FEDERAL COURT OF AUSTRALIA

EBC17 v Minister for Immigration and Border Protection [2018] FCA 1836

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| Appeal from: | *EBC17 v Minister for Immigration and Border Protection* [2018] FCCA 853  |
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| File number(s): | NSD 636 of 2018 |
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| Judge(s): | **FARRELL J** |
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| Date of judgment: | 23 November 2018  |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia – Safe Haven Enterprise visa – review of a decision of the Immigration Assessment Authority to affirm delegate’s decision to refuse visa – whether the authority treated an omission in the entry interview with sufficient caution pursuant to obiter dicta in *MZZJO v Minister for Immigration and Border Protection* (2014) 239 FCR 436; [2014] FCAFC 80 – appeal dismissed  |
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| Legislation: | *EBC17 v Minister for Immigration and Border Protection* [2018] FCCA 853*MZZJO v Minister for Immigration and Border Protection* (2014) 239 FCR 436; [2014] FCAFC 80  |
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| Cases cited: | *Migration Act 1958* (Cth) Pt 7AA, s 46A  |
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| Date of hearing: | 14 November 2018 |
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| Registry: | New South Wales |
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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 |
|  |  |
| Number of paragraphs: | 25 |
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| Counsel for the Appellant: | Mr O Jones on a direct access basis  |
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| Solicitor for the First Respondent: | Mr L Leerdam of DLA Piper  |
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| Counsel for the Second Respondent: | The Second Respondent submitted save as to costs |

ORDERS

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|  | NSD 636 of 2018 |
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| BETWEEN: | EBC17Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentIMMIGRATION ASSESSMENT AUTHORITYSecond Respondent |

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| JUDGE: | FARRELL J |
| DATE OF ORDER: | 23 november 2018  |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant must pay the first respondent’s costs as agreed or taxed.

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

REASONS FOR JUDGMENT

FARRELL J

1. This is an appeal from a decision of the Federal Circuit Court of Australia: *EBC17 v Minister for Immigration and Border Protection* [2018] FCCA 853. The primary judge dismissed an application for judicial review of a decision of the Immigration Assessment **Authority** (or **IAA**) to affirm a decision of a **delegate** of the **Minister** for Immigration and Border Protection to refuse the appellant a Safe Haven Enterprise visa (**SHEV**).

# Background

1. The appellant, EBC17, is a Tamil from the Batticaloa district of the Eastern Province of Sri Lanka. In summary, EBC17 fears harm if he were to return to Sri Lanka due to his ethnicity, imputed political opinion as a Tamil from the Eastern Province, actual and imputed political opinion from his involvement with the Tamil United Liberation Front (**TULF**), his previous detention on suspicion of involvement with the Liberation Tigers of Tamil Eelam (**LTTE**), links with the LTTE through his deceased older brother and a relative referred to as “E” and because he will be returning to Sri Lanka after seeking asylum in Australia.

## Entry interview

1. He arrived in Australia on 28 August 2012 as an unauthorised maritime arrival and participated in an entry interview on 10 January 2013. In response to the question “Why did you leave your country of nationality (country of residence)?”, EBC17 said (as written):

My life is in danger because of armed groups.

I didnt know which armed group came to my house and asked my name in 2000, 2008 they came once and 2102 they came twice.

They asked my name and they wanted to meet me.

My brother was involved in LTTE and disappeared and I was involved in the Tamil party – that is why they were looking for me.

1. In response to the question “Have you or any members of your family been associated or involved in any political group or organisation”, he responded “yes” and said that it was “Tamil party & LTTE”. He answered “no” to the question of whether any members of his family were involved in any activities or protests against the government. He said that he left Sri Lanka because his brother was involved in the LTTE and that he came to Australia with his brother-in-law.
2. He applied for a Protection (Class XA) visa on 7 August 2013. Included with the application was a statutory declaration of the same date setting out his claims. That application was determined to be invalid. On 29 September 2015, the Minister lifted the bar to applying for a SHEV pursuant to s 46A of the *Migration Act 1958* (Cth). The appellant lodged an application for a SHEVon 10 December 2015 and provided a statutory declaration dated 8 December 2015 in support of that application.

## Claims concerning family association with LTTE

1. Relevantly to the ground pursued on appeal, both statutory declarations contained the following claims (as written):

**Late 1980’s**

7. In or around the late 1980’s my brother [name redacted] had become increasingly disenchanted with the Sri Lankan authorities’ mistreatment of the Tamil people. He was also exposed to a large amount of LTTE propaganda whilst at school. Subsequently [his brother] decided to join the LTTE in an administrative role. Although he was only about 16 years old at the time, he would attend the LTTE offices after school hours and assist with general administrative duties. My family warned him that involvement with militant organisations was dangerous but he continued his involvement regardless.

8. At the time a relative of mine named [name redacted but referred to as “E”] was also a high level member of the LTTE and supported my brother’s involvement. Despite [E’s] high level involvement with the LTTE, he was a close family member so my family and I would often visit his home. As a result of this, my family became well known as having a connection with the LTTE.

**1990: Several members of my family are killed**

9. In or around 1990 [E’s] family was attacked by an unknown militant group who were against the LTTE. I do not know the details of who was involved in this attack. During the attack, [E’s] brothers and father were abducted and killed and his house was burned down. Seeing the devastation that could occur to him, he warned my family of future hardships and then departed Sri Lanka. He departed to Qatar and I have not talked to him since.

10. Shortly thereafter, men with covered faces arrived at my family home in [name redacted] and kidnapped my brother [name redacted]. Fortunately for me, I was not present at home. This was a dangerous time in Sri Lanka when militant groups operated freely. We do not know what happened to my brother and to this day we have not heard from my brother. We have assumed he is dead and that his death was connected to his involvement with the LTTE and the attack against [E]. [The December 2015 statutory declaration annexed a certified copy of his brother’s death certificate]

1. EBC17 attended a SHEV interview with a delegate of the Minister on 10 March 2016 and provided further submissions on 23 March 2016.
2. On 11 November 2016, the delegate refused to grant the visa finding that there was no real chance or real risk of harm to him if he returned to Sri Lanka for reasons of his ethnicity, his real or imputed political opinion, as a failed asylum seeker or his illegal departure from Sri Lanka. It summarised its findings of fact as follows:

**Summary of findings**

The claim to have been pursued by militant groups is a fabrication. I also do not accept that the applicant campaigned for the TULF.

I do accept he has an opinion in favour of the TULF.

I accept that his brother [name redacted] was a civil administrator for the LTTE, and that he disappeared in 1990. I also accept the applicant had some relation to [E] and that [E] left Sri Lanka in 1990 after members of his immediate family were killed. I also find the applicant’s past family links to the LTTE are not known to the authorities.

I accept that the applicant has been detained twice, once in about 1993 and once in 2008. I do not accept that the two arrests are indicative of an ongoing interest in the applicant.

1. On 16 November 2016, the matter was referred to the Authority for review. On 7 December 2016, the appellant’s migration agent and solicitor provided to the Authority written submissions and a statutory declaration by the appellant dated that date.
2. On 10 August 2017, the Authority affirmed the delegate’s decision. Relevantly to the appeal, at A[14]-[15] the Authority summarised the claims made in the appellant’s statutory declarations as set out above at [6] and went on to find as follows at A[16]-[18]:

16. I accept the applicant’s older brother was a member of the LTTE and that in 1990 he was abducted by an unidentified armed militant group. I accept that in 1997, as over a year had lapsed since the applicant’s older brother had gone missing, he was officially declared as deceased by the Sri Lankan authorities. The applicant’s evidence regarding the past circumstances of his brother has been consistent throughout his interactions with the Department. The applicant has also provided an official Sri Lankan death certificate in support of his older brother’s death.

17. However, I do not accept the applicant’s relative E, was a member of the LTTE. At the entry interview the applicant was asked whether he or any members of his family had been associated, or involved with, any political groups or organisations. He provided details about his brother’s LTTE membership but made no reference to anyone else. The applicant did provide details of E’s involvement in both his protection visa applications; however I find the details to be vague and unconvincing. The applicant made no mention of how E was related to him nor did he specify E’s position in the LTTE as anything more than as “high level member”.

18. I do not accept that the applicant’s familial connections to the LTTE led to his family being “well known”. On the evidence before me, I find these claims to be exaggerated and unsubstantiated. While I accept the applicant’s older brother was an LTTE member, I am not satisfied that this fact alone forms a credible basis to the applicant’s claim that his family were then considered to be “well known”.

# The appeal

1. The Minister was represented by Mr Leerdam and filed written submissions. Until the morning of the hearing, it appeared that the appellant was not represented and he filed no written submissions. Mr Jones of counsel appeared for the appellant at the hearing on a direct brief.
2. The notice of appeal filed by the appellant on 26 April 2018 contained four grounds, however, at the commencement of the hearing, Mr Jones formally abandoned all but the following ground and particular:

1. The Immigration Assessment Authority (**“the IAA”**) fell into jurisdictional error in finding at [para 17] “I do not accept the applicant’s relative E was a member of the LTTE”. The Federal Circuit Court Judge Street failed to hold that the IAA fell into jurisdictional error.

**Particulars**

1. One reason the IAA made this finding was because the applicant did not provide details of E in his entry interview. The weight placed by the IAA in the absence of reference to E in the entry interview leads to a conclusion that the IAA committed the error referred to by the Full Federal Court in *MZZJO v Minister* (2014) 239 FCR 436 at [56]-[57], that the Authority misunderstood the nature and context of an entry interview and thereby misunderstood its task on review.
2. It is convenient to set out the paragraphs of the Full Court’s judgment in *MZZJO v Minister for Immigration and Border Protection* (2014) 239 FCR 436; [2014] FCAFC 80 (***MZZJO v MIBP***) referred to in the ground and to include [55] which provides context:

55. We agree with the Federal Circuit Court that the Tribunal’s conclusions were “well open to it” in the sense of being findings about the credibility of the account given by the appellant. They were based only in part on the Tribunal’s questioning of the appellant about agnosticism. They were also based on inconsistencies the Tribunal identified between the appellant’s various accounts of what had happened to him, and about his failure to mention certain matters at his entry interview.

56. On the latter issue, some caution should be exercised by decision-makers in relation to omissions by applicants of matters at entry interview. They are conducted shortly after a person has arrived in Australia; in the case of the appellant, after a long journey on the ocean in cramped and difficult conditions. On the evidence, a significant part of the entry interview content concerns questions designed to elicit information about so-called “people smuggling”. They are the first substantive and formal engagement with Australian officials by people who come, as the appellant does, from regimes where authority figures may be viewed with some fear and mistrust. A person is asked to articulate personal matters of family and individual history not only to a strange official, but also to an interpreter who is a stranger, without the assistance and support of a lawyer or migration agent. It is unlikely many interviewees appreciate the use to which the information they give might be put, notwithstanding the script which is read to them. The interviewees are being asked to digest a lot of information quickly and in circumstances they may perceive as hostile.

57. Had the Tribunal relied only on a failure to mention details at the entry interview, we may have been inclined to see this as involving a misunderstanding of its task on review. However, the Tribunal relied on inconsistencies arising from information presented by the appellant after the entry interview as well, including inconsistencies between the delegate interview and what he said to the Tribunal, and the somewhat inexplicable reluctance of the appellant to have his childhood friend, who arrived on the same boat, give evidence to corroborate aspects of his account. We consider its approach was open to it as a merits decision-maker, and the Federal Circuit Court was correct to so find.

## Federal Circuit Court Decision

1. This ground reflects the ground of review by the Federal Circuit Court referred to as “ground 1A” by the primary judge. The principal focus of the appellant’s attack is the Authority’s reasons at A[17] (see [10] above).
2. At J[28], the primary judge noted that counsel for the appellant took the Court to the Authority’s reasons at A[17], to the appellant’s statutory declaration dated 7 August 2013 and to a “separate declaration”. His Honour summarised the content of the statutory declarations set out at [6] above in relation to E.
3. At J[29]-[32], the primary judge summarised parts of the entry interview to which counsel for the appellant took the Court set out at [4] above.
4. The appellant’s counsel submitted that the Authority should have taken the Full Court’s caution in *MZZJO v MIBP* at [56]-[57] into account before making its finding at A[17], that it must have misunderstood the nature and content of the entry interview and thereby misunderstood its task on review, and that the Authority had provided only two reasons in support of its adverse finding that E was not a member of the LTTE: J[33].
5. At J[34]-[35], the primary judge found (as written):

34. The Authority’s reasons in the entry interview do refer to the applicant providing details about his brother’s LTTE membership and make no reference to anyone else. The Authority found that the details in relation to E’s involvement that the applicant provided were vague and unconvincing. The Authority further identified that the applicant made no mention of how E was related to him. The Authority also made reference to the absence of any specification of the position that E held in the LTTE beyond that of being a high level member. The adverse credibility finding of the Authority was not based solely on the entry interview admission and there is nothing to support that the Authority misunderstood the nature and context of the entry interview or misunderstood its task or review.

35. The Authority’s reasons in support of not accepting E’s involvement was cogent and logical and cannot be said to be unreasonable. The statutory declaration dated 7 August 2013 referred, in paragraph 8, to the E being “a relative of mine”, in the context of asserting that this gave rise to the applicant’s family being one which had a well-known connection to the LTTE. This generality together with the absence of mention of E at the entry interview provides a logical basis for the adverse findings by the Authority together with the context in which a vague reference is made to E’s high-level involvement and in context of being a close family friend that the applicant and his family visited. No jurisdictional error as alleged in ground 1A is made out.

## Submissions

1. Counsel for the appellant submitted that:
2. Accepting that the passages at [56]-[57] of *MZZJO v MIBP* are obiter dicta, they are nonetheless statements of principle made by a Full Court.
3. The requirement to exercise caution in drawing conclusions from an applicant’s failure to mention in an entry interview something later raised in the more formal protection visa application process amounted to something like a mandatory consideration.
4. The Authority’s failure to mention the need for caution in A[17] is indicative that the appropriate caution was not exercised in drawing conclusions from the appellant’s failure to mention a claim related to E at the entry interview.
5. While it is true that the Authority did not rely solely on the failure of the appellant to refer to E’s claimed involvement in the LTTE at the entry interview, the other reasons given do not “pass muster”. The asserted inadequacy in the passages of the statutory declarations dealing with the claim relating to E was not enough to outweigh the requirement to exercise caution in drawing conclusions from the failure to make a claim relating to E’s involvement in the LTTE at the entry interview.
6. The Authority’s truncated procedures heighten the need for caution because a Part 7AA review usually takes place “on the papers” where applicants do not get the same opportunity to allay concerns which the applicant might normally be invited to address in the course of a hearing under different parts of the Act.
7. The Minister’s representative submitted that:
8. For the reasons given by the primary judge at J[28]-[39], the appellant’s argument rises no higher than a challenge to the factual findings made by the Authority. The Authority accepted that E was related to the appellant but did not accept that he was involved in the LTTE. It was open to the Authority to make the findings that it did at A[17].
9. The Minister accepts that not all discrepancies between claims made in an entry interview and later claims will outweigh the need for caution arising from the circumstances of the entry interview. However, the direct questions asked in the entry interview (referred to at [3] and [4] above) were specific as to the reason the appellant left Sri Lanka and the family’s political affiliation and anti-government activities and might be expected to have elicited a claim relating to E’s involvement in the LTTE.
10. It is apparent that the Authority did exercise caution in this case, because it did not just rely on the omission in the entry interview. It also based its findings on the lack of precision in the statutory declarations about the nature of E’s relationship with the appellant and the office held by E in the LTTE.
11. The truncated procedure for review required under Part 7AA does not increase or decrease the required caution in drawing conclusions from omissions in entry interviews.

## Consideration

1. I am not persuaded that the ground of appeal or the appellant’s submissions identify a jurisdictional error by the Authority or appellable error by the primary judge.
2. The counsel to caution by decision-makers in *MZZJO v MIBP* at [56]-[57] is well placed, especially in a context such as a review under Part 7AA of the *Migration Act*, where review “on the papers” will occur. But those circumstances do not negate an expectation that an applicant will disclose the nub of their claims to protection at the interview. Further, those passages of *MZZJO v MIBP* relied on by the appellant are obiter dicta and do not suggest that the need for caution which the Full Court counselled rises as high as a mandatory consideration: there is nothing in the subject matter, scope or purpose of the *Migration Act* or Part 7AA in particular which would suggest that.
3. I agree that it would be useful for the IAA to acknowledge in its reasons that it should treat with caution the omission of details in the entry interview; the express recognition of that need is likely to promote its observance. However, I do not accept that the failure to make that express recognition indicates jurisdictional error. The reasoning applied by the decision-maker having regard to the circumstances of the case under review is what is determinative.
4. In this case, the stated fear was based on the appellant’s own political involvement in TULF and familial link to the LTTE. Paragraph [17] of the Authority’s reasons needs to be read in context. On a fair reading of A[16]-[17], the Authority contrasts the way EBC17 made his claims in relation to his brother’s links to the LTTE and the way the claims were made in relation to E’s links. The claim in relation to the brother’s links with the LTTE was made consistently in all of the appellant’s dealings with the Department and he substantiated the brother’s death by providing an official Sri Lankan death certificate. In contrast, no claim was made in the entry interview concerning E despite a specific question concerning whether the appellant or any members of his family had been associated with or involved in any political groups or organisations. That is a notable omission if E was a “close family member” and a “high level member” of the LTTE. Both the closeness of the relationship and height of E’s rank in the LTTE affect the risk to the appellant of being identified with the LTTE. It was therefore not illogical for the Authority to take into account the vagueness of the description of E as a “relative” and “high level member” of the LTTE. Nor do I accept that these reasons did not, in the context, “pass muster” on the basis of the Full Court’s reasons in *MZZJO v MIBP* at [56]-[57].

# Conclusion

1. The appeal should be dismissed with costs.

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| I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate

Dated: 23 November 2018