Federal Court of Australia

DOF16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1385

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| Appeal from: | *DOF16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCCA 3539 |
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| File number: | NSD 2111 of 2019 |
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| Judgment of: | **LEE J** |
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| Date of judgment: | 21 September 2020 |
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| Catchwords: | **MIGRATION** – cricket not the delight of everyone – Sri Lankan national – application for Safe Haven Enterprise Visa – adverse credibility finding based on inconsistency in evidence concerning incident at a cricket ground – whether merely elaboration and expansion on earlier evidence – other evidence generally accepted by Authority – whether adverse credibility finding legally unreasonable – rational and intelligible reasons provided – identification of inconsistency not illogical or irrational – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 5H, 36, 473DC |
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| Cases cited: | *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA 62; (2004) 221 CLR 1  *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; (2016) 253 FCR 496  *DGZ16 v Minister for Immigration and Border Protection* [2018] FCAFC 12; (2018) 258 FCR 551  *DOF16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCCA 3539  *Miller v Jackson* [1977] QB 966  *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82  *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253  *SZTFQ v Minister for Immigration and Border Protection* [2017] FCA 562  *VAAD v Minister for Immigration & Multicultural Affairs* [2005] FCAFC 117 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 23 |
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| Date of hearing: | 21 September 2020 |
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| Counsel for the Appellant: | Mr G Foster |
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| Solicitor for the Appellant: | Sentil Solicitor |
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| Counsel for the First Respondent: | Mr G Johnson |
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| Solicitor for the First Respondent: | HWL Ebsworth Lawyers |
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| Counsel for the Second Respondent | The Second Respondent entered a submitting notice save as to costs |

ORDERS

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|  | | NSD 2111 of 2019 |
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| BETWEEN: | DOF16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| order made by: | LEE J |
| DATE OF ORDER: | 21 September 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.
2. Order 1 take effect upon the publication of the revised reasons.

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

REASONS FOR JUDGMENT

(Revised from the Transcript)

LEE J:

# A INTRODUCTION AND BACKGROUND

1. According to the appellant, at least in one Sri Lankan summer, village cricket was not the delight of everyone: cf *Miller v Jackson* [1977] QB 966 (at 976 per Lord Denning MR).
2. Indeed, as the appellant made clear, this appeal is “centrally concerned” with the contention that the primary judge failed to find that the reasoning process of the second respondent (**Authority**), in relation to the appellant’s claims concerning an incident at a cricket ground, was illogical or irrational.
3. The background to the proceeding is set out in some detail in the reasons of the primary judge: see *DOF16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCCA 3539 (at [3]–[36]). For present purposes, there is no need to recount all the details set out there, save for noting that the appellant is a Sri Lankan who came to Australia in 2012 and, in 2016, applied for a Safe Haven Enterprise Visa (**SHEV**); the basis for the application being that the appellant claimed to fear being abused, tortured or killed by the Sri Lankan Army (**SLA**) if he was to return to Sri Lanka due to an imputed political opinion arising from family affiliations with the Liberation Tigers of Tamil Eelam (**LTTE**). Indeed, the appellant claimed that, *inter alia*: his cousin was arrested for financing the LTTE; his father was forced to work for the LTTE; he was arrested, detained and beaten in 2008 following a bomb blast; and he was again arrested, detained and beaten in 2009 after he was found at his grandmother’s house while the SLA were looking for his cousin, after which he was, until February 2010, subject to reporting requirements by the authorities.
4. It is necessary, however, to recount in more detail the incident contended to have occurred at the cricket ground, around which the appeal is centred. During his arrival interview, the appellant contended that in around May 2012 there was a problem at a cricket ground used by the Tamil people. The following details were given of the incident, namely that: (a) one of the people who used to play cricket was a Tamil “pro-government supporter”; (b) some people had been drinking (albeit, not the appellant) and an argument ensued regarding whether everyone had to learn Singhalese; (c) the argument escalated and the pro-government supporter brought army personnel and told them that “we were all LTTE supporters”, after which they were all arrested (clarified to mean that there were nine people, but only three were detained) and the appellant was, for the period of a week, subject to reporting requirements; (d) at this point, the appellant had been playing cricket for three years at the ground without incident, and it was only after the pro-government supporter came along three to four months prior to the relevant incident that the racial problems started; (e) when questioned by the authorities, the appellant was accused of threatening to kill and harm the pro-government supporter; and (f) as to why the appellant was detained, but others released, the following explanation was given:

I think it was because I talked back to him and when we played cricket against the army I used to take a lot of wickets and I was known to them. … If we won against them they would not [be] happy, if we lost they would be and we thought if we did not play against them it would be best but that was not an option.

The appellant also stated that following the cricket ground incident, he moved to Colombo for a short period before leaving for Malaysia on 1 September 2012.

1. In the appellant’s SHEV application and subsequent interview, he indicated the following in relation to the cricket ground incident, recorded (at [21]) in the Authority’s reasons:

… In his SHEV application he stated … he and his friends were involved in an altercation with a pro-government supporter over racial-related comments; that he was taken for questioning by the SLA, and the pro-government supporter also told the SLA he had threatened the pro-government supporter; he was then released on reporting conditions; after a week of reporting he and his Sinhala speaking cousin spoke to the Senior SLA officer who warned the SLA officer; after this the SLA officer was worked up and threatened him when he saw him in public and he left for Colombo, where he was from June 2012; and due to monitoring by the SLA he had to travel back to Jaffna every month to report, before leaving for Malaysia on 1 September 2012. At the SHEV interview he initially said the cricket ground incident occurred during May, June, July or August 2012, he was in charge of the ground but there was one person from a paramilitary group, the EPDP, who wanted to play cricket with him and his friends but they wouldn’t let him; as it was a school cricket field, the paramilitary man spoke to the school principal, lied and said they drank on the grounds but the principal declined to do anything; the paramilitary man was close to the SLA officer who was second in charge and took the matter to him, including saying the applicant threatened to kill or harm him; the SLA officer came to the ground to speak to them and told them the paramilitary man must be allowed to play; they refused; the applicant was made to report to the SLA from 8am to 4pm every day for a week; and the applicant told the SLA he had to attend an exam and during the night without informing anyone he left for Malaysia. At the SHEV interview, after the delegate reminded the applicant what he said in his arrival interview and stated in his SHEV application about the cricket ground incident, he said after the Senior SLA officer went, the SLA officer always came and threatened him; one day he was in a shop looking at facebook and didn’t see the SLA officer enter so he didn’t stand up and the SLA Officer was angry and made to hit him but didn’t hit him; even a month before (approximately August 2016) a thorough search was done of his family home, although not just his family’s home; and the SLA Officer and the EPDP man keep saying to his mum that they will kill him.

1. It was the “changes and inconsistences in the applicant’s evidence”, which led the Authority to conclude that it did not find “him to be a credible witness in relation to the cricket ground incident”: see Authority Reasons (at [22]).

# B THE PROCEEDING BELOW

1. The case as advanced before the primary judge was somewhat different to the case advanced on appeal. Below the appellant contended that the Authority had acted unreasonably in failing to put an adverse credibility finding to him for comment under s 473DC(3) of the *Migration Act 1958* (Cth) (**Act**). An allegation of a reasonable apprehension of bias was also made.
2. The primary judge rejected each of these contentions. Correctly, the primary judge noted that it was unnecessary for the authority to have put its adverse credibility finding to the appellant (see *DGZ16 v Minister for immigration and Border Protection* [2018] FCAFC 12; (2018) 258 FCR 551 (at 569 [72] per Reeves, Robertson and Rangiah JJ)). This point was not pressed on appeal. His Honour further found that there could not be said to have been an absence of an evident and intelligible justification for the Authority’s non-consideration of the exercise of power under s 473DC of the Act, in circumstances where the delegate had made a finding identifying the appellant had fabricated an element of his claim in relation to the alleged cricket ground incident. The primary judge also found that the Authority had provided logical and intelligible reasons in support of its finding as to the appellant’s credibility in relation to the cricket ground incident. The primary judge similarly rejected the appellant’s assertion that the Authority’s reasoning gave rise to a reasonable apprehension of bias, which, as the argument was put to the primary judge, was said to arise by virtue of errors in Authority’s findings as to the credibility of the appellant.

# C THE PROCEEDING ON APPEAL

1. The argument on appeal has been somewhat refined. Mr Foster, counsel for the appellant, sensibly, if I may say so, accepted that the apprehended bias argument below was framed in such a way that it did not amount to an independent basis upon which his client could obtain relief. Given it was said that the apprehension of bias arose by reason of the illogicality or unreasonableness of the decision-making relating to the cricket ground incident, if that reasoning process was successfully impugned then the appellant would be entitled to relief irrespective of any contention as to apprehended bias. Accordingly, it was accepted that the allegation of bias can be put to one side.
2. The focus of the appellant’s argument was refined as constituting an assertion that the primary judge erred in failing to find that the Authority committed jurisdictional error in making a credibility finding on the basis of the evidence concerning the cricket ground incident. Such a finding is seen most directly in the following paragraph of the Authority’s reasons (at [22]):

Given the changes and inconsistencies in the applicant’s evidence, I do not find him to be a credible witness in relation to the cricket ground incident. In particular, even accepting what he said at the arrival interview as a summary, the applicant has been largely inconsistent on the details of the incident. He changed his evidence about the reason for the SLA becoming interested in the matter; whether he was detained; what reporting conditions applied; whether he resided in Colombo prior to leaving for Malaysia; raised an additional incident with the SLA officer; and extended the death threats made against him after he left Sri Lanka to his mother to both the SLA officer and the paramilitary man from the cricket ground. The difficulties with his evidence are to such an extent that I am not satisfied that the applicant is a witness of truth on this matter and I reject his evidence that he was involved in an incident at the cricket ground in 2012 that led to further attention from the SLA, including the SLA officer, or that he was detained, questioned, placed on reporting conditions and/or threatened as a result. It follows that I also do not accept that after he left Sri Lanka the SLA Officer, or anyone else, made threats against the applicant to his parents or threatened his parents with arrest.

1. The appellant submits that the “changes and inconsistencies” asserted were minor and, in any event, were explicable on a number of bases which would, if accepted, not have led the Authority to make the adverse credibility finding in relation to the cricket ground incident. As this contention was developed during the course of oral submissions, Mr Foster noted that the “majority” of the so-called inconsistencies should instead be perceived as expanding upon, or providing additional detail in relation to, aspects of the appellant’s contentions as to the cricket ground incident; a proposition which was said to be hardly surprising given the lapse of time since the date of the incident. Indeed, it was submitted that the Authority, in reaching a conclusion that the appellant had been “largely inconsistent on the details of the incident” and hence lacked credibility, proceeded in an irrational, illogical and legally unreasonable way.
2. As is evident from the primary judge’s reasons, this more refined argument was not expressly advanced in the Court below. Yet, as the Minister correctly concedes, no prejudice is occasioned in the appellant advancing such a contention on appeal. I therefore granted leave for the notice of appeal to be amended.
3. What is important to stress at the outset is that this is not a case such as *SZTFQ v Minister for Immigration and Border Protection* [2017] FCA 562, where it is necessary to have regard to the fact that the assessment of credibility is impressionistic, and emphatic adverse findings on credibility may well, expressly or implicitly, be linked with one another so that it would not be possible or realistic for a reviewing court to be confident that an error in one strand of credibility reasoning does not infect other strands. As I stated in that case (at [44]–[45]), credibility findings can often not be put into “hermetically sealed boxes” and that to compartmentalise decision-making is to “underplay the complexity of the anatomy” of such a process: see also *VAAD v Minister for Immigration & Multicultural Affairs* [2005] FCAFC 117 (at [79] per Hill, Sundberg and Stone JJ); *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 (at 89 per Gleeson CJ); *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA 62; (2004) 221 CLR 1 (at 23–4 [81] per Kirby J).
4. The reason why this case is different is because here, the appellant’s evidence was otherwise accepted in relation to what might be described as the “core aspects” of that evidence. Indeed, based on generally consistent evidence in relation to other incidents and the country information, the Authority (at [23]) was prepared to accept that: the appellant and his family lived in a LTTE controlled area at times during the war; he was aware of a number of deaths of people he knew or which happened nearby his house during the war; his father was forced to do work for the LTTE; his mother’s cousin worked for the LTTE as a broadcaster and actor; his cousin did work for the LTTE painting vehicles, was placed in a camp towards the end of the war and had to bribe his way out of the camp; and another cousin was arrested in 2008 for financing the LTTE but was subsequently released after a successful court action.
5. Moreover, the Authority accepted the appellant’s contention that he was detained, questioned, seriously mistreated and subsequently released after a few days by the SLA in 2008 following a bomb blast. The Authority also accepted the appellant’s contention that he was detained, questioned, seriously mistreated and subsequently released after two to three weeks by the SLA in 2009, after he was found at his grandmother’s house while the SLA were looking for his cousin, and was thereafter required to report to the army once a week until February 2010. The Authority similarly accepted the appellant’s evidence that he paid money in 2010 and 2011 when he tried to organise a visa to study in London, that the institution involved did not have proper accreditation, that he was warned by some SLA personnel on behalf of the institution and, after approaching the police and courts about the matter, he received some of his money back through the police. Various other allegations concerning harassment by SLA personnel were accepted, as were various personal matters relating to the appellant’s health condition.
6. Hence, although there was a finding adverse to the appellant by reason of what is said to be the “changes and inconsistencies” in the appellant’s evidence as to the cricket ground incident, the Authority made clear that the adverse finding as to his credibility was solely in relation to that specific incident. This credibility finding then flowed on to a rejection of the appellant’s evidence as to the cricket ground incident and any claim to the extent it was based on this incident and its aftermath.
7. Notwithstanding that the Authority generally accepted a number of assertions made by the appellant, it concluded (at [42] and [49]), on the basis of findings and for reasons which were not the subject of any direct challenge on appeal, that: (a) it was satisfied that the appellant will not face a real chance of harm from the Sri Lankan authorities due to any links to the LTTE on return to Sri Lanka now or in the reasonably foreseeable future; and (b) it was not satisfied that there is a real chance the appellant would face serious harm on his return as a failed Tamil asylum seeker from Australia now or in the reasonably foreseeable future. There was no real attempt by the appellant to demonstrate any substantive connexion between the rejection of the cricket ground incident and the ultimate disposition of the appellant’s case on the basis that he did not meet the requirements of the definition of a refugee in s 5H(1) of the Act, nor the requirements in s 36(2)(a) of the Act. Perhaps it is understandable this task was eschewed, because given a review of the Authority’s findings and reasons as a whole, it is difficult to see how the rejection of the evidence in relation to the cricket ground incident was likely to be determinative of the ultimate conclusion reached by the Authority. But having noted this, the argument of the appellant proceeded on the unarticulated but perhaps dubious basis that acceptance of the claim relating to the cricket ground incident (and its sequelae) would necessarily and inevitably have led to the conclusion that the appellant now, or in the reasonably foreseeable future, faced a real chance of harm from the Sri Lankan authorities.

# D DISPOSITION

1. Although credit findings are generally matters for a tribunal (or in this case, the Authority), they are not, of course, immune from review for jurisdictional error: see *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; (2016) 253 FCR 496 (at 508–9 [37]–[38] per McKerracher, Griffiths and Rangiah JJ). Indeed, the mere fact that a finding is made by the Authority on a matter of credit does not shield its decision-making processes from scrutiny. As Flick J explained *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 (at [31]), credit findings “… like all findings, must be rationally made and based upon facts having logical and probative weight.” Furthermore, as Gordon J explained in *SZLGP v Minister for Immigration and Citizenship* [2008] FCA 1198 (at [25]), determinations on credibility must “be made rationally and logically and be articulated properly” and minor inconsistencies and trivial errors in an account cannot be used to find that an applicant is not credible. Importantly, however, the consideration of these principles often arises where so-called minor inconsistencies or omissions are used to make adverse credibility findings and conclude that a claim of an applicant is concocted without disclosing a legitimate, articulated basis for such a finding.
2. Of course, determining whether a credibility finding is so irrational, illogical or unreasonable so as to amount to jurisdictional error requires an examination of the facts of the case, but without derogating from the case specific nature of the inquiry, adverse credibility findings may involve jurisdictional error on recognised grounds if, as Crennan and Bell JJ explained in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 (at 649–50 [135]):

… 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 there is no logical connection between the evidence and the inferences or conclusions drawn**.

(emphasis added).

1. As can be seen from the extract of the Authority’s reasons (at [10] above), detail was given as to what was characterised by the Authority to be “changes and inconsistencies” in the evidence of the appellant in regard to the cricket ground incident. To the extent that the appellant disagrees with the Authority’s assessment, there is an obvious danger of sliding impermissibly into a review of the case on the merits.
2. I accept the Minister’s submission that read in context and without an “eye keenly attuned to the perception of error” (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (at 271–2 per Brennan CJ, Toohey, McHugh and Gummow JJ)), the appellant’s criticism of the relevant part of the Authority’s reasoning process, which had, as its point of departure, the existence of at least some inconsistencies in the account given by the appellant, is not one which can be said to amount to jurisdictional error. Indeed, I do not consider the changes in the appellant’s account to be mere matters of elaboration or expansion of essentially the same contentions; rather they could be fairly described as inconsistencies and did give rise to legitimate concerns. The Authority, even accepting what the appellant had said at the arrival interview as a summary, found (at [22]) that he had changed his evidence in relation to: (a) the reason for the SLA becoming interested in the matter; (b) whether he was detained; (c) what reporting conditions applied; and (d) whether he resided in Colombo prior to leaving for Malaysia. This is furthered by the Authority’s finding that in the SHEV interview, the appellant raised additional matters, such as the SLA officer approaching and threatening him in a store, and that the SLA officer and paramilitary man made extended threats to his mother after he left Sri Lanka that they would kill him. This was also all in the context of the appellant presumably intending the reference to “pro-government supporter” to be interchangeable with “paramilitary man”.
3. It is clear that the Authority gave consideration to the way in which the contentions had changed and there is no reason for considering that the Authority did not appreciate that the appellant’s claims made during an entry interview might not be as detailed or so expansive as might be given at a later time. This is particularly the case given the inconsistencies identified were largely between the written SHEV application and the subsequent SHEV interview, in which time the appellant would have had the opportunity to consider more fully the facts of the cricket ground incident and the events that followed. Put simply, despite Mr Foster saying everything he could in relation to the argument, it could not be successfully submitted that there was no logical or rational connexion between the evidence identified by the Authority (at [21]) and the inferences and conclusions drawn (at [22]). It follows that the allegation of jurisdictional error cannot be made out.
4. As noted above, no submissions were put on appeal which sought to advance an argument that it was necessary for the Authority to put the credibility finding to the appellant for comment or that separately from the argument that the finding as to the cricket ground incident was unreasonable, irrational or illogical, there was any basis for finding that the Authority was infected by bias. It follows that the appeal must be dismissed with costs.

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| I certify that the preceding twenty- three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee. |

Associate:

Dated: 28 September 2020