has appealed from a decision of the Federal Circuit Court: see *AYJ15 v Minister for Immigration & Anor* [2016] FCCA 252 (*AYJ15*).

# The grounds of this appeal

1. In his original notice of appeal, the appellant relied on a sole ground of appeal:

That the Federal Circuit Court Judge erred in dismissing the proceedings without proper reasoning and that to do so was procedurally unfair.

1. However, in an amended notice of appeal filed shortly before the hearing of his matter, the appellant sought leave to amend his notice of appeal to abandon his original sole ground of appeal and to replace it with three entirely new grounds as follows:
2. That the AAT fell into jurisdictional error in failing to correctly or adequately identify and assess the appellant’s particular social group or political opinion.

...

1. That particular and dispositive findings of the AAT were not compatible with rational process.

...

1. The AAT fell into error in failing to assess the nature and qualities of the extortion which had occurred and would likely reoccur if the appellant was returned to Sri Lanka.
2. In his written and oral submissions in support of this application to amend, the appellant conceded that none of these three new grounds was raised before the Federal Circuit Court. The Minister opposed the application.
3. In *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158, Kiefel, Weinberg and Stone JJ outlined (at [46]) the principles pertinent to an application for leave to amend to rely on new grounds of appeal in the following terms:

Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O’Brien v Komesaroff* (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]-[24] and [38].

1. Immediately thereafter, their Honours went on to add the following observations about the prevalence of applications of this kind in migration appeals such as this (at [48]):

The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

See also *MZYPO v Minister for Immigration and Citizenship* [2013] FCAFC 1 (*MZYPO*) at [101], per Jessup J.

1. Before proceeding to consider whether the appellant has offered an adequate explanation for his failure to raise these proposed new grounds before the Federal Circuit Court and whether any of them clearly has merit, it is appropriate to record briefly the factual and procedural background to this appeal.

# The factual background

1. The appellant is a citizen of Sri Lanka, who first arrived in Australia on 28 July 2012 as an unauthorised maritime arrival. He lodged an application for a protection (class XA) visa on 17 January 2013.
2. During the civil war in Sri Lanka, he lived in an area that was controlled by the Liberation Tigers of Tamil Eelam (LTTE). He claimed to fear harm from the Karuna group, a political group in Sri Lanka, primarily because he is of Tamil ethnicity, but also because of his political support for the Ceylon Tamil Arasu Party which is opposed to the Sri Lankan government and to the Karuna group. He also claimed to fear harm as a result of his illegal departure from Sri Lanka and his extended presence in Australia as an asylum seeker. Finally, he claimed to fear harm based on his membership of a particular social group, namely that comprised of Tamil males.

# The proceeding before the Tribunal

1. After the Minister’s delegate refused the appellant’s application for a protection visa, he applied to the Refugee Review Tribunal, now the Administrative Appeals Tribunal (the Tribunal), for merits review of that decision. The appellant attended a hearing before the Tribunal in April 2015. The Tribunal affirmed the delegate’s decision in May 2015.
2. In short, the Tribunal did not accept that the appellant was a credible witness. It found that, although he gave clear and consistent evidence in relation to his (and his wife’s) family, his business earnings and the rental outgoings of his fruit shop, key aspects of his evidence were evasive, vague and repetitive, in particular concerning the two places where he claimed to have lived since 2005. Further, the appellant’s lack of spontaneity in his responses to questioning suggested to the Tribunal he was falsifying his account, even making allowances for his limited education. The Tribunal also found that his evidence evolved and changed over time.
3. Consequently, the Tribunal rejected the appellant’s claims that:
4. his house had been occupied by the Karuna group;
5. the Karuna group had abducted and detained him for 10 days in 2010;
6. he was a member, or active supporter, of the Tamil United Liberation Front (TULF), the Tamil National Alliance (TNA), or any other party;
7. the Karuna group took his van;
8. his brother was a member, or was suspected of being a member, of the LTTE; and
9. the Karuna group were looking for him.
10. The Tribunal did, however, accept some aspects of the appellant’s claims. In particular, it accepted that:
11. he had been made to walk naked at a checkpoint during the civil war in Sri Lanka when he was approximately 17 years of age;
12. he had seen people die during the civil war in Sri Lanka;
13. his father had been “rounded up” during the civil war in Sri Lanka; and
14. he had been required to pay an unofficial tax to the Karuna group.
15. Despite accepting these aspects of the appellant’s claims, the Tribunal did not accept that he had suffered significant, or serious, harm, nor that he was at risk of future harm. The Tribunal also rejected his claims that he was at risk of being suspected as a person who had links, or associations, with the LTTE, or anti-government organisations. As well, it was not satisfied that he had a real chance of being persecuted should he return to Sri Lanka as a failed asylum seeker, nor due to his extended presence in Australia. Finally, the Tribunal did not accept that there was a real risk that the appellant would suffer serious or significant harm because of his Tamil ethnicity, or because of the particular social group to which he belonged.
16. The Tribunal therefore concluded that the appellant did not satisfy the refugee criterion in s 36(2)(a) of the *Migration Act 1958* (Cth) (the Act). In light of its factual and credibility findings, the Tribunal also concluded that the appellant did not satisfy the complementary protection criterion in s 36(2)(aa) of the Act.

# The decision of the Federal Circuit Court

1. By an application filed in the Federal Circuit Court in June 2015, the appellant sought judicial review of the Tribunal’s decision. Since the appellant frankly conceded (see at [4] above) that none of his three proposed grounds of appeal was put to the Federal Circuit Court, it would be pointless to outline the details of the Federal Circuit Court’s decision dismissing his application.

# There is no adequate explanation for the appellant’s failure to raise the three new grounds of appeal before the Federal Circuit Court

1. The only explanation the appellant has offered for his failure to raise before the Federal Circuit Court any of his three proposed new grounds of appeal was that he had changed his lawyer and his new lawyer had taken a different view of the matter. For obvious reasons, this is not an adequate explanation. It moves the arena for judicial review of the Tribunal’s decisions from the Federal Circuit Court to this Court: see *Coulton v Holcombe* (1986) 162 CLR 1 at 7 per Gibbs CJ, Wilson, Brennan and Dawson JJ. It perverts the role of this Court as an appellate court reviewing error in the Federal Circuit Court: see *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [14] per Gleeson CJ, Gaudron and Hayne JJ. It subverts the deliberate intention of the Legislature expressed in the *Migration Litigation Reform Act 2005* (Cth) to remove this Court’s original judicial review jurisdiction in migration matters and confer that role on the Federal Magistrates Court(now Federal Circuit Court) confining the role of this Court, in such matters, to that of an appellate court (ss 476 and 476A of the Act). It is therefore inimical to the due administration of justice in migration appeals.
2. This lack of an adequate explanation would be sufficient, by itself, to dispose of this application to amend. Nonetheless, I will briefly consider whether any of the three proposed new grounds of appeal “clearly has merit”. This need for clear merit is obviously intended to discourage appellants from employing this approach to the Court’s appellate jurisdiction in the expectation that they will obtain a hearing on entirely new grounds of appeal, even though they have no adequate explanation for not raising them before the primary judge. On the other hand, it accommodates the interests of justice in the sense that if any of the proposed new grounds has such clear merit, the appellant should be allowed to advance it, notwithstanding the extraordinary departure from the normal review and appellate procedures described above.

# None of the proposed new grounds OF APPEAL has clear merit

1. The three proposed new grounds are set out at [3] above. It should be noted that, at the hearing of this appeal, the appellant’s counsel stated that grounds 1 and 3 raised essentially the same issue. I will therefore consider those two grounds together.
2. Both those grounds relate to the identification of the particular social group of which the appellant claimed to be a member. Surprisingly, that group is not identified in either of those grounds. In submissions, that group was described as wealthy Sri Lankans who were opposed to the Sri Lanka Freedom Party (SLFP). The appellant claimed he would be subject to “extortion” in the future if he were to return to Sri Lanka by reason of his membership of that particular social group. In this respect, it is important to note that the expression “extortion” and the act of being forced to pay an “unofficial tax” to the Karuna group have been used interchangeably throughout this proceeding.
3. The appellant claimed that the Tribunal had committed jurisdictional error because it failed to consider this particular component of his claims. There is no doubt such an obligation is imposed on the Tribunal with respect to every component integer of the claims an applicant puts before it: see *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244; [2001] FCA 1802 at [42] per Allsop J (as he then was) with whom Spender J agreed. However, in oral submissions, the appellant was forced to accept that he had not actually articulated such a claim before the Tribunal. Instead, he asserted that it was a claim that clearly arose from the materials he had placed before the Tribunal. Despite this assertion, the appellant was not able to point to anything in the Tribunal’s decision record, or elsewhere, to support it. Even if he were able to do so, as the Minister correctly submitted, the Tribunal expressly found that this “extortion”, or having to pay an unofficial tax to the Karuna group, did not amount to “serious or significant harm”. This is a finding of a fact that is not open to review by this Court or the Federal Circuit Court.
4. For these reasons, I do not consider that the appellant’s proposed new grounds 1 and 3 have any merit, much less such clear merit that he should be given leave to advance them for the first time in this appeal.
5. The appellant’s remaining proposed new ground of appeal seeks to raise an allegation that the Tribunal’s reasoning process was irrational or illogical. To succeed on such a ground, the appellant would need to establish that the Tribunal’s decision was of the following kind: “[a] decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision-maker does not come to that conclusion, or if the decision to which the decision-maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn”: see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [135] per Crennan and Bell JJ.
6. To make out this claim, the appellant has pointed to the use of the words “target” and “targeting” in the following parts of the Tribunal’s decision record where it recorded the evidence before it concerning the activities of the Karuna group:

Karuna target anyone opposed to SLFP regardless of whether they are Tamil or Singhalese or Muslin and extort money

and

… the targeting of wealthy Tamils is known to continue on a small scale in the Eastern Province.

1. The appellant then pointed to the conclusion the Tribunal reached about the Karuna group’s activities and, in particular, its use of the word “indiscriminate” as follows: “the country information is that the Karuna group do not target Tamils but are indiscriminate and they are involved in criminal activities”. He claimed this provided evidence the Tribunal’s decision was irrational.
2. Read in the context of the Tribunal’s decision as a whole, I do not consider there is any inconsistency between the expressions “target” and “targeting”, on the one hand, and “indiscriminate”, on the other, much less one that meets the test for illogicality or irrationality set out above. There is, therefore, in my view, no merit, let alone clear merit, in this remaining proposed new ground of appeal.

# Conclusion

1. For these reasons, the appellant’s application to amend his notice of appeal to introduce the three new proposed grounds of appeal is refused. Since the appellant has not advanced any other ground of appeal, it necessarily follows that his appeal must be dismissed. He should also be ordered to pay the Minister’s costs.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves. |

Associate:

Dated: 2 August 2016